

Protest of ) Date: May 18, 1990  
CONSULTANTS & DESIGNERS INC. )  
Solicitation No. 359990-89-A-0140 ) P.S. Protest No. 90-11

### DECISION

Consultants & Designers Inc. timely protests the award of a contract for the services of data entry clerks to Olsten Services ("Olsten"). Consultants & Designers contends that the hourly rate Olsten proposed was too low to allow Olsten to comply with the Service Contract Act and make other required tax and benefit payments associated with the wages.

Solicitation 359990-89-A-0140 was issued on October 26, 1989, by the Procurement and Material Management Service Office, New York, NY, with an offer due date of November 20. The solicitation sought a contractor to provide sixteen, full-time data entry clerks to type labels for the Postal Service. The term of this firm fixed price contract was one year, renewable on a month-to-month basis not to exceed one year.

The solicitation informed offerors that the resulting contract would be subject to the Service Contract Act of 1965, as amended, and that a wage determination from the U.S. Department of Labor would be incorporated into the contract. The Service Contract Act clause of the contract provided:

Each service employee employed in the performance of this contract by the contractor or any subcontractor must be  
(a) paid not less than the minimum monetary wages and  
(b) furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor... as specified in any wage determination attached to this contract.

Solicitation, H.19, Service Contract Act (Clause 10-12) (April 1989), subsection b.1.

Wage Determination No. 88-772 (Rev. 1), dated July 7, 1989, was attached to the solicitation. The wage determination listed the minimum hourly wage for a key entry operator I in the New York - New Jersey area as \$8.18. The determination listed the cost of the required health and welfare benefits as \$.59 an hour and enumerated the eleven required paid holidays.

The solicitation listed cost or price as being of primary importance in making this award. Section M.1 stated that "award will be made to that responsible offeror [whose] proposal is technically acceptable and which offers the Postal Service the lowest cost or price proposal."

Twenty two proposals were received. Best and final offers were requested. Consultants & Designers offered a best and final hourly wage rate of \$11.21, and was the eighth lowest offeror. Olsten, initially the third low offeror, submitted a best and final price of \$10.14/hr. The low offeror withdrew its offer and the second low offeror was determined to be nonresponsible, leaving Olsten the low offeror and Consultants & Designers fifth low. Olsten awarded the contract on January 10, 1990.

Consultant & Designers' timely protest letter was received by the contracting officer on January 18. The protester alleges that it calculated from the award price of \$337,459.20 that Olsten was charging an hourly rate of \$10.14. By contrast, the protester asserts that the direct labor cost package mandated by the Service Contract Act and other tax and insurance contribution requirements for a data key punch operator in New York would result in a minimum hourly cost of \$10.62. Consultants & Designers includes in this \$10.62 figure the \$8.19 minimum wage it ascertained from the wage determination<sup>1/</sup> plus \$.64 for health and welfare, and \$1.79 for required holidays, vacations, FICA, etc. According to the protester, since the \$10.62 price does not even include any contractor profit or overhead costs, award to Olsten must necessarily result in a violation of the Service Contract Act. Consultants & Designers points out that at the award price Olsten would be losing at least \$.48 each hour an employee worked.

The contracting officer initially denied the protest by letter dated January 30, 1990, on the grounds that the protester did not have standing to protest since it was not the next lowest priced offeror. The contracting officer also stated that an uneconomically low offer does not mean it is also "unrealistic." Consultants & Designers replied in a letter dated February 1 that it did not find the contracting officer's response acceptable since it did not address the merits of its protest. An additional reply was requested. The contracting officer forwarded this further appeal to our office.

In his report, the contracting officer states that it is pure speculation on the protester's part concerning Olsten's profit or loss position. The contracting officer further states that such speculation in a competitive bidding situation is unwarranted since profit/loss information is private.

The contracting officer then asserts that the Postal Service is not charged with enforcement of the Department of Labor's wage guidelines beyond inclusion in the

<sup>1/</sup>The rate in the wage determination for a key entry operator I was actually \$8.18. We accept for purposes of this decision, without deciding, that key entry operator I is the appropriate category for this work.

contract of the minimum wage rates for certain classes of employees in particular geographical areas. Finally, the contracting officer comments that it is unrealistic for Consultants & Designers to assume that an offer price \$.48 below its assessment of the minimum wage rate is a violation of the Service Contract Act.

Consultants & Designers, through counsel, responds to the contracting officer's report by reiterating its claim that it is an interested party in this matter. The protester contends that it has a right to bid under procedures that are uniformly fair and that that right gives it standing. Consultants & Designers questions the logic of only allowing the next low bidder to protest unfair bid procedures, especially when, as here, the next low bidder fails to protest. The protester adds that its status as a taxpayer gives it standing to protest Olsten's unfair bidding practices.<sup>1/</sup>

The protester further replies that since the contracting officer never disputes that the awardee's bid is less than that required under the Service Contract Act, it follows that Olsten is going to violate the Act and not pay the required amounts to its employees. Consultants & Designers suggests that a look at Olsten's required cost breakdown will reveal whether its price includes the required Service Contract Act payments. Additionally, the protester suggests that the Postal Service ask the Olsten employees currently performing if the was required payments are being made to them.

Winston Temporaries, the next low offeror, briefly comments that it is an interested party to this protest and that it did follow the Service Contract Act in its bid proposal. Winston states that it feels that award to a competitor who based its cost be-low the number mandated by the Act gives that competitor an unfair advantage.

The Procurement Manual (PM) states that an interested party may protest the award or any other action relating to the award of a contract. PM 4.5.2 a. An interested party is a protester who would be eligible for award of the contract if the protest were upheld. Dataview Electronic Systems, Inc., P.S. Protest No. 90-9, March 29, 1990; Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985.

Consultants & Designers, the fifth low offeror, has filed a protest against award of a contract to Olsten Services. The protester has not challenged the next low offeror, Winston Temporaries, or any of the other three offerors with prices between its and Olsten's.<sup>1/</sup> As this solicitation provided that award would be made to the offeror submitting the lowest technically acceptable offer, even if the protester were to succeed in its challenge to Olsten's offer, it would not be next in line for award. "Where it does not appear that the protester, even if correct, would be eligible for award, resolution of

<sup>2/</sup>We note here that the protester makes repeated references to "bidder" and the "bid procedures". These terms are incorrectly used because they relate only to formally advertised procurement proedures. The correct term of art in a negotiated procurement like this one is "offeror". See Handling Systems, Inc., P.S. Protest No. 89-70, December 19, 1989.

<sup>3/</sup>Winston Temporaries and the other three offerors all offered a price<sup>above</sup> the \$10.62 the protester alleges is the amount of direct costs a contractor would have under this contract.

its protest would be an academic exercise." Strapex Corporation, supra. As the protester lacks standing, this protest must be dismissed.<sup>4/</sup>

The protest is dismissed.

**[Norman Menegat for:]**  
William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[checked against original JLS 6/2/93]**

<sup>4/</sup>Although the protester lacks standing to protest in this case, we note that the Procurement Manual specifically states that "[t]he Secretary of Labor administers and enforces the Service Contract Act." PM 10.2.10 a.5. Further, the PM makes clear that investigations and enforcement proceedings are within the province of the Department of Labor. See PM 10.2.10 h, i, j.

In addition, the fact that the awardee may have proposed a price below its apparent cost of performing the contract is not grounds for rejection of the offer. "The protester's . . . argument that [the awardee's] low prices preclude the discharge of its obligation to pay SCA wage rates is . . . unconvincing. [T]here [is] no legal basis to object to even a below cost award if the offeror [is] otherwise responsible." United HealthServ Inc., Comp. Gen. Dec. B-232640, B-232642, B-232643, 89-1 CPD & 43, January 18, 1989; accord Malcolm A. Miller, Inc., P.S. Protest No. 87-87, August 25, 1987; Shirley J. Slusher, P.S. Protest No. 84-60, July 30, 1984.