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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Madison Services, Inc.

File: B-256834

Date: August 3, 1994

James M. Ulam, Esq., Ott, Purdy & Scott, for the protester.
Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for FKW Incorporated, and Richard M. Gutekunst, for Theta Services, Inc., interested parties.
Lester Edelman, Esq., and Timothy L. Felker, Jr., Esq., Department of the Army, Office of the Chief of Engineers, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that Service Contract Act provisions and wage rate determinations should apply to solicitation for family housing maintenance work, rather than Davis-Bacon Act provisions and wage rate determinations, is denied where the agency reasonably determined that the solicitation's requirements were principally for construction work.

2. Protest that solicitation did not adequately explain how price proposals would be evaluated is denied where the nature of the price evaluation was specifically set forth and its relative weight designated.

3. Price adjustment clause included in a solicitation for family housing maintenance work, which is considered to be construction under the Davis-Bacon Act, reasonably included the construction cost index of the Engineering News Record as that index was found to bear a logical relationship to the solicitation's costs.

DECISION

Madison Services, Inc. protests certain terms of request for proposals (RFP) No. DACA41-94-R-0012, issued by the Army Corps of Engineers for total family housing maintenance at Fort Riley, Kansas. Madison contends that the RFP improperly includes provisions relating to wage rate determinations under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1988), for construction work. Madison contends that the

principal purpose of the contract is for maintenance services to be performed by service employees and that, therefore, the Service Contract Act of 1965, 41 U.S.C. § 351 (1988), and its wage rate determinations should instead apply to the contract.[1] Madison also protests the adequacy of the RFP's provisions regarding the evaluation of price proposals using "price analysis" techniques, and the RFP's economic price adjustment clause--involving the application of an index factor (based upon an annual comparison of a published construction cost index) to the base year contract price to determine option year prices.[2]

We deny the protest.

The RFP, issued on February 14, 1994, contemplates the award of a firm, fixed-price indefinite quantity/indefinite delivery contract for a combination of construction work and services (regarding continuous scheduled and "on demand" maintenance, repair, inspection, and pest control for approximately 3,700 Army family housing units, 800 billeting quarters, and associated grounds at Fort Riley) for a base year plus 4 option years. The RFP contains more than 900 contract line item numbers (CLINs) setting out specific maintenance and repair requirements and provides estimated quantities of work for each CLIN derived from historical contract information.

The RFP contains provisions and a wage determination implementing the Davis-Bacon Act. In deciding that the Davis-Bacon Act was applicable, the contracting officer, prior to the issuance of the RFP, classified each CLIN's work requirement based upon historical contract information as either construction, service, or variable (i.e., including those requirements considered susceptible of either classification depending upon the work context in which it is ordered). The agency's CLIN-by-CLIN analysis was conducted to determine the extent of construction work required under the RFP compared to the extent of service-type work to be performed. As part of its analysis, the agency considered the estimated quantity of the particular work anticipated under each CLIN (these estimates were provided in the RFP) and multiplied that quantity by the

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[1]The Davis-Bacon Act generally covers construction activity, including alteration and repair work, as distinguished from service or maintenance work covered under the Service Contract Act.

[2]Madison filed its protest with our Office on March 25, prior to the scheduled closing date for the receipt of proposals. The agency proceeded with closing, as scheduled, on March 30.

agency's estimated unit price for each CLIN. The agency then calculated the total estimated extended prices for all CLINs identified as construction (including alteration and repair work), those identified as services, and those identified as variable. A comparison of these total prices showed that 66.6 percent of the work was construction-related, 23.8 percent was service-related, and 9.6 percent was variable. The agency also compared the estimated unit prices for each CLIN, totaling the prices for each type of work (construction, services, and variable). This comparison showed that 56.7 percent of the requirement was for construction-related work, 28.4 percent was for service-related work, and 14.9 percent was considered variable. Based upon its CLIN analysis, the agency concluded that "considerably more" than half of the work contemplated under the contract was for construction and that even if the variable CLINS were considered services, service-related work under the contract still would only account for less than 50 percent of the total contract requirements.[3]

The protester contends that the agency misclassified the procurement as principally for construction and improperly included the Davis-Bacon Act wage determinations. Madison states that although some construction work is required under the RFP, the procurement is principally for routine (scheduled and "on demand") maintenance services to be performed by service employees and, thus, the Service Contract Act wage determinations and related provisions should apply to the contract.[4]

The responsibility for determining whether the Davis-Bacon Act provisions apply to a particular contract rests

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[3]These percentages were in line with the current contract for similar total family housing maintenance work at Fort Riley, which includes the Davis-Bacon Act provisions.

[4]Although Madison originally protested the Davis-Bacon Act's application to any severable work project under the contract that does not meet the $2,000 contract threshold of the Davis-Bacon Act because many task orders will be below that amount, Madison has abandoned this contention. Madison's comments in response to the agency report on the protest do not rebut the agency's position (based upon an opinion of the Department of Labor in an unrelated procurement) that the $2,000 threshold applies to the total contract amount, rather than individual orders. Additionally, although Madison alleges in its comments that the agency purposely misclassified the requirement in order to reduce agency costs, the record suggests no evidence of such alleged bad faith on the part of the agency.

primarily with the contracting agency which must award, administer, and enforce the contract. Four Star Maintenance, B-229703, Apr. 7, 1988, 88-1 CPD ¶ 348. The determination of whether items of work involve basic maintenance within the scope of the Service Contract Act, or are more in the nature of construction, alteration, or repair within the scope of the Davis-Bacon Act, is a matter of agency judgment. It is often difficult to classify maintenance requirements as either construction-type work or services since the actual work ordered may include service work or construction work, depending upon the context within which the work is ordered under the contract. Id. We will question the agency's determination only where it lacks a reasonable basis. See Dynalectron Corp., 65 Comp. Gen. 290 (1986), 86-1 CPD ¶ 151.

Madison's protest states a generalized challenge to the Davis-Bacon Act's application to the RFP's work requirements (which total approximately 900 CLINs). Madison essentially contends that since the RFP describes the contract requirements as family housing "maintenance," the contract relates to services to be performed by service employees and that any construction or repair work will be incidental to those services and therefore the Service Contract Act provisions and wage determinations should have been included in the RFP.

We think the agency's comparison of the estimated dollar amount of construction-related work versus services-related work using the regulatory guidance set forth in Defense Federal Acquisition Supplement (DFARS) § 22.402-70(c), (d) was an acceptable method of determining whether this procurement was primarily for construction in order to determine the applicability of the Davis-Bacon Act. The agency's analysis reasonably included consideration of the quantity of work anticipated under each CLIN and classified the anticipated work as either construction, services or variable, considering the context in which the work is expected to be ordered based upon historical contract information, and then calculated the percentage of the total contract work that was considered construction.

While the protester contends that large groups of CLINs (some including several hundred CLINs), including scheduled maintenance (to "[detect] and [correct] incipient failures and [accomplish] maintenance and repair"), pest and odor control requirements, appliance and equipment inspection and replacement (including certain structural work), and maintenance of vacant quarters should be classified as services and not construction, the record shows that most of the referenced CLINs (e.g., those relating to pest and odor control and equipment work) were in fact classified as services in the agency's analysis. We have no basis to

question the agency's position that the other CLINs are properly classified as construction. For example, these CLINs cover repair of walls and ceilings, kitchen and bathroom cabinets and countertops, tile, sheet and hardwood flooring, and toilet and bathroom accessories, as well as exterior work such as repair of stone, brick, siding and sidewalks--all of which work can reasonably be considered to be construction under the DFARS § 222.402-70(c), (d).

In sum, the protester's general challenge to the RFP as being for maintenance is not sufficient to question the reasonableness of the agency's determination that the Davis-Bacon Act was applicable.[5] The fact that many CLINs involve or are labeled maintenance work does not mean that they are not properly classified as construction under the Davis-Bacon Act. See Four Star Maintenance, supra.

Madison also protests that the RFP does not explain with sufficient specificity how price proposals will be evaluated. This argument has no merit. The RFP states that award will be made to the "responsible offeror whose offer is technically acceptable and will be most advantageous to the government, price and other factors . . . considered." Offerors are advised that price "will be evaluated, but not point scored," and that "[p]rice is second most important of the evaluation factors; the RFP states that "total [t]echnical outweighs [p]rice which outweighs [s]ubcontracting [p]lan." The RFP provides that:

> "[p]rice will be evaluated using price analysis techniques. In selecting the best overall proposal, the Government will consider the value of each proposal in terms of the quality offered for the price. Price will be evaluated for price reasonableness, cost realism, possible unbalanced bidding and possible collusion between offerors."

We believe the RFP presents sufficient information about the agency's evaluation of price proposals to allow offerors to intelligently compete on an equal basis for this firm, fixed-price indefinite quantity/indefinite delivery-type contract. See Dynalectron Corp., supra.

Madison finally protests that the RFP's price adjustment clause for option years violates DFARS § 216.203-4(d). That regulation requires that the economic adjustment be based upon a cost index that bears a logical relationship to the type of contract costs that are subject to the index. Here,

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[5]We understood that the Department of Labor has been asked for its views on this matter, which the Corps may wish to take into account before proceeding.

the economic price adjustment clause provides that if the agency decides to exercise an option year under the contract, base year unit prices will be adjusted by application of an index factor to determine the option year unit prices. The RFP states that the index factor will be computed by dividing the "Construction Cost Index [as published in the Engineering News Record (ENR)] for the first week of the month in which the option year is to be exercised" by the "Construction Cost Index for the first week of the month of award for the base contract," and multiplying this figure by the contract's base year unit prices to determine option year unit prices. Madison challenges the use of a construction cost index factor, asserting that this is in fact a services contract. Since we find above that the agency reasonably determined that the RFP is principally for construction, we think it is reasonable for the RFP to include the Construction Cost Index published in ENR, a leading construction industry publication, since it bears a logical relationship to the contract's costs. As to the protester's contention that the applicable index cost factor should be updated more frequently--to better reflect market fluctuations--than on an annual basis, we note that the agency's formula for annual adjustment of the index factor is reasonably within the index adjustment parameters set forth in DFARS § 216.203-4(d)(xii), which suggests quarterly to annual cost index reviews.

The protest is denied.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel