Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: IBI Security Service, Inc.

File: B-236462; B-236462.2; B-236462.3

Date: November 14, 1989

DIGEST

1. Initial determination of whether job classifications in a solicitation are positions subject to the Service Contract Act is for the procuring activity.

2. Solicitation properly notified bidders as to applicability of collective bargaining agreement where the contracting agency incorporated into the solicitation the Department of Labor wage determination which included a provision notifying offerors that the awardee will be required to comply with the collective bargaining agreement and provided two addresses where information on the agreement could be obtained.

3. General Accounting Office does not review wage rate determinations issued by the Department of Labor in connection with solicitations subject to the Service Contract Act.

4. The procuring agency is not required to cancel solicitation after bid opening to incorporate revised wage rates received more than 1 month after bid opening.

DECISION

IBI Security Service, Inc., protests the terms of invitation for bids (IFB) No. N62467-89-B-3977, issued by the Navy for unarmed security guard services at Key West Naval Air Station. We deny the protests in part and dismiss them in part.

The Navy has amended the solicitation three times, partially in response to issues raised by IBI's protests. However, IBI contends that deficiencies concerning applicable wage rates and job classifications remain in the solicitation. Bids on the solicitation were opened September 11, 1989. Award has not been made.

The Service Contract Act of 1965 requires federal contractors to pay minimum wages and fringe benefits as determined by the Secretary of Labor to employees under service contracts exceeding $2,500. 41 U.S.C. §§ 351-358 (1982). Department of Labor (DOL) regulations implementing the Service Contract Act require agencies to notify DOL of their intent to enter into such contracts and to list the classes of service employees they expect to employ. 29 C.F.R. § 4.4 (1988). The Navy in this case provided DOL with one class of prospective employees; unarmed uniformed guard service employees. The Navy did not include the positions of supervisor or project manager required under the solicitation, on the basis that these employees serve in an executive or administrative capacity, and therefore are not covered by the Service Contract Act.

IBI first argues that only DOL has the authority to determine if certain classes of employees in a solicitation are covered by the Service Contract Act, and that the contracting officer therefore was required to provide DOL with a list of all classes of employees expected to be used under the contract, not just those he believed were covered by the Service Contract Act. The protester argues that if the contracting agency has the authority, it was exercised improperly here since the supervisor and project manager positions are service positions covered by the Service Contract Act.

It is proper for the contracting agency to make the initial determination of whether certain classes of employees fall within the coverage of the Service Contract Act. Dynalectron Corp., 65 Comp. Gen. 290 (1986), 86-1 CPD ¶ 151. Therefore, the contracting officer was acting within his authority when he determined that the supervisors and/or project managers required under the solicitation did not fall within the ambit of the Service Contract Act. Id.

As far as the propriety of that determination is concerned, the protester has merely expressed its disagreement with the agency's judgment. In such cases, we have held that the protester must show that the agency did not use the appropriate statutory and regulatory criteria, or that the agency's determination concerning Service Contract Act coverage was not based on the best information available, or otherwise misrepresented the agency's needs, or resulted from fraud or bad faith. Dynalectron Corp., 65 Comp. Gen. 290, supra. Here, the solicitation refers to the DOL regulation, 29 C.F.R. § 541, which describes executive and administrative duties exempt from Service Contract Act coverage, and the agency report states that these regulations were used in determining that the supervisor and

project manager positions required under the solicitation were not subject to the Service Contract Act. Additionally, there is no indication in the record that the determination was not based on the best information available, misrepresents the agency's needs, or results from fraud or bad faith. Therefore, we have no basis upon which to question the agency conclusions here. In any event, to the extent that IBI disagrees with the actual wage rate issued by DOL pursuant to the Service Contract Act, that challenge should be made to DOL through that agency's administrative procedures set forth in the C.F.R., part 29.

IBI, the incumbent contractor, and subject to a collective bargaining agreement, next contends that the solicitation is vague because it does not clearly indicate that the collective bargaining agreement will be binding on the successful offeror with regard to wages and benefits for all service employees.

The wage determination incorporated in the solicitation includes a note which provides that:

> "In accordance with Section 4(c) of the Service Contract Act, as amended, the wage rates and fringe benefits set forth in this wage determination are based on collective bargaining agreement(s) under which the incumbent contractor is operating. The wage determination sets forth the wage rates and fringe benefits provided by the collective bargaining agreement and applicable to performance on the service contract. However, failure to include any job classification, wage rate or fringe benefit encompassed in the collective bargaining agreement does not relieve the successor contractor of the statutory requirements to comply as a minimum with the terms of the collective bargaining agreement insofar as wages and fringe benefits are concerned."

In addition, the solicitation states that "[i]t is the responsibility of all potential bidders and the subsequent contractor to become familiar with the terms and conditions of the applicable collective bargaining agreement." This section also provides two addresses where information concerning the agreement can be obtained. These provisions serve to clearly notify all bidders of their legal responsibility to comply with the collective bargaining agreement. Ryan-Walsh, Inc., B-232330, Dec. 8, 1988, 88-2 CPD ¶ 572.

To the extent that IBI is suggesting that the wage determination in the solicitation is deficient because it is inconsistent with the collective bargaining agreement, we will not consider this matter on its merits. It is our policy not to review whether a DOL wage determination issued in connection with a solicitation subject to the Service Contract Act is consistent with an existing collective bargaining agreement. Ryan-Walsh, Inc., B-232330, supra. As indicated above, any challenge to the wage determination should be made to DOL in accordance with the procedures set forth in C.F.R., part 29.

Further, IBI notes that on October 16 DOL issued a new wage rate concerning this requirement. The protester argues that the agency is therefore required to cancel the solicitation and resolicit the requirement using the latest wage rate.

A solicitation does not have to be canceled whenever a new wage determination is issued after bid opening but prior to award. Rosendin Elec., Inc., B-200025, Feb. 20, 1981, 81-1 CPD ¶ 119. In fact, wage rates issued less than 10 days before bid opening do not always have to be incorporated into the existing solicitation. Federal Acquisition Regulation § 22.1008-1.

Finally, IBI raised a number of other issues concerning the solicitation. These matters were addressed in the amendments to the solicitation or were answered in the agency's reports. Since the protester has not mentioned these matters further, we will not consider them. See Precision Echo, Inc., B-232532, Jan. 10, 1989, 89-1 CPD ¶ 22.

The protests are denied in part and dismissed in part.

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General Counsel