

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
JDD, Inc.) ASBCA No. 55282
)
Under Contract No. NNC04CB02C)

APPEARANCE FOR THE APPELLANT: Mr. James Vaughan, Jr.
President

APPEARANCE FOR THE GOVERNMENT: Jerald J. Kennemuth, Esq.
Agency Representative
NASA Glenn Research Center
Cleveland, OH

OPINION BY ADMINISTRATIVE JUDGE KETCHEN
UNDER RULE 12.3

JDD, Inc. (JDD or appellant) seeks an adjustment in the amount of \$96,688.45 from the National Aeronautics and Space Administration (NASA or government) for increases to JDD's service employee wage rates and fringe benefits (wages) for the contract's second year of 1 December 2004 through 30 November 2005. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13, applies to the appeal. We decide the appeal pursuant to Rule 11 based on the parties' election and Rule 12.3 based on JDD's request. Only entitlement is before us.

FINDINGS OF FACT

1. JDD was the incumbent contractor on NASA Contract No. NAS3-00183 to provide janitorial services for the NASA Glenn Research Center (NGC), Cleveland, Ohio for the period of 1 December 2000 through 30 November 2003 (declaration of Leahmarie Stervagi (Stervagi decl.), ex. 1)¹. By letter dated 15 July 2003, the government informed prospective offerors, including JDD, of the intended solicitation of the follow-on contract for scheduled janitorial services. NASA stated that it would hold a non-mandatory preproposal conference on 30 July 2003; advised that it would issue a request for offers (RFO) electronically on the NASA Acquisition Internet Service (NAIS or NAIS website); made offerors responsible for downloading their own copies of the RFO; stated

¹ We refer to the five documents labeled as tabs 1-5 appended to the Stervagi decl. as exs. 1-5 to distinguish them from the R4 file documents that are identified by tabs using Arabic numerals.

offerors “shall monitor the [NAIS] site for amendments to the solicitation” and provided that offerors could submit questions regarding the RFO by letter, facsimile, or email. (Stervagi decl., ex.1)

2. The Collective Bargaining Agreement (CBA) between JDD and Service Employees International Union, Local 47 (SEIU) effective for the period of 1 May 2001 through 30 April 2005 governed the wages JDD paid its service employees performing janitorial services at the NGC (R4, tab 1 at 1, 15). The CBA provided for specified wage increases on each of 1 December 2001, 1 December 2002, 1 December 2003 and 1 December 2004. (R4, tab 1, Art. XIX at 9)

3. On 18 July 2003, NASA issued Solicitation RFO-03-C6D-001 for janitorial services for the NGC by posting on the NAIS website (R4, tabs 2, 14). The period of performance was three years from the effective date plus two twelve-month options. The RFO incorporated as attachment G (“Wage Determination and Collective Bargaining Agreement”) the CBA effective 1 May 2001 through 30 April 2005. (R4, tabs 1-3, 14)

4. The RFO included FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) (SCA) that, in part, provides:

(c) *Compensation.* (1) Each service employee employed in the performance of this contract by the Contractor . . . shall be paid not less than the minimum monetary wages . . . as specified in any wage determination attached to this contract.

....

(3) *Adjustment of Compensation.* If the term of this contract is more than 1 year, the minimum monetary wages . . . required to be paid . . . shall be subject to adjustment after 1 year and not less often than once every 2 years, under wage determinations issued by the Wage and Hour division.

....

(f) *Successor Contracts.* If this contract succeeds a contract subject to the Act . . . and service employees were paid wages . . . provided for in a collective bargaining agreement, . . . neither the Contractor nor any subcontractor under this contract shall pay any service employee . . . less than the wages and fringe benefits provided for in such

collective bargaining agreement, . . . including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement.

(R4, tab 4)

5. The RFO included FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) that, in pertinent part, provides:

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.

(b) The Contractor warrants that the prices in this contract *do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.*

(c) The wage determination . . . *current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract*

(d) The contract price or contract unit price labor rates *will be adjusted* to reflect the Contractor's *actual increase . . . in applicable wages and fringe benefits to the extent that the increase is made to comply with . . .*

(1) *The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period*

. . . .

(e) Any adjustment will be limited to increases . . . in wages and fringe benefits as described in paragraph (c) of this clause

(R4, tab 4) (emphasis added)

6. The RFO directed prospective offerors not to include “any contingencies (escalation) to cover increased costs for which adjustment is provided under” FAR 52.222-43. (R4, tab 2, RFO at 10)

7. On 30 July 2003, Mr. James Vaughan, president of JDD, and Mr. Freddie Robinson, also a representative of JDD, attended the preproposal conference NASA held regarding the RFO (Stervagi decl. at 1, ex. 2). The government explained to the prospective offerors in attendance that the CBA wage determination in effect through 30 April 2005 specified the service employee wages and wage increases applicable to the contract. The government used a chart for its explanation that the government subsequently placed on the NAIS website on 1 August 2003. The chart indicates under “Pricing”:

- No Detailed Certified Cost or Pricing Data
- No Contingencies in Price
 - CBA – Specifies Wages/Fringe
 - Expires April 30, 2005
- Adjustments – Anniversary Date
 - Fair Labor Standards Act and Service Contract Act – Price Adjustment Clause

(Stervagi decl., ex. 3 at 14)

8. On 6 August 2003, NASA posted on the NAIS website its affirmative response to a prospective offeror’s understanding that the RFO required offerors to price their proposals based on the annual wage increases set forth in the current CBA wage determination for the first two years of the contract as follows:

Q: The Collective Bargaining Agreement identifies wage increases for hourly workers through April 30, 2005. . . . It is our understanding that we are to escalate our option year direct labor calculations and related prices according to the increases in the CBA. Is our understanding correct?

A:

....

Since the contract contains an adjustment feature to the contract price to cover any increases in wages and/or fringe benefits, *do not escalate your proposed prices beyond the anniversary date of the contract [which is] December 1, 2005 (the end of contract year 2)*. The adjustment is available only on the anniversary dates of the contract [,] December 1 in 2005, 2006, and 2007. *Hence, the proposed prices should be escalated only for the first two years beginning December 1, 2003 – not for any time period beyond December 1, 2005 – until such time as a new wage determination is applicable to the contract.*

(Stervagi decl. at 1, exs. 4, 5 at 2; R4, tab 2) (emphasis added)

9. JDD's letter of 20 August 2003 transmitted its proposal (R4, tab 3). Apparently, JDD did not escalate its proposed prices for the second year of the contract (R4, tab 4, ¶ 43).

10. The government awarded Contract No. NNC04BA03B,² to JDD on 1 December 2003 for a period of thirty-six months plus two twelve-month options for a total contract period of five years. (R4, tab 4)

11. On 9 March 2005, JDD notified the CO by email that its employees had received a wage increase on 1 December 2004 for contract year 1 December 2004 through 30 November 2005 "per our current contract [CBA] that expires in June '05 [sic]" (R4, tab 8). It submitted a claim for an equitable adjustment on 6 September 2005 in the amount of \$96,688.45 for service employee annual wage rate increases for 1 December 2004 through 30 November 2005. JDD stated that its proposal did not include wage rate increases for the contract's second year. It maintained the RFO directed offerors not to include annual wage rate increases in their proposals because the contract's FAR labor provisions provided for annual adjustment of wage rate increases under the CBA wage determination. (R4, tab 13)

12. The current CBA expired on 30 April 2005 and was replaced by a new CBA and CBA wage determination effective for the period of 1 May 2005 through 30 April 2007 (R4, tab 10). Bilateral Modification No. 4 (Mod 4) issued on 6 December 2005

² Contract Modification No. 5 revised the contract number to NNC04CB02C (R4, tab 5).

incorporated the new DOL Wage Determination CBA-2005-3373 applicable to contract years beginning, respectively, on 1 December 2005 and 1 December 2006 (R4 tab 15). There is no issue in this appeal as to any wage increase resulting from this wage determination.

13. By letter dated 7 November 2005, the CO issued a final contracting officer's decision that denied JDD's claim for an equitable adjustment for service employee annual wage rate increases for 1 December 2004 through 30 November 2005 (R4, tab 14). JDD filed a timely notice of appeal (NOA) (R4, tab 16).

DECISION

Appellant contends its offer did not include the annual wage rate increases for 1 December 2004 through 30 November 2005 under the CBA wage determination in effect at time of award due to FAR 52.222-43, that states "(a) This clause applies to . . . contracts subject to collective bargaining agreements" and "(b) The Contractor warrants that the prices in this contract **do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.**" (NOA at 1) (emphasis by appellant) The government responds that, during the solicitation period, it advised offerors through questions and answers to price their proposals based on annual wage increases for the first two contract years as set forth in the CBA wage determination effective through 30 April 2005 (gov't br. at 7).

Appellant's contract was subject to the requirements of the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.* (SCA). FAR 52.222-43, implementing the SCA, provides as follows:

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The wage determination . . . current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract

(d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase . . . in applicable wages and fringe benefits to the extent that the increase is made to comply with . . .

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period

Thus, FAR 52.222-43, which prohibits the inclusion of any contingency to cover increased costs for which adjustment is provided under the clause, clearly provides for a price adjustment for wage increases under the terms of an existing CBA wage determination on a contract's anniversary or option renewal dates. *United States v. Service Ventures, Inc.*, 899 F.2d 1, 3 (Fed. Cir. 1990). *Accord Guardian Moving and Storage Co., Inc. v. Hayden*, 421 F.2d 1268, 1273 (Fed. Cir. 2005).

In the case before us, FAR 52.222-43 obligated appellant to warrant, which it did by entering the contract, that its contract price did not include wage rate increases applicable on 1 December 2004, the first "anniversary date," for the contract's second year as set forth in the CBA wage determination. In so doing, it correctly followed the requirements of FAR 52.222-43 in not including in its offer wage increases for that second contract year. Appellant reasonably understood that FAR 52.222-43 protected it by providing for a price adjustment on the contract's anniversary date of 1 December 2004 for its actual increased costs due to wage increases under the then current CBA wage determination. *Swanson Group, Inc.*, ASBCA No. 47676, 95-2 BCA ¶ 27,708 at 138,102 ("There is no requirement that to be recoverable, an increase in labor rates due to increases mandated by a wage determination applicable at the beginning of the renewal period be unknown at the time the contract is entered into."), *aff'g in relevant part*, 95-1 BCA ¶ 27,472.

We note that the government's answer to an offeror's question regarding a price adjustment under the CBA wage determination did not address the first anniversary date of 1 December 2004 (finding 8). The FAR clause, however, applies to each anniversary date, and controls over the questions and answers. This interpretation is consistent with the preproposal conference chart that referred, without qualification, to "Adjustments – Anniversary Date" (finding 7).

In summary, the provisions of FAR 52.222-41 and FAR 52.222-43 required appellant to warrant that its offer did not include an allowance for increased costs for which the government had agreed to make adjustment for actual wage increases on the contract anniversary dates under the applicable CBA wage determination. Appellant is entitled to a price adjustment for actual wage rate increases under the CBA wage determination that went into effect on the second year anniversary date of the contract of 1 December 2004.

For the reasons set forth, we sustain the appeal and remand to the parties for resolution of quantum.

Dated: 13 July 2006

EDWARD G. KETCHEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55282, Appeal of JDD, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals