

Protest of)
) Date: February 9, 1988
 SPICK & SPAN MAINTENANCE)
 CO., INC.)
 Solicitation No. 451800-87-B-H229) P.S. Protest No. 87-122

DECISION

Spick & Span Maintenance Company, Inc. (Spick & Span) protests a determination made by the contracting officer that its offer was "nonresponsive"^{1/} to the solicitation. On September 25, 1987, the Support Services Office, Columbia, SC, issued Solicitation No. 451800-87-B-H229 for the provisions of cleaning services at the Pinehaven Branch post office, Charleston, SC, with an offer due date of October 13, 1987. Three proposals were received. Spick & Span offered the lowest price; the next low offeror was Cyrus Johnson.

On October 15, Spick & Span was informed of particular deficiencies in its proposal, specifically that its proposal did not include the name and address of the person who was to do the work and that the hourly wage rate listed in its cost proposal was below the prevailing wage rate under the Service Contract Act of 1965 (SCA).^{1/} On October 16, the president of Spick & Span stated by letter to the Support Services Office that it could not yet determine who would be providing cleaning services for the entire year and that, as much of the work would be done by officers of Spick & Span, a corporation, it was exempted from the SCA wage rate. In its letter, Spick & Span asserted that if its offer was deemed to be unacceptable, it was protesting the actions of the contracting officer.

In a letter dated October 21, the contracting officer, reiterating the deficiencies stated

^{1/}The solicitation involved in this protest was a negotiated procurement. Throughout correspondence, both oral and written, terms including "bid" and "nonresponsive" were used by both parties. Such terms are unique to advertised procurements, and, are not applicable to negotiated procurements.

^{2/}The solicitation included P.S. Form 7331x, which provides (page 1, item 11) that offerors, other than self-employed contractors, must list the name and address of the person who would do the work. The solicitation (at page 9) also incorporates the terms of the SCA and other labor laws, and includes a wage determination for the locale where the service is to be performed, stating mandatory wages and fringe benefits.

orally to Spick & Span on October 15, informed Spick & Span that award could not be made to it on the grounds that its offer was below the SCA wage rate and that it had failed to name the person that would be performing the work. The October 21 letter does not refer to Spick & Span's October 16 protest to the contracting officer.

Subsequently, by letter dated October 26, the contracting officer denied Spick & Span's protest of October 16 as obviously without merit, reasserting that Spick & Span's proposal was unacceptable since it included hourly wage rates below the prevailing wage rate and failed to name the persons who would actually be performing the work.

Spick & Span sent a protest dated November 3 to the General Accounting Office (GAO), requesting that the GAO order the contracting officer to cancel the contract with Cyrus Johnson "on the grounds that the Postal Service denied Spic [sic] & Span due process."^{1/} A copy of the protest was sent to the contracting officer, where it was received on November 5.^{1/}

Item 11 of the solicitation (P.S. Form 7331x) requires an offeror to state whether it is or is not a self-employed contractor; if the response is that the offeror is not a self-employed contractor, the offeror must enter the name and address of the person who will be doing the work. Since Spick & Span bid as a corporation, it clearly was not a self-employed contractor, yet it failed to identify the employee to perform the work. Further, Spick & Span's proposal listed an hourly wage rate below the SCA prevailing wage rate. These deficiencies were pointed out to Spick & Span.

Spick & Span could have clarified its offer in this negotiated procurement. The only exchange which approximates a clarification is Spick & Span's October 16 assertion that it did not know the names and addresses of the persons who would perform the services under the contract and that officers of the corporation would be performing the work.^{1/}

Section 8(b) of the SCA, 41 U.S.C. '357(b), states that the provisions of the SCA are applicable to employees, other than persons employed in bona fide executive, administrative, or professional capacities. However, since the cleaning services sought are not of an administrative or professional nature, it is highly unlikely that the exemptions for administrative or professional employment would be relevant to the instant janitorial contract.

^{3/}The GAO does not have jurisdiction over Postal Service procurements. Postal Contracting Manual (PCM) 2-407.8. The GAO sent Spick & Span's November 3 protest to the Postmaster General, whose office forwarded the protest to us, where it was received on November 16.

^{4/}If the instant protest were a new protest against award, it would be untimely, as it was received more than ten working days after the protester knew the information on which the protest was based, based upon the October 15 conversation or the October 21 letter. However, the protest is timely, as a request for our review of the contracting officer's October 26 denial of the initial protest. PCM 2-407.8 d. (4).

^{5/}We need not resolve the inconsistency which suggests that Spick & Span does not know the identity of its corporate officers.

An extensive discussion of the exemption for employment in bona fide executive capacity is set forth in the Department of Labor's regulations, 29 C.F.R. "541.1 et seq. The main requirement of that exemption is that the employee's "primary duty consists of the management of the enterprise in which he is employed...." 29 C.F.R. '541.1(a). Management contemplates supervision of the employees under him 29 C.F.R. '541.102. The regulation defines "primary duty" as the major part, i.e., greater than fifty percent. However, time alone is not the sole test; other pertinent factors include the relative importance of managerial duties as compared with other types of duties; the frequency with which the employee exercises discretion; the employee's relative freedom from supervision; and relationship between the employee's salary and the wages paid other employees for the kind of non-managerial work performed by the supervisor. 29 C.F.R. '541.103. Further 29 C.F.R. '541.105 provides that an employee will qualify as an "executive" only if he customarily and regularly supervises at least two full-time employees or their equivalent. Here the nature of the contract work (some 62 hours per weeks) makes it unlikely that corporate officers could perform the work while supervising two or more full-time employees.

In this matter, no award could be made without receipt of information by the contracting officer which would eliminate the

deficiencies in Spick & Span's proposal.^{4/} In its letter of October 16, Spick & Span declared that the work would be done by "officers of the Corporation." This assertion was not detailed nor did it explain how the officers were exempted from the SCA. As such, these declarations created an unresolved ambiguity in Spick & Span's offer, which makes it technically unacceptable. Cf. Falcon System, Inc., et al., P.S. Protest Nos. 86-31, 86-33, and 86-35, July 25, 1986, and cases cited therein at pages 6 and 7. Accordingly, we will not disturb the award of the contract.

The protest is denied.

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[checked against original JLS 3/22/93]

^{6/}There is some question whether the communications between the parties (prior to the award of the contract) constituted discussions under PCM 3-805.1, which provides, in pertinent part, that discussions should be conducted with all offerors who submitted proposals within a competitive range. In any event, this is not determinative here. No discussions are required where a proposal is technically unacceptable. H & B Telephone Systems P.S. Protest No. 83-61, February 6, 1984. Further, in negotiated procurements, the requirement for discussion is met where, as here, the contracting officer notifies the offeror of the deficiencies in its proposal. Chamberlain Manufacturing Corporation, *supra*.