



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: K & M Maintenance Services, Inc.

File: B-236239

Date: November 21, 1989

DIGEST

Where solicitation for base operations and maintenance covered by the Service Contract Act includes language calling for the "repair or replacement" of utility systems and equipment, such repair or replacement work is considered in the context of accomplishing routine maintenance when agency has also issued a separate solicitation for indefinite quantity multi-trade construction work which it states it will utilize for work covered by the Davis-Bacon Act.

DECISION

K & M Maintenance Services, Inc., protests request for proposals (RFP) No. N62467-89-R-0516, issued by the Naval Facilities Engineering Command, Charleston, South Carolina, for the basic maintenance and utilities operation of the Mayport Naval Station Complex. K & M contends that the solicitation is defective because the Navy did not specify the application of the Davis-Bacon Act (DBA), 40 U.S.C. § 276(a) (1982), for some of the work covered by the DBA, but instead only included the Service Contract Act (SCA), 41 U.S.C. § 351 et seq. (1982), wage determinations.

We deny the protest.

The RFP requires the work to be performed under a fixed-price-award-fee contract and divides the work into 4 categories: (1) preventive maintenance inspections; (2) emergency work; (3) scheduled recurring maintenance; and (4) other recurring maintenance. In paragraphs titled "Additional Work," "Other Recurring Work," and "Correction of Deficiencies," the RFP provides for the "repair or replacement" of base utility systems. These provisions also require the contractor to perform all other maintenance and repair to maintain the systems and equipment to the standards specified in the contract. The RFP states that for this work, material costs over \$2,000 for the repair or

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replacement of any single item of equipment are reimbursable, but that the contractor is "responsible for all labor costs associated with such maintenance, repair and replacement of systems and equipment."

The protester contends that these paragraphs make the contractor contractually responsible for all unscheduled repair work, including replacement of base utility systems, regardless of the cost of materials or labor. K & M contends that the solicitation improperly classifies all of this work as being subject to the SCA, even though it will involve repair or replacement work of such a magnitude as to be considered construction covered by the DBA. The protester notes that the prior fixed-price and indefinite quantity work contract (N62467-87-C-0248) for basically the same services included one category, "specific work," which allowed for work beyond the scope of regular, routine maintenance and was subject to either DBA or SCA wages as applicable. However, this protested RFP makes no such provision for work beyond ordinary repair/maintenance.

The Navy argues that all the work required under the RFP is correctly classified as SCA work because it covers only the operation and maintenance of existing facilities and systems and routine day-to-day work to extend the life of the items or systems. The Navy contends that the RFP involves work different from that covered by the prior contract since that contract had extensive indefinite quantity work items for major repairs, renovations and alterations subject to the DBA. In contrast, the Navy claims, this RFP contains no provision for indefinite quantity work or for major construction/alteration work or any work outside the scope of maintenance, repair or operation of existing facilities. The agency states that a separate solicitation (N62867-89-B-6868) has been issued for indefinite quantity multi-trade construction work to cover all work beyond that needed to maintain the existing systems.

Regulations of the Department of Labor provide that, where contracts principally for services also involve substantial construction work, the provisions of both the DBA and the SCA apply. 29 C.F.R. § 4.116(c)(2) (1988). To be covered by the DBA in a service contract, a work project must be: (1) physically and functionally separate from the service work called for in the contract and, as a practical matter, capable of being performed on a segregated basis from the service contract work, and (2) greater than the statutory threshold of \$2,000 applicable to DBA work. Federal Acquisition Regulation § 22.402(b) (FAC 84-34); Dynalectron Corp., 65 Comp. Gen. 290 (1986), 86-1 CPD ¶ 151. Therefore, in order for a job assignment under this RFP for

repair and maintenance work to be classified as DBA work, it must satisfy both the test of severability and the \$2,000 threshold.

Here, the protester's concerns stem from the language in the solicitation calling for the "repair or replacement" of utility systems. While out of context this language may suggest that Davis-Bacon work could be required, we read this language to mean repair or replacement of portions of the utility system to accomplish routine, day-to-day service or maintenance work. Indeed, in response to the protester's queries at the pre-proposal conference, the Navy asserted that only SCA work was encompassed by this RFP. Any doubts as to the work which may be required under this protested procurement were resolved by the issuance of the separate solicitation for indefinite quantity multi-trade construction work. The Navy has repeatedly stated that the solicitation for indefinite quantity multi-trade work would cover "all work not required to maintain the existing systems under the subject solicitation." While the protester doubts that the Navy will adhere to this division of work and asserts that the replacement of a utility system could be ordered under the protested RFP, these doubts are not grounds for sustaining a protest.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel