DECISION

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

31090

FILE: B-217069; B-218006 DATE: April 26, 1985

MATTER OF: IBI Security Service Inc.

DIGEST:

1. A contractor is not entitled to a price adjustment for vacation benefits payable in the option years of a contract pursuant to the basic wage determination in the contract because such increased labor costs are not contemplated by the "Fair Labor Standards Act and Service Contract Act - Price Adjustment" clause of the solicitation, which only relates to wage rate changes mandated by the Department of Labor after award of the contract.

2. A bid was properly rejected as mistaken for not including in the first-year price factors covering anticipated increased labor costs to be incurred in the option years of a contract where the solicitation clearly provided that the options, if exercised, would be at the same price as the first-year price.

3. Alleged defects in an invitation for bids, apparent prior to bid opening, must be protested to either the contracting agency or GAO prior to the time set for opening bids in order to be considered.

4. A minor defect occasioned by possibly confusing terminology in a solicitation provision does not constitute a ground for sustaining the protest where the protester does not allege that it was prejudiced in any manner by the defect, and there is no indication that the competition was not conducted on an equal basis.

IBI Security Service Inc. protests the rejection of its bid on the basis of mistake under invitation for bids (IFB) No. N62472-84-B-9202, issued by the Department of the Navy for guard services. IBI asserts that its bid is not mistaken, and that certain provisions of the IFB were ambiguous. We deny the protest in part and dismiss it in part.

Background

The IFB solicited bids to provide guard services for a 1-year period, with the right of the government to extend the term of the contract for up to two additional 1-year periods. Prices were requested for the first year only. The option years were not evaluated, but bidders were informed that the options, if exercised, would be at the same price as the first-year price. A revised wage rate determination from the Department of Labor's Wage and Hour Division was incorporated into the solicitation.

IBI was the seventh low bidder. However, five of the six lower bids were rejected as nonresponsive for failure to acknowledge certain solicitation amendments; the other lower bidder was permitted to withdraw because it acknowledged a mistake in preparing its bid.

As a result, IBI appeared to be the low, responsive bidder. However, because of the large difference between IBI's bid and the government estimate, the firm was asked to verify its bid, and a preaward survey was initiated. IBI did not verify its bid, but indicated that it had not factored costs for vacation time into its bid since it anticipated hiring all new employees for the contract, who would not be entitled to vacation pay during the first year. The Navy believed that the bid was therefore mistaken because the IFB provided for up to two option years, and the incorporated wage rate determination required that vacation benefits were to be paid to all employees after the first year of service.

In addition, the Navy concluded that IBI had based its bid upon a mistaken interpretation of paragraph 4 of section 00005 of the IFB. That paragraph required the contractor to supervise its employees through "informal guardmounts," which involve providing instructions to relief guards at shift changes. IBI indicated that its

interpretation was based upon the customary meaning of the term in the industry; that is, instructions are given to the relief guards by a supervisor when the guards report to their posts. However, the Navy pointed out that the provision, although using the word "informal," specifically required the assembly of relief personnel for "inspection, arming, announcements, and a general transfer of information from one shift's personnel to the next." The Navy noted that the IFB specified that this requirement was in addition to the time necessary for the posting and relief of personnel. It concluded that IBI's bid was mistaken because the actual required procedure was a more formal one which would involve additional costs beyond those associated with IBI's interpretation.

The Navy has determined to reject IBI's bid in accordance with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.406-3(g)(5)(ii) (1984), which provides that when a bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless there are indications of error so clear as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to the other bidders. Because of the stated urgency of the requirement, the Navy has informed us that it will proceed with award notwithstanding the protest.

IBI asserts that its bid is not mistaken, and is based upon its correct interpretation of the solicitation provisions in issue. The firm urges that it is entitled to the award as the remaining low, responsive bidder. In the alternative, IBI contends that the solicitation is ambiguous and should be canceled, corrected, and reissued.

Analysis

As indicated, bidders were not asked to price the two option years, which, if exercised, were to be at the same price as the first-year price, and the Navy evaluated the bids on the basis of the first-year only. IBI did not factor vacation pay into its bid price because it assumed that it could obtain a price adjustment for these increased costs if the options were exercised. The firm relied upon the "Fair Labor Standards Act and Service

Contract Act - Price Adjustment" clause of the IFB, which provides that the contract price will be adjusted to reflect increases or decreases in the minimum prevailing wage determination, including fringe benefits, as mandated by the Department of Labor. The IFB specified that the options, if exercised, would be subject to any labor rate adjustments required by the clause.

IBI errs in assuming that this clause entitles the contractor to a price adjustment if it is required to pay vacation benefits in the option years. We held in Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD ¶ 317, that the clause only provides for contract price adjustments if the contractor is compelled to increase employees' wages to comply with a minimum wage change mandated by the Department of Labor. Here, the revised wage determination incorporated into the IFB already provides that guards are to be paid 1 week's vacation after 1 year of service, and 2 weeks' vacation after 2 years of service. Therefore, IBI could not obtain a price adjustment under the clause if the options were exercised because the vacation pay requirement would not result from a change in the Department of Labor minimum wage determination. Id.

Since IBI incorrectly assumed that it could obtain a price adjustment for vacation pay if the options were exercised, the firm failed to project the costs associated with such required benefits and failed to include in the first-year price factors covering the increases. We agree with the agency that this constituted a mistake in bid. See 50 Comp. Gen. 655 (1971).

Although IBI argues that the agency cannot consider the impact of vacation pay on its costs for the option years because prices for those years were not solicited or evaluated, we find no merit to this contention. The essential point here is that the IFB provided that the options, if exercised, would be at the same price as the first-year price. Bidders therefore were on notice that they had to include, in their first-year bids, a factor covering the projected cost increase for vacation pay in the option years. Since IBI admittedly did not do so, the Navy properly rejected the bid under FAR, § 14.406-3(g)(5)(ii), supra.

IBI also contends that it correctly interpreted the IFB provision with respect to what constitutes an "informal guardmount." According to the firm, the customary meaning of the term in the industry is that relief guards reporting to their posts are given necessary instructions at their posts by the shift supervisor. IBI believes that the Navy's contrary interpretation is inherently unreasonable because the guardmount provision requires that personnel be assembled for the transfer of information from one shift to the next, and assembly at a central point would leave the guard posts unmanned.

We believe the issue is untimely. In general, we regard allegedly ambiguous language in an IFB as an issue that must be raised prior to bid opening. Skytop Plastics, Inc., B-207022, Oct. 15, 1982, 82-2 CPD ¶ 340. The only exception is where the protester was unaware, prior to bid opening, that its interpretation of the IFB provision was not the only one possible. This exception is recognized because, absent awareness of a second interpretation, the protester cannot be aware of an ambiguity. See Conrac Corp., B-205562, Apr. 5, 1982, 82-1 CPD ¶ 309. However, we cannot conclude that this exception is applicable here.

Although the Navy used the term "informal guardmount," the provision in question clearly indicated that the assembly of all relief personnel at a central point was a definite requirement. In this regard, while IBI may have interpreted the provision in accordance with industry usage, it should have been obvious to the firm that the provision was susceptible to a second interpretation, since the requirement for assembly at a central point allegedly is inconsistent with the customary industry meaning of an "informal guardmount." Because IBI did not allege the ambiguous nature of the provision until nearly 2 months after bids were opened, the issue is untimely and will not be considered.

IBI also complains that the solicitation was ambiguous because it referred to "Class A" and "B" guards performing certain work requirements, whereas the incorporated wage determination provided hourly rates for "Guard I" and "Guard II" (respectively, $5.68 and $7.23). The wage determination defines "Guard I" as an employee who may or may not be armed, but who is generally not required to demonstrate weapons proficiency and physical fitness,

and is assigned duties not requiring the exercise of a large degree or discretion. In contrast, "Guard II" is defined as an employee who is required to demonstrate weapons proficiency and physical fitness, and whose duties require specialized training and the exercise of judgment in handling emergencies. The IFB provided that "Class A" guards were to be armed and demonstrate weapons proficiency, but "Class B" guards were not to be armed.

IBI asserts that this caused confusion because the terminology between the IFB and the wage determination did not coincide. We find no merit in the assertion.

We agree with the Navy that a bidder should have been able to determine from the IFB's requirements that "Guard II" is equivalent to a "Class A" guard, as only "Class A" guards were to be armed and demonstrate weapons proficiency. Further, IBI never asserts that it was prejudiced in any manner by this minor defect, and there is no indication that other bidders were misled into competing on an unequal basis. See Contact International Inc.--Request for Reconsideration, B-210062.2, Sept. 2, 1983, 83-2 CPD ¶ 294.

Finally, IBI asserts in its latest submission to this Office that the incorporated wage determination is unclear as to what standards constitute weapons proficiency and physical fitness in a "Guard II" employee. The matter is clearly untimely and will not be considered since it involves an alleged solicitation impropriety apparent prior to bid opening. Grace Industries, Inc., B-216224, Sept. 6, 1984, 84-2 CPD ¶ 262.

The protest is denied in part and dismissed in part.

Harry R. Van Cleve
General Counsel