K. 1029 PC-II

DECISION

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

FILE: B-220518 **DATE:** February 11, 1986

MATTER OF: Dynalectron Corporation

DIGEST:

1. Under a solicitation for base operations and maintenance, job assignments ordinarily should be categorized in accord with the basic nature of the resulting contract, i.e., service work, and laborers performing those assignments classified as Service Contract Act workers. It is not proper to categorize all job assignments in a given area of activity as covered by the Davis-Bacon Act's minimum wage requirements applicable to construction workers without regard to that act's $2,000 threshold for each severable construction, reconstruction, renovation, or repair project.

2. In a contract for base operations and maintenance covered by the Service Contract Act, agency procedures for managing "project" work, including the use of written work orders and payment only upon inspection and acceptance of the final product, do not establish that the minimum wage requirements of the Davis-Bacon Act for construction workers should apply. Other criteria, such as the $2,000 Davis-Bacon Act threshold for severable projects and whether the service is incidental to maintenance, also must be considered.

3. Where solicitation for base operations and maintenance services covered by the Service Contract Act includes routine maintenance of railroad tracks at the installation, such maintenance work should be considered service work covered by the Service Contract Act, rather than construction work under the Davis-Bacon Act.

034523/129071

4. Protest that solicitation fails to specify the relative importance of cost in the procuring agency's evaluation is denied where provisions of the request for proposals regarding the extent to which cost will be independently considered in the evaluation are unambiguous.

5. Protest that solicitation contains insufficient information for offerors intelligently to estimate material costs is denied where the record shows that offerors have been given access to all information reasonably available to the agency and that the information, together with the offeror's business knowledge and experience, should permit them to prepare proposals intelligently and on an equal basis. The mere presence of risk in a solicitation does not make the solicitation inappropriate, and specifications are not rendered materially deficient because the agency's prior cost experience cannot be fully determined from the solicitation.

Dynalectron Corporation protests the terms of request for proposals (RFP) No. DAKF06-85-R-0052, issued by the Department of the Army in connection with a cost comparison under Office of Management and Budget Circular A-76, to determine whether it should continue performing base maintenance services at Fort Carson, Colorado, with government personnel or have them performed by a commercial firm. The protester alleges that the RFP contains terms that unfairly favor continued government performance over commercial performance. Dynalectron contends that the Army cannot justify the Davis-Bacon Act staffing levels imposed upon offerors; that the solicitation fails to indicate clearly the relative importance of cost in the evaluation; and that the solicitation should stipulate the amount of materials and supplies needed to operate the base, rather than require each offeror to estimate that amount.

We sustain Dynalectron's protest on the first ground and deny it on the last two grounds.

The Contracting Division, Fort Carson, issued the solicitation on February 1, 1985, seeking offers to perform base operations and maintenance services. These include such services as operation of the water system, the wastewater treatment plant, and the landfill; maintenance and

repair of buildings, roads, kitchen equipment, and other items; and minor construction, alteration, repair, and renovation projects. The contractor will be required to operate its own supply system incident to performance of the work. If performance of the work by contract is found to be more economical than performance by government employees, the solicitation contemplates a cost-plus-award-fee contract for a base year, with 4 option years.

Davis-Bacon Act

Dynalectron contends that the solicitation improperly requires offerors to estimate their labor costs for certain categories of work using wage levels required under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1982). Dynalectron argues that the Army has classified approximately 40 percent of the work under that act, an amount that is appreciably greater than the 5 to 15 percent under comparable contracts at other Army installations.

According to Dynalectron, this misclassification means that a disproportionate amount of the offerors' estimated labor costs must reflect Davis-Bacon Act wages, which are generally applicable to construction workers, rather than wages that the offerors will actually be required to pay under provisions of the Service Contract Act, 41 U.S.C. 351, et seq. (1982). Dynalectron states that Davis-Bacon Act wages are appreciably higher than those for comparable skills under either the Service Contract Act or the government salary schedule. The firm argues that the government has an unfair competitive advantage in the cost comparison, since it has artificially inflated the wage rates private firms must propose.

The Army explains that in developing the solicitation, it divided the work into three categories: (1) "project" work; (2) maintenance, plant operations, and service (including maintenance of the railroad); and (3) repair work. The Army classified both the "project" work and the maintenance of the railroad at Fort Carson as subject to the Davis-Bacon Act. The Army states that in making this determination, it has taken care to comply with a consent decree that resolved a suit alleging that Fort Carson had

evaded the requirements of the Davis-Bacon Act by improperly categorizing contracts as nonconstruction and by dividing projects into a series of contracts to place them below the $2,000 minimum for Davis-Bacon Act applicability. Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 v. Carmen, No. 77-F-1197 (D.Colo. Apr. 19, 1982) (consent decree).1/

The responsibility for determining whether the Davis-Bacon Act provisions should be included in a particular contract rests primarily with the contracting agency, which must award, administer, and enforce the contract. Yamas Construction Co., Inc., B-217459, May 24, 1985, 85-1 CPD ¶ 599. It follows that the determination of whether items of work fall within the coverage of the Service Contract Act, or within the scope of the Davis-Bacon Act, is fundamentally a matter of agency judgment. In challenging the Army's estimate of work subject to the Davis-Bacon Act, Dynalectron must show that the Army did not use the appropriate statutory and regulatory criteria, D.E. Clarke, B-146824, May 28, 1975, 75-1 CPD ¶ 317, or that the estimates are not based on the best information available, or otherwise misrepresent the agency's needs, or result from fraud or bad faith. Yamas Construction Co, Inc., B-217459, supra.

Regulations of the Department of Labor provide that, where contracts principally for services also involve substantial construction work, the provisions of both the Davis-Bacon Act and the Service Contract Act apply. 29 C.F.R. § 4.116(c)(2) (1985). Nonprofessional work under service contracts should be classified under the Service Contract Act except for construction, reconstruction, alteration, or repair work that is "physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract." 29 C.F.R.§ 4.116(c)(2)(ii). Consequently, to be covered by the Davis-Bacon Act in a service contract, each work project must individually satisfy the requirements of that act. In other words, the work must involve construction activity as distinguished from servicing or maintenance work, 29 C.F.R. § 5.2(i), and

1/ The consent decree imposes a number of obligations on Fort Carson, including a good-faith obligation to assure that contractors performing work under service contracts are properly classifying work under those contracts that is governed by the Davis-Bacon Act.

it must include all work done in the construction or development of a project, including, without limitation, altering, remodeling, and installation work. 29 C.F.R. § 5.2(j). Further, each minor project is subject to the statutory threshold of $2,000 applicable to the Davis-Bacon Act work. D.E. Clarke, B-146824, Oct. 17, 1974, 74-2 CPD ¶ 212; modified on other grounds, B-146842, May 28, 1975, 75-1 CPD ¶ 317.2/

The Fort Carson solicitation is primarily for installation support and maintenance work covered by the Service Contract Act, with incidental minor construction, reconstruction, alteration, or repair work covered by the Davis-Bacon Act. See 29 C.F.R. § 4.116(c)(2). Since the construction work is performed as part of a service contract, the Davis-Bacon Act will only apply to work that is physically and functionally separate from the service work called for by the contract. Id. In this context, a job assignment must satisfy both the test of severability from the Service Contract Act work and the $2,000 threshold in order to fall under the Davis-Bacon Act.

A. "Project" Work

Based upon provisions of the solicitation, we conclude that the Army did not properly apply the threshold in estimating the amount of the Davis-Bacon Act work to be performed. In modification No. 3 to the RFP, the Army

2/ On September 9, 1985, the Department of Defense promulgated a uniform policy specifically limiting the application of the Davis-Bacon Act in contracts for installation support, maintenance, and repair calling for Davis-Bacon Act services performed in response to a service call or work order to those service calls and work orders in excess of $2,000. Memorandum for Secretaries of the Military Departments from the Assistant Secretary of Defense for Acquisition and Logistics (Sept. 9, 1985); see also Memorandum for Director of the Army Staff from the Deputy Assistant Secretary of the Army for Programs and Commercial Activities (October 1, 1985).

The parties here differ on the application of the policy because it was issued after the procurement was initiated. Since we previously held in D.E. Clarke that the Davis-Bacon Act applies to work orders for construction that exceed $2,000 in operation and maintenance contracts, we consider the Defense Department policy statement to merely restate a preexisting requirement.

responded to a question from a prospective offeror by stating that it applied the $2,000 threshold to the line item representing "project" work rather than to anticipated work orders to be issued under the line item. In modification No. 5, the Army stated that as long as the total contract exceeded $2,000, no individual repair task had to exceed the threshold to be subject to the Davis-Bacon Act. This means, for instance, that all "project" work, involving hundreds of unrelated activities, is classified under the Davis-Bacon Act irrespective of whether each "project" independently meets the statutory $2,000 threshold.

Another example of this improper classification is found in Technical Exhibit 29, incorporated into the solicitation by modification No. 7. It indicates that all exterior electrical work on street lights, area lights, and traffic lights is outside of the Service Contract Act, as is all interior plumbing work on piping and fixtures, as well as unstopping drains. This would mean that the simple replacement of a lamp in a street light, or the unclogging of a difficult drain beyond the capabilities of the building occupants' capabilities, would be covered by the Davis-Bacon Act. All air-conditioning repair work and all work on heating systems, hot water heaters, piping systems, and controls under the contract are included within the Davis-Bacon Act coverage, even though at least some failures of these systems must involve very minor adjustments or repairs well below the $2,000 threshold.

In addition to failing to apply the $2,000 threshold, it appears that the Army also did not properly distinguish between construction, reconstruction, alteration, and repair work that is subject to the Davis-Bacon Act and maintenance or repair that is subject to the Service Contract Act. Technical Exhibit 26 lists typical "projects" performed during 1981-1983. Large numbers of these appear clearly to be services in the nature of maintenance or repair work related to maintenance, or to be below the $2,000 Davis-Bacon Act threshold. The Army states that some Service Contract Act work was included in the exhibit because of the difficulty of classifying work from its historical data, and some, such as changing light bulbs, will be performed in the future by building occupants. However, the number of minor projects described in Technical Exhibit 26 that appear clearly to be maintenance in nature--from rebuilding a meat slicer to replacing a garbage disposal--leads us to conclude that the Army did not properly differentiate the Davis-Bacon Act work from other work to be performed.

This improper classification appears to have resulted from the Army's belief that Fort Carson's procedures for ordering, directing, and approving the "projects" establish their Davis-Bacon Act character. We agree that these procedures--employing written orders, specifications, specified completion date, staffing estimates, and separate inspection and acceptance before payment--are appropriate for Davis-Bacon Act work. However, such procedures can also be appropriate for Service Contract Act work. Moreover, it may be appropriate to give oral directions for Service Contract Act work as well as Davis-Bacon Act work in many instances. The employment of more complex, written procedures, therefore, does not convert Service Contract Act work into Davis-Bacon Act work, or vice versa. In the case of a plumber assigned to unclog a stopped drain, it is the nature of the work assignment, not the procedure used for directing the plumber to carry out that assignment, that determines whether the Davis-Bacon Act or the Service Contract Act applies.

B. Railroad Maintenance

The other major contract item that the Army believes should be covered by the Davis-Bacon Act is railroad maintenance. This item includes periodic inspection of the 7 miles of track at Fort Carson; realigning and regauging track; replacing washed-out ballast; replacing and resetting spikes; oiling and tightening track bolts; and replacing deteriorated equipment, such as an estimated 2 switches, 100 ties, and 240 linear feet of rail a year.

Paragraph C.5.2.1.1.2 of the performance work statement lists railroad maintenance as "service-type" work, along with other work items normally covered by Service Contract Act, i.e., landfill operations, grounds maintenance, and snow removal. Much of the railroad maintenance work appears consistent with this classification, in that it involves continuing inspection and minor maintenance (such as tightening bolts) of the railroad tracks throughout the year. Even for those aspects which entail more significant activity, such as the replacing of switches, the work is of a continuing nature, with replacement performed as needed to maintain the line, rather than as a separate project directed by the government. Moreover, Fort Carson proposes to supervise railroad maintenance work with methods that, it argues elsewhere, apply to Service Contract Act work. The contractor is to schedule its own railroad maintenance work, without benefit of written orders, cost estimates, or specifications issued by Fort Carson. Similarly, there is no inspection and

acceptance of a completed product; rather, the contract objective is the continued functioning of the railroad line throughout the period of performance. Again, payment for railroad maintenance is made periodically and not upon the accomplishment of identified work items or projects.

Fort Carson's classification of railroad maintenance as Davis-Bacon Act work is inconsistent with our decision in 40 Comp. Gen. 565 (1961), in which we held that the Davis-Bacon Act did not apply to the railroad maintenance subcontract issued under a contract for the operation of a government-owned ammunition plant. In that case, the track was badly deteriorated due to past failures to perform periodic maintenance. Hence, it was necessary to perform by subcontract a relatively significant amount of repair work to bring the line up to standards. We held that the track repair work was incidental to the purpose of the prime contract, which was the operation of the plant, and thus the Davis-Bacon Act was not applicable.

We believe that the Army's classification of all "project" work and all railroad maintenance as covered by the Davis-Bacon Act is unreasonable. We sustain this portion of Dynalectron's protest. By separate letter to the Secretary of the Army, we are recommending that the agency reevaluate the amount of services that should be classified as the Davis-Bacon Act work in accordance with the criteria discussed above and revise the solicitation to reflect the reevaluation.

Cost Evaluation Criteria

Dynalectron also contends that the solicitation fails to indicate the relative importance of cost, as opposed to other considerations, in the evaluation of proposals.[3/]

[3/] One of the interested parties to the protest asserts that when comparing the government's cost of in-house performance to that of a commercial firm, only the lowest cost, technically acceptable proposal may be used. Although this issue was not protested in a timely manner, we note that Circular A-76 (Aug. 1983), part IV, para. B.2.d, provides that where, as here, an award fee is proposed, the contract price for cost comparison purposes is "the most advantageous offer to the government," not the "low negotiated estimated cost plus fee" used otherwise.

The RFP lists four evaluation factors in their order of importance: technical, management, quality control, and cost. Dynalectron argues that a subsequent modification made the relative importance of cost ambiguous. In modification No. 14, the Army added a provision regarding relative order of importance of evaluation factors, stating that the "technical" factor was twice as important as any other factor; management was more important than quality control; and cost would not be weighted or scored. The modification stated that cost would be fully evaluated and considered in relation to each offeror's technical, management and quality control approach without stating that it was more or less important than any other factor. Dynalectron argues that the failure to restate the relative importance of cost leaves the solicitation ambiguous.

The protester also states that how significant cost will be is further confused by another provision, "Basis of Award." That provision states that "the selection of the proposal for cost comparison will be based upon both scores and a subjective analysis of the relative merits of the proposals."

The Army argues that the solicitation satisfactorily conveys the relative importance of cost in evaluation, since it did not directly modify the list of four evaluation factors, in which cost came last in order of importance. The agency also states that the other provisions merely reflect the discretion accorded procuring agencies in assessing the role of cost in a cost-type contract, where the agency considers precise numerical scoring to be inappropriate.

Solicitations must be drafted to inform all offerors in clear and unambiguous terms what is required of them so that they can compete on an equal basis. Dynalectron Corp., B-198679, Aug. 11, 1981, 81-2 CPD ¶ 115. The Federal Acquisition Regulation (FAR) requires that the relative importance of all factors be stated, including cost or price. 48 C.F.R. § 15.406-5(c) (1984). It is particularly important that offerors be informed of the relative significance of cost in procurements used in the cost comparison process, since the evaluated cost of the most advantageous offer will determine whether the work will be performed by contract or continue to be performed by the Army itself.

We do not believe that modification No. 14 introduced an ambiguity by stating the relative importance of all factors except cost. The original RFP provisions stating

that cost was the least important factor remained unchanged, and modification No. 14 is consistent with that provision. Also, while the statement that cost will not be weighted is not as clear as it might be, the Army reports that it intended to indicate that cost will not be "numerically weighted," and we believe that this is the only reasonable interpretation of the provision.

The FAR requires that agencies select the offer that is most advantageous to the government, and they must consider price in this determination. 48 C.F.R. § 15.611. In view of this obligation on procuring agencies, we do not think that the statement in this case, that award will be based on scores and a "subjective analysis" of relative merit, establishes an ambiguity or misleads offerors so as to warrant sustaining the protest on this ground.

We recognize, however, that the meaning of the term "subjective analysis" in the context of a procurement is not clear. In view of the fact that we are recommending that the solicitation be revised for other reasons, we are also recommending that the Army consider revising the solicitation language to state that cost will not be "numerically" weighted or scored if this remains the Army's intention and to define "subjective analysis" or omit the use of the term.

Estimated Supply Costs

Finally, Dynalectron contends that offerors should not be required to estimate the quantities of supplies and materials to be used by the contractor to perform the contract, excluding project work. Instead, Dynalectron states that Fort Carson should estimate the quantities of supplies and materials required and apply that estimate to the evaluation of all proposals, including the government's proposal for in-house performance.

In this regard, Dynalectron complains that the information the Army has supplied on material usage is inadequate for offerors to prepare a realistic cost proposal, and that this informational deficiency was not cured by the 2-day inspection of Fort Carson permitted during the procurement process. Dynalectron points out that much of the historical information Fort Carson has provided fails to identify either the particular work required or the supplies and materials needed to accomplish the work. For example, the documents simply list "repair doors." In these circumstances, Dynalectron complains, any estimate of the cost of supplies prepared by an offeror can amount to

no more than "guesstimating," which could very well cause its proposal to be viewed as unreasonably high (or low) in cost. For these reasons, Dynalectron urges that Fort Carson follow the example of numerous other military installations conducting similar cost comparisons and treat the cost of supplies and materials as a "wash" item, established by the agency in advance for all proposals.

The Army responds by pointing out the numerous instances where the solicitation and its accompanying documents indicate estimated quantities of supplies. Examples of such estimates include the number of railroad switches to be replaced; the square footage of pot holes to be patched; the acres of ground to be fertilized; and the number of telephone poles to be replaced each year.

For those instances where estimated quantities have not been indicated, the Army notes that offerors have been given access to a complete computer printout which lists all repair jobs performed at Fort Carson during 1981, 1982 and 1983. While this printout does not list the supplies used to perform each item of work, it does identify the nature of the work in general terms. The Army contends that with this information, an offeror should be able to prepare realistic cost estimates for supplies based on its own knowledge of the industry and experience performing comparable work elsewhere. The Army further notes that because those records which have not been released do not segregate the costs of supplies in the same manner as the contract work is organized, they would be of no use to offerors in any event.

The Army also argues that its performance-oriented work statement encourages offerors to propose the best possible means for satisfying its requirements. Offerors should be free to propose alternate means of satisfying their supply needs, such as bulk purchasing, which would result in differing supply costs. The Army believes that offerors may propose differing methods for performing base operations and maintenance functions that could affect both the frequency of the need for supplies and the nature of the supplies needed. Moreover, the Army argues, Fort Carson has no preferential position in this regard. When developing the government's in-house cost proposal under A-76, the agency is required to use only the information available to the offerors.

As noted above, a solicitation must contain sufficient information to allow offerors to compete intelligently and

on equal terms. Analytics Inc., B-215092, Dec. 31, 1984, 85-1 CPD ¶ 3. Specifications should be free from ambiguity and should describe the agency's minimum needs accurately. Klein-Seib Advertising and Public Relations, Inc., B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251. There is no legal requirement, however, that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor, or that the procuring agency remove every uncertainty from the minds of every prospective offeror. Security Assistance Forces & Equipment International, Inc., B-199366, Feb. 6, 1981, 81-1 CPD ¶ 71.

While we recognize areas of uncertainty in the information available to offerors here, particularly with respect to the actual quantities of materials consumed in base operations, maintenance and minor repair work, we cannot say that the information that was provided does not give offerors an adequate basis for preparing intelligent proposals on equal terms. Further, since Fort Carson's historical records and accounts do not segregate its use of supplies in a manner consistent with the structure of this contract, it is not clear that any greater precision is possible.

The protest is sustained in part and denied in part.

for Comptroller General
of the United States