



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Scientific Radio Systems, Inc.
File: B-228033; B-228033.2
Date: November 13, 1987

DIGEST

1. Protest that solicitation did not contain a wage determination is dismissed as untimely where the protester did not raise this issue until after award.
2. General Accounting Office does not review the accuracy or correctness of wage determinations issued by the Department of Labor.
3. Whether wages paid by a contractor comply with Service Contract Act requirements is a matter for the Department of Labor.

DECISION

Scientific Radio Systems, Inc. (SRS), protests the award of a contract to Independent Technology, Inc. (INTEC), by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, under request for proposals (RFP) No. WG3300-6-00003. We deny the protest in part and dismiss it in part.

The RFP was for maintenance services for 336 remotely located transmitters that are components of the agency's weather radio systems. Prior to issuing it, the agency, in June of 1986, submitted to the Department of Labor (DOL) a "Notice of Intention to Make a Service Contract and Response to Notice" (Standard Form (SF) 98) as required under DOL regulations, 29 C.F.R. § 4.4(a)(1) (1986), implementing the Service Contract Act of 1965 (SCA), 41 U.S.C. § 351 *et seq.* (1982). The purpose of such a notice is to obtain from DOL a wage determination setting forth the minimum wages and fringe benefits a contractor must provide the various classes of service employees that will perform the contract. On July 29, 1986, DOL returned the SF 98 to NOAA indicating that an attached wage determination, No. 80-377 (Revision 7), applied to this procurement. That wage

determination specified the prevailing wages for various classes of employees in four regions of the country.

NOAA issued the RFP on July 1, prior to receiving the wage determination. The solicitation stated that a wage determination would be provided as an amendment to the RFP. At no time before award of the contract on July 27, 1987, however, did the agency issue a formal amendment to the RFP expressly incorporating the wage determination.^{1/}

The agency received three proposals in response to the RFP, one of which the agency ultimately determined was technically unacceptable. With respect to SRS and INTEC, the agency scheduled discussions with both firms and reports advising them by telephone that copies of the applicable wage determination would be made available at these sessions. The agency's notes indicate that during the meetings a contract specialist provided the firms with the wage determination, stated that "it would be incorporated as part of the resulting contract," and advised that best and final offers must comply with it. The protester acknowledges receiving the wage determination, but says that it was "filed away and forgotten" because a formal amendment incorporating it in the RFP was expected. Following an additional round of telephone discussions, during which NOAA informed both offerors that their wages for service employees complied with the applicable wage determination, the agency requested the submission of best and final offers. NOAA's evaluation showed that INTEC was the low offeror, and the agency awarded the contract to that firm.

SRS complains that the agency failed to incorporate, formally, DOL's wage determination into the RFP. The protester does not explain how it may have been prejudiced by this oversight, and we fail to understand how it could have been since the agency advised both offerors during discussions of the wage determination that would apply to this procurement. In any event, this basis for protest is untimely. Our Bid Protest Regulations provide that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1) (1987). Here, the fact that the solicitation did not contain a wage determination was apparent from the face of the RFP. In fact, the RFP expressly noted the omission and advised potential offerors that a wage determination would be incorporated later by amendment. Although the agency failed to issue such an amendment, SRS raised

^{1/} There is no explanation in the record why this procurement took more than 1 year to complete.

this issue only after learning that it had not been selected for award. See Potomac Documentation and Design, Inc., B-197347 et al., Sept. 19, 1980, 80-2 C.P.D. ¶ 211.

SRS argues that it was justified in failing to raise this issue earlier on the basis that NOAA affirmatively represented both in the RFP and during discussions that a formal amendment would be issued. The protester says it had a right to rely on such representations and that its failure to protest earlier therefore should be excused. We find this argument unpersuasive. While an offeror may rely on an agency to cure apparent defects in a solicitation, an offeror is required to protest such defects in a timely manner if the agency fails to do so. Here, the latest that SRS reasonably could expect the issuance of a formal amendment incorporating the wage determination was the time set for receipt of best and final offers, but SRS failed to protest this issue until well after that time.

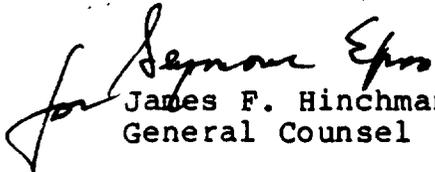
SRS has requested that in the event we find its protest on this issue to be untimely we nevertheless consider it under either the good cause or significant issue exception contained in our regulations. 4 C.F.R. § 21.2(c). This exception does not apply here. "Good cause" refers to some circumstance beyond the protester's control that prevented a timely filing. Dontas Painting Co., B-226797, May 6, 1987, 87-1 C.P.D. ¶ 484. No such circumstance existed here. A "significant issue" is one of widespread interest to the procurement community that previously has not been considered by our Office. Continental Telephone Company of California, B-222458.2, Aug. 7, 1986, 86-2 C.P.D. ¶ 167. SRS argues that its case is significant because it is similar to the subject of our decision in Tombs & Sons, Inc.--Request for Reconsideration, B-178701, Nov. 20, 1975, 75-2 C.P.D. ¶ 332. That case involved the solicitation of bids under one wage determination followed closely by a postaward increase in the contract price to reflect a revised wage determination. This is not what happened here, however, since both SRS and INTEC competed under the same wage determination received during discussions, and the same wage determination was referenced in and attached to INTEC's contract.

The rest of SRS's protest focuses on the mechanics of NOAA's application for and use of the wage determination. Basically, SRS contends that NOAA did not inform DOL of the wage rates that would apply if the services required were performed by federal employees or of where the bulk of the services would be performed, and failed to get an updated wage determination when the procurement was delayed. SRS also argues that NOAA incorrectly decided which of the classifications in the wage determination DOL issued would

be used during contract performance; that decision was the basis for NOAA's advice to SRS and INTEC during discussions that their proposed wage rates were acceptable. SRS argues that although NOAA determined that the electronics technicians proposed by both SRS and INTEC were Class I technicians, both firms would need to use higher-paid Class II or Class III technicians to perform the contract. On this basis SRS contends that the agency's evaluation of the proposals was flawed. Further in this regard, SRS contends that INTEC may violate the SCA if it uses Class II or III technicians but pays them Class I wages.

Our review of the record, which includes SRS's protest, NOAA's response, and both parties' comments following a conference in our Office on the issues SRS raises, establishes that NOAA met its obligations in submitting the SF 98 to DOL, that DOL had at its disposal all the information needed to issue an appropriate wage determination, and that the wage determination was current when the contract was awarded in July of 1987. To the extent SRS believes that the wage determination was wrong, we point out that our Office generally does not review the accuracy of DOL wage determinations. Gerald Moving & Warehousing Co., B-225618, Jan. 14, 1987, 87-1 C.P.D. ¶ 59. Whether INTEC will violate the SCA during contract performance by using Class II or Class III technicians while paying Class I wages is a matter for DOL, the agency responsible for enforcement of SCA. OAO Corp., B-211803, July 17, 1984, 84-2 C.P.D. ¶ 54.

The protest is denied in part and dismissed in part.


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General Counsel