13542 PL-I

DECISION

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

FILE: B-196356 DATE: April 24, 1980

MATTER OF: T.W.P. Company

DLG04469

DIGEST:

1. Since contracting agency found successful bidder to be responsible, there is no basis to question award merely because bidder allegedly submitted below-cost bid.

2. Where successful bidder takes no exception to invitation's Davis-Bacon provisions, question of whether successful bidder will comply with Davis-Bacon Act is matter of contract administration and not for consideration under GAO's Bid Protest Procedures.

3. Where individual members of partnership perform work of laborers or mechanics on project subject to Davis-Bacon Act, contracting agency should ensure that such partners are paid in accordance with act and payroll reporting requirements are met.

DLG04474

T.W.P. Company (TWP) protests the award of a contract to Bill Ward Painting & Decorating (Ward) under invitation for bids (IFB) No. F04612-79-B-0023 issued by Mather Air Force Base, California (Air Force).

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The IFB solicited bids for the repainting of family housing interiors. The Air Force received five bids with Ward being the low bidder and TWP second low. Ward was also the incumbent contractor, which in the past had subcontracted the work to Gorman and Sons Painting (Gorman), a partnership consisting of a husband, wife and two sons as coequal partners. Gorman was scheduled to perform the work under this contract as well.

DLG04473

The grounds for TWP's protest are that: 1) Ward's bid is below cost; 2) in the past the Air Force has not required Ward to comply with the Davis-Bacon Act's

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[Protest Against Contract Award]

minimum wage or payroll reporting requirements and will not require Ward to comply under this solicitation; and 3) because the Air Force did not intend to enforce the Davis-Bacon requirements in regard to Ward, the bidders did not compete on an equal basis.

However, for the reasons indicated below, we find no basis to disturb the award which the Air Force has made to Ward.

At the outset, we note that our Office has often stated that acceptance of a below-cost bid is not legally objectionable. Ward Smith Transfer and Storage Company, Inc., B-196970, December 14, 1979, 79-2 CPD 409; Radiology Services of Tidewater, B-194264, June 18, 1979, 79-1 CPD 432. In fact, rejection of a below-cost bid requires a finding that the bidder is nonresponsible. Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166. The Air Force determined that Ward was responsible, and this Office does not review affirmative determinations of responsibility unless fraud on the part of procuring officials is shown or it is alleged that definitive responsibility criteria have not been met, neither of which is present in this case. SAI Comsystems Corporation, B-196163, February 6, 1980, 80-1 CPD 100.

The IFB in this case required compliance with the pertinent wage determinations issued by the Secretary of Labor pursuant to the Davis-Bacon Act, 40 U.S.C. § 276a (1976), which were attached to the IFB. The Davis-Bacon Act requires that certain Government contracts over $2,000 for the "construction, alteration, and/or repair, including painting and decorating," of public buildings or public works within the United States contain a provision to the effect that no laborer or mechanic employed directly upon the site shall receive less than the prevailing wage, including basic hourly rates and fringe benefits, as determined by the Secretary of Labor. Further, the act states that these wages will be paid "regardless of any contractual relationship which may be alleged to exist between the contractor * * * and such laborers and mechanics."

In its bid, Ward did not take exception to the IFB's Davis-Bacon provisions. Accordingly, there is no basis to claim that Ward's bid was nonresponsive since it is an offer to perform, without exception, the exact thing called for in the invitation and upon its acceptance binds Ward to perform in accordance with all the IFB's terms and conditions. 49 Comp. Gen. 553, 556 (1970). Whether Ward or its subcontractor complies with the invitation's Davis-Bacon provisions is a matter of contract administration and not for consideration under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), which are reserved for considering whether an award or proposed award complies with statutory, regulatory and other legal requirements. See, e.g., Albert S. Freedman d/b/a Reliable Security Services, B-194016, February 16, 1979, 79-1 CPD 122. It is the Air Force's responsibility to monitor the contract and to take appropriate action if the contract is not properly performed. Parenthetically, we note that Ward states the dollar amount delegated to labor by Gorman was more than Davis-Bacon wages.

Protest denied.

However, we believe it is incumbent upon us to comment on the Air Force's position that the Davis-Bacon Act does not apply to subcontractors such as Gorman. It is Air Force policy that to the extent contract work is performed by coequal partners of a bona fide partnership, no Davis-Bacon coverage is applicable to those partners since they are not "laborers" or "mechanics" within the meaning of the act. Consequently, the Air Force has not and will not require Ward to comply with the Davis-Bacon Act, despite the Davis-Bacon provision contained in the IFB. The Air Force states that it instituted this policy because the Department of Labor has not provided any current guidance regarding the applicability of Davis-Bacon wage rates when the work is to be performed, as here, by coequal partners rather than by individuals working for an hourly wage.

The Davis-Bacon Act provides that the prevailing wage will be paid to all laborers and mechanics "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics." In other words,

the purposes of the act cannot be defeated by a claim that, due to some contractual relationship, an individual is an independent contractor although he is in fact performing the work of a laborer or mechanic. The controlling element, therefore, is the type of work performed, not the contractual relationship between the parties. See 41 Op. Att'y Gen. 488 (1960); and cf. United States v. Landis & Young, 16 F. Supp. 832 (W.D. La. 1935).

In view of the above, each of Gorman's coequal partners should be paid no less than the prevailing Davis-Bacon wage when actually performing the work on this project. Therefore, the Air Force should take whatever steps are necessary to ensure compliance with the various requirements of the act. In addition, the Air Force should ensure that, in the future, whenever a member of a partnership performs the work of a laborer or mechanic on a project that falls within the scope of the Davis-Bacon Act, the prevailing wage determination is applied.

By separate letter of today, we are informing the Secretary of the Air Force of our findings.

Milton J. Socolar

Acting Comptroller General
of the United States