



Comptroller General
of the United States

348710

Washington, D.C. 20548

Decision

Matter of: PacOrd, Inc.
File: B-253690
Date: October 8, 1993

Dan Kirsch for the protester.
Robert S. Brock, Esq., Federal Emergency Management Agency,
for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest that contracting agency improperly failed to comply with Federal Acquisition Regulation concerning the incorporation of wage determinations into solicitations where the place of performance is unknown is denied where, though agency did not comply with the regulation in a number of specific ways, protester was not prejudiced by this failure.
2. Protest that solicitation did not contain sufficient information concerning labor category requirements is denied where procedures set forth in the solicitation provided a reasonable basis for bidders to estimate their labor costs and to compete on an equal basis.

DECISION

PacOrd, Inc. protests alleged defects in invitation for bids (IFB) No. EMW-93-B-4190, issued by the Federal Emergency Management Agency (FEMA), for power circuit breaker repairs at FEMA's Federal Service Center in Olney, Maryland. PacOrd argues that the solicitation improperly provides for the post-bid opening incorporation of the appropriate wage determination, and improperly fails to include sufficient information concerning labor category requirements for a bidder to estimate its costs.

We deny the protest.

BACKGROUND

FEMA's Office of Acquisition Management received the requisition and statement of work (SOW) for this requirement

on December 22, 1992. The requirement is for the removal of circuit breaker units from FEMA's Federal Service Center in Olney, Maryland, and the performance of certain repairs on the units at the contractor's location. After the repairs are made, the contractor is to ship the units back to the Olney facility and reinstall them. On February 16, 1993, a notice describing the requirement was published in the Commerce Business Daily (CBD). In response to that notice, 56 firms requested a copy of the solicitation; all were placed on the source list.

The IFB was issued on March 31 and contemplated award of a firm, fixed-price contract, with the work to be performed within 120 days of contract award. The IFB is covered by the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351-358 (1988), which requires that employees must normally be paid at least the minimum hourly wages set forth in Department of Labor (DOL) area wage determinations. 41 U.S.C. § 351(a)(1). Regulations implementing the SCA require that agencies notify DOL of their intent to enter into a service contract exceeding \$2,500 and list the classes of workers they expect to employ. See 29 C.F.R. Part 4 (1992). The instrument to provide that notice is Standard Form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice." The SF 98 serves as a request that DOL issue a wage determination to establish the minimum wages and fringe benefits a contractor must provide to the various classes of service employees used in performing the contract in a given locality. Federal Acquisition Regulation (FAR) § 22.1001. A wage determination issued in response to such a submission must generally be incorporated into the solicitation. FAR §§ 22.1007-1013.

The initial solicitation did not include any wage determinations. However, the IFB's section H.1, "Wage Determination," provided that:

"In the performance of this contract the Contractor shall comply with the requirements of a U.S. Department of Labor Wage Determination. Once the place of performance has been identified, an appropriate wage determination will be required and incorporated into the contract."

On March 31, the same day the solicitation was issued, the contracting officer requested from DOL wage determinations for those areas which she identified as the most likely places of performance: four Maryland localities and the District of Columbia. Whether this request was in accordance with the applicable regulations is an area of contention discussed below.

The IFB's section I.2 included the clause at FAR § 52.222-42, "Statement of Equivalent Rates for Federal Hires." This clause identified the classes of service employees expected to be employed under the contract and stated the wages and fringe benefits payable to each if they were employed by the contracting agency subject to the provisions of 5 U.S.C. § 5341 or 5332. The clause listed two classes of service employees; Electrician (High Voltage), and Electrical Equipment Repairer.

In an April 20 letter to the agency, PacOrd asked numerous questions about the solicitation including, among other things, the labor-related questions at issue here. In general, those labor-related questions concerned the propriety of the post-bid opening incorporation of the appropriate wage determination under the IFB's wage determination clause, the propriety of the service employee classifications listed in the IFB's federal hire clause, and the adequacy of the information provided concerning the minimum labor category requirements. PacOrd also requested that the agency provide it with a wage determination applicable to its intended place of performance, Norfolk, Virginia.

The agency issued amendment Nos. A001 and A002 on April 23 and April 29, respectively, to answer questions submitted by prospective bidders, to set a cut-off date for receipt of additional questions, and to extend the bid opening date. Amendment No. A003 was issued on May 11 to answer additional questions, to provide the four wage determinations received to date from DOL (including that applicable to the protester's intended place of performance), and to extend the bid opening date. None of these amendments responded to the labor-related questions raised by PacOrd. As a result, in a May 14 letter to the agency, PacOrd raised the labor-related questions again. On May 26, the agency issued amendment No. A004 to clarify one of PacOrd's prior technical questions, and to again extend the bid opening date. The amendment also stated that the agency considered that it had answered all pertinent questions.

PacOrd filed this protest in our Office on June 8, prior to bid opening. The agency proceeded to open bids as scheduled on the June 10 extended bid opening date. Of the 18 bids received, PacOrd's was the fifteenth lowest, with a bid price three times higher than that of the lowest submitted bid. While the apparent low bidder's appropriate wage determination was not incorporated into the solicitation, the appropriate wage determinations of at least four other bidders, all of whose bids were priced significantly lower than PacOrd's, were incorporated into the solicitation by amendment No. A003. On September 17, the agency notified

our Office of its determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit delay of the award until after resolution of the protest. See 4 C.F.R. § 21.4(a) (1993).

DISCUSSION

PacOrd essentially raises two objections to the solicitation. First, PacOrd argues that the solicitation improperly provides for the post-award incorporation of the appropriate wage determination into the contract, rather than providing for the incorporation, by amendment, of all applicable wage determinations into the solicitation. Second, PacOrd argues that the solicitation improperly fails to include the correct service employee classifications and other information concerning the minimum labor category requirements sufficient to allow a bidder to estimate its costs.

Wage Determination

In its protest, PacOrd asserted that the IFB's section H.1 should be corrected to indicate that the applicable wage determinations would be incorporated by amendment into the solicitation, and therefore must be considered as a part of a bidder's estimation of its costs. PacOrd argued that, under section H.1, all applicable wage determinations might not be incorporated into the solicitation, and all bidders might not have the information required to ensure their compliance with the SCA.

Wage determinations are generally required to be included in the solicitation. FAR § 22.1012-1. This is because the SCA mandates that employees normally be paid at least the minimum hourly wages set forth in the applicable wage determinations. 41 U.S.C. § 351(a)(1). A solicitation which provides some, but not all, bidders with the wage determinations applicable to their places of performance violates the general principle that all bidders must be treated equally, see The Fred B. DeBra Co., B-250395.2, Dec. 3, 1992, 93-1 CPD ¶ 52, as only those bidders whose applicable wage determinations are incorporated in the solicitation will be on notice of the required minimum wages.

However, the FAR provides for two exceptions to the general rule that wage determinations must be incorporated into the solicitation. The first exception applies where wage determinations are not received from DOL in time for the

agency to incorporate them into the solicitation. 29 C.F.R. §§ 4.5(a)(2), (c)(1); FAR §§ 22.1012-2(b) and 22.1012-4; see also VIP Human Resources, B-242696, May 21, 1991, 91-1 CPD ¶ 496. The second exception applies where the place of performance is unknown at the time the solicitation is issued. 29 C.F.R. § 4.4(a)(2)(i); FAR § 22.1009. The agency argues that this latter exception applies here.

FAR § 22.1009, "Place of performance unknown," delineates the procedures that a contracting officer must follow with regard to wage determinations in situations where the place of performance is unknown. FAR § 22.1009-1, "General," provides:

"If the place of performance is unknown, the contracting officer may use the procedures in this section. The contracting officer should first attempt to identify the specific places or geographical areas where the services might be performed (see 22.1009-2) and then may follow the procedures either in 22.1009-3 or in 22.1009-4."

FAR § 22.1009-2, "Attempt to identify possible places of performance," provides:

"The contracting officer should attempt to identify the specific places or geographical areas where the services might be performed. The following may indicate possible places of performance:

- (a) Locations of previous contractors and their competitors.
- (b) The solicitation mailing list.
- (c) Responses to a presolicitation notice"

The remaining two subsections of FAR § 22.1009 provide contracting officers guidance under two alternative scenarios: where all of the possible places of performance have been identified, and where all of the possible places of performance have not been identified. The second scenario, governed by FAR § 22.1009-4, is at issue here.

Prior to the issuance of the solicitation, the contracting officer must submit an SF 98 to DOL for those possible places of performance which have been identified. FAR §§ 22.1008-7; 22.1009-4(a). The CBD synopsis for the requirement must contain the following information: that the place of performance is unknown; the possible places of performance for which wage determinations have been requested; that the contracting officer will request wage determinations for additional possible places of performance if asked to do so in writing; and the time and date by which those requests must be received. FAR § 22.1009-4(b). Both

the solicitation and the contract must contain the clause at FAR § 52.222-49, "Service Contract Act--Place of Performance Unknown," and that clause must include certain required information. FAR § 22.1009-4(c).¹ If the contracting officer receives any timely requests for additional wage determinations, she must submit additional SF 98s for those localities, amend the solicitation to include all wage determinations, and, if necessary, extend the bid opening date. FAR § 22.1009-4(e). If, after award, it is discovered that the successful offeror did not timely request a wage determination and will perform in a place for which no wage determination was requested,² the contracting officer shall award the contract, request the wage determination, and incorporate the wage determination into the contract retroactive to the date of contract award and with no adjustment in contract price. FAR § 22.1009-4(f).

As discussed below, the agency did not comply with the regulations governing wage determinations in a number of ways. We conclude, nevertheless, that the protester was not prejudiced by FEMA's actions.

First, the contracting officer did not timely request wage determinations for the possible places of performance which she had identified prior to the issuance of the solicitation. Where, as here, the contract action is for a nonrecurring or unknown requirement, the SF 98 must be submitted to DOL not later than 30 days before the IFB is issued. 29 C.F.R. § 4.4(a)(1); FAR §§ 22.1008-7(a), (b). Here, while the CBD notice for this requirement was published on February 16, the contracting officer did not submit the SF 98 to DOL until, at the earliest, March 31, the same day the IFB was issued.

Second, the CBD notice published on February 16 does not as required by FAR § 22.1009-4(b): (1) state that the place of performance is unknown; (2) list the possible places of performance for which wage determinations have been requested; (3) inform prospective bidders that the contracting officer will request wage determinations for

¹The required information is the possible places of performance for which the contracting officer has requested wage determinations, and the time and date by which requests for wage determinations for additional places must be received by the contracting officer. FAR §§ 22.1009-4(c) and 52.222-49(a).

²Late receipt of a bidder's request for a wage determination for an additional place of performance does not preclude the bidder's competing for the proposed acquisition. FAR § 22.1009-4(d).

additional possible places of performance if asked to do so in writing; or (4) state the time and date by which those requests must be received.

Third, contrary to FAR § 22.1009-4(c), the solicitation does not include the clause at FAR § 52.222-49, "Service Contract Act--Place of Performance Unknown." This clause, like the required CBD notice, informs prospective bidders that the place of performance is unknown, advises them which wage determinations have been requested, and instructs them as to the procedures for obtaining applicable wage determinations. Moreover, it warns prospective bidders that while they may still compete for the procurement if a wage determination applicable to them was neither attached to the solicitation nor requested by them, the appropriate wage determination will be requested after bid opening and incorporated into the contract retroactively, with no adjustment in contract price. FAR § 52.222-49(b). As a result, not only does the clause serve to tell prospective bidders how to obtain the appropriate wage determinations for their compliance with the SCA, the clause warns them of the potential consequences of the failure to do so.

The agency concedes that it inadvertently omitted this clause,³ but argues that it substantially and practically complied with all of the regulatory requirements. We disagree. Contrary to the agency's assertions, the solicitation did not notify bidders of the fact that no bid or contract price adjustment would be permitted. It also did not inform bidders which wage determinations had been requested. A bidder could only have inferred, after the issuance of amendment No. A003, that at least four wage determinations were requested; there was no way for a bidder to know if additional wage determinations had been requested but not yet received. Finally, the agency's statement that amendment No. A001's cut-off date for receipt of questions on the solicitation served the same purpose as the required cut-off date for receipt of requests for additional wage determinations is without merit, in light of the agency's failure to provide any information concerning the procedures for obtaining additional wage determinations in the solicitation.

³While the agency's failure to include the clause in the initial solicitation may have been inadvertent, PacOrd's April 20 and May 14 letters were sufficient, in our view, to place the agency on notice that the required clause was not in the solicitation. Despite the issuance of four amendments after the receipt of PacOrd's initial letter, the agency did not add the required clause when it clearly could have, and should have, done so.

Finally, PacOrd argues that the contracting officer did not comply with the first requirement of the FAR under this scenario, which is to attempt to identify the specific places where the services might be performed, using, as one indicator, responses to a presolicitation notice. FAR § 22.1009-2. While the contracting officer did request wage determinations for those areas in closest proximity to the Federal Center, we do not understand why her attempts in this regard apparently did not consider the source list. The source list contains the names and addresses of the 56 firms that responded to the CBD notice. Of these 56 firms, 41 were not located in the areas for which wage determinations were initially requested.⁴ We believe that an examination of the source list should have indicated to the contracting officer that wage determinations other than those applicable to local areas would likely be required.

The DOL regulations governing this matter require that an applicable wage determination be obtained for each firm participating in the bidding for the location in which it would perform the contract. 29 C.F.R. § 4.4(a)((2)(i)). The FAR requires a contracting officer to make a considerable effort to identify, through a variety of sources, potential bidders and to request wage determinations applicable to those potential bidders, prior to the issuance of the solicitation. These provisions also require a contracting agency to notify potential bidders which wage determinations have been requested and the procedures by which additional wage determinations may be requested, prior to the closing date for receipt of bids. This requirement allows all bidders the opportunity to utilize the appropriate wage determinations in the preparation of their bids. A contracting agency cannot disregard all of these requirements and rely solely on its own inadequate wage determination clause to inform prospective bidders of their rights and responsibilities with respect to wage determinations under the SCA.

Irrespective of FEMA's failure to comply with the regulation, because PacOrd was not prejudiced, its protest cannot be sustained. Prejudice is an essential element of a viable protest. Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379; The Fred B. DeBra Co., supra. While any doubt concerning the existence of prejudice will be resolved in favor of the protester, IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378, we will not presume prejudice where the record establishes that the protester was not prejudiced by the violation of regulation.

⁴Half of the 18 bids received were not covered by one of the wage determinations incorporated in the solicitation.

Amendment No. A003 incorporated the wage determination appropriate to PacOrd's place of performance, and PacOrd concedes that it relied on this wage determination in preparing its bid.⁵ Further, at least four other bidders who submitted bids lower than that of PacOrd also received the appropriate wage determinations for their places of performance by amendment No. A003 and presumably relied upon them in the preparation of their bids.⁶ The result was that FEMA's failure to comply with the FAR did not prejudice PacOrd, as the firm does not allege, and we see no reason to assume, that its bid or the bids of these lower bidders would have changed had the agency complied with the FAR. See The Fred B. DeBra Company, supra.

Service Employee Classifications and Conformance

PacOrd's remaining arguments concern the agency's responsibilities with respect to providing prospective bidders with information to assist them in establishing wages and fringe benefits for classes of employees that are not covered by applicable wage determinations.

The clause set forth at FAR § 52.222-41, which was incorporated by reference in this solicitation, establishes a "conforming" procedure to enable contractors to determine appropriate wages for labor categories that are subject to the SCA but not covered by applicable wage determinations. Generally, under this conforming procedure, the contractor establishes wages that are reasonably related to those of workers in classifications listed in an applicable wage determination with the same knowledge and skill level. The "conformed" wage rate must be finally approved by DOL and the contractor must pay the wage rate ultimately set or approved by DOL. 29 C.F.R. § 4.6(b)(2); FAR §§ 22.1019, 52.222-41(c).

⁵The protester contends that the wage determination for its intended place of performance, incorporated into the solicitation by amendment No. A003, was not the appropriate one, because the agency did not provide an SF 98 requesting that wage determination in its report issued in response to the protest. However, the agency represents that this wage determination was in fact appropriate to this solicitation, and we have no basis to find otherwise.

⁶A bidder which offers rates below those specified in an applicable wage determination is nonetheless eligible for award so long as the bid does not evidence an intent to violate the SCA and the firm is otherwise determined to be responsible. See Solid Waste Servs., Inc., B-248200.4, Nov. 9, 1992, 92-2 CPD ¶ 327. PacOrd has not alleged that any of these lower bids evidenced such intent.

PacOrd argues that the agency's SF 98 improperly used service employee classifications that are not contained in the SCA Directory of Occupations.⁷ As a result, PacOrd complains, the wage determinations do not contain the listed classifications, and prospective bidders cannot ensure conformance.

The agency's SF 98 listed two service employee classifications, "Electrician (High Voltage)" and "Electrical Equipment Repairer."⁸ PacOrd's assertion that these classifications are not contained in the Directory are not challenged by the agency. Under the FAR, the SF 98 shall list all classes of service employees to be utilized, "using the exact title in the . . . Directory . . . , or providing an appropriate job title and job description if the Directory cannot be used." FAR § 22.1008-2(a)(1) (emphasis added). The FAR also provides that a contracting officer shall use the Directory "to the maximum extent possible" in listing service employee classes on the SF 98 to enhance timely issuance of comprehensive wage determinations. FAR § 22.1008-2(b)(1). Since the contracting officer is not required to use Directory classifications in all cases, and the protester has not argued that a particular Directory classification could have been used, we cannot conclude that the agency acted improperly in this regard.⁹

⁷The Directory contains standard job titles and descriptions for many commonly utilized service employee occupations. FAR § 22.1008-2(b)(1).

⁸PacOrd also argues that FEMA's use of these classifications in the solicitation's federal hire clause was improper, and that the clause should have contained additional information to assist prospective bidders in conformance. However, the regulations do not require a contracting agency to utilize Directory classifications in the federal hire clause, nor do they require the inclusion of the additional information which the protester suggests would be helpful. See FAR §§ 22.1016; 52.222-42.

⁹PacOrd argues that the SF 98 was also defective because it did not contain, as required, the estimated number of service employees in each class, or the wage rate that would be paid each class if employed by the agency. FAR §§ 22.1008-2(a)(2), 22.1008-2(a)(3); 29 C.F.R. § 4.4(b). While the SF 98 did not contain this required information, since DOL did not return the SF 98 to the agency for further action, and in fact issued the requested wage determinations, we cannot conclude that the SF 98 was defective. See 29 C.F.R. § 4.4(e); The Fred B. DeBra Co.,

(continued...)

PacOrd also argues that the solicitation improperly fails to provide a description of the minimum labor category requirements for the two listed service employee classifications. PacOrd asserts that this information is required to assist prospective bidders in conforming with the appropriate wage determination classification.

The procedures set forth in the IFB for contractors to establish wages and fringe benefits for omitted classes of employees provide a reasonable basis for them to estimate their labor costs and to compete on an equal basis. West Coast Fire Serv., Inc., B-228170, Dec. 16, 1987, 87-2 CPD ¶ 599; Harris Sys. Int'l, Inc., B-228096, Oct. 14, 1987, 87-2 CPD ¶ 357. While the absence of a particular wage determination might affect bid prices, all bidders will be affected equally. Moreover, the wage determinations specify minimum wages; they are not a guarantee that a bidder can employ the appropriate workforce at those rates. See Broken Lance Enters., Inc., B-201482, Mar. 17, 1981, 81-1 CPD ¶ 203. Some risk is inherent in projecting costs, and bidders are expected to allow for that risk in computing their bids. Id.

Here, while the SOW does not specifically describe the minimum labor category requirements, it does describe in some detail the work to be performed. In addition, the IFB's federal hire clause informs prospective bidders of the classes of service employees expected to be employed under the contract and states the wages and fringe benefits payable to each if they were paid by the contracting agency.¹⁰ Firms are expected to use their experience and business judgment in preparing their bids, which necessarily includes determining what wages to pay employees. Although a bidder would find specific descriptive information useful in constructing its bid, the government is not required to


⁹(...continued)

supra (DOL must be accorded great deference in the interpretation of the regulations it has issued in implementing the SCA).

¹⁰While the wage determinations incorporated into the solicitation do not include the specific classifications listed in the federal hire clause, they do list, among them, such classifications as "Electrician, Maintenance," "Electrical Equipment Worker," and "Electrician/Technician."

provide all details in order to remove all uncertainties.
See West Coast Fire Serv., Inc., supra; Aleman Food Serv.,
Inc., B-219415, Aug. 29, 1985, 85-2 CPD ¶ 249.

The protest is denied.


for James F. Hinchman
General Counsel