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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Saltwater Inc.

File: B-293335.3

Date: April 26, 2004

Joseph M. Sullivan, Esq., and Elizabeth Poh, Esq., Mundt MacGregor, for the protester.

William T. Grimm, Esq., Davis Grimm Payne & Marra, for NWO, Inc., an intervenor.
Terry H. Lee, Esq., and Lynn W. Flannagan, Esq., National Oceanic and Atmospheric Administration, for the agency.

Charles W. Morrow, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that an agency is improperly terminating the protester's previously-awarded contract, and awarding to another offeror, is denied where the record shows that the protester has refused to execute a modification to its previously-awarded contract that properly reflects changes that occurred during a reevaluation undertaken in response to a previous protest of this award; the protester's underlying assertion that the proffered modification is ambiguous is untimely where the record shows there is nothing in the modification that was not also included in the agency's second request for revised proposals, and the protester did not raise the matter before submitting its revised proposal.

DECISION

Saltwater Inc. protests the proposed award of a contract to NWO, Inc., as well as the proposed termination of Saltwater's earlier-awarded contract. This proposed award, and corresponding termination, is based on Saltwater's refusal to sign a modification to its contract issued to reflect (in the agency's view) changes that occurred during a reevaluation of proposals undertaken in response to an earlier protest by NWO. The original award was made to Saltwater pursuant to request for proposals (RFP) No. AB1330-03-RP-0024, issued by the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for fisheries observer services.

We deny the protest.

BACKGROUND

The RFP here, issued as a total small business set-aside on January 30, 2003, sought fisheries observer services in connection with NOAA's National Marine Fisheries Service (NMFS) Pacific Islands Region Observer Program (PIROP), under a fixed-rate contract, for a base year and one option year. The PIROP is operated under the authority of the Fishery Management Plan for the bottomfish and seamount groundfish fisheries established under the Magnuson-Stevens Fishery Conservation and Management Act.¹ Under PIROP, observers collect and record data about sea turtles, sea birds, marine mammals, and other protected species and bycatch in various fisheries. The fisheries observers here were to serve on commercial fishing vessels usually embarking out of Honolulu, Hawaii and Pago Pago, American Samoa. See Agency Report (AR), Tab 1, at 1; RFP, Statement of Work (SOW) at 1, 6.

The RFP's price schedule required offerors to insert a unit price and extended amount, for various points of embarkation based upon a "Hawaii Longline Observer Sea-day."² RFP at 2. For each point of embarkation, the RFP included an estimate of the number of observer sea days (e.g., 6,118 days for Item No. 1). Id. The SOW explained "[w]hen at sea, observers work 70 plus hours per week, as the sole contractor employee[s] aboard privately owned commercial fishing vessels."³ SOW at 2. The RFP anticipated that award would be made to the offeror whose proposal is found to be most advantageous to the government, considering the following

¹ This Act provides for the conservation and management of the United States' fishery resources. See 16 U.S.C. § 1801 et seq. (2000). Under the Act, the term observer means any person required or authorized to be carried on a vessel for conservation and management purposes. 16 U.S.C. § 1802(27).

² An "observed Sea Day" is a day when the observer is on board the fishing vessel and the vessel is not in port, but includes the days of departure from, and return to, port. RFP at 3.

³ The RFP explained as follows:

Observers travel by public transportation to meet their assigned boats, and are expected to remain with their boats until they return to port to unload target catch. Typically, tuna trips average just over 21 days in duration and swordfish trips average over 30 days. Bottomfish trips average about three weeks. Long line and bottomfish vessels fish in deep ocean waters, beyond 50 miles of the Northwestern Hawaiian Islands in all weather conditions.

RFP, SOW at 2-3. In addition, the RFP stated "[v]essels not in port are assumed to be fishing and counted as one day of effort. Vessels carrying an observer and not in port are counted as one observed day of effort." Id.

evaluation factors, in descending order of importance: technical approach, experience, past performance, and price. RFP at 64-65.

Saltwater and NWO both submitted proposals by the original March 20 closing date. At the conclusion of evaluations, Saltwater received the original award on July 11. NWO protested that award on July 23, and on August 21, NOAA decided to take corrective action in the face of the protest, citing procedural flaws in its evaluation. The agency stated that it would conduct clarifications or discussions, request revised offers if necessary, and reevaluate; in response, we dismissed the protest. NWO, Inc., B-292633, Aug. 23, 2003.

During the course of the re-evaluation, and after the offerors had submitted final proposal revisions (FPR), the contracting officer (CO) became concerned about whether the proposals included overtime compensation for observers.⁴ See AR, CO's Statement at 4-6. To resolve this concern, the CO sought a legal opinion within the agency regarding "whether overtime pay is applicable to fisheries observers." AR, Tab 14. On November 13, the Director of NOAA, in a memorandum to the Office of General Counsel, responded as follows:

NMFS maintains the position that fisheries observers are biological technicians and are therefore eligible for overtime compensation under the Service Contract Act (SCA), the Fair Labor Standards Act (FLSA), and other Acts stipulating wages and benefits for contracted service employees, as appropriate.

While we understand that work performed by observers beyond U.S. territorial waters is outside of the jurisdiction of the SCA and FLSA, attempting to track the geographical location of a vessel in order to determine whether or not SCA/FLSA wages apply would be a huge administrative burden for both the contracted observer provider and the agency. Therefore, it is the position of NMFS that the wage rate that the Department of Labor determines is appropriate for each specific locality should be applied to contracted fisheries observers whether they are working inside or outside of U.S. territorial waters in order to provide a fair, simple, and consistent application of the SCA/FLSA.

AR, Tab 15, at 2-3.

⁴ The agency found that NWO's price was based on an assumption that the company would pay overtime compensation at 1½ times regular pay for all hours over 40, but that Saltwater's proposal did not appear to have been based on similar overtime compensation assumptions, did not include SCA-mandated vacation and holiday pay, and was based upon paying observers under a different SCA wage determination.

In light of this memorandum, on November 18, the agency issued a second request for FPRs to permit the offerors to make any pricing adjustments needed to cover the cost of complying with the agency's view about the application of these statutes to fisheries observers. In its letter to Saltwater, the agency stated:

It is the policy of the [NMFS] that fisheries observers are considered non-exempt technicians and must be compensated for overtime work pursuant to the overtime standards of the [FLSA]. Accordingly, if the new award decision re-selects your firm, your contract (No. AB133F-030-CN-0024) will be modified, effective January 1, 2004, to include the revised Wage Determination dated 5/31/2001, and to require payment to fisheries observers at a rate not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours a week. Note that it is also NMFS policy that the [SCA] and overtime requirements apply whether an observer is within or without U.S. territorial waters.

AR; Tab 16, at 1.

In response, both offerors revised their proposals, advised that they would provide overtime compensation to the observers for hours worked in excess of a 40-hour week, and explained that their proposals assumed a 70-hour work week for the observers. Saltwater, however, added the following caveat to its revisions:

[P]lease note that this revised proposal should not be construed as a concession, admission, or opinion, on our part, about the validity of any legal conclusions upon which NMFS has based its policies with regard to overtime compensation requirements pursuant to applicable state and federal laws.

AR, Tab 21, at 1.

Saltwater's FPR was priced at \$4,196,243, and NWO's was priced at \$4,217,061. In evaluating the FPRs, the source evaluation board (SEB) compared prices on the basis of the cost per sea day for each proposal, and noted that the compensation levels for both firms met the minimum requirements of the SCA, and NMFS's policy regarding overtime compensation. The SEB recommended award to Saltwater based upon its higher technical score, slightly higher benefits, and slightly lower price. See AR, Tab 23, at 2; Tab 24, at 13-14, 16.

On December 2, NOAA notified Saltwater of its re-selection, and provided, for execution, a modification to Saltwater's earlier awarded contract. Among other things, the modification contained the following language concerning the NMFS policy statement:

[T]he contract is hereby modified to incorporate . . . [t]he requirement, as determined by NMFS policy, that fisheries observers be paid at a rate not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours a week, in accordance with the [FLSA] and other Acts. It is also NMFS policy that the [SCA] and overtime requirements apply whether an observer is within or without U.S. territorial waters.

AR, Tab 27, at 2.

Upon receipt of the modification, Saltwater advised the agency that it was not willing to execute the modification, because it did not accurately reflect the terms of Saltwater's FPR. Saltwater stated, however, that it remained willing to perform the contract in accordance with its FPR. On January 13, NOAA informed Saltwater that it intended to terminate the contract for the convenience of the government. This protest followed.⁵

DISCUSSION

Saltwater argues that the agency's plan to terminate Saltwater's previously-awarded contract because of the company's refusal to accede to the terms of the pending modification is unreasonable. In Saltwater's view, the proposed modification does not accurately reflect the terms of Saltwater's FPR, and is ambiguous. In addition, Saltwater argues that the agency exceeded the scope of the corrective action it undertook in response to NWO's earlier protest by incorporating into this solicitation the recent changes to NMFS policy regarding overtime compensation for fisheries observers. Finally, Saltwater argues that the proposed award to NWO will be improper because the agency is contemplating making award to NWO on terms different from those in its proposal.

We turn first to Saltwater's underlying contention that the modification here is ambiguous. In this regard, Saltwater has raised several concerns about a conflict between the estimated workweek in the RFP, and the meaning of the NMFS policy statement regarding overtime compensation for fisheries observers. For example, Saltwater states that its proposal was based on the RFP's estimate that fisheries

⁵ Prior to learning of the agency's decision to terminate Saltwater, NWO again protested Saltwater's selection, on December 19. This protest was dismissed, however, after the agency changed its course and decided to award to NWO. The protester also filed a separate action in court for injunctive relief on January 27. Since the protester sought only an injunction to bar the agency from lifting the stay so that our Office could continue to consider the protest, the protester's suit did not constitute a basis to dismiss the protest. See 4 C.F.R. § 21.11(b) (2004). We have been advised by the protester's counsel that the agency agreed to take no action on this procurement until our Office issues its decision.

observers work a 70-plus hour workweek. On the other hand, Saltwater states that the NMFS policy interpreting fisheries observers as non-exempt technical personnel—together with the policy of applying the FLSA both within, and outside of, U.S. territorial waters—could result in a determination that observers be paid for each and every hour of the week they are on board a fishing vessel—up to 168 hours per week. In addition, Saltwater argues that the terms of the modification would force the company to change its approach to paying its observers from paying a flat rate per day to paying an hourly rate. It is in this sense that Saltwater argues that the proffered modification does not accurately reflect the terms of its FPR.

While we acknowledge the significance of the matters Saltwater raises, these issues are not timely at this juncture. Our Bid Protest Regulations require that improprieties in a solicitation—including those which did not exist in the initial solicitation, but were subsequently incorporated—must be raised prior to the next closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1); East Penn Mfg. Co., Inc., B-261046, Aug. 1, 1995, 95-2 CPD ¶ 50 at 3. Put simply, Saltwater's contention that it became aware of these potential ambiguities upon receipt of the modification on December 2, rather than upon receipt of the agency's November 18 second request for FPRs, is not persuasive.

As set forth above, a comparison of the November 18 request for a revised proposal with the terms of the modification provided to implement the new selection decision shows nothing in the modification that was not previously disclosed to the company in the November 18 request. Specifically, the November 18 request: (1) expressly advises that fisheries observers will be viewed as non-exempt employees eligible for overtime; (2) advises that overtime must be paid at a rate not less than 1½ times the basic rate of pay for hours worked in excess of 40 per week; and (3) advises that NMFS views these requirements as applicable whether an observer is within or without U.S. territorial waters. AR, Tab 16, at 1. Each of these issues is reflected, in very similar terms, in the December 2 modification.

Indeed, Saltwater's response to the request for a second FPR indicates to us that the company fully understood the implications of the NMFS policy statement—and had concerns about it. In this regard, it advised the agency that while it had revised its proposal, it did not want its actions to be construed as agreement that the NMFS policies were required by law. In our view, the clear language of the November 18 notice, Saltwater's caveat about it, and the lack of any meaningful difference between the notice and the December 2 modification, mean that Saltwater was required to raise any challenge to these overtime policies prior to submitting its second FPR. Its attempt to do so now—as the underlying basis for challenging the termination of its contract for its refusal to execute the modification—is untimely.

As a result of our finding that Saltwater cannot now raise a timely challenge to the terms of the modification to its contract, we conclude that Saltwater has offered no reasonable justification for its refusal to sign the proposed modification to its

originally-awarded contract. Accordingly, we deny Saltwater's protest contention that the agency's decision to terminate its contract is improper.

We turn next to Saltwater's contention that the agency exceeded the scope of the originally proposed corrective action by incorporating in this contract the NMFS policy statement regarding overtime payments for fisheries observers. Again, we disagree. We know of no basis for holding that the agency could not, or should not, have incorporated this policy statement into the contract. To the extent that the agency was concerned that the offerors might not have prepared their proposals with the NMFS policy in mind, there was nothing improper about allowing both offerors to revise their pricing accordingly. Moreover, we again think any challenge to incorporating the NMFS policy statement into this procurement had to be raised prior to the closing date set for receipt of the second FPRs.

As a final matter, Saltwater complains that the agency is contemplating an improper award to NWO. In this regard, Saltwater states that when the agency first notified our Office of its intent to terminate Saltwater's contract--during the pendency of NWO's second protest--the agency stated that it would award to NWO "at a price to be agreed upon between the parties." Initial Protest, Tab 13 (Letter to GAO General Counsel from Dept. of Commerce). In Saltwater's view, the agency's stated intent to negotiate a new price with NWO is improper, and supports Saltwater's view that the solicitation here contains ambiguities that must be resolved.

We note first that the agency did not use the language quoted above in answer to this protest. Rather, the agency explains that it intends to award to NWO at the prices offered in response to the second request for FPRs. AR, Tab 1 at 14. In addition, we note that the agency has agreed not to proceed with its award until our Office issues a decision on this protest. As a result, this matter is premature at this juncture. In the event the agency awards a contract to NWO on a basis other than the proposal submitted in response to this reopened competition, Saltwater can pursue that matter at that time.

The protest is denied.

Anthony H. Gamboa
General Counsel