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N. Zuckerman
OGC 2

DECISION

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

FILE: B-191554 DATE: July 13, 1978

MATTER OF: Midwest Service and Supply Co. and Midwest Engine Incorporated

DIGEST:

1. Where it is clear from protester's submissions that protest is without legal merit, GAO will decide matter on basis of these submissions without obtaining agency report.

2. Primary responsibility for interpreting and administering the Service Contract Act (SCA) is vested in Department of Labor (DOL) and DOL's determination as to those contracts to which the SCA will be applied and the manner in which it will be applied is not objectionable unless so unreasonable as to be clearly contrary to law.

3. Application of SCA to proposed contract for maintenance, repair and overhaul of heavy construction, material handling, ground powered industrial and vehicular equipment, gasoline and diesel engines and related items, and designation of certain work as subject to dual SCA/ Walsh-Healey Act coverage is not clearly contrary to law.

4. DOL's policy of basing wage determinations issued pursuant to SCA on wide geographic area within jurisdiction of procuring activity, when place of performance is not known prior to receipt of bids, although questionable, is not clearly contrary to law.

5. Descriptions of classes of employees contained in DOL wage rate determinations are sufficiently definite to be meaningful.

6. Omission of wage rate determination for certain white collar service employees does not render solicitation defective since DOL regulations provide orderly method by which such employees can be appropriately classified and afforded protection of SCA.

7. There is no legal requirement that procuring activity hold procurement in abeyance pending resolution of DOL administrative proceeding.

Midwest Service and Supply Co. and Midwest Engine Incorporated (Midwest) protest the application of the Service Contract Act of 1965 (SCA), 41 U.S.C. 351 *et seq.* (1970), to invitation for bids (IFB) GSW-8FWR-80006 issued by the General Services Administration (GSA), Region 8. The solicitation is for a requirements-type contract for the maintenance, repair and overhaul of heavy construction, material handling, ground powered industrial and vehicular equipment, engines and related items.

Protesters assert the following as the basis for their protest:

1. The procurement is not subject to the Service Contract Act because the principal purpose of the contract is not to furnish services through the use of service employees but is for the manufacture or furnishing of materials, supplies, articles and equipment within the meaning of the Walsh-Healey Public Contracts Act.

2. The solicitation and award of the contract is contrary to the policy of the Department of Defense (DOD) for which GSA acts as an agent.

3. The wage determinations do not relate to the locality where the work is to be performed. [The wage rates were composite rates for the entire 6-state geographic area comprising GSA Region 8.]

4. The solicitation improperly isolates one group of equipment for dual SCA/Walsh-Healey coverage.

5. The solicitation does not define the job classifications included in the wage determinations and those classifications do not conform to the categories of employees expected to be utilized during contract performance.

Midwest also claims that the questions raised by the protest are currently pending in an "administrative proceeding" in the Department of Labor (DOL), and suggests that bid opening and award would be improper "until the questions raised in said proceeding have been resolved." As we understand it, the "administrative proceeding" is an enforcement proceeding brought by DOL because of Midwest's alleged failure to comply with SCA requirements contained in other Government contracts.

Among other things, protesters request postponement of award pending resolution of the protest or, in the alternative, postponement of bid opening, award and resolution of this protest until the DOL proceeding has been completed.

This case falls within the ambit of our decisions which hold that where it is clear from a protester's submission that the protest is without legal merit, the matter will be decided on the basis of the protester's submission without our obtaining a report from the procuring activity. Braswell Shipyards, Inc., B-191451, March 24, 1978, 78-1 CPD 233.

For the most part, the issues raised by the protester involve the application, interpretation, and administration of the SCA. These issues have been considered by this Office on a number of occasions. See The Cage Company of Abilene, Inc., B-188119, B-187655, June 13, 1978, 78-1 CPD ___ (where we considered the "locality" issue); B.B. Saxon Company, Inc., B-190505, June 1, 1978, 57 Comp. Gen. ___, 78-1 CPD ___ (concerned with the "principal purpose" of the contract); Central Data Processing, Inc., 55 Comp. Gen. 675 (1976), 76-1 CPD 67 and Hewes Engineering Company, Incorporated, B-179501, February 28, 1974, 74-1 CPD 112 (dealing with types of employees covered by the Act); Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44 and 53 Comp. Gen. 370 (1973) (discussing

types of employees covered and locality); 53 Comp. Gen. 412 (1973) (dealing with applicability). These cases uniformly hold that it is the Department of Labor, and not other executive agencies, which is primarily responsible for the administration of the SCA. This concept was articulated in Hewes, supra, as follows:

> "[T]he Secretary of Labor is responsible for administering the Act and for promulgating rules and regulations under the Act. [citations omitted]. Thus in determining whether or not Service Contract Act provisions are applicable to a given procurement, we think it is reasonably clear that contracting agencies must take into account the views of the Department of Labor unless those views are clearly contrary to law."

Moreover, as we noted in Saxon, supra:

> "[T]he term 'services' as used in the SCA is not defined in the Act, and that resort to the legislative history of the Act is not helpful. Therefore it appears that the determination of whether the 'principal purpose' of a contract is to furnish 'services' through the use of 'service employees' is a matter within the reasonable discretion of the Secretary of Labor. We do not believe that a determination that an aircraft engine overhaul contract is one which has as its principal purpose the 'furnishing of services' (overhauling and repair of Government property) may be considered 'clearly contrary to law' since there is nothing in the Act which prohibits that determination. Cf., 53 Comp. Gen. 370 (1973). Accordingly, * * * the circumstances mandate that the Air Force submit a SF98 to DOL and include in its solicitation whatever wage determinations DOL finds to be applicable."

We think these cases clearly stand for the proposition that under existing administrative and legal requirements, DOL has primary responsibility for interpreting and administering the SCA, and that it is within DOL's discretion to determine those contracts to which the SCA will be applied and the manner in which it will be applied unless that determination and application is so unreasonable as to be "clearly contrary to law."

With respect to the "locality" issue, our Office has recently reviewed DOL's practice of issuing wage determinations based upon an assumed place of performance. The Cage Company of Abilene, Inc., supra. DOL's rationale in Cage was that the term "locality" as used in the Act, must have an "elastic and variable meaning," depending upon all of the facts and circumstances of a given situation and that therefore it is "not possible to devise any precise single formula which would define the exact geographic limits of a 'locality' that would be relevant or appropriate for all situations." DOL therefore took the position that if the actual place of performance is not known, a wage rate determination based upon an assumed place of performance rather than upon the actual place of performance determined after award is made, is a proper application of the SCA to these procurements. In this respect our decision noted that the "locality" issue has been the subject of "detailed consideration and review by this Office, the courts, the Executive Branch, and the Congress," and concluded that DOL's position was not legally objectionable. We stated:

> "We have once again carefully reviewed the legislative history of the Act, and have considered the arguments advanced by DOL and by the protester, along with the more recent developments * * *. Our reading of the legislative history of the Act continues to indicate that what Congress had in mind when it originally considered this particular legislation was the elimination of wage cutting in a fixed locality; we do not find any indication that the Congress intended to eliminate whatever competitive advantage a firm might have because it

> operated in an area with prevailing wages that are lower than those that prevail in another area.
>
> "Nonetheless, we note that in the 1975 hearings cited above [hearings before the Subcommittee on Labor Management Relations of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975)], members of the subcommittee made it clear that they thought DOL's position was consistent with the purposes of the Act, that in fact a uniform wage floor for each procurement for services, regardless of variable performance locations, was what had been intended and that the court's decision in Descomp [Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D.Del. 1974), where it was held the term "locality" referred to the area where the services are actually performed] was erroneous. We also note that the Executive Branch is again planning a major review of the area. Under these circumstances, we find it inappropriate to abandon our prior conclusions, which is that DOL's approach is not clearly "prohibited by the language of the Service Contract Act." (citations omitted)

We held that --

> "--DOL's use of a wide geographic area, consonant with the jurisdiction of a GSA regional office, as the locality basis for a wage determination in connection with a procurement conducted by that regional office, when it is not known where the services will be performed, is not clearly contrary to law."

The "locality" issue of this case falls squarely within the rationale of cited portions of Cage since although this solicitation divided the 6-state geographic region into distinct "service areas" (an area

within designated city or county limits or within the boundaries of a military post) where the work is to be performed, the solicitation also permitted prospective contractors to have their repair facilities and perform the work "not more than 100 miles from the service area boundaries" listed in the solicitation. Thus it is clear that prior to award, it is not known where the services would actually be performed.

Accordingly, with respect to the issues raised, we conclude that:

1. DOL's administrative determinations that the SCA applies to the proposed contract is not clearly contrary to law since the "principal purpose" of the proposed contract does not differ materially from those previous contracts we have considered in which the SCA was found to be applicable.

2. DOD's policy, of viewing the SCA as inapplicable to repair and overhaul contracts, is not controlling here and in fact was found in Saxon, supra, to be improper.

3. DOL's use of GSA Region 8 as the "locality" for the wage rate determination is, under the circumstances, not clearly contrary to law.

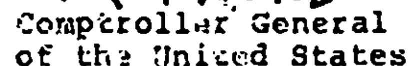
4. Application of the Walsh-Healey Act to a portion of the job functions related to the assembly, testing, inspection and shipping of Group C gasoline and diesel engines is consistent with DOL regulations, see 29 C.F.R. 4.122, 4.131 (1977) and is not so unreasonable as "to be clearly contrary to law "

5. The descriptions of the cla[illegible] of service employees contained in the DOL wage rate determination (automotive mechanic, welder, heavy equipment mechanic, sheet metal mechanic, etc.) are

> not indefinite and do not, in our opinion, require definition or elaboration in order to be meaningful. Moreover, we have examined the job classifications used in the wage determination and find that they materially conform to the categories of workers that are listed in the solicitation as those the Government would utilize if the work were performed in-house. We note that certain white collar employees (mainly clerical personnel) were not included in the wage determination. However, since DOL regulations provide an orderly method by which such omitted employees can be appropriately classified and afforded SCA protection, we do not conclude that the solicitation is defective in this respect. See 29 C.F.R. 4.6(b) (1977).

Finally, we point out that there is no legal requirement that the procuring activity hold its procurements in abeyance pending resolution of the DOL administrative proceeding. We note, however, that GSA has included in its solicitation a clause entitled "Potential Inapplicability of the Service Contract Act," which provides for contract price adjustments if the SCA is found to be inapplicable to the procurement.

The protest is summarily denied.



Deputy Comptroller General
of the United States