Moorhouse

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RG&B Contractors, Inc.

File: B-225925.2

Date: March 10, 1987

DIGEST

Although the contracting agency's reasons for deleting a Davis-Bacon Act wage rate determination from a solicitation calling for military housing maintenance services with significant construction elements are not known, the protest is nevertheless denied where there is no evidence that the lack of incorporated wage rates for the affected construction labor categories precluded the submission of intelligent bids prepared on a reasonably equal basis or caused the protester to be competitively prejudiced.

DECISION

RG&B Contractors, Inc. protests the award of any contract under invitation for bids (IFB) No. F65501-86-B-0139, issued by the Department of the Air Force. The procurement is for military family housing maintenance services at Elmendorf Air Force Base, Alaska. RG&B complains that the IFB failed to incorporate any Department of Labor (DOL) wage determination for certain labor categories involving a significant portion of the contemplated contract. Accordingly, RG&B contends that bids were not prepared on an equal basis because bidders had no knowledge of what hourly rates would be applicable to the categories in question for purposes of preparing intelligent bids.

We deny the protest.

BACKGROUND

The IFB, issued on September 30, 1986, contemplated the award of a contract for a base period plus two 1-year option periods. Because the procurement was for overall base maintenance services with significant elements generally regarded as construction work, such as exterior/interior painting and

floor refinishing, the IFB contained both Davis-Bacon Act, 40 U.S.C. § 276a (1982), and Service Contract Act, 41 U.S.C. § 351 et seq. (1982), wage rate determinations. See Labor Standards for Federal Service Contracts, 29 C.F.R. § 4.116(c)(2) (1986). However, the Air Force subsequently determined that the Davis-Bacon Act provisions were not applicable to the procurement, and the incorporated wage determination was therefore deleted from the IFB by amendment.

Prior to bid opening, RG&B protested to this Office that the deletion of the Davis-Bacon wage rate determination made it impossible to prepare a reasonable bid with respect to those aspects of the work utilizing labor categories formerly embraced by the determination--principally painters and refinishers--since those categories were not included in the Service Contract Act wage determination remaining in the IFB, which was only applicable to categories of maintenance workers.

The Air Force did not receive notice of RG&B's protest before the time scheduled to open the 14 bids received in response to the IFB. The apparent low bidder was International Service Corporation with a total bid (base period and options) of $5,676,779.88. RG&B was the fifth low bidder with a total bid of $6,710,298.60. No award has been made pending our resolution of the protest. 31 U.S.C. § 3553(c)(1) (Supp. III 1985).

ANALYSIS

We note that the Air Force's administrative report on the protest fails to set forth the specific reasons why the provisions of the Davis-Bacon Act were determined to be inapplicable to the procurement. Generally, however, the responsibility for determining whether Davis-Bacon Act provisions should be included in a particular contract rests primarily with the contracting agency since it must award, administer, and enforce the contract. Yamas Construction Co., Inc., B-217459, May 24, 1985, 85-1 CPD ¶ 599. Therefore, it is our view that the determination of whether items of work fall within the coverage of the Service Contract Act or the Davis-Bacon Act is fundamentally a matter of agency judgment. Dynalectron Corp., 65 Comp. Gen. 290 (1986), 86-1 CPD ¶ 151.

We nevertheless recognize that RG&B's protest is not merely an assertion that one statutory provision is more applicable to this procurement than the other, as the Air Force has characterized the protest, but rather a basic complaint that

the absence of any specified wage rates in the IFB for painters and refinishers, labor categories representing a significant portion of the total work, was improper. Hence, we do not necessarily accept the Air Force's position that this apparent deficiency in the solicitation is remedied simply by the fact that any category of utilized employee not covered by the wage determination will be "conformed" by DOL as subject to the provisions of the Service Contract Act. See 29 C.F.R. § 4.6(b)(2) (which provides that employees not covered will be classified by contractor, subject to final DOL approval, "so as to provide a reasonable relationship" between unlisted classifications and the classifications set forth in the wage determination for wage purposes. However, assuming for the sake of argument that RG&B is correct in its assertion that the IFB was deficient because it did not specify labor rates for painters and refinishers, a threshhold question which must be resolved is whether the procurement was flawed by this defect to the extent that RG&B was competitively prejudiced thereby. In this regard, it is well-settled that a showing of prejudice is an essential element of any viable protest, and this Office, accordingly, will not disturb an on-going procurement where the deficiency in issue did not unfairly deprive the protester of a contract award. Honeywell Information Systems, Inc., B-191212, July 14, 1978, 78-2 CPD ¶ 39.

We have closely examined the abstract of bids accompanying the agency report, and we find no evidence that the lack of incorporated wage rates for painters and refinishers precluded the submission of intelligent bids prepared on a reasonably equal basis or caused RG&B to be competitively prejudiced in this procurement. We note that RG&B's combined price for the painting and refinishing work represents some 25 percent of its total bid. This percentage is seemingly consistent with the equivalent percentages observable in the other bids, percentages which ranged from a low of 18 to a high of 29, or an average of 23 percent among the other bids. Thus, with respect to the relationship between construction work prices and total bid price, the bids all appear to be reasonably comparable, a fact which serves to weaken RG&B's implicit assertion that there were widely divergent bid prices due to the lack of specified wage rates for those affected labor categories.

Moreover, RG&B is only the fifth low bidder, and the record does not indicate that the firm likely would have submitted the successful bid even with specified wage rates for painters and refinishers incorporated into the IFB. Hence, noting as well that RG&B is not the low bidder when the prices for painting and refinishing work are eliminated in

their entirety from the bids for comparative evaluation purposes, we find that RG&B has failed to make that showing of prejudice necessary to give validity to its protest position. Honeywell Information Systems, Inc., B-191212, supra, 78-2 CPD ¶ 39 at 7.

It is certainly the rule that procuring activities must give sufficient detail in an IFB to enable intelligent competition on a relatively equal basis. Jones Refrigeration Service, B-221661.2, May 5, 1986, 86-1 CPD ¶ 431. However, we see no ground upon which to sustain the protest here where RG&B has not shown that the lack of specified wage rates in the IFB for the construction labor categories in question had any appreciable effect upon either the viability of the competition in general or the firm's own competitive status in particular.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel