Ms. Eaton

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DECISION

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

FILE: B-199050 DATE: March 2, 1981

MATTER OF: Hayes International Corporation

[Protest of FAA Contract Award]

DIGEST:

When Department of Labor adopts final rule indicating that it will follow Court of Appeals decision, issued after date of solicitation, and will examine procurements on case-by-case basis to determine appropriate locality for wage determinations, protest arguing that minimum hourly wage rates were improperly set on nationwide basis is denied.

Hayes International Corporation protests the award of a contract under a Federal Aviation Administration solicitation for painting of a single airplane, arguing that the minimum hourly wage rates specified in the solicitation pursuant to the Service Contract Act of 1965, as amended, 41 U.S.C. § 351(a)(1) (1976) (SCA), were improperly set on a nationwide basis.

Hayes cites a recent U.S. Court of Appeals decision, Southern Packaging and Storage Co., Inc. v. United States, 618 F. 2d 1088 (4th Cir. 1980), which held that for wage determination purposes, "locality" as used in the SCA refers to the Standard Metropolitan Statistical Area where the bidding party's plant or facility is located. Hayes' wage rates, which were established by a collective bargaining agreement, were less than those specified in the solicitation.

During development of the protest, the Department of Labor (DOL) published final rules which indicate that it will follow Southern Packaging. In the future, the regulation states, DOL will examine each procurement on an individual basis to determine the appropriate locality or

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localities for wage determinations. 46 Fed. Reg. 4320 at 4326, 4348 (1981). But see 29 C.F.R. 4.53(b), as revised at 46 Fed. Reg. 4348 (1981) (with respect to successor contractors). We are denying Hayes' protest.

Hayes recognizes that under prior decisions of our Office, it could not have prevailed. E.g., The Cage Company of Abilene, Inc., 57 Comp. Gen. 549 (1978), 78-1 CPD 430. Cage also concerned a contract whose actual place of performance was not known prior to contract award except in terms of broad geographic scope. DOL established a five-state "composite" prevailing wage rate as applicable to the contract. While we disagreed with DOL's position that its "flexible" approach, which it viewed as placing all bidders on an equal footing with respect to wage rates, was necessary to effectuate the purpose of the SCA, we nonetheless concluded that:

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

We stated that the legislative history of the SCA did not indicate that the Congress intended to eliminate any competitive advantage held by a firm which operated in an area with lower prevailing wages than other prospective contractors. Our conclusion, however, was based on testimony to the contrary, presented during Congressional hearings on regulations proposed by the Department of Labor in 1975, and a planned Executive Branch review of the entire problem.

The Fourth Circuit is the first Court of Appeals to construe "locality," as used in the SCA. We note that it affirmed a lower court ruling for three reasons. First, DOL indicated that in 98 percent of requested determinations, the Standard Metropolitan Statistical Area provides an appropriate base for mean average wages, and that a nationwide minimum wage rate is used in only one-half of one percent of requested determinations. The court found this was not an undue burden. Second, the court believed that the definition of "locality" as a "particular spot, situation, or location" could not, by

common sense, be considered synonymous with nationwide. Third, the court distinguished "locality" as used in the Walsh-Healey Act from the term used in the Service Contract Act. Both the Court of Appeals and the lower court in Southern Packaging adopted the view of Descomp, Inc. v. Sampson, 377 F. Supp. 254 at 265 (D. Del. 1974), which, in turn, had relied on 1965 testimony of the then-Solicitor of Labor before a Congressional subcommittee that the term "locality" was comparable to that used in the Davis-Bacon Act, and meant the city, town or village in which the contract was to be performed.

In a footnote, the Court of Appeals stated that it did not accept Southern Packaging's contention that national wage rates were never permissible, since there might be "rare and unforeseen" service contracts which might be performed at locations throughout the country and which would generate truly nationwide competition. Whether national wage rates might be permissible under these circumstances was not decided.

Although we agree with the Court of Appeals, we note that the protested solicitation was issued before the decision was rendered and closed before the time for seeking review by the Supreme Court had expired. The resulting contract had been awarded and performance completed long before DOL announced its decision to follow Southern Packaging and issued implementing regulations. Under these circumstances, we do not believe it appropriate to disturb the action taken.

The protest is denied.

Milton J. Socolar

For The Comptroller General
of the United States