



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** JC&N Maintenance, Inc.

**File:** B-253876

**Date:** November 1, 1993

Darcy V. Hennessy, Esq., Moore, Bucher & Morrison, for the protester.

John J. Mahon, Esq., Department of the Army, for the agency. Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where agency received wage determination after bid opening but prior to award, agency properly canceled solicitation rather than awarding to lowest-priced bidder and then adjusting its price.

### DECISION

JC&N Maintenance, Inc. protests the cancellation after bid opening of invitation for bids (IFB) No. DACW45-93-B-0028, issued by the U.S. Army Corps of Engineers for accounting services to document the Corps' costs under the Superfund program. The agency canceled the IFB, under which JC&N was the apparent low bidder, because it did not include a wage determination. The protester contends that the omission from the IFB of a wage determination did not warrant cancellation of the solicitation since the agency could have awarded a contract and then modified it to incorporate the wage determination.

We deny the protest.

Since the IFB anticipated the award of a service contract for more than \$2,500, it was subject to the requirements of the Service Contract Act, 41 U.S.C. §§ 351-358 (1988), including the requirement that it contain provisions specifying the minimum monetary wages and fringe benefits to be paid the various classes of workers to be employed. 41 U.S.C. § 351(a)(1) and (2). To enable the Department of Labor (DOL) to issue appropriate wage determinations, applicable regulations require that agencies notify DOL of their intent to enter into service contracts; list the classes of workers they expect to be employed; and identify,

if known, the specific locales where the services may be performed. 29 C.F.R. Part 4 (1992); Federal Acquisition Regulation (FAR) Subpart 22.10. This notice (Standard Form [SF] 98) must be submitted to DOL not less than 60 days prior to issuance of the IFB for recurring or known requirements and not less than 30 days prior to issuance of the IFB for nonrecurring or unknown requirements for which advance planning was not feasible.

Where a contracting agency fails to notify DOL within the prescribed time frame and DOL is unable to provide the wage determination by the latest date needed to maintain the acquisition schedule, the contracting officer is instructed either to incorporate in the solicitation the wage and fringe benefit terms of the collective bargaining agreement under the existing contract, or, if no such agreement exists, to use the latest wage determination or revision, if any, incorporated in the existing contract. FAR §§ 22.1012-4; 22.1012-5. With regard to the latter alternative, the regulations further provide that if any new or revised wage determination is received later in response to the notice, the contracting officer is to include it in the solicitation or contract within 30 days of receipt, and that if the contract has been awarded, the contracting officer is to equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating the wage determination or revision. FAR § 22.1012-4.

In this case, the Corps of Engineers submitted an SF 98, in which it requested nationwide rates for the classes of workers to be employed, to DOL on February 1, 1993, only 16 days prior to issuance of the IFB. According to the Corps, nationwide rates were requested because--despite the fact that the IFB explicitly provided that office operations would be centrally located in Omaha, Nebraska--contracting officials were under the impression that the contract work would be performed throughout the United States without benefit of a central office location. The solicitation, as amended, notified bidders that a wage rate determination had been requested, and that it would be incorporated into the solicitation upon receipt.

At some point after submission of the notice but prior to bid opening, DOL notified the Corps via telephone that it would not furnish nationwide rates for the procurement and asked the Corps to identify possible places of performance. Agency officials decided to proceed with bid opening as scheduled due to the urgency of the requirement and to then request wage determinations for the localities from which bidders had mailed their bids and make any necessary adjustments in the prices bid. The contracting officer did not incorporate into the solicitation a wage determination

from the existing contract pending receipt of the updated determination since the contract work had previously been contracted for by the Environmental Protection Agency (EPA), and the Corps had been unable to obtain a copy of the wage determination from the EPA contract.

Eight bids were received by the April 20 bid opening date. JC&N's bid of \$420,368 was low, with the other seven bids ranging from \$575,000 to \$1,291,000. The agency submitted a second SF 98 to DOL, requesting wage determinations for the localities from which the bids had been mailed. On April 30, DOL responded with wage determinations for four localities (Nebraska-Iowa, Kansas-Missouri, Arizona, and Maryland).

On the bid opening date, the second low bidder, MKM Engineers, Inc., filed an agency-level protest complaining that the low bidder, JC&N, could not perform the contract while paying minimum wage rates. In analyzing the IFB to respond to MKM's protest, the Corps discovered that the solicitation specified that office operations were to be centralized in Omaha, Nebraska. Because it had not requested a wage determination for the Omaha area and incorporated it into the IFB prior to bid opening, the agency determined that the solicitation should be canceled and the requirement readvertised. On June 16, the Corps issued an amendment canceling the IFB.

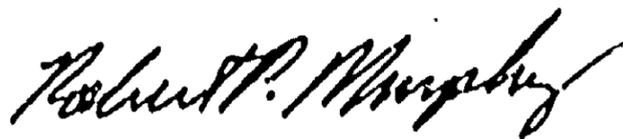
An IFB may be canceled after bid opening only where there is a compelling reason to do so. FAR § 14.404-1. Here, the protester contends that the omission of a wage determination from the solicitation does not warrant cancellation since FAR § 22.1012-4 provides that in situations in which a wage determination has not been received prior to bid opening due to agency delay in requesting it; the agency should proceed with award and then equitably adjust the awardee's price.

We do not agree with the protester's reading of FAR § 22.1012-4. This section provides for incorporation of a wage determination received after issuance of an IFB into the solicitation or into the contract, if awarded, and in the latter case, for equitable adjustment of the contract price. The section does not require that the agency proceed with award and then adjust the awardee's price where a wage determination is received after bid opening but prior to award; it simply does not address the appropriate course of action to be taken in such circumstances.

Failure to incorporate an applicable wage determination compels the contracting officer to speculate about how competitors would have altered their bids if the determination had been incorporated into the IFB. The goal of full and open competition is not well served by assuming that new minimum wage rates would affect all bidders equally. Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD ¶ 35, aff'd, Tombs & Sons, Inc.--Recon., B-178701, Nov. 20, 1975, 75-2 CPD ¶ 332. The proper way to determine the effect of a wage determination issued prior to award generally is to revise the solicitation and invite new bids. Id. This approach is derived from the general principle that all bidders must be treated equally and that agencies must not award contracts with the intent of materially changing them immediately after award. The Fred E. DeBra Co., B-250395.2, Dec. 3, 1992, 93-1 CPD ¶ 52.

Here, the contracting officials initially determined that they should proceed with bid opening without awaiting the appropriate wage determination due to the urgency of the requirement; however, they subsequently reconsidered their urgency finding and concluded that time permitted cancellation of the existing IFB and resolicitation with an IFB incorporating an appropriate wage determination. Given the presumptive impact on the preparation of bids of the addition of a wage determination--and in the absence of any showing that the wage determination would not affect the competition, see id.--we think it was proper for the agency to cancel the IFB in order to issue a revised IFB incorporating the applicable wage determination. See FAR § 14.404-1(c)(10) (compelling basis exists for canceling an IFB after bid opening where cancellation is clearly in the public's interest).

The protest is denied.

  
for James F. Hinchman  
General Counsel