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DECISION

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

[Request for Reconsideration]

FILE: B-196829.2 DATE: September 18, 1980

MATTER OF: A&C Building and Industrial Maintenance Corporation--Reconsideration

DIGEST:

1. Where record indicates that at time Standard Form 98 was submitted to Department of Labor (DOL) and at time IFB was issued contracting officer did not know basis for DOL determination that protester had violated Service Contract Act (SCA) and what class of workers was affected, GAO cannot conclude that contracting officer erred in not including that class of employees in SF 98.

2. Incumbent contractor is not at competitive disadvantage because DOL wage rate determination did not include specific job classifications, since DOL wage rate determination notified bidders of their legal responsibility to comply with incumbent contractor's collective bargaining agreement with respect to wages and fringe benefits for job classifications not specifically included in wage rate determination but required for contract performance.

[A & C Building and Industrial Maintenance Corporation (A&C) requests reconsideration of our decision] A & C Building and Industrial Maintenance Corporation, B-196829, March 31, 1980, 80-1 CPD 238, on the basis that the decision reflects a "gross misunderstanding" of the facts of the case. We affirm our prior decision.

[In its protest A&C contended that the solicitation issued by the General Services Administration (GSA) and the accompanying Service Contract Act (SCA) wage determination were defective because the contracting officer failed to include certain job categories in the Standard Form (SF) 98, "Notice of Intention to Make a Service

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Contract and Response to Notice," which had been submitted to the Department of Labor (DOL). DOL regulations require a contracting officer to file with the SF 98 information concerning the number and classes of service employees "expected to be employed under the contract," as well as the incumbent contractor's collective bargaining agreement (CBA), if there is one applicable to the contract work. 29 C.F.R. 4.4 (1979). DOL then issues its wage determination(s) for the service contract involved based upon the information contained in the SF 98 and the information contained in any applicable CBA.

Here, the solicitation for "complete janitorial" services involved the traditional janitorial tasks of dusting, cleaning, and floor maintenance as well as paper baling, rubbish removal, snow removal, window washing, exterminating and landscaping. The protester argued that the contracting officer should have identified these latter categories on the SF 98. Our decision stated that:

> "It is not clear from the record, however, whether the contracting officer has reason to expect that these various categories of employees would be utilized to perform the contract. On the one hand, the incumbent apparently was performing much of the work with general maintenance and custodial workers and had a collective bargaining agreement covering those categories of workers. On the other hand, some of the work was performed by non-union workers, and other specific work was subcontracted. There is no indication in the record, however, as to whether any of this work was performed by general maintenance workers or specific categories of employees such as window washers or landscapers. Therefore, we cannot conclude that the contracting officer erred in submitting the SF 98 or that the resulting wage determination is deficient."

A&C now contends that the contracting officer knew more than our decision indicated. A&C points out that under its prior contract, DOL directed the contracting officer to withhold approximately $7000 in contract payments to A&C because A&C had paid its landscape workers

less than the prevailing wage for landscape workers in the applicable locality. The protester argues, therefore, that the contracting officer knew that DOL would require payment to workers doing landscape work on the basis "of an existing wage determination for landscape workers" and that regardless of whether union, non-union or subcontract personnel would be used, the contracting officer erred in not specifying on the SF 98 that landscaping (as well as other job categories) would be involved in contract performance. In this connection, A&C also contends that the contracting officer, after reviewing the timesheets for each day worked, also knew what category of workers performed each service.

DOL advises, however, that it directed GSA to withhold $7000 from A&C not because A&C failed to pay its landscape workers in accordance with a prevailing wage for landscape workers but because A&C did not pay these workers at the janitor-porter-cleaner rate set forth in its contract's wage determination. DOL made this determination (in accordance with the successor contractor doctrine of section 4(c) of the Act) because the CBA of A&C's predecessor contractor defined an "other" classification to include porters, cleaners and all service employees employed on the contract except those classes of employees specifically listed. Landscape workers were not so listed.

Nonetheless, A&C maintains that when GSA issued this IFB, the contracting officer knew that DOL would require landscape and other workers to be paid the janitor-porter-cleaner rate and should have included this information in the IFB or SF 98. Furthermore, A&C stated that as a result of its experience under the prior contract, it was the only bidder which knew that a wage rate in "excess of the minimum wage" would have to be paid to landscape workers and to other workers in the omitted job categories. Thus, A&C believes it was at a competitive disadvantage which the contracting officer should have rectified by including landscapers and the other job categories in the SF 98 so that DOL could issue an appropriate wage determination for those categories.

The record does not support A&C's allegation concerning the contracting officer's knowledge. The record shows

that the contracting officer did not learn of a DOL investigation until sometime after October 16, 1979; the SF 98 was submitted to DOL in August 1979. While the IFB was issued subsequent to October 16, the DOL correspondence concerning A&C's SCA violations did not disclose the precise nature of the violations, but only that A&C had not paid the "prevailing rate and fringe benefits" and overtime. None of the DOL correspondence, including that dated as late as May 1, 1980, disclosed which employees or category of employees were involved or the rate which should have been paid and why. Also, while the contracting officer may have seen timesheets which may have indicated the category of work being performed, that in itself does not establish that he knew that DOL viewed those performing in that work category as a separate category for SCA purposes or that DOL had mandated that they be paid at a particular rate. Therefore, we cannot conclude that the contracting officer, at the time he submitted the SF 98 to DOL or at the time he issued the IFB, knew that DOL had determined that A&C landscape workers and other classes of employees should have been paid the porter-cleaner rate as set forth in the applicable CBA.

With respect to A&C's allegation of competitive disadvantage, A&C argues that only it was aware that "a wage rate in excess of the minimum wage would be required to be paid for the landscapers and other employees" not listed in the wage determination and that other bidders, unaware of this requirement, were able to submit lower bids.

We do not think A&C should have been at a competitive disadvantage vis-a-vis other bidders. In both the IFB and the prior solicitation on which A&C was the awardee, the DOL wage determination stated:

> "[T]he wage rates and fringe benefits set forth in this wage determination are based on a collective bargaining agreement under which the incumbent contractor is operating. However, failure to include any job classification, wage rate or fringe benefit encompassed in the collective bargaining agreement does not relieve the successor contractor of the statutory requirement to comply as a minimum with the terms of the collective bargaining agreement

insofar as wages and fringe benefits are concerned." (Emphasis added.)

The CBA listed a wage rate for handyperson, foreperson, starter, and other. "Other" was defined to include "porters * * * cleaning persons, matrons and all other service employees employed in the building except for those other classifications specified above." (Emphasis added.) Moreover, the record shows that A&C signed a CBA with the same union containing the same language in August 1979, two months before this IFB was issued. Thus, both A&C and any other bidder on this procurement should have known that if it intended to use, for example, landscape workers, a classification not listed in the wage determination, rather than a porter to cut the grass, it would be bound by the terms of the CBA to pay the porter-cleaner or the so-called "other" rate. Indeed, it was because of the CBA's definition of "other" and the determination that A&C's landscapers fell within this category that DOL directed GSA to withhold payment to A&C. Thus, we think all bidders should have been aware of the applicable labor rates under the SCA and that A&C was not at a competitive disadvantage.

We affirm our decision.

Milton J. Socolar

For the Comptroller General
of the United States