25885

DECISION

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

FILE: B-211226 **DATE:** August 1, 1983

MATTER OF: SEACO, Inc.

DIGEST:

1. GAO will not review a bid protest alleging that the awardee is in violation of the Service Contract Act since the responsibility for the enforcement of the act belongs to the contracting agency head and the Secretary of Labor. Moreover, allegation that awardee may have proposed wage rate below minimum Service Contract Act wage rate for certain class of employees does not necessarily mean that awardee intends to violate Service Contract Act since awardee may have proposed below-cost offer for this particular class of employee, and below-cost offer is not an impediment to award of contract. Protest therefore is dismissed.

2. Under Service Contract Act, 41 U.S.C. § 351, et seq. (1976), successor employer is only required to pay the same levels of compensations as the predecessor contractor where the predecessor contractor had a collective bargaining agreement with its employees. Protester, which must bear the burden of proof, has not indicated that it, as predecessor contractor, had a collective bargaining agreement with employees involved and successor contractor states that its proposal did not include protester's employees. Therefore, protester has not carried its burden of proof.

3. Protest alleging that request for proposals contained the Service Contract Wage rates for the wrong categories of services employees is dismissed. Alleged impropriety in solicitation was apparent before date set for receipt of initial proposals, but was not filed until

after the contract was awarded. Therefore, protest was untimely filed under section 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 21 (1983)), which requires that such protests be filed before date set for submission of initial proposals.

SEACO, Inc. (SEACO), protests award of a contract to Columbia Research Corporation (CRC) by the Department of the Navy pursuant to solicitation No. N61331-83-R-0004. The basis for the protest is that the salary rate quoted by CRC for hyperbaric specialists may be below the salary rate paid to hyperbaric specialists under SEACO's predecessor contract and the minimum wage rate established by the Department of Labor under the Service Contract Act, 41 U.S.C. § 351, et seq. (1976). SEACO also contends that the wage determinations included in the solicitation were for the incorrect classes of services employees and requests that a current wage determination be made for the "highly specialized" hyperbaric technicians required under the terms of the request for proposals.

The protest is denied in part and dismissed in part.

The Service Contract Act places the responsibility for enforcing its provisions on the contracting agency head and the Secretary of Labor. 41 U.S.C. § 352(b) (1976). Thus, our Office will not consider a protest that a contractor is not complying with the act. See James M. Smith, Inc., B-210982, March 25, 1983, 83-1 CPD 309; Starlite Services, Inc., B-210762, March 7, 1983, 83-1 CPD 229. Moreover, the fact that CRC may have proposed a wage rate below the minimum Service Contract Act rate does not mean that CRC intends to violate the act; CRC may have submitted a below-cost offer with regard to the work to be done by hyperbaric technicians. In this regard, we have held that there is no legal impediment to awarding to an offeror because it offers a below-cost bid so long as that offeror is determined to be responsible. See NonPublic Educational Services, Inc., B-204008, July 30, 1981, 81-2 CPD 69. Our Office no longer reviews an agency's affirmative determination of an offeror's responsibility, except in circumstances not presented here. See NonPublic Educational Services, Inc., supra.

Concerning SEACO's charge that the rate proposed by CRC is less than the rate paid to hyperbaric technicians by SEACO under the predecessor contract, we have held that under the Service Contract Act, a successor contractor which hires its predecessor contractor's employees is bound by the predecessor contractor's salary levels only where they are established by a collective bargaining agreement. See J. L. Associates, Inc., B-201331.2, February 1, 1982, 82-1 CPD 99. SEACO, which must bear the burden of proving its case, has not shown that it had such a collective bargaining agreement with its hyperbaric technicians nor that CRC has hired former SEACO employees. See ACMAT Corporation, B-197589, March 18, 1981, 81-1 CPD 206. We note that CRC states that its offer did not include SEACO personnel. Accordingly, we find that SEACO has not carried its burden of proof, and this portion of the protest is denied.

Finally, with regard to SEACO's charge that the solicitation contained wage rates for the wrong categories of employees, we find that the protest was untimely filed. Under our Bid Protest Procedures, protests based upon improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed before that date. 4 C.F.R. § 21.2(b)(1) (1983). The alleged ambiguity in the request for proposals was apparent prior to the date set for submission of initial proposals (December 14, 1982), but the protest was not filed in our Office until March 23, 1983. Therefore, this portion of the protest was untimely filed and will not be considered on the merits. See Blue Ridge Security Guard Service, Inc., B-208605.2, November 22, 1982, 82-2 CPD 464.

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States