The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fischer Engineering & Maintenance Co., Inc.

File: B-223359

Date: September 26, 1986

DIGEST

1. Contracting agency, which has the primary responsibility for determining whether Davis-Bacon Act provisions should be included in a particular contract, acted properly by including these provisions where a Department of Labor Wage Appeals Board decision reasonably concluded that the Act applied to privately financed housing for Department of Defense families to be leased by the government for 20 years because the housing is for public purpose and its cost will be reimbursed through lease payments.

DECISION

Fischer Engineering & Maintenance Co., Inc. protests the inclusion of Davis-Bacon Act, 40 U.S.C. 276(a) (1982), wage rate requirements in request for proposals (RFP) No. F04605-86-R-0004, issued by March Air Force Base, California, for the construction, lease, maintenance and operation of 200 family housing units near the base.

We deny the protest.

The RFP was issued pursuant to section 801 of the Military Construction Authorization Act of 1984 (Construction Act), 10 U.S.C. § 2828(g), (Supp. III 1985). The Construction Act authorizes the Department of Defense (DOD) to contract for privately financed construction of family housing units, which are to be leased by DOD. According to the Construction Act, developers are to construct the housing to DOD specifications. Id. § 2828(g)(3). The housing is to be leased to the government for up to 20 years and during the lease term the developer will maintain and operate the facility. Id. §§ 2828(g)(2) and (4). The government has the right of

first refusal to acquire title if the developer wishes to sell the facility. Id. § 2828(g)(5). The RFP reflected these statutory terms.

Fischer argues that the relationship between the government and the awardee will be nothing more than tenant and landlord and that the Davis-Bacon Act provision should not have been included in the solicitation.

The Davis-Bacon Act requires that federal contracts over $2,000 for construction, alteration, or repair, including painting and decorating of public buildings or public works, in the United States contain a clause requiring that contractors' pay scales be based on prevailing wages in the locality as determined by the Secretary of Labor. 40 U.S.C. § 276a.

The responsibility for determining whether the Davis-Bacon Act provisions should be included in a particular contract rests primarily with the contracting agency, which must award, administer, and enforce the contract. Dynalectron Corp., B-220518, Feb. 11, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ 151. In challenging the contracting agency's decision to incorporate the Davis-Bacon Act provisions, the protester must show that the agency did not use the appropriate statutory and regulatory criteria, or that the decision resulted from fraud or bad faith. Id.

Here, the Air Force decided that the Davis-Bacon Act applied based on a decision by the Department of Labor's Wage Appeals Board, In the Matter of Military Housing, Ft. Drum, New York, WAB Case No. 85-16, Aug. 23, 1985. In that case, involving the construction and lease of a similar housing facility also under the Construction Act, the Board held that contracts let pursuant to the Construction Act are contracts for construction of public buildings or public works of the United States within the meaning of the Davis-Bacon Act and, therefore, its wage determination must be included in all such contracts.

While the protester argues that the Board opinion upon which the Air Force based its decision to include the Davis-Bacon Act provisions in the RFP is inconsistent with a prior decision of our Office, 42 Comp. Gen. 47 (1962), it has not otherwise attempted to specify exactly in what respect the Board decision is erroneous. The protester does, however, argue that the inclusion of Davis-Bacon rates will greatly increase the cost of the project.

In 42 Comp. Gen. 47 we held that the Davis-Bacon Act did not apply to the construction, alteration or repair of buildings for occupancy by the government under lease agreements. Our decision in 42 Comp. Gen. 47 followed an earlier decision in which we held that the Davis-Bacon Act did apply to lease-purchase agreements under which buildings were constructed with private funds, and then leased to the government, which ultimately acquired title at the end of the lease term. See 34 Comp. Gen. 697 (1955). In distinguishing the 1955 case, we stated that the earlier decision was not "intended. . .to suggest that the acquisition of ownership was unimportant" in determining applicability of the Davis-Bacon Act. 42 Comp. Gen at 49.

We do not believe, however, that ownership is necessary in every case. As indicated in 42 Comp. Gen. 47,"public buildings" and "public works" status can be conferred on projects, for Davis-Bacon Act purposes, if they are clothed sufficiently with elements indicating that they indeed are serving a public purpose.[1]/

Thus, unlike the situation in 42 Comp. Gen. 47, where we merely considered the general question of whether a lease agreement, without more, came within the purview of the Act, we have here a specific factual situtation involving a program established by federal statute to provide housing for military personnel and their families that will be built to government specifications, leased by the government for up to 20 years, and paid for with public funds through long-term rental payments. We have reviewed the Wage Appeals Board decision in the Fort Drum case and we find reasonable the conclusion reached therein, particularly in the concurring opinion, that under the specific facts presented, the contract to be awarded can be viewed as being for the construction of public buildings.

Therefore, we agree with the Air Force's inclusion of Davis-Bacon Act provisions in the RFP and, accordingly, we deny the protest.

for Seymour Efros
Harry R. Van Cleve
General Counsel

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[1]/ The Department of Labor has traditionally taken the view that it is not necessary for the government to hold title to a building for the Davis-Bacon Act to be applicable. See 29 C.F.R. § 5.2(k) (1985).