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DECISION

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

FILE: B-200025 DATE: February 20, 1981

MATTER OF: Rosendin Electric, Inc.

[Request for Reconsideration]

DIGEST:

1. Subcontractor which submitted quotations for electrical work to bidders for prime contract is interested party since basis for protest is that IFB contained incorrect Davis-Bacon Act wage rates for electricians which would favor potential nonunion subcontractors.

2. Decision dismissing original protest as untimely is affirmed where no error of law is shown in original decision. Argument that award of contract was initial adverse agency action on protest to agency does not warrant reconsideration where record shows that initial adverse agency action was opening of bids without taking corrective action on protest, and protest to GAO was not filed within 10 days of bid opening.

3. Where Davis-Bacon Act wage rate revision was published in Federal Register after bid opening but before award, cancellation of IFB is not mandatory unless agency intends to modify contract with low bidder to incorporate new wage rate. Award based on IFB's stated wage rate is proper since new wage rate was published later than 10 days before bid opening and is, therefore, not effective under Department of Labor regulations, 29 C.F.R. § 1.7(b)(2) (1980).

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Rosendin Electric, Inc. (Rosendin), has requested reconsideration of our decision dismissing as untimely its protest under invitation for bids (IFB) No. DACA05-80-B-0105 issued by the United States Army Corps of Engineers. Rosendin Electric, Inc., B-200025, September 2, 1980. Rosendin has also raised a new protest issue based upon the award of a contract on September 5, 1980, to Martin Electric Company, Inc. and Charles H. Martin, a joint venture (hereinafter referred to as Martin), pursuant to the subject IFB.

Both the request for reconsideration and the new protest are hereby denied.

The facts leading to Rosendin's protest were fully set forth in our September 2, 1980, decision and will be repeated here only insofar as is necessary. Subsequent to Rosendin's filing of its request for reconsideration and new issue of protest, we requested and received a report on this matter from the Corps of Engineers and Rosendin and Martin were invited to comment on that report.

Rosendin's original protest contended that the IFB was defective because the prevailing wage rates for electricians, required under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1976), were inaccurately set forth in the IFB. Rosendin had orally protested this issue to the Corps of Engineers before bid opening, but bids were opened on July 23, 1980, without amending the IFB to correct the alleged deficiency. Rosendin filed a protest on this issue with our Office on August 18, 1980. On August 22, 1980, the Department of Labor published a new higher wage rate for electricians in the Federal Register. On September 2, 1980, we dismissed Rosendin's protest as untimely because Rosendin had not filed its protest with our Office within 10 days of the initial adverse agency action (bid opening). On September 5, 1980, the Corps of Engineers awarded the contract to Martin. Rosendin filed its request for reconsideration with our Office on September 15, 1980, and simultaneously protested against the award to Martin based upon the old wage determination stated in the IFB rather than the new wage determination as published in the Federal Register on August 22, 1980.

The Corps of Engineers argues, among other things, that Rosendin is not an "interested party" with standing to protest under section 20.1(a) of our Bid Protest Procedures. 4 C.F.R. part 20 (1980). The Corps of Engineers believes that Rosendin is not an interested party because Rosendin did not submit a bid in response to the IFB but was merely a potential subcontractor which had submitted quotations to a number of firms which did bid for this contract.

We believe that Rosendin is an "interested party" as required under section 20.1(a) of our Bid Protest Procedures. In determining whether a protester satisfies the interested party criterion, we examine the degree to which the asserted interest is both established and direct. In making this evaluation, we consider the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. The requirement that a party be interested serves to insure the party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged action may be decided. However, the concept of an interested party should not be equated with the concept of standing to sue as developed by the courts. Thus, we have recognized the rights of nonbidders to have their protests considered on the merits where there is a possibility that recognizable established interests will be inadequately protected if our bid protest forum is restricted to bidders in individual procurements. See Abbott Power Corporation, B-186568, December 21, 1976, 76-2 CPD 509; Enterprise Roofing Service, 55 Comp. Gen. 617 (1976), 76-1 CPD 5. In the instant case, it is evident that Rosendin has a financial interest in making certain that the correct wage rate for electricians is used since Rosendin submitted quotations for the electrical work required under the prime contract to firms which bid in response to this IFB. Furthermore, Rosendin contends that use of an incorrect wage rate which is too low would favor a potential nonunion subcontractor over Rosendin which is a union company. In the circumstances, Rosendin's interest is sufficient to meet the "interested party" criterion. See Abbott Power Corporation, supra.

Rosendin's request for reconsideration of our September 2, 1980, decision is based upon the argument that the initial adverse agency action on Rosendin's protest to the Corps of Engineers did not occur until Rosendin received notification that award was made to Martin. Rosendin argues that the Corps of Engineers did not take action on the protest and, therefore, award to Martin constituted an implied denial of the protest and was the initial adverse action by the agency. We do not agree. Our Procedures require filing with our Office within 10 days of the initial adverse agency acton and actual or constructive knowledge of such action is sufficient to begin running of the 10-day period. 4 C.F.R. § 20.2(a) (1980). We have held that opening bids without taking corrective action on a protest constitutes an adverse agency action on a protest. Kleen-Rite Janitorial Service, Inc., B-178990, February 19, 1974, 74-1 CPD 78. Even though Rosendin is correct that the award of a contract may represent an adverse agency action, in the present case, the award to Martin was not the initial action on the protest. Accordingly, we find no error of law in our September 2, 1980, decision and, therefore, reconsideration on this issue is not warranted.

Regarding Rosendin's protest against award to Martin, this issue differs from Rosendin's original protest by virtue of the publishing of the new rates in the Federal Register on August 22 and award to Martin on September 5 without changing the IFB to conform to the published wage rate revision. Since this issue was filed within 10 days after Rosendin knew this basis for protest (notification of award to Martin), we find this protest issue to be timely.

Rosendin relies upon a number of our previous decisions which stand for, among other things, the proposition that award of a contract pursuant to the advertising statutes must be made upon the same terms which were offered to all bidders under the solicitation. Rosendin derives the general rule from these cases that the minimum wage rates required under the Davis-Bacon Act cannot be incorporated into the contract awarded in any other way than by inclusion in

the IFB's stated specifications. Rosendin relies primarily upon our decision in Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, reconsidered and affirmed in Tombs & Sons, Inc.--Request for Reconsideration, B-178701, November 20, 1975, 75-2 CPD 332, as support for its argument that, where a new wage rate is issued after bids are opened but before award, the proper remedy is for the contracting officer to cancel the IFB and resolicit using the new wage rate. Furthermore, Rosendin contends that Defense Acquisition Regulation (DAR) § 18-704.2(g)(2)(i)(B)(I) (1976 ed.) is invalid in view of the above decisions, since it would allow a contracting officer to award the present contract to Martin based upon the IFB's old wage rate and then amend the contract to incorporate the new wage rate.

The wage rates in question were required to be included in the IFB under provisions of the Davis-Bacon Act. The Secretary of Labor is authorized to issue regulations implementing the act. 40 U.S.C. § 276c. The implementing regulations state at 29 C.F.R. § 1.7(b)(2) (1980):

> "All actions modifying a general wage determination shall be applicable thereto, but modifications published in the Federal Register later than 10 days before the opening of bids shall not be effective, except when the Federal agency * * * finds that there is a reasonable time in which to notify bidders of the modification. * * *"

Thus, since the wage rate revision was not published in the Federal Register until after bid opening, the new wage rate is not applicable to the present procurement.

Even though we have recommended canceling a solicitation in circumstances where the wage rate was modified after bid opening but before award (See, for example, Dyneteria, Inc., supra.), we do not maintain that a solicitation must be canceled whenever a new wage determination is issued less than

10 days before bid opening or after bid opening but prior to award. If the procuring activity awards the contract under the old wage determination and the contract is to be performed under that old wage determination, then the contract awarded is the contract advertised and there is no need to cancel the solicitation. If, on the other hand, the procuring activity intends before award to incorporate the new wage determination into the contract, then, under the reasoning in the Dyneteria decision, the solicitation should be canceled and readvertised in order to protect the equality of competition. Since we have been informally advised by the Corps of Engineers that it has not modified the contract with Martin to incorporate the new wage rate under DAR § 18-704.2(g)(2)(i)(B)(I), and do not intend to, we will not rule on the validity of the regulation. Accordingly, this issue of Rosendin's protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States