



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: OMNE of New Jersey, Inc.

File: B-246292

Date: February 27, 1992

Barry M. Sinins for the protester.
L. James Tillman, Department of Energy, for the agency.
Amy Mito Shimamura, Esq., and Gary L. Kepplinger, Esq.
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Where hybrid procurement procedures are utilized by Department of Energy management contractor, and bids are not publicly opened, contractor reasonably canceled a solicitation after receipt of bids under the standard applicable to negotiated procurements. In these circumstances, the failure to incorporate current Davis-Bacon Act wage rate determination in solicitation provided a reasonable basis for cancellation and resolicitation of the same requirement.

2. Protest of higher wage rates, that management contractor and union allegedly would require potential subcontractor to pay its employees, is a matter for consideration by the Department of Labor which has the exclusive authority to determine new wage rates.

DECISION

OMNE of New Jersey, Inc., the apparent low bidder, protests the cancellation of Solicitation No. 482508, issued as a small business set-aside by Associated Universities Inc./Brookhaven National Laboratory (AUI) for electrician labor/hour services and a truck for a 1-year period beginning October 1, 1991. AUI, a government prime contractor, manages, operates and maintains by and for the Department of Energy (DOE) the agency's Brookhaven National Laboratory in Suffolk County, New York. OMNE contends that AUI should have awarded the contract to its firm under the canceled solicitation. In addition, OMNE protests that the DOE and the International Brotherhood of Electrical Workers (IBEW) improperly control the wage rates and the personnel required to perform the work called for by the solicitation.

The protest is denied.

Initially, we point out that federal procurement statutes and regulations do not apply per se to a management contractor operating by and for the government; such a prime contractor must conduct procurements according to the terms of its contract with the agency and its own agency approved procedures. Our review is limited to determining whether the procurement conforms to the "federal norm," i.e., the policy objectives in the federal statutes and regulations. BECO Corp., B-219651, Nov. 26, 1985, 85-2 CPD ¶ 601.

The solicitation, issued on August 19, 1991, specifically stated that it was a "sealed bid invitation" but it did not provide for the public opening of bids. Rather, the solicitation stated that bids would be "privately opened".

The solicitation incorporated Department of Labor (DOL) General Wage Decision No. NY91-13, Modification No. 5 dated July 19, 1991, and required bidders to pay their workers not less than the wage rates specified in Modification No. 5. The solicitation advised that bids would be evaluated on the straight time hourly billing rates for the labor classifications of Electrician Journeyman and Electrician Foreman I, each weighted 50 percent, and that the bidder with the lowest total points for the two classifications would be awarded the contract.

Seven bids were received in response to the solicitation by the September 3 bid opening date. The bids were opened privately and prices were not disclosed. OMNE was informed by AUI that it was the apparent low bidder. AUI and OMNE held pre-award "conversations" over the next several weeks during which AUI informed OMNE that prior contractors providing electrical labor/hour services were affiliated with Local #25 of the IBEW, and referred OMNE to an official of Local #25. AUI also requested that OMNE provide additional information regarding its past performance and the identification and qualifications of its proposed workers. OMNE provided the requested information on September 30.

On October 2, AUI received DOL's Modification No. 6 to General Wage Decision 91-13, which was effective on October 11, 1991. Modification No. 6 increased the hourly wage rates for the two categories of electrical workers listed in the solicitation. Since AUI was unable to complete its determination of OMNE's responsibility and to award the contract prior to October 11, it canceled the solicitation and reissued it with Modification No. 6 incorporated on that date. The new solicitation was provided to OMNE, the six other original bidders and another bidder.

OMNE protests the cancellation of the solicitation and contends that the contract should have been awarded to it, based on its low, responsive bid. If this were a "sealed bid" procurement conducted by a federal agency, the solicitation could only be canceled after bids were exposed if there were a compelling reason to do so. Federal Acquisition Regulations (FAR) § 14.404-1. Normally, on a federal agency sealed bid procurement, if a new wage determination that changes any wage rates is received by the contracting officer after bid opening, the new wage rate would not be included in the solicitation and therefore would not apply to the proposed contract. FAR § 22.404-6(b)(2). Thus, the fact that a new wage determination is issued does not, in itself, provide a compelling reason to cancel after bids are exposed on a sealed bid procurement conducted by a federal agency.

With regard to cancellation of the solicitation, DOE states that neither the prime contract nor Brookhaven's Standard Operating Procedures provided AUI with any guidance. However, the agency states, since there was no public exposure of bid prices, the "compelling reason" standard applicable to sealed bidding was not required to be followed. Rather, DOE maintains that AUI properly followed the "reasonable basis" standard that is applicable to cancellation of negotiated procurements and that FAR § 22.404-6(c) provided a reasonable basis for the cancellation of the solicitation. When contracting by negotiation, if a new DOL determination changes wage rates, the contracting officer is required to amend the solicitation to incorporate the new determination, and furnish the wage rate information to all offerors that submitted proposals. FAR § 22.404-5(c)(3).

The solicitation stated that it was a "sealed bid invitation," but the record indicates that hybrid procedures combining elements of sealed bidding and negotiation were followed. Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards. FAR § 14.101. Here, since bids were not publicly opened, an essential element of sealed bidding was missing. In this respect, AUI followed negotiated procurement procedures under which proposed prices are not disclosed. FAR § 15.411(b).

Under the circumstances, since bid prices were not exposed, a reasonable basis was needed to cancel and resolicit. While FAR § 22.404-5(c)(3) contemplates actual offerors being given the opportunity to submit revised offers based on a revised wage determination, prime contractors are not required to comply with all aspects of the FAR. In the absence of countervailing applicable regulations, we find that AUI has a reasonable basis to cancel the solicitation

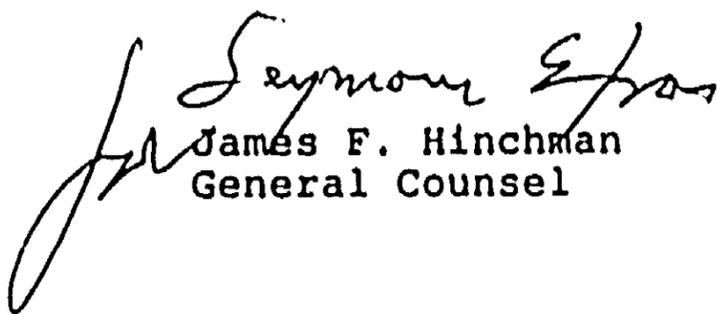
and resolicit, based on the significant revisions to the wage determination.

OMNE also protests that the AUI and IBEW are requiring the payment of higher wage rates. Under the Davis-Bacon Act, 40 U.S.C. § 276a (1988), the Department of Labor (DOL) has the authority to determine the minimum wage rates and fringe benefits to be paid to the electricians called for under the proposed contract. If OMNE objects to the DOL's new wage rate determination it should submit its request for reconsideration of the increase to the DOL. See 29 C.F.R. § 1.8 (1991). The matter is not for consideration by the GAO under its bid protest function. R-A-L Mechanical, Inc., B-223049, July 30, 1986, 86-2 CPD ¶ 128.

The protester further contends that DOE and the IBEW will improperly require the employment of the Local #25 members, who previously provided electrical services under prior contracts, for the performance of the proposed contract.

The DOE responds that OMNE fails to provide any support for its allegation that DOE (and IBEW) will require the employment of prior electrical workers for the performance of the proposed contract. The DOE admits, however, that AUI, which is entirely responsible for the conduct of the procurement, referred OMNE to a Local #25 official. DOE states that since OMNE is a New Jersey-based concern, it was appropriate for AUI to provide OMNE with as much information as possible on work-related conditions in the Suffolk County (Long Island) area and at the Brookhaven site, in particular.

OMNE did not substantively respond to the DOE's explanation. Based on our review of the record, we find no impropriety in AUI's encouragement of the protester to contact local union officials and that AUI did not improperly require the continued use of particular union employees.


James F. Hinchman
General Counsel