



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Allen-Norris-Vance Enterprises, Inc.

File: B-243115

Date: July 5, 1991

John O. Cates, Esq., Sadler, Sullivan, Herring & Sharp, P.C., for the protester.
Craig E. Hodge, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency issuance of modification to a purchase order is dismissed as academic where the agency determines that the modification was issued in error and seeks to recoup sums paid under the modification.
2. Protest that awardee's quote on small purchase violates Service Contract Act (SCA) because one quoted hourly rate was below the SCA-specified wage rate is denied where record does not show the awardee intended to violate the SCA in the performance of contract.

DECISION

Allen-Norris-Vance Enterprises, Inc. (ANV) protests the award of purchase order No. DAAH03-91-P-0597 to Foreign Language Services, Inc. (FLS), issued by the Department of the Army. ANV argues that the agency improperly evaluated quotes in making the award to FLS by failing to take cognizance of the fact that FLS quote below the cognizant Service Contract Act (SCA) wage rate for one of the positions called for under the purchase order. ANV also argues that the agency improperly issued a modification to the purchase order that increased the hourly rate to be paid for that position and that this modification rendered FLS' quote second low.

We deny the protest in part and dismiss it in part.

On December 21 and 28, 1990, the agency orally solicited quotations from three prospective small business vendors for the performance of support services for the Army Education

Learning Center, Redstone Arsenal, Alabama,^{1/} The contemplated firm, fixed-price purchase order was for a 2-month interim period (January and February 1991) pending the agency's acquisition of the services under section 8(a) of the Small Business Act. In soliciting for the quotations, the agency's contract specialist read to the prospective vendors the applicable statement of work, which includes position descriptions and a specified number of hours for four different types of contractor employees. Hourly unit prices were solicited for each of the four position descriptions. In addition, the contract specialist provided the prospective sources with information regarding two applicable Department of Labor Service Contract Act (SCA) wage determinations.

All three firms supplied the agency with verbal quotations as requested. The agency multiplied these hourly rates by the number of hours specified for each item. FLS submitted the lowest priced quotation at \$21,191 while ANV's quote was \$22,552. The unit price quoted by FLS for the clerk/data entry positions was \$8.86 per hour as compared to ANV's \$10 per hour quote. FLS received the award since it submitted the low quote. The agency incorporated into the award document the clause contained in Federal Acquisition Regulation § 52.222-41, which requires the contractor to comply with the SCA, and the two applicable SCA wage determinations.

After performing the contract for approximately 1 month, FLS requested a modification of the contract in order to increase its per-hour rate for its clerk/data entry personnel. In its letter requesting the modification, FLS explained that at the time it had submitted its original quotation, it had used the SCA hourly wage rate for "file clerk II" of \$7.72 per hour as specified in the wage rate determination, but, upon observation of the actual duties required, it had determined that the higher hourly wage rate of \$9.23 per hour specified for "key entry operator II" was in fact more appropriate. FLS therefore requested an increase in contract value to reflect the higher wage rate. The agency issued a modification to the purchase order to increase the purchase order by \$1,478. This amount represents the adjustment in the rate paid ANV for these positions from \$8.86 per hour to \$11.17 per hour. If the amount of this modification were added to the initial

^{1/} On December 28, the agency obtained revised quotes for 2 months of services; only 1 month of services was solicited on December 21.

purchase order price, FLS would be displaced as the low-priced quoter and ANV would be low.^{2/}

We dismiss ANV's protest insofar as it challenges the modification. After receipt of the protest, the agency concluded that it had erred in issuing the modification and resolved to recoup the sum authorized by this modification.^{3/} Accordingly, we view ANV's protest of the modification to be academic in light of the agency's corrective action. See East West Research, Inc.,--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379. In addition, since ANV, in its comments on the agency report, expressed satisfaction in the Army's proposed action on this modification, it appears that the protester has abandoned its protest of this matter. See Ross Aviation, Inc., B-236952, Jan. 22, 1990, 90-1 CPD ¶ 83.

ANV primarily argues that the agency did not fairly and reasonably evaluate the quotations submitted, and that had it done so it would have determined that the offer of FLS violated the SCA, since the FLS hourly rate quotation for the "Clerk/Data Entry" personnel was below the hourly rate required to be paid by the wage determination. ANV therefore concludes that the agency should have determined the quotation of FLS to be nonresponsive and made award to ANV as the low responsive responsible firm.

Where a firm offers hourly rates which are below those specified in an SCA wage determination, that firm is eligible for award so long as the bid or proposal does not evidence an intent to violate the SCA and the firm is otherwise determined to be responsible. See NKF Eng'g, Inc.; Stanley Assocs., B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497; Uniserv Inc.; Marine Transport Lines, Inc., B-218196; B-218196.3, June 19, 1985, 85-1 CPD ¶ 699. On a firm, fixed-priced contract, as here, a bid or proposal that does not take exception to the solicitation's SCA provisions yet offers labor rates that are less than the SCA-specified rates may simply constitute a below-cost bid or offer, and an award to a responsible firm on the basis of such an offer is legally unobjectionable. See K&P, Inc. and Kirsch Maintenance Serv., Inc., B-212263; B-212263.2, Oct. 11, 1983, 83-2 CPD ¶ 436. In contrast, where there is an indication that the bidder or offeror does not intend to be bound by the terms of the SCA,


^{2/} This is so because ANV's \$22,552 quote was based on the key entry operator II wage rate and this modification amount increased FLS' price to \$22,669.

^{3/} FLS' entitlement to payment under the modification is currently the subject of a claim being decided by the contracting officer.

its offer must be rejected.^{4/} See Johnson Moving & Storage Co., B-221826, supra; see also Unified Indus., Inc., B-237868, supra, aff'd, RGI, Inc.--Recon., B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120.

Here, although FLS' proposed rates for the clerk/data entry personnel represented a below-cost quote, there is no evidence that FLS did not intend to comply with the SCA. The executed purchase order expressly required compliance with the SCA, including paying covered employees no less than rates in the applicable wage rate determinations. Moreover, the record indicates that FLS recognized that it was required to comply with the SCA, as evidenced by its assertion of a mistake in basing its quote on the wrong SCA classification.^{5/} Under the circumstances, we do not find that FLS' quote could not be accepted.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel

^{4/} For example, where a bidder fails to acknowledge a solicitation amendment which incorporates an SCA wage determination, the bid is nonresponsive because the bidder has not agreed to be bound by the requirements of the SCA. Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 CPD ¶ 273. Also, SCA wage rate requirements should be taken into account in agency cost realism analyses. See Unified Indus., Inc., B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346.

^{5/} In retrospect, it is apparent that the contract specialist should have expressly identified to prospective quoters the applicable SCA classification for the clerk/data entry personnel. The record shows that the Army personnel recognized that the applicable classification was not clear some months prior to this solicitation and, after coordinating with the Department of Labor, determined that the clerk/data entry position most appropriately fell under the key entry operator II classification. It would have been reasonable for the contract specialist to have queried FLS when its rate indicated a below-cost quote on this position. However, we do not find that this inaction violated any law or regulation.