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DECISION

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

FILE: B-190004 DATE: April 17, 1978

MATTER OF: University Mechanical & Engineering Contractors, Inc. - Reconsideration

DIGEST:

Decision B-190004, September 28, 1977, 77-2 CPD 238, wherein it was held that because of holding in Nello L. Teer Company v. United States, 348 F.2d 533 (1965), GAO was precluded from reviewing refusal by Department of Labor (DOL) to add classification of "plumbers or fitters helper" to wage determination, is affirmed. Case distinguishable from Electrical Constructors of America, Inc., B-188306, December 19, 1977, 77-2 CPD 479, in that latter decision did not involve refusal by DOL to add classification to wage determination.

By letter of February 17, 1978, counsel for University Mechanical & Engineering Contractors, Inc. (UMEC), requested reconsideration of our decision University Mechanical & Engineering Contractors, Inc., B-190004, September 28, 1977, 77-2 CPD 238, wherein we held that GAO was precluded from reviewing the refusal by the Department of Labor (DOL) to add the classification of "plumber or fitters helper" to a wage determination issued by DOL in connection with Tahoe-Truckee Sanitation Agency project No. C-06-1121-020-04.

In order to better understand our present decision we offer, by way of background, a brief summary of the events leading to our decision of September 28, 1977. On October 15, 1975, the Tahoe-Truckee Sanitation Agency contracted with Del E. Webb Corporation and UMEC, a joint venture, for the construction of a waste water

treatment facility in Tahoe Vista, California. Since this project was funded, in part, by Federal funds, the contractor agreed not only to comply with the requirements of the State labor standards relative to the payment of prevailing wages, but also to comply with the wage determination issued by DOL. The determination issued by DOL was issued pursuant to DOL's authority under the Davis-Bacon Act, 40 U.S.C. § 276a (1970). The list of prevailing wage rates, which was included in the contract, was based on a wage determination issued by DOL and published in the Federal Register. A statement immediately following the list stated, in part, that "Any classification omitted herein shall be not less than $9.735 per hour." The rate of $9.735 was the wage rate for laborers and was the lowest rate on the list.

We were advised by UMEC that in bidding for that contract the laborers rate of $9.735 was overlooked and UMEC submitted its bid based on the use of "plumbers or fitters helpers," a classification sanctioned by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local Union No. 350. The wage rate for plumbers and fitters helpers, as established by the collective bargaining agreement, was $7.03 per hour, including fringes, before October 1, 1976; $7.23 per hour, including fringes, between October 1, 1976, and August 1, 1977; and $7.73 per hour, including fringes, subsequent to August 1, 1977.

It was UMEC's position that the above-mentioned wage rates were the prevailing wage rates for its geographical area for the plumbers and fitters helpers classifications. Therefore, according to UMEC, an additional classification should have been added to the DOL wage determination applicable to the above-mentioned project, the State wage rate determinatinon should have been altered accordingly and the contract should have been modified to reflect the prevailing wage rate for this classification. DOL refused to add the classification to its wage determination. The basis for DOL's refusal was that since, according to UMEC, the work performed by the helpers could be reasonably divided

between the plumbers, pipefitter or laborer classes, the wage rate for these classifications already contained in the wage determination would be appropriate.

We held in our September 28 decision that, under the holding of Nello L. Teer Company v. United States, 348 F.2d 533 (1965), since the Secretary of Labor's determination to include or omit certain classifications of workers in a wage determination is not subject to review by the courts or by a Government agency, our Office was precluded from reviewing the matter.

UMEC bases its request for reconsideration on our holding in Electrical Constructors of America, Inc. (Elcon), B-188306, December 19, 1977, 77-2 CPD 479, wherein we held that the area practice of one union using electricians to perform certain functions in connection with the installation of underground cable need not be followed for Davis-Bacon wage purposes, since there was evidence of a substantial area practice to use lower-paid electrician laborers to perform these functions. It is UMEC's position that our Office, pursuant to our authority under the Davis-Bacon Act, caused funds withheld from the contractor for alleged Davis-Bacon underpayments to be released to the contractor. UMEC states that we took this position notwithstanding the fact that DOL had been involved in the matter and had already initiated a survey of the area practice relative to the question of whether the work which was the subject of the protest was work normally performed by electricians or electrician laborers. UMEC argues that our rationale in that case is applicable to its case.

While perhaps there are similarities between the two cases, we are of the view that the two cases can be distinguished. In the Elcon case both classifications, i.e., electrician laborers and electricians, were included in the wage determination. There was no request to DOL for any additional classifications. In the Elcon case the only matter with which we dealt was the question of which of two classifications, both of which were in the wage determination, would be

applicable. In UMEC's case, since the classification of "plumbers and fitters helper" was not included in the wage determination, we have the question of the propriety of DOL's refusal to add the classification after award. In essence, UMEC is requesting that GAO establish a wage rate or classification. It has long been the position of our Office that the refusal of the Secretary of Labor, as in UMEC's case, to approve the listing of an additional classification of workers to his wage schedule is not reviewable by the General Accounting Office. See Nello L. Teer Company v. United States, supra, and 45 Comp. Gen. 318 (1965).

Also, we note that in its letter of August 8, 1977, to our Office, UMEC cites Department of the Air Force's inclusion in contract of adjusted Davis-Bacon wage rate and adjustment of contract price, B-154687, January 26, 1977, 77-1 CPD 57, as authority for our Office to consider its (UMEC's) protest. In that decision we held that a contract to be performed in an area where union scale prevailed could be modified to include wage rates contained in a union agreement which became effective subsequent to issuance of the solicitation and prior to bid opening. However, in a recent decision, Dawson Construction Company, Inc., B-189036, February 9, 1978, 78-1 CPD 108, we overruled our holding in the above-mentioned Department of the Air Force case and under the standards, as set out in the Dawson case, we would not allow the modification of a contract to include wage rates which were not included in the wage rate determination at the time of award.

In view of the above, we find no material error of fact or law in our decision of September 28, 1977, and it must therefore be affirmed.

Deputy Comptroller General
of the United States