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Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Cobarc Services, Inc.

File: B-252359.4

Date: September 23, 1994

DECISION

Cobarc Services, Inc. protests modification No. P00002 to contract No. DAKF57-93-D-0020, which was awarded by the Department of the Army to Luzon Services, Inc.

We dismiss the protest because it raises a matter of contract administration over which our Office does not exercise jurisdiction.

The modification challenged by Cobarc is the result of Luzon and the Army's interpretation of a collective bargaining agreement between the (then) incumbent, Cobarc, and a union and a wage determination from the Department of Labor (DOL). Prior to issuing the solicitation to which the disputed modification applies, the Army sought a DOL opinion on the application of the collective bargaining agreement to the procurement. When the solicitation was issued in August 1992, it contained wage determination No. 76-0014 (Rev. 18). In January 1993, DOL had not yet rendered an opinion, and the Army amended the solicitation to delete the wage determination and to advise offerors to consider the economic terms of the collective bargaining agreement. See Federal Acquisition Regulation (FAR) § 52.222-47. Under the terms of the agreement, Cobarc was required to pay the union $2.04 per hour for all hours worked (up to 40 hours per week) for the purpose of providing holiday, vacation, sick leave, and other benefits.

Luzon proposed to furnish the employees with equal benefits, but to administer those benefits itself, thus saving the government a portion of the $2.04 per hour charge. The Army informally verified through internal consultations with higher commands that this plan was feasible and agreed in negotiations that Luzon could validly propose its rates in this way. After the conclusion of negotiations and the submission of best and final offers (BAFOs), Luzon's proposal had the highest technical score and the lowest proposed price, while Cobarc's proposal had the second highest score and the third highest price (approximately

$7.6 million higher than Luzon's). Prior to the award, DOL sent the Army wage determination No. 76-0014 (Rev. 20) which required contractors to pay the $2.04 per hour benefit charge. The Army did not then incorporate this wage determination into the solicitation because it was based on the collective bargaining agreement, the terms of which already were applicable. The contracting officer determined that Luzon's was the best overall proposal and awarded Luzon the contract on June 24, 1993.

After award and the commencement of a dispute between Luzon and the union, the Army determined that the wage determination must be incorporated into the contract retroactively. The Army also determined that under DOL regulations, Luzon was required to pay the $2.04 per hour benefit charge, regardless of the value of the benefits Luzon was providing. Since Luzon had only proposed a portion of this charge in its benefits plan, Luzon requested a contract modification to increase the price. The Army agreed and issued modification P00002 which increased the price by $1,885,280.59.

The Army modified the contract on the basis of its determination that a mutual mistake had been made in the negotiation of its contract with Luzon. See FAR §§ 14.406-4, 15.1005. In view of Luzon's clear explanation of its intent to structure its benefits package as it did and the Army's encouragement of that structure, without ensuring that it was valid, it appears that the Army reasonably determined that there was clear evidence of mutual mistake which would authorize reformation of the contract. FAR §§ 14.406-4(c), 14.406-4(b)(2). Thus, the reformation of the contract is a matter of contract administration.

Our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552 (1988). Therefore, we generally do not exercise jurisdiction to review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. See 4 C.F.R. § 21.3(m)(1); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228. The few exceptions to this rule include situations where it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement, CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD ¶ 364; where a protest alleges that the exercise of a contractor's option is contrary to applicable regulations, Bristol Elecs., Inc., B-193591, June 7, 1979, 79-1 CPD ¶ 403; or where an agency's

basis for contract termination is that the contract was improperly awarded. Condotels, Inc. et al., B-225791 et al., June 30, 1987, 87-1 CPD ¶ 644. None of the exceptions apply in this case.

In any event, we note that the Army's action results in no prejudice to Cobarc. The modification raised Luzon's price to $35,460,605.54, which remains more than $5.7 million lower than the BAFO price proposed by Cobarc. Since Luzon's proposal was rated higher technically than Cobarc's, and its price remains significantly lower than Cobarc's, there is no reasonable possibility that the award determination would have been different if Luzon had included the full benefit cost in its original BAFO. Where, as here, there is no prejudice, we will not disturb a contract award. American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65.

The protest is dismissed.

Paul Lieberman
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