



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 3, 2017

CBCA 5036

SECTEK, INC.,

Appellant,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

Respondent.

Jeffrey Weinstein of The Weinstein Law Group, PLLC, Washington, DC, counsel for Appellant.

Jennifer A. Klein, Office of the General Counsel, National Archives and Records Administration, College Park, MD, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **SHERIDAN**.

HYATT, Board Judge.

This appeal is of a contracting officer's deemed denial of the certified claim of SecTek, Inc. for the amount of \$168,655.52 in increased costs of employee benefits it incurred in performing its contract to provide security guard services for two National Archives and Records Administration (NARA) locations. The parties have agreed to a joint statement of undisputed facts and have filed cross motions for summary relief. For the reasons stated herein, we deny SecTek's motion and grant the Government's motion, thus denying the appeal.

Findings of Fact

On March 6, 2015, NARA issued a request for quotation (RFQ) for the provision of security guard support services for the Archives I building located in Washington, D.C., and for the Archives II building located in College Park, Maryland. The RFQ contemplated the award of a firm fixed-price task order under the successful offeror's General Services Administration (GSA) Schedule contract, for a base year with four option years. The pricing instructions stated that the offered prices were to represent the fully burdened cost to deliver the services listed in the task order. The RFQ also provided that in the event option years were exercised, task order prices would be adjusted in accordance with Federal Acquisition Regulation (FAR) clause 52.222-43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts).

As required by the Service Contract Act, 41 U.S.C. §§ 6701-6707 (2012), the RFQ included documentation setting forth minimum wage and fringe benefit requirements for the proposed contract. Enclosure three provided the pertinent Department of Labor wage determination dated June 19, 2013. The incumbent contractor had entered into a collective bargaining agreement with the National Association of Special Police and Security Officers. Enclosure four contained the applicable collective bargaining agreement wage determination, CBA-2010-3553. Article XXVII of the incumbent contractor's collective bargaining agreement addressed employee wages and benefits, which are set forth in an appendix to the agreement. The appendix prescribed the hourly wages to be paid to armed security guards, the rates for employer health and welfare and pension contributions, and the basis for accrual of vacation and holiday pay. With respect to accrued vacation benefits, the collective bargaining agreement established the amount of vacation time employees earned based on their years of service as follows:

1 - 4 years of service	2 weeks
5 - 14 years of service	3 weeks
15 or more years of service	5 weeks

The RFQ also incorporated by reference FAR clause 52.222-17, Nondisplacement of Qualified Workers. 48 CFR 52.222-17 (2014). This clause requires the successor contractor to offer the service employees of the predecessor contractor, whose employment will be terminated as a result of the award of the new contract, a right of first refusal of employment under the newly awarded contract in positions for which the employees are qualified. To facilitate the nondisplacement of the successor contractor's employees, paragraph (e)(1) of the clause requires:

[T]he predecessor Contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor Contractors or their subcontractors. If there are no changes to the workforce before the predecessor contract is completed, then the predecessor Contractor is not required to submit a revised list 10 days prior to completion of performance and the requirements of 52.222-41(n) are met. When there are changes to the workforce after submission of the 30-day list, the predecessor Contractor shall submit a revised certified list not less than 10 days prior to performance completion.

Paragraph (e)(2) of this clause provides:

Immediately upon receipt of the certified service employee list but not before contract award, the contracting officer shall provide the certified employee list to the successor contractor, and, if requested, to employees of the predecessor contractor or subcontractors of their authorized representatives.

Enclosure 8 of the RFQ set forth instructions for the submission of quotations. Paragraph 6 of that section stated:

Exceptions Taken to any Terms and Conditions Stated in the RFQ. Complete rationale, justification, and cost impact must be included on a separate sheet, titled "Exceptions[,]" within the Vendor's quotation. If this sheet is not included, the Government may consider your quotation [as] containing no exceptions. The Government advises Vendors that it intends to evaluate quotations and award a task order without discussions.

In preparing its offer, SecTek inquired whether the Government would provide a list of the incumbent contractor's security officers including their employment seniority. NARA responded to this question in amendment 3 to the solicitation, which was provided to all offerors:

In accordance with [FAR] section 2.1204 – Certified Service Employee Lists, paragraph (b): Immediately upon receipt of the certified list, but not before contract award, the contracting officer shall provide the certified service employee list to the successor contractor, and, if requested, to the employees

of the predecessor contractor or subcontractors or their authorized representatives.

SecTek submitted a best and final offer to NARA on August 5, 2014. SecTek's quote stated that it was "inclusive of all direct costs, indirect costs, and profit" and "include[d] all costs associated with providing services described in the Statement of Work to include relief, training, equipment, vacation, sick time, and travel." Section 3 outlined SecTek's offered fringe benefits. Regarding vacation time, SecTek's quote stated, "As no seniority roster was provided, we have projected the average length of service [for each employee] to be approximately three years. This equates to 80 hours of vacation for all guards." SecTek's offer also included an exceptions sheet in volume III – Price, that stated: "SECTEK ACCEPTS ALL TERMS AND CONDITIONS STATED IN THE RFQ." SecTek's offer totaled \$40,918,522.84.

NARA awarded firm fixed-price task order NAMA-14-F-0127, in the amount of \$40,918,522.84, to SecTek on August 18, 2014. On August 28, 2014, ten days after contract award, NARA provided SecTek with the seniority list of the predecessor contractor's employees.

On April 21, 2015, SecTek submitted to NARA a request for equitable adjustment in the amount \$168,665.52. The letter stated:

As a seniority list was not provided in the RF[Q], SecTek's current contract price does not include the actual vacation earned by the employees on the contract. Therefore, SecTek respectfully requests \$168,665.52 to reimburse [it] for the vacation expense incurred in the base year due to the seniority status of the workforce. Please note that all calculations are based on the seniority list (as of 12/17/14) provided with this letter.

By email message dated May 20, 2015, the contracting officer notified SecTek that its request was denied because the agency had fully complied with the FAR in releasing the seniority list. The contracting officer's decision further stated that since the task order awarded to SecTek was firm fixed-price there was no basis for providing an equitable adjustment for the claimed costs.

Thereafter, through email messages, SecTek requested that NARA reconsider its denial of SecTek's request, advising that it had "adjusted" its request to reference FAR clause 52.222-43 "Fair Labor Standards Act and Service Contract Labor Standards–Price Adjustment (Multiple Year and Option Contracts)." In a letter dated July 9, 2015, the

contracting officer responded to SecTek's request for reconsideration, upholding the prior decision denying SecTek's request for an equitable adjustment.

SecTek filed a formal certified claim dated August 6, 2015, again asserting that it was entitled to an upward revision of the contract price in the amount of \$168,665.52, because NARA had not provided the seniority list prior to award, and SecTek was obligated to comply with the collective bargaining agreement's defined benefit level for vacation pay.

When no decision was issued by the contracting officer in response to the certified claim, SecTek appealed to the Board, alleging it was entitled to an upward equitable adjustment to the contract price necessitated by NARA's failure to provide the seniority information prior to contract award.

Discussion

Each party has filed a motion for summary relief contending that it is entitled to prevail as a matter of law. The parties have filed a joint statement of undisputed facts and assert that this matter is suitable for resolution on summary relief. The issue to be resolved is whether the failure to provide SecTek with a seniority list of the incumbent contractor's service employees prior to award entitles SecTek to the price adjustment that it seeks.

Resolving a dispute on a motion for summary relief is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as matter of law. *E.g.*, *Celotex Corporation v. Catrett*, 477 U.S. 317, 330 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When both parties move for summary relief, each party's motion will be evaluated on its own merits and all reasonable inferences will be resolved against the party whose motion is under consideration. The sole issue presented in this appeal is a question of law, so resolving the issue on cross-motions for summary relief is appropriate. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Department of the Interior*, CBCA 2024-ISDA, 11-1 BCA ¶ 34,685, at 170,843 (citing *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996)).

This contract is subject to the Service Contract Act, which, through the inclusion of mandatory contract clauses, provides minimum wage and benefit protections for service workers employed to perform government contracts. *See Call Henry, Inc. v. United States*, No. 2016-1732, 2017 WL 1521788, at*1 (Fed. Cir. Apr. 28, 2017); *Lear Siegler Services, Inc. v. Rumsfeld*, 457 F.3d 1262, 1266 (Fed. Cir. 2006); *Corrections Corp. of America v. Department of Homeland Security*, CBCA 2647, 15-1 BCA ¶ 35,971, at 175,588; *CTI Global Solutions, Inc. v. Department of Justice*, CBCA 2498, 12-1 BCA ¶ 34,889, at 175,742 (2011). Contractors are obligated to pay their service workers the prevailing wage rates as set forth

either in a wage determination issued by the Department of Labor or in an applicable collective bargaining agreement. In addition, successor contractors are prohibited from paying their employees less than the wages and benefits paid by the predecessor contractor pursuant to a collective bargaining agreement. 41 U.S.C. § 6707(c)(1); *Lear Siegler*, 457 F.3d at 1266. In the event the prevailing wage rate or collective bargaining wage rates are subject to an increase during a period of contract performance, FAR clause 52.222-43, “Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts), comes into play, entitling the contractor to a price increase in the option years if a new wage determination causes the contractor to pay increased wages or benefits.

Under Executive Order 13495, as implemented in FAR 22.1200, a successor contractor, subject to certain exceptions, and allowing for differing staffing patterns, is required to offer those service employees that are employed under the predecessor contract, and whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. 48 CFR 22.1202(a). To this end, FAR 22.1204 requires that not less than thirty days before completion of the contract, the predecessor contractor shall furnish to the contracting officer a certified list with the names of all service employees working under the contract and any subcontracts at that time. If there are changes to the workforce after submission of that list, a revised list is to be provided no less than ten days prior to contract completion. Immediately upon receipt of the list, but not prior to contract award, the contracting officer shall provide the list to the successor contractor.

The price adjustment that SecTek claims represents the higher costs it incurred as a result of having underestimated the vacation time to which the predecessor service employees who continued to work on the successor contract would be entitled. SecTek maintains that the Government’s failure to provide the requested seniority list before the submission of best and final offers and contract award precluded it from ascertaining the actual level of vacation pay that it would be required to pay the incumbent contractor’s employees. According to SecTek, the Government had an affirmative duty to provide a complete copy of the existing collective bargaining agreement to it prior to contract award, and absent the seniority list, the collective bargaining agreement was incomplete.

In support of its argument, SecTek relies heavily on a decision issued by the Armed Services Board of Contract Appeals, addressing the duty of an agency to provide complete information covering the wages and benefits required under the incumbent contractor’s collective bargaining agreement. *CAE USA, Inc.*, ASBCA 58006, 14-1 BCA ¶ 35,519. In *CAE*, the Air Force awarded a successor contract for the provision of support services for its Aircrew Training System (ATS). The predecessor ATS contract was subject to two

collective bargaining agreements, copies of which were provided with the solicitation. The agreements referenced the incumbent contractor's corporate benefit program offered to employees, but copies of the benefit program, which detailed the specific benefits provided to employees, were not included with the copies of the two agreements. Lacking this information, CAE submitted a bid based on its own cost estimate. After award of the contract, CAE discovered that it had underestimated the actual cost of providing the fringe benefits and requested an equitable adjustment for the increased costs, arguing that the Service Contract Act and the FAR imposed upon the contracting officer a duty to supply "all information regarding the amount of wages and fringe benefits that the predecessor contractor had agreed to" in the new collective bargaining agreements. *Id.* at 174,088 (emphasis added).

The board agreed that FAR 22.1008-2 imposed upon the contracting officer an affirmative duty to provide to successor contractors a complete copy of any collective bargaining agreement applicable to the successor contract. The board also found that the contracting officer's failure to include specific cost information concerning the predecessor contractor's wages and fringe benefits program rendered the collective bargaining agreements provided to the offerors incomplete because without this information offerors would be unable to ascertain the amount of wages and fringe benefits required by the solicitation under the FAR and the Service Contract Act and thus would be unduly hindered in the need to meet the statutory requirement to provide not less than the level of benefits offered by the incumbent contractor. Recognizing that "the FAR's requirement that the [contracting officer] provide a complete [collective bargaining agreement] and provide it to bidders is intended to benefit contractors," the board nonetheless denied the appeal because CAE had been aware of the omission and failed to ask the Government for the missing information, choosing instead to formulate its offer using its own assumptions. *CAE*, 14-1 BCA at 174,089.

SecTek urges that, unlike the appellant in *CAE*, it, in fact, inquired about the "missing" seniority list, and since the Government failed to provide the list, it should recover the added expense. The rationale of *CAE*, however, does not extend to these facts. In *CAE*, the contracting officer failed to provide offerors the actual wage and fringe benefits information required to be paid to service employees under the applicable collective bargaining agreements. In contrast, the collective bargaining agreement provided by NARA in the RFQ expressly set forth the employee wages and fringe benefits provided under the predecessor contract. Thus, under the facts relevant to the board's analysis in *CAE*, NARA fully met its obligation to furnish a complete collective bargaining agreement to prospective offerors.

Although information about the seniority of the predecessor contractor's employees may have been helpful in estimating the level of benefits extended to those employees, this does not mean that the information must be, or even could have been, provided in advance of contract award. SecTek's argument is incompatible with the applicable provisions of the Service Contract Act and the FAR. The Government, under FAR 22.1204, is not entitled to request the list until thirty days prior to the expiration of the contract. In addition, the Government is not permitted to release the seniority list to the successor contractor until after contract award. The Government furnished the seniority list to SecTek on August 28, 2014 – ten days after contract award and in full compliance with the FAR requirement.

NARA points out that the RFQ contemplated the award of a fixed-price task order, with limited circumstances under which the contractor would be eligible to recover increased costs under the Price Adjustment clause. After receiving the agency's response to its question regarding the seniority list in amendment 3, SecTek submitted a proposal, which it noted was inclusive of all direct costs, including vacation time. Notwithstanding its notation that its costs estimates were prepared without the benefit of the requested seniority list, SecTek did not specify in its offer, as required by the solicitation, that it took any exceptions to the stated terms and conditions. Whatever SecTek intended by this notation, it nonetheless bore the risk that its cost projections might prove to be insufficient. Indeed, the general rule in fixed-price contracting is that, in the absence of a contract provision reallocating the risk, the contractor assumes the risk of increased costs not attributable to the Government. See *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119, at 172,445 (quoting *Southwestern Security Services, Inc. v. Department of Homeland Security*, CBCA 1264, 09-2 BCA ¶ 34,139, at 168,777); *B & M Cillessen Construction Co. v. Department of Health and Human Services*, CBCA 1110, 09-1 BCA ¶ 34,069, at 168,460; *Gulf Shores, LLC v. Department of Homeland Security*, CBCA 802, 09-1 BCA ¶ 34,024, at 168,305 (2008).

Decision

For the reasons stated above, appellant's motion for summary relief is denied. The Government's motion for summary relief is granted. The appeal is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

PATRICIA J. SHERIDAN
Board Judge