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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209192 DATE: May 3, 1983

MATTER OF: American Mutual Protective Bureau

DIGEST:

1. Our Office will consider a protest alleging terms of a solicitation to be defective although those terms concern the Service Contract Act, the enforcement of which is under the jurisdiction of the Department of Labor.

2. IFB which specified class "A" security guards but contained Service Contract Act Wage Determination for class I and class II security guards was ambiguous and should have been amended. However, where the record indicates that no bidders were prejudiced by the ambiguity and the Government will receive the desired services, no "cogent and compelling reason" exists for cancellation of the IFB and resolicitation.

American Mutual Protective Bureau (American) protests the procurement of guard services under invitation for bids (IFB) No. MDA902-82-B-0011 issued by the American Forces Radio and T.V. Service, Department of Defense (Defense). American contends that the solicitation contains ambiguous terms which make it necessary to cancel the solicitation and to resolicit this procurement.

We deny the protest.

Initially, American, the then incumbent contractor, sent a TWX to the contracting officer prior to bid opening questioning the type of guard service solicited and the responsibility for uniform cleaning fees. This protest was orally denied by the contracting officer in a telephone conversation on September 22, 1982, and a timely protest was subsequently received by our Office.

Bids were opened as scheduled on September 24, 1982, and in March 1983 Defense approved award of the contract to the low bidder, notwithstanding the protest.

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American, the fifth low bidder, contends that an ambiguity exists in the IFB regarding the class of guards, because the IFB, under "Description/Specifications," specifies "class 'A'" guards, but Wage Attachment 78-56 (Rev. 6), March 11, 1982, describes the guards for purposes of the minimum wage payable under the Service Contract Act, 41 U.S.C. § 351 et. seq. (1976), as class II and class I. American asserts that because of this ambiguity prospective bidders were unable to determine whether to bid the service with the wage rate for class I ($4.31 per hour) or class II ($7.48 per hour) guards, and since the cost for each is different, bids could not be evaluated on an equal basis. The IFB, therefore, should have been amended for clarification.

American also contends that it is essential that bidders be advised of the minimum wage requirements in relation to uniform cleaning costs so that in computing price-per-hour of guard services the bidders will be considering all pertinent costs. The IFB omits reference to a uniform cleaning fee.

Defense contends that neither the protester nor any other bidder was misled by the discrepancy between the specification and the wage determination, since the wage determination is merely a statement of the minimum wage which a contractor must pay to specified classes of guards under the Service Contract Act, 41 U.S.C. § 351 et seq., and, citing 48 Comp. Gen. 22 (1968) and United States v. Winghampton Construction Company, 347 U.S. 171 (1954), argues that it constitutes neither a representation that guard services are available at those wage rates nor dictated rates which the bidder must pay, other than the specified minimum.

Concerning the uniform cleaning allowance, Defense contends that the IFB adequately informs bidders of a contractor's obligation. The IFB incorporated by reference the Service Contract Act (Defense Acquisition Regulation (DAR) § 7-1903.41 (Defense Acquisition Circular (DAC)) No. 76-7, April 29, 1977), which incorporates 29 Code of Federal Regulations (C.F.R.) part 4 describing the method of payment of rates and fringe benefits. 29 C.F.R. § 4.165 (1982) states "No deduction, rebate or refund is permitted except as hereinafter stated." In addition, the IFB noted that uniforms will be at the contractor's expense.

Finally, citing our decision in Ellsworth Street Associates, B-206859, June 21, 1982, 82-1 CPD 611, Defense

argues that the protest against the failure to include information in the IFB concerning a uniform cleaning allowance should be dismissed because the administration and enforcement of the Service Contract Act is under the jurisdiction of the Department of Labor.

Our decision in Ellsworth Street Associates, supra, is not applicable. In that decision, the protest was that acceptance of an allegedly below cost bid would result in a violation of the Service Contract Act. We dismissed the protest because enforcement of the Service Contract Act is vested in the Department of Labor and whether contract provisions are carried out is a matter of contract administration which is the function of the contracting agency. We will, however, consider a protest, which, as here, alleges that the solicitation is deficient because it does not contain provisions clearly setting out the requirements of the Service Contract Act.

At the time that the IFB was prepared, security guards were classified as class "A", those required to be proficient with firearms and physically fit, and class "B." By Revision 6 of March 11, 1982, the class "A" and class "B" designations were changed to class II and class I, respectively. On receipt of the revision it was incorporated into the IFB but the designation change was not noted and, therefore, was not changed in the specifications.

The contracting officer reports that several telephone inquiries were received to confirm that the new class II was the same as the previous class "A." The IFB was not amended because of lack of time since bid opening was on September 24 and the protester's current contract expired on September 30.

At bid opening, attended by six of the 15 bidders, including the protester, the contracting officer announced that questions had arisen concerning guard classification and uniform cleaning allowance. The contracting officer clarified the matters for those present and there were, reportedly, no questions. Cost breakdown data submitted by the six low bidders, including the protester, indicates that all used the class II guard rate.

The IFB specifies "armed class 'A'" guards (now class II guards). Class "B" guards (now class I guards) may also

bear arms, but, unlike the class II guards, are not required to demonstrate either physical fitness or proficiency with firearms or other weapons. There is nothing in the description of duties or under qualification of guards in the IFB which clearly indicates that the class "A" guards are the class II guards in the wage rate determination as evidenced by the several telephone inquires to clarify the discrepancy.

The IFB contains conflicting provisions which create an ambiguity, and the IFB should have been amended to clarify the conflict. However, there is no evidence in the record that the protester or any other bidder was misled by the discrepancy. On the contrary, the evidence shows that the six low bidders correctly computed costs on the basis of the correct class II salary rates, which are the higher of the two salary rates. As noted by Defense, it is unlikely that higher priced bidders were misled into using the lower salary rates.

Concerning a uniform cleaning allowance, the contracting officer notes that in the past dry cleaning was an accepted fringe benefit, but with the advent of "Wash and Wear" guard uniforms as acceptable wear, the cleaning benefits were not required "except where certain guards are required to wear uniforms requiring dry cleaning."

The Service Contract Act and the implementing regulations (29 C.F.R. § 4.1 et seq. (1982)), make clear that the contractor is obligated to pay not less than the minimum wage specified in the Wage Determination unreduced by fringe benefits. Therefore, since the wage determination did not list a uniform allowance and the IFB made clear uniforms were the contractor's responsibilty, we find the IFB was not ambiguous as to the payment of such allowance.

DAR § 2-404.1 (DAC No. 76-17, September 1, 1978), provides that a solicitation may be canceled after bid opening only when a cogent and compelling reason exists since cancellation after opening of bids tends to discourage competition because it publicly discloses bids without award and causes bidders to have expended manpower and money in bid preparation without the possibility of acceptance. Marmac Industries, Inc., B-203377.5, January 8, 1982, 82-1 CPD 22; Tennessee Valley Service, B-188771, September 29, 1977, 77-2 CPD 241. The regulations then provide a list of

grounds which may justify cancellation of an IFB after bid opening and before award, including inadequate or ambiguous specifications.

However, the fact that specifications are inadequate, ambiguous or otherwise deficient is not a compelling or cogent reason to cancel an IFB and resolicit the requirement if the Government will receive the goods or services wanted and there is no showing of prejudice to bidders. GAF Corporation; Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586 (1974), 74-1 CPD 68.

There is no indication in the record either that the Government will not receive the services desired or that any bidder was misled by the defect in the terms. Compare Transco Security, Inc. of Ohio (B-197177, May 29, 1980, 80-1 CPD 371), where we held an IFB should be canceled where the four low bidders were misled by the IFB into basing their bids on an improper, lower paid guard classification and were thereby prejudiced.

The protest is denied.

Milton J. Socolar

for Comptroller General
of the United States