



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dismantlement and Environmental Management
Company

File: B-257632

Date: October 24, 1994

Sam Zalman Gdanski, Esq., for the protester.
Jose Aguirre, Esq., Cynthia S. Guill, Esq., and Paul M.
Fisher, Esq., Department of the Navy, for the agency.
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the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest against cancellation of invitation for bids after
bid opening is denied where agency properly determined that
Service Contract Act (SCA), 41 U.S.C. §§ 351-358 (1988),
applies to solicitation for contract with principal purpose
of furnishing of services rather than sale of property; and
failure to include SCA provisions and accompanying wage rate
determinations may affect bidders' pricing, thus providing a
compelling reason to cancel.

DECISION

Dismantlement and Environmental Management Company (DEMCO)
protests the cancellation after bid opening of an invitation
for bids (IFB) for the purchase, removal, and disposal of a
450-ton crane structure at the Hunters Point Annex Naval
Station, Treasure Island, San Francisco, California, issued
by the Department of the Navy.¹

We deny the protest.

At the March 23, 1994, bid opening, nine bids were received
in response to the IFB. DEMCO submitted the apparent high
bid. The Navy subsequently canceled the solicitation
because the IFB omitted various clauses, including the
clauses concerning the Service Contract Act of 1965 (SCA),

¹The crane is a fixed bridge structure supported by four
towers, pairs of which straddle a 405-foot-wide pier.
Constructed of riveted and welded braces and plates, the
bridge is 730 feet long and rises 182 feet above the main
high tide in the San Francisco Bay.

41 U.S.C. §§ 351-358 (1988) and accompanying Department of Labor (DOL) wage rate determinations, as required by Federal Acquisition Regulation (FAR) § 22.1002-1.² The SCA provides that covered service employees must normally be paid at least the minimum hourly wages set forth in the Department of Labor area wage determinations. 41 U.S.C. § 351(a)(1).

DEMCO asserts that the cancellation was improper. The protester argues that the acquisition was not principally for services but rather involved a sale of property--the crane. DEMCO concludes that the SCA therefore is inapplicable and that the related clauses were not required in the solicitation. Alternatively, the protester argues that the solicitation need not be canceled because the omitted SCA provisions could be incorporated in any awarded contract through an administrative modification.

The SCA applies to government contracts where the "principal purpose" is to furnish services through the use of service employees. 41 U.S.C. § 351; FAR § 22.1003-1. Under DOL's administrative regulations implementing the Act, the decision as to whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case. 29 C.F.R. § 4.111(a) (1994). We will not question such a determination unless it is shown to be unreasonable. Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114.

In illustrative examples of situations where the services involve more than the use of labor, as here, the applicable regulations, 29 C.F.R. § 4.116(b), provide that:

"Contracts under which the contractor receives tangible items from the Government in return for furnishing services (which items are in lieu of or in addition to monetary consideration granted by either party) are covered by the Act where the facts show that the furnishing of such services is the principal purpose of the contracts. For example, property removal or disposal contracts

²Other omitted FAR clauses required for service contracts included Certificate of Independent Price Determination, FAR § 52.203-2; Gratuities, FAR § 52.203-3; Small Business Concern Representation, FAR 52.219-1; Small Disadvantaged Business Concern Representation, FAR § 52.219-2; Women-Owned Small Business Representation, FAR § 52.219-3; Certification Regarding a Drug-Free Workplace, FAR § 52.223-5; Insurance-Work on a Government Installation, FAR § 52.228-5; and Inspection of Services--Fixed-Price, FAR § 52.246-4.

which involve demolition of buildings or other structures are subject to the Act when their principal purpose is dismantling and removal (and no further construction activity at the site is contemplated). However, removal or dismantling contracts whose principal purpose is sales are not covered. So-called 'timber sales' contracts generally are not subject to the Act because normally the services provided under such contracts are incidental to the principal purpose of the contracts."

The same regulations further provide that:

"It should be noted that the fact that a contract may be labeled as one for the sale and removal of property, such as salvage material, does not negate coverage under the Act even though title to the removable property passes to the contractor. While the value of the property being sold in relation to the services performed under the contract is a factor to be considered in determining coverage, where the facts show that the principal purpose of removal, dismantling, and demolition contracts is to furnish services through the use of service employees, these contracts are subject to the Act."

Additionally, in this regard, FAR § 37.301 provides that "[c]ontracts for dismantling, demolition, or removal of improvements are subject to either the Service Contract Act (41 U.S.C. §§ 351-358) or the Davis-Bacon Act (40 U.S.C. §§ 276a-276a-7)."¹ Specifically, it further provides that if a contract:

"is solely for dismantling, demolition, or removal of improvements, the Service Contract Act applies unless further work which will result in the construction, alteration, or repair of a public building or public work at that location is contemplated. If such further construction work is intended, even though by separate contract, then the Davis-Bacon Act applies to the contract for dismantling, demolition or removal."

¹Generally, the SCA covers service or maintenance work as distinguished from construction activity, including alteration and repair work, which is covered by Davis-Bacon. See Madison Servs., Inc., B-256834, Aug. 3, 1994, 94-2 CPD ¶ 54; Four Star Maintenance, B-229703, Apr. 7, 1988, 88-1 CPD ¶ 348.

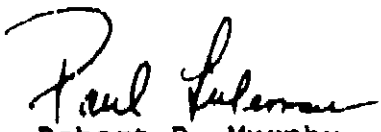
Here, the solicitation clearly was principally for dismantling, demolition, and removal services, rather than the sale of the crane. The work requested in the IFB was described as "removal and disposal" and "demolition/removal," with the proposed "method of removal" left to the discretion of the bidders, subject to Navy approval. Additionally, DEMCO's submission indicates that the firm's proposed method of removal would include both "conventional dismantlement" and "demolition" by "controlled explosions." Once the crane structure was at ground level, the protester proposed to cut the sections into manageable sizes for off-site removal. The fact that the successful contractor would receive the crane (presumably for any salvage or scrap value) in addition to monetary consideration for the demolition, disposal, and removal services does not change the principal purpose to a property sale. Rather, the sale was merely incidental to the agency's principal purpose of having the crane dismantled and removed. Accordingly, the agency correctly concluded that the SCA was applicable to the requirement.

An agency may cancel a solicitation after bid opening only where it has a compelling reason to do so. NonPublic Educ. Servs., Inc., B-207751, Mar. 8, 1983, 83-1 CPD ¶ 232. We have held that the failure to include required SCA provisions and accompanying wage rate determinations is such a compelling reason. Id. The fact that the SCA provisions could be added after award (or automatically be incorporated in any awarded contract under the "Christian Doctrine") does not render the omission less than compelling, since the omission created the possibility of prejudice to bidders--some firms may have assumed the application of the SCA and bid on that basis, while others may not have made such an assumption. See R. S. Data Sys., Inc., B-225437, Mar. 11, 1987, 87-1 CPD ¶ 274.

The protester further contends that the Navy canceled the solicitation because of political pressure from a minority group; this, according to the protester, constitutes bad faith. This allegation is unsupported in the record. DEMCO has presented no evidence besides its own speculative assertions as to the agency's motivations here. This simply

does not provide a basis to find bad faith or improper conduct on the part of the agency. Brisk Waterproofing Co., Inc., B-256138.3, June 30, 1994, 94-1 CPD ¶ 394. Moreover, as explained above, the Navy reasonably determined that the circumstances here provided a compelling reason to cancel the solicitation.

The protest is denied.


for Robert P. Murphy
Acting General Counsel