DOCUMENT RESUME

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[Protest to Cancellation of Solicitation Involving Wage Determination]. B-189027. September 16, 1977. 6 pp.

Decision re: Suburban Industrial Maintenance Corp.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: National Aeronautics and Space Administration: Ames Research Center, Moffett Field, CA.
Authority: Service Contract Act. 41 U.S.C. 358. NASA Procurement Regulations 12.1005-3(b). B-171701 (1975). B-184263 (1976). 56 Comp. Gen. 160. Prestex Inc. v. United States, 320 F.2d 367, 112 Ct. Cl. 620 (1963).

A protester to a cancellation of an invitation for bids maintained that: it was the low bidder under the solicitation, an appropriate wage determination was available to the procuring agency, and it was entitled to amend its bid prior to award. Since the wage determination was issued subsequent to bid opening but prior to award, the contracting officer's cancellation and readvertisement of the requirement was proper, and the action proposed by the low bidder would have been tantamount to awarding a contract different from the one advertised. (Author/HTW)

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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189027 DATE: September 16, 1977

MATTER OF: Suburban Industrial Maintenance Co.

DIGEST:

Where wage determination increasing wage rate was issued subsequent to bid opening but prior to award, and low bidder requested that it be allowed to modify its bid to reflect new wage rates and receive award based on bid as modified, contracting officer's cancellation and readvertisement of requirement was proper. To have followed course of action proposed by low bidder would have been tantamount to awarding contract different from one advertised and all bidders would not have competed on same basis.

Suburban Industrial Maintenance Co. (SIMC) protests the cancellation of invitation for bids (IFB) 2-26634, issued by the National Aeronautics and Space Administration's (NASA) Ames Research Center (ARC), Moffett Field, California. The invitation solicited bids for replacing burnt-out light bulbs and washing lamp fixtures in various buildings at ARC.

On March 9, 1977, the contracting officer executed Standard Form (SF) 98 (Notice of Intention to Award a Service Contract) and forwarded it to NASA Headquarters, from where it was subsequently forwarded to the Department of Labor (DOL). On March 15, 1977, the IFB was issued without a minimum wage determination. However, page 7, paragraph 22 of the IFB contained the following notation:

"Minimum Wage Determination and Fringe Benefits

"A Wage Determination has been requested from the U.S. Department of Labor. If a Wage Determination applicable to this procurement is available before bid opening, it will be incorporated in the solicitation by Amendment, if it is not available until after a contract is awarded, it will be incorporated in the contract by modification."

On March 18, 1977, NASA was advised by DOL that as of that date, no wage determination applicable to the specified locality and classes of employees was in effect. Amendment No. 1 to the invitation was issued on March 21, 1977, notifying potential bidders that no wage determination was available. On April 14, 1977, bids were opened and it was determined that SIMC had submitted the low bid of $12,156.48, while Cleaning Services, Inc., submitted the second low bid of $17,939. On April 28, 1977, NASA was informed by DOL that it (DOL) had made a mistake in its reply to the SF-98 and that, in fact, a wage determination was available and could be issued for the IFB. Apparently, DOL had information on the wage rate paid in the ARC area to laborers of the type called for in the present invitation, but for some reason had overlooked this information when it replied to the SF-98.

On May 5, 1977, after SIMC had been found to be a responsible contractor, the attorney for SIMC contacted the contracting officer and requested that award be held up until DOL issued a wage determination, at which time, the attorney argued, SIMC should be permitted to adjust its bid and then be awarded the contract. The contracting officer advised the attorney that he intended to make the award on the bid as submitted without the wage determination and would consider amending the contract after a wage determination was issued. Apparently, this was not satisfactory to SIMC, since on the same day SIMC's attorney lodged a protest maintaining that ARC had misrepresented the number of people necessary to perform the work (less than five), and that it was NASA's fault that DOL declined to issue a wage determination.

At this point it should be explained that prior to the execution of the SF-98, the contracting officer had received assistance from the project's technical monitor as to how many employees would be required to perform the work covered by the IFB. The contracting officer was advised that four employees would be required. However, it was subsequently discovered that the scope of work had been understated in the invitation and, presumably, more than four employees would be required. This is significant because under 41 U.S.C. § 358 (1970), DOL is not required to perform a wage survey and issue a wage determination for contracts employing five or less service-type employees. While the attorney for SIMC argues that NASA misrepresented the number of employees required to perform the contract and, as a result of this misrepresentation, DOL declined to issue a wage determination, there is no evidence of record to indicate that the contracting officer was not acting in

good faith when he indicated on the SF-98 that only four employees would be required. Also, it should be pointed out that DOL is not precluded from issuing a wage determination where there are less than five employees if, as in this case, there was available minimum wage information for the appropriate labor classifications.

The contracting officer also received information from the Assistant Personnel Officer in establishing the equivalent Civil Service Commission Job Title and Wage Grade of WG-2/2 ($5.60 per hour). This information was supplied to DOL.

It was subsequently decided that the best course of action would be to cancel the invitation and readvertise after the wage determination was received. By amendment No. 4, dated May 5, 1977, the invitation was canceled. On May 9, 1977, SIMC lodged a second protest challenging the cancellation.

SIMC maintains that since it was the low responsive and responsible bidder under the instant solicitation and since an appropriate wage determination was available to the procuring agency on or before April 28, 1977, SIMC is entitled to amend its bid prior to award in conformance with the appropriate wage determination. In support of its position SIMC cites paragraph 2 of the solicitation, quoted above, and section 12.1005-[illegible] of NASA's Procurement Regulations (NASA PR), which states as follows:

> "(b) Subsequent to award. If a required wage determination is not included in the solicitation or contract (either because the notice required by 12.1005-2 is not filed or is not filed in the time provided by 12.1005-2(a), and if the Contracting Officer receives a wage determination from the Department of Labor within 30 days of the late filing of the notice or the discovery by the Department of Labor of the failure to include a wage determination required by this part -
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> "(i) The Contracting Officer shall attempt to negotiate a bilateral modification to:
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> "(A) Incorporate the Service Contract Act clause in 12.1004(a), if not previously included;

"(B) Incorporate the wage determination which shall be effective as of the date of issuance unless otherwise specified; and

"(C) Equitably adjust the contract price to compensate for any increased costs of performance under the contract caused by the wage determination.)"

While we are unaware of any decision by this Office exactly on point with the facts of the present case, we have had occasion to rule on cases of a similar nature. In Dyneteria, Inc., B-178701, July 15, 1975, 75-2 CPD 36 on the day bids were opened (April 30, 1974) under an invitation for mess attendant services, the incumbent contractor entered into a collective bargaining agreement (cba) with the union representing the mess attendant service employees. Subsequently, on May 16, 1974, a revised wage determination was issued reflecting the higher cba wages. However, the contract was not awarded until August 14, 1974, and incorporated the wage determination contained in the IFB which was applicable prior to the consummation of the cba. Subsequently, on December 10, 1974, the contract was modified to reflect the revised wage determination. Under the circumstances, we held that the mess attendant services requirement should have been resolicited when the Air Force was informed of the applicability of a new wage determination. We arrived at this conclusion because the Air Force's actions were tantamount to awarding a contract different from the one advertised and a contractor should not be selected on a different basis than that under which it must perform the contract. See Prestex Inc. v. United States, 320 F.2d 367, 112 Ct. Cl. 620 (1963); Tombs & Sons, Inc., B-178701, November 20, 1975, 75-2 CPD 332. Also, in a similar case involving a negotiated procurement, we held that the General Services Administration (GSA) should have reopened negotiations when it was informed that a revised wage determination was applicable, so that all offerors could have the opportunity to revise their proposals to reflect the Government's actual requirements regarding service employees' wage rates. In that case GSA incorporated a wage determination which was revised, with GSA's knowledge, prior to award selection and over 1 month prior to award. The contract was subsequently modified to reflect the revised wage determination. Minjares Building and Maintenance Company, B-184263, March 10, 1976, 76-1 CPD 168. See also High Voltage Maintenance Corp., 56 Comp. Gen. 160 (1976), 76-2 CPD 473.

In the present case, we are of the opinion that the course of action proposed by the protester, i.e., delaying award until the issuance of the wage determination and then allowing SIMC to modify its bid to reflect the wage determination, would be tantamount to awarding a contract different from the one advertised since the contract awarded to SIMC would be based on a wage rate differenc from that contained in the solicitation (Fair Labor Standards Act (FLSA) minimum wage) and which the other bidders, as well as SIMC, based their bids. Also, it is always possible that SIMC's bid as amended would not represent the most favorable price to the Government since we have no way of knowing, with any certainty, what the bid price of the others would have been had their bids been based on the wage determination. All the record indicates is that SIMC's bid price was based on the FLSA minimum wage. It might well be that the bid prices of other bidders would have actually been lower than SIMC's bid price. The only way we can be certain of who would have submitted the low bid based on the wage determination is to place all the bidders on an equal footing under a new solicitation.

In this regard, the attorney for SIMC points out that had award been made to SIMC prior to April 28, 1977 (the date on which attorney for SIMC contends that NASA received the wage determination), NASA would have been obligated pursuant to NASA PR § 12.1005-3(b), quoted above, and paragraph 22 of the solicitation, also quoted above, to modify such contract to reflect the wage determination. The attorney for SIMC goes on to state that NASA cannot now be heard to say that merely because a wage determination was received subsequent to bid opening and prior to award that a cancellation and resolicitation of the services to be procured is in order. We agree that had SIMC been awarded a contract prior to the issuance of the wage determination, NASA would be obligated to modify the contract to reflect the wage determination. Both paragraph 22 and NASA PR § 12.1005-3(b) clearly provide for such modification. However, in such a case the contract awarded to the successful bidder would have been the same contract as called for in the solicitation and all of the bidders would have competed on the same basis, since any successful bidder under these circumstances would have been entitled to have its contract modified.

We are not prepared to rule that paragraph 22 and NASA PR § 12.1005-3(b) permit the modification of a bid after bid opening to reflect a wage determination issued subsequent to bid opening, but prior to award. Paragraph 22 speaks only of two timeframes

"before bid opening" and "after a contract is awarded." NASA PR § 12.1 -3(b) is entitled "Subsequent to award," which on its face would appear to apply only to wage determinations received after award. The attorney for SIMC argues that NASA PR § 12.1005-3(b) anticipates events occurring subsequent to bid opening. It appears that she bases this conclusion on the fact that NASA PR § 12.1005-3(b) refers to both "the solicitation or contract." However, a reasonable interpretation of the use of the word "solicitation" in NASA PR § 12.1005-3(b) is that it was used to clarify the fact that where the contract should have contained a wage determination, either by inclusion in the solicitation or in the contract itself, but does not contain the wage determination, such determination may be incorporated after award.

For the above reasons, we are of the view that the cancellation and readvertisement by the contracting officer was reasonable and proper. This is especially so since there was ample time to resolicit new bids and all bidders would be on an equal footing under the new solicitation.

Accordingly, SIMC's protest is denied.

R.F. Keller

Acting Comptroller General
of the United States