5549

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189168 DATE: March 6, 1978

MATTER OF: Reaction Instruments, Inc.

DIGEST:

Request for reconsideration of decision is denied where protester fails to specify any error of law or information not previously considered.

Reaction Instruments, Inc. (Reaction), seeks reconsideration of our denial of its request for reformation of its contract, No. DOT-FA75 -3645, with the Federal Aviation Administration (A). See Reaction Instruments, Inc., B-189163, November 30, 1977, 77-2 CPD 424.

Reaction states (1) that our conclusion that the contracting officer pointed out the possibility of error in Reaction's bid is unsupported in the record; and (2) that the Government should have disclosed its own estimate of performance cost. Reaction supports this latter argument by pointing to the large discrepancy between the Government's estimate and Reaction's bid for items 1 and 3 of the solicitation, and it claims that our statement of the difference between the estimate and Reaction's bid for the entire contract is somehow incorrect.

Reaction seeks to prove this point by isolating two elements of the solicitation and showing that the Government's estimate with respect to these items was 174 percent higher than Reaction's bid. However, our comparison was between the estimate and Reaction's bid for the entire contract. We stated that the estimate was 21 percent higher than the bid. This was a correct computation, as is Reaction's. We do not believe that Reaction's comparison, although accurate,

represents information not considered in our earlier decision. With respect to the contract as a whole, the disparity between the estimate and Reaction's bid was not such as to cause us to find that the Government was "obviously getting something for nothing," especially considering that Reaction was on notice of the disparity and affirmed its bid thereafter, that the FAA engineering study found Reaction's bid reasonable, and that Reaction operated under the contract for 2 years prior to requesting reformation.

All of the matters raised by Reaction in its reconsideration request were fully aired in connection with our original decision. The record clearly shows that the contracting officer properly discharged his verification duty by bringing to Reaction's attention the possibility of error in its bid, first orally at the bid opening, attended by Reaction's vice president, and later in a written followup by bringing to Reaction's attention the disparity between its bid and that of the only other bidder. Our decision was based on the fact that since Reaction's alleged errors were not apparent or capable of being discovered from the bid, the contracting officer had no basis for suspecting the specific nature of the possible errors.

Pursuant to section 20.9 of our Bid Protest Procedures, 4 C.F.R. § 20.9 (1977), since Reaction fails to specify any error of law or information not previously considered, its request for reconsideration must be denied.

Deputy Comptroller General
of the United States

5550

Zuckerman
P.L. II

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-190588 DATE: March 6, 1978

MATTER OF:

Suburban Industrial Maintenance Co.

DIGEST:

1. Agency is not required to include escalation clause in invitation for bid for an annual contract for janitorial services to provide for possible increases in wages which may occur as a result of collective bargaining agreement due to be negotiated after bid opening, and failure to do so is not a violation of the terms and policies of the Service Contract Act of 1965, as amended, 41 U.S.C. 351 et seq.

2. Wage rate determination of the Secretary of Labor establishes the minimum wages prevailing in the locality of contract performance at the time of the advertisement, and is not a guarantee that the appropriate work force can be employed by the bidder at those rates during the performance of the contract; it is the responsibility of the bidder to project his costs and to include in his basic contract price a factor to cover any potential increase in wages.

3. Where IFB contains applicable Service Contract Act wage determination and low bidder is obligated to accept award and perform contract at its bid price, a new collective bargaining agreement negotiated by incumbent contractor prior to award and during pendency of protest provides no basis to cancel IFB and readvertise requirement.

Suburban Industrial Maintenance Co. (Suburban) protests the failure of the General Services Administration to include an escalation clause to cover increased wages which may be paid under a contract resulting from invitation for bid (IFB) No. 2PBO-VN-19,092 for janitorial services at the U.S. Customs House, New York, New York, for the one year period ending November 30, 1978.

The IFB was issued on October 3, 1977, with bid opening originally scheduled for October 28, 1977. On October 13, a pre-bid conference was held, and all prospective bidders were invited and requested to submit questions they might have regarding the solicitation. Surburban did not attend the conference. Amendment No. 1 was issued on October 18, 1977, and incorporated the minutes of the conference as well as the questions and answers and extended the bid opening date to November 1, 1977. The amendment specifically indicated that an escalation clause would not be utilized.

Bids received were as follows:

Complete Building Maintenance	$488,093.76
Triple A Maintenance	673,181.79
Lu-San Enterprises	685,039.00
Suburban Industrial Maintenance	694,108.20

The balance of the bids received ranged upwards to $761,504. The bids of the two lowest bidders were rejected for reasons not germane to this protest, and notwithstanding the protest, the contract was awarded to Lu-San in the latter part of January 1978 pursuant to Federal Procurement Regulations 1-2.407-8(b)(4) (1964 ed. amend. 68).

On July 13, 1977, GSA filed Standard Form 98 (Notice of Intention to make a Service Contract) with the Department of Labor (DOL), and on August 16, DOL issued its prevailing wage rate determination for the proposed contract. Suburban contends that because it "is anticipated that a revised collective bargaining agreement will be negotiated between the incumbent contractor and the union * * * bidders are unable to ascertain what wage rate shall be effective * * * during the majority of the contract term." Suburban claims that the failure of the agency to provide for

any change in the contract price should the wage rate applicable to the contract be changed subsequent to award is "in contravention of the terms and policies behind the Service Contract Act, 41 U.S.C. 351 et seq".

The Service Contract Act provides in pertinent part:

> "Every contract * * * entered into by the United States * * * in excess of $2,500 * * * the principal purpose of which is to furnish services in the United States through the use of service employees, * * * shall contain the following:
>
> "(1) A provision specifying the minimum monetary wages to be paid the * * * employees * * * as determined by the Secretary * * * in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with * * * such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. * * *" 41 U.S.C. 351 (Supp. V 1975)

Implementing regulations of the Secretary of Labor set forth in Title 29, Code of Federal Regulations, provide in pertinent part that:

> "(a)* * *[No successor] contractor * * * shall pay any employee employed on the contract work less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms length negotiations, to which such services employees would have been entitled if they were employed under the predecessor contract including * * * any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement. * * *
>
> "(b) * * * The wage rates * * * provided for in any collective bargaining agreement applicable to the performance of work under the predecessor

> contract * * * consummated during the period of performance of such contract shall not be effective for purposes of the successor contract * * * , if -
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> "(1) In the case of a successor contract for which bids have been invited by formal advertising notice of the terms of such new or changed collective bargaining agreement is received by the contracting agency less than 10 days before the date set for opening * * *." 29 C.F.R. 4.1c (1977).
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> "[U]nless affected by * * * a change in the Fair Labor Standards Act minimum wage * * * the minimum monetary wage rate specified in the contract * * * will continue to apply throughout the period of contract performance. No change in the obligation of the contractor or subcontractor with respect to minimum monetary wages will result from the mere fact that higher or lower wage rates may be determined to be prevailing * * * in the locality after the award and before completion of the contract * * *." 29 C.F.R. 4.161. (Emphasis added.)
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> " * * * A determination of prevailing wages * * * made after the date of the contract award * * * does not apply to the performance of the previously awarded contract.* * * " 29 C.F.R. 4.164. (Emphasis added.)

From the foregoing it is readily apparent that neither the statute nor the DOL regulations contemplate a change in the prevailing minimum wage rate determination applicable to an annual contract after the contract has been awarded whether or not such rates are based on collective bargaining agreements. Thus the DOL wage determination applicable to the contract will not be revised merely because the incumbent contractor negotiates a higher wage rate. It is also important to note in this regard that the wage determination specifies the minimum wages to be paid--it is not a guarantee that the appropriate workforce can be employed by

the bidder at those rates. What-Mac Contractors, Inc., B-187782, December 15, 1976, 76-2 CPD 500. As in any solicitation for a fixed price contract, it is the responsibility of the bidder to project costs (all bidders were apprised of the fact that a new collective bargaining agreement would be negotiated) and to include in the basic contract price a factor to cover any projected increases in costs. Some risk is inherent in most types of contracts, and bidders are expected to allow for that risk in computing their bids. Palmetto Enterprises, B-190060, February 10, 1978, 57 Comp. Gen. ___, 78-1 CPD ___. Accordingly, GSA's refusal to include an escalation clause in the IFB is not legally objectionable. Cf. 49 Comp. Gen. 186 (1969).

Suburban, citing Suburban Industrial Maintenance Company, B-189027, September 16, 1977, 77-2 CPD 198, also claims that the solicitation should be canceled and readvertised because "revised provisions of the collective bargaining agreement have become applicable" since bid opening and that under the Service Contract Act these revisions "are the basis of a revision to the wage rate determination applicable to the instant solicitation." In Suburban, the IFB had not included a wage rate determination. However, a wage rate determination was received from DOL subsequent to bid opening but prior to award. We held it was proper to cancel the IFB rather than to allow Suburban (the low bidder) to adjust its bid prior to award to account for the new minimum wage rate determination, and then receive the award at the adjusted bid.

We stated:

> "[W]e are of the opinion that the course of action proposed by the protester, i.e., delaying award until the issuance of a wage determination and then allowing [Suburban] to modify its bid to reflect the wage determination, would be tantamount to awarding a contract different from the one advertised since the contract awarded to [Suburban] would be based on a wage rate

> different from that contained in the solicitation (Fair Labor Standards Act minimum wage) * * * and which the other bidders, as well as [Suburban] based their bids. * * * [I]t is always possible that [the] bid as amended would not represent the most favorable price to the Government * * * ."

In the prior case, it had been anticipated that a wage determination applicable to the contract might be issued, and the IFB accordingly provided for inclusion of the wage determination by contract modification if it was received after contract award or by amendment to the IFB if received prior to bid opening. Thus, when the wage determination was received after bid opening, but before award the agency's proposed cancellation of the IFB and readvertisement was seen as the only appropriate way of giving effect to the wage determination. Here, of course, the situation is completely different. The applicable wage determination was included in the IFB, all bidders have obligated themselves to reimburse their service employees in accordance with the determination, and no revised wage determination applicable to the contract has been issued. In short, the Suburban case does not require cancellation here.

The protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States