

**DECISION**

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

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**FILE:** B-212689.3, B-212689.4    **DATE:** February 14, 1984

**MATTER OF:** Logistical Support, Inc.

**DIGEST:**

Where wage determination increasing wage rate was received at least 10 days prior to bid opening, but was not included in solicitation by amendment, contracting officer's cancellation and readvertisement of requirement were proper. To have made award to low bidder and then modified contract to include wage determination would have been tantamount to awarding a contract different from the one advertised.

Logistical Support, Inc. (Logistical), protests the cancellation of invitation for bids (IFB) No. N68836-83-B-0042, issued by the Naval Supply Center, Jacksonville, Florida, and the issuance of a new IFB for the same services. Both IFB's solicited bids to provide mess attendant services for building A515 at the Naval Air Station, Key West, Florida.

The protest is denied.

On May 11, 1983, Notice of Intention to Make a Service Contract and Response to Notice (standard form 98) was forwarded to the Department of Labor. The notice cited an applicable collective bargaining agreement, but a copy was not attached as required by section 12-1005.2(b)(1)c (1976 ed.) of the Defense Acquisition Regulation (DAR). IFB No. N68836-83-B-0042 was issued on July 11, 1983, without a wage determination. However, section H-12 of the invitation schedule contained the following notation:

"An SCA Wage Determination has been requested from the U.S. Department of Labor but has not been received. Upon receipt, the applicable Wage Determination, if any, will be incorporated herein."

The notice, required by DAR § 12-1005.2(b)(2), advising prospective bidders of the collective bargaining agreement, was not included in the solicitation. Also, the invitation failed to incorporate the provisions of DAR § 7-2003.85 (1976 ed.), entitled "SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement." This provision applies the economic terms of a predecessor contractor's collective bargaining agreement to any successor contract awarded.

We have been informally advised by the Navy that the procuring activity probably received the wage determination at least 10 days prior to bid opening. However, for some unknown reason, the solicitation was not amended to include the wage determination.

Bids were opened as scheduled on August 10, 1983. Only two bids were received. Logistical was the apparent low bidder. This limited response led to a review of the contract file and it was discovered that, in addition to the above-mentioned deficiencies, the requirement had not been, as required by DAR § 1-1003.1 (1976 ed.), synopsisized in the Commerce Business Daily (CBD).

Logistical contends that prior to bid opening, it inquired of the contracting officer as to whether a wage determination had been included in the solicitation by modification and, if not, if the solicitation would be modified to extend the bid opening date. Logistical states that it was advised that even though there was no wage determination, bid opening would be held as scheduled and that negotiations would be conducted with the successful bidder to incorporate the wage determination when it was received.

Logistical maintains that it was the low, responsive and responsible bidder and should have been awarded the contract and that when the wage determination was received by the contracting officer, negotiations could have been conducted with Logistical to incorporate the wage determination into the contract. In support of its position, Logistical cites DAR § 12-1005.3, which states, in pertinent part, as follows:

"Applicability of Wage Determinations - Subsequent to Award. If a required wage determination is not included in the solicitation or contract due to failure to comply with 12-1005.2(b)(1) (issuance of SF 98) or (2) (notice to interested parties of a collective bargaining agreement), and if the

contracting officer receives a wage determination from the Department of Labor within 30 days of the late filing of the SF 98/98a or the discovery by the Department of Labor of the failure to include a wage determination required by this part:

"(i) the contracting officer shall attempt to negotiate a bilateral notification to:

"(A) incorporate the appropriate clauses, if not previously included;

"(B) incorporate the required wage determination, which shall be effective as of the date of issuance unless otherwise specified; and

"(C) equitably adjust the contract price to compensate for any increased cost of performance under the contract by the wage determination;  
. . . ."

Cancellation of an IFB after bid prices have been exposed can have a harmful effect on the competitive bid system. For that reason, cancellation is improper unless there is a cogent and compelling reason which justifies the cancellation. Massman Construction Co. v. United States, 60 F. Supp. 635 (Ct. Cl.), cert. denied, 325 U.S. 866 (1945); Downtown Copy Center, B-206999.6, December 6, 1982, 82-2 CPD 503. However, a contracting officer has broad discretion in determining whether a cogent and compelling reason exists, Marmac Industries, Inc., B-203377.5, January 8, 1982, 82-1 CPD 22, and thus a determination to cancel a solicitation after bid opening is not legally objectionable unless there clearly is no reasonable basis for it. Central Mechanical, Inc., B-206030, February 4, 1982, 82-1 CPD 91.

We recognize that an award to Logistics literally would have been based on the advertised specifications. However, prior to bid opening, the contracting officer knew (1) of the existence of the collective bargaining agreement and the existence of the wage determination; (2) that the wage determination contained higher wage rates; and (3) that the contract awarded would have to be modified to incorporate the wage determination. In light of these circumstances, we

believe that an award to Logistical would have been tantamount to awarding a contract different from the one advertised. A contractor should not be selected on a different basis than that under which it must perform the contract. See Tombs & Sons, Inc.-- Request for Reconsideration, B-178701, November 20, 1975, 75-2 CPD 332; Prestex Inc. v. United States, 320 F2d 367, 112 Ct. Cl. 620 (1963). Also, it is always possible that had award been made to Logistical and the contract modified to incorporate the wage determination, the contract price would not represent the most favorable price to the government since we have no way of knowing, with any degree of certainty, what the bid price of the other bidder would be if it were based on the wage determination. We do not know if the other firm based its bid, as Logistical did, on the minimum wage. Being a local firm, it could well have been aware of the collective bargaining agreement and based its bid (which was in excess of \$66,000 higher than Logistical's bid) on the wage rates contained in the collective bargaining agreement. For that matter, the other bidder might have been a union firm required to pay wage rates in compliance with the collective bargaining agreement. The only way that we can be certain of who would have submitted the low bid based on the wage determination is to place all of the bidders on equal footing under a new solicitation. See Dyneteria, Inc., B-178701, July 15, 1975, 75-2 CPD 36; Minjares Building Maintenance Company, B-184263, March 10, 1976, 76-1 CPD 168.

Logistical argues that it should have been awarded the contract and, pursuant to DAR § 12-1005.3, quoted above, negotiations to incorporate the wage determination into the contract could have been conducted. While DAR § 12-1005.3 does provide for the modification of the contract to reflect the wage determination where the wage determination is issued subsequent to award, in the present case, the wage determination was issued and received prior to award. In a similar case involving a National Aeronautics and Space Administration (NASA) regulation (NASA PR 12-1005.3(b)), which used language identical to that contained in DAR § 12-1005.3, we held that the regulation applied only to wage determinations received after award. See Suburban Industrial Maintenance Co., B-189027, September 16, 1977, 77-2 CPD 198.

Because of the procuring activity's failure to incorporate the applicable wage determination in the solicitation, the contracting officer had a reasonable basis for the determination to cancel the IFB and to issue a new solicitation for the services. Therefore, it is not necessary to address the failure of the procurement to be synopsisized in the CBD.

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Accordingly, the protest is denied.

*for* *Milton J. Aouler*  
Comptroller General  
of the United States