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Crowley Proc H

DECISION

THE COMPTROLLER GE[illegible]
OF THE UNITED S[illegible]
WASHINGTON, D.C. 2[illegible]

FILE: B-188119, B-187665 DATE: June 13, 1978

MATTER OF:
The Cage Company of Abilene, Inc.

DIGEST:

1. Department of Labor's policy of basing wage determinations, issued pursuant to Service Contract Act, on wide geographic area within jurisdiction of Government procuring activity, when place of performance is not known prior to receipt of bids, although questionable, is not clearly contrary to Act.

2. When solicitation for services to be provided throughout 5-state region divides region into service areas and requires successful bidders to perform within each service area, separate wage determinations for each service area, rather than single composite wage determination for entire area, are more appropriate.

3. Agency's improper designation of 5-state area on Standard Form 98, Notice of Intention to Make a Service Contract, as place of performance is not prejudicial to protester who points out that performance would not be limited to 5-state area, since under current Department of Labor approach same wage determination, reflecting 5-state area as locality of performance, would have been issued.

This case involves the propriety of wage determinations included in two solicitations issued by Region 7 of the General Services Administration (GSA) pursuant to the Service Contract Act of 1965, as amended, 41 U.S.C. § 351 et seq. (1970 and Supp. V 1975) (hereinafter the Act).

In each solicitation, the "locality" covered by the wage determination is the 5-state area comprising GSA Region 7. The protester objects to the wage determinations on the grounds that each encompassed an overly broad economic area and that each was determined by the location of the contracting agency (Government installation) rather than the place of contract performance. The protester contends that the wage determinations placed it in an unfair competitive position. For the reasons stated herein, we are denying the protests.

The protester, The Cage Company of Abilene, Inc. (Cage), a small business located in Abilene, Texas, initially protested the two solicitations to the GSA contracting officer. The first was Invitation for Bids (IFB) No. GSW-7FWR-70009, a solicitation for services involving the rebuilding of compressors for air conditioners and refrigeration units. Awards were made by service area, with each of the 5 states in Region 7 identified as a separate service area. The second solicitation, IFB GSW-7FWR-70008, was for maintenance, repair, and overhaul of Government-owned vehicles. Twenty-six service areas were named in that solicitation. Under solicitation -70009, bidders were not required to perform the work at the Government installation, nor were they required to be located within the service areas for which they chose to bid. IFB -70008, however, did require that the bidder have facilities within the service area for which it submitted a bid. Both solicitations contained wage determinations setting forth the minimum wages and fringe benefits to be paid service employees working under the contracts to be awarded. The "locality" covered by the wage determinations was stated to be "[GSA] Region 7, States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas."

GSA denied the protests, stating that the Department of Labor (DOL) had advised GSA that the wage determinations had been issued in accordance with applicable laws and regulations. Cage then timely filed its protests with this Office. However, Cage did not bid on these solicitations.

Cage asserts that DOL's position is contrary to both the legislative history of the Act and judicial precedent construing the Act. Cage also asserts, with respect to IFB-70009, that an improper wage determination was issued because GSA submitted to DOL an incorrectly completed Standard Form (SF) 98, "NOTICE OF INTENTION TO MAKE A SERVICE CONTRACT," regarding the place of performance. According to Cage, GSA should have entered "unknown" as the place of contract performance rather than the Region 7 5-state area, since it was possible that the successful bidder would perform outside the service area. Cage contends that GSA's erroneous entry on the SF 98 misled DOL into believing that performance would be limited to the area encompassed by Region 7.

The Act requires that every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain a provision specifying the minimum monetary wages and fringe benefits to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder as determined by the Secretary of Labor, or his authorized representative, in accordance with the "prevailing rates" and fringe benefits "for such employees in the locality." If a collective-bargaining agreement covers any such service employees, the specified rates and fringe benefits for such employees are to be as provided for in such agreement, including any prospective wage and fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. 41 U.S.C. 35(a) (Supp. V 1975).

DOL believes that the term "locality" must have "an elastic and variable meaning" depending upon all 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. 29 C.F.R. 4.163 (1977). Thus, when, pursuant to DOL's regulations, a contracting officer submits an SF 98 to DOL 30 days prior to the issuance of a solicitation for a procurement which may be subject to the Act, see 29 C.F.R. 4.4, and it is indicated therein that the services are to be performed at a known location, a prevailing wage rate determination is made based on where the contract will be performed. If, however, the actual place of performance is not known, DOL takes the position that a wage determination based upon an assumed place of performance, rather than upon the actual place of performance as determined after the award is made, represents a proper application of the Act to these procurements.

In this case, DOL believes that the 5-state region designation it used in establishing wage rates applicable to these procurements is not violative of the "locality" concept. DOL argues that the "locality" used for wage determination purposes must be a single locality of appropriate scope--not "a congerie of separate localities" with wages separately determined for each--to provide uniform minimum wages for all bidders. Accordingly, for both procurements, the wage rates and fringe benefits were derived from data collected by the Bureau of Labor Statistics in cross-industry surveys conducted in various areas throughout GSA's Region 7. The use of this "co-mingled data" plus an analysis of the wage board rates applicable to direct-hire employees of the Federal Government, yielded the rates quoted in the wage determinations.

The major question raised by this protest--concerning the proper interpretation and application of the statutory term "locality"--has been the subject of detailed consideration and review by this Office, the courts, the Executive Branch, and the Congress. In the first major case to treat the issue, DOL issued a wage determination based on the locality of the procuring activity (Washington, D.C. metropolitan area); a firm based in Wilmington, Delaware, where

the work would be performed, challenged the validity of the wage determination. We questioned DOL's position, stating that "the relevant language of the Act indicates quite clearly that 'locality' has reference to the place where services are performed." 53 Comp. Gen. 370, 375 (1973). In so doing, we pointed to the legislative history of the Act, which includes testimony by the then Solicitor of Labor that the purpose of the proposed Act was to prevent use of Federal funds to finance contracts which "undercut and depress the wage rate prevailing in a locality," Hearing before the Special Subcommittee on Labor of the House Committee on Education and Labor on H.R. 10238, 89th Congress, 1st Sess. 6 (1965), and that "the word 'locality' is comparable to * * * city, town, village, or any other political division of the state in which the contract is to be performed." See Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on H.R. 10238, 89th Cong., 1st Sess. 11 (1965). We further pointed out that DOL's approach of basing its wage determination on the locality of the Government installation for which services were to be performed, instead of on the locality of actual performance, had an adverse impact on the Government's procurement of services because it had the effect of creating a nationwide wage rate since all bidders, whatever their location, would be bound to pay the wage rates found to be prevailing in the area of the procuring activity. We concluded, however, that while DOL's approach was thus "subject to serious question," it was not clearly contrary to the Act, but recommended that DOL obtain clarification from the Congress regarding the proper interpretation of "locality." See also Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44. We reached a similar conclusion, and made a similar recommendation, in A-V Corporation, 53 Comp. Gen. 646 (1974), 74-1 CPD 111.

Subsequently, in Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D.Del. 1974), it was held that the term "'locality' as used in the Act refers to the area where

the services are actually performed * * *," 377 F. Supp. at 266, and that DOL could not properly base a wage determination on the locality of the Government installation when the services were not to be performed in that locality.

As a result of these decisions, an Executive Branch task force was created to study the locality issue and other problem areas involving the Act. The recommendations made by the task force culminated in the issuance by DOL of proposed regulations, pursuant to which wage determinations would be based on the locality of actual performance (determined by means of a "two-step" procedure, whereby the contracting agencies would first identify the firms that would participate in a procurement and then notify DOL of all locations where performance might take place, which would then issue a wage determination, as applicable, for each location.) See 30 Fed. Reg. 16086 (1975). Those proposed regulations, however, were opposed as not reflecting the original intent of Congress, see Hearings before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1965), and the subcommittee expressed its preference that the proposed regulations be "withdrawn." id. at 43. DOL ultimately withdrew most of what it had proposed, including the provisions dealing with locality. 41 Fed. Reg. 5388 (1976).

The Office of Federal Procurement Policy (OFPP) on January 21, 1977, then issued a statement of "Procurement Policy for the Service Contract Act," which adopted the two-step approach for determining locality. 42 Fed. Reg. 6033 (1977). However, that policy statement was canceled prior to the implementation date to enable the new Administration to fully consider the matter. 42 Fed. Reg. 8237 (1977). OFPP recently advised this Office that it is "presently planning to begin work with the Department of Labor and other agencies to review existing labor statutes that impact on procurement policy."

Throughout this period, DOL has maintained that its "flexible" approach is necessary to effectuate the purpose of the Act, which it views as the placing of all bidders on an equal footing with respect to wage rates. In this regard, DOL refers to the Walsh-Healey Act, 41 U.S.C. 35 et seq. (1970), under which the courts have upheld the use of nation-wide wage rates, despite the statutory language regarding "prevailing minimum wages * * * in the locality," see 41 U.S.C. 35(b), because the use of individual locality wage determinations "would freeze the competitive advantage of concerns that operate in low-wage communities and * * * would defeat the purpose of the Act." Mitchell v. Covington Mills, 229 F. 2d 506, 508 (D.C. Cir. 1955), cert. denied, 350 U.S. 1002 (1956). See also Consolidated Electric Lamp Co. v. Mitchell, 259 F. 2d 189 (D.C. Cir. 1958), cert. denied 359 U.S. 908; (1959); Ruth Elkhorn Coals, Inc. v. Mitchell, 248 F. 2d 635 (D.C. Cir. 1957), cert. denied 355 U.S. 953 (1958).

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 described above. 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, 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 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." 53 Comp. Gen. 370, 376; Descomp, Inc., supra; A-V Corporation, supra.

Accordingly, the protest issues are resolved as follows:

--DOL's use of a wide geographic area, consonant with the jurisdication 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.

--DOL's use of composite prevailing wage rates for an entire GSA region, when a solicitation divides the region into service areas and requires that the services be performed within each area, while not clearly illegal, is inappropriate since DOL is aware, prior to bid submission, of distinct localities within the region where contract services will be performed. In this regard, however, DOL has informed us that it is now aware that under solicitation -70008 performance was restricted to designated service areas and that because a specific locality can be ascertained when such geographic restrictions are imposed, it has commenced issuing separate wage determinations for each service area.

--GSA's designation on the SF 98 of the 5-state Region 7 area as the place of performance in connection with solicitation -70009 was not prejudicial to Cage. According to GSA, this incorrect identification of the place of performance "had no effect on the subsequent

prevailing wage determination by the Department of Labor." This position is based on informal assurance "by the Service Contract Office of the Department of Labor that their determination of the locality would have been the 5-state area even if the place of performance designation had been correctly stated as unknown." This is consistent with DOL's basic approach to the locality question, and thus it appears that in fact the wage determination would not have been different had the SF 98 indicated that the place of performance was "unknown."

The protests are denied.

Acting Comptroller General
of the United States