

DOCUMENT RESUME

G3876 - [A2774009]

[Improper Wage Determination in Contract]. B-187671. September 29, 1977. 5 pp. + 6 enclosures (6 pp.).

Decision re: Government Contractors, Inc.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Navy: Naval Facilities Engineering Command, Alexandria, VA; E. C. Professional Services.

Authority: Service Contract Act (41 U.S.C. 351). A.S.P.R.

2-407.9(b)(3)(iii). A.S.P.R. 12-1005.8(h). 29 C.F.R. 4.145.

B-182436 (1975). B-178701 (1975). 56 Comp. Gen. 160. 55

Comp. Gen. 97.

The protester objected to the award of a contract which contained an improper Service Contract Act wage determination. The Navy should terminate the contract and resolicit the requirement under the proper wage determination because the Navy failed to insure that the contract as awarded included the proper determination. (Author/SC)

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DECISION



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

FILE: B-187671

DATE: September 29, 1977

MATTER OF: Government Contractors, Inc.

DIGEST:

Where contract is awarded containing improper Service Contract Act wage determination because Navy failed to request new determination when required by ASPR §12-1005.8(b) (1 month prior to award) contract should be terminated and requirement resc. cited under proper wage determination because Navy failed to insure that contract as awarded included proper determination and Department of Labor has said that revised determination must be incorporated in contract. Further, proper way to determine effect of new wage determination on competition is to recompet.

Government Contractors, Inc. (GCI), has protested the award of a contract to E.C. Professional Services (ECPS) by the Naval Facilities Engineering Command for janitorial services at the Sewalls Point Area, Norfolk, Virginia, under invitation for bids (IFB) No. N62470-76-B-0181.

This procurement has been the subject of several decisions by our Office.

When bids were opened on September 2, 1976, the low bid of \$612,000 was submitted by GCI. ECPS was the fifth low bidder at \$751,680. GCI alleged an error in its bid and its request for correction was denied by the Navy and its bid was rejected.

GCI protested this action by the Navy and in our decision in Government Contractors, Inc., B-187671, January 31, 1977, 77-1 CPD 80, we questioned the reasonableness of the denial of GCI's request. Furthermore, we noted that from the worksheets submitted by GCI to support its request for correction, it had based its bid on 141,700 man-hours, whereas the IFB required 169,000 man-hours. We stated that this called into question the

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responsibility of GCI and recommended that a determination of GCI's responsibility be made prior to any award.

By letter of February 8, 1977, the Navy requested reconsideration of our decision contending that the compliance with the man-hour requirement was a matter of responsiveness rather than responsibility, and that GCI's bid could be disregarded without a responsibility determination. On March 3, 1977, we affirmed our prior decision as the bid of GCI was responsive on its face and it was only after bid opening, through a review of the work-sheets, that the man-hour discrepancy was discovered. See Government Contractors, Inc. - Reconsideration, B-187671, March 3, 1977, 77-1 CPD 159.

By letter of March 21, 1977, the Navy requested clarification of our prior decisions in view of the possibility that award to GCI, even at its corrected bid price, could be unconscionable. Further, the Navy argued that if it made a negative responsibility determination on GCI, when the matter was submitted to the Small Business Administration (SBA) for consideration of the issuance of a certificate of competency (COC), a COC was likely to be issued because GCI did possess the capacity and credit to perform the contract but was not intending to utilize the required man-hours. Therefore, if SEA issued a COC, the Navy would have to award to GCI, knowing GCI did not intend to comply with the man-hours.

The same day, April 29, 1977, our Office issued its decision, which reaffirmed our prior decisions and answered the Navy's latest allegations. The Navy made an urgency determination under section 2-407.8(b)(3)(iii) of the Armed Services Procurement Regulation (1976 ed.) and awarded the contract to ECPS as the only bidder who stated it would comply with the man-hours requirement.

On May 9, 1977, GCI protested this award to our Office on several grounds.

One basis of protest is that a new wage determination under the Service Contract Act (41 U.S.C. § 351 (1970)) was issued after bid opening and prior to the date the contract was awarded to ECPS.

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In a letter dated August 18, 1977, the Department of Labor recites the following regarding the wage determination contained in the IFB under which the award was made.

"It is our understanding that bids were originally invited for this contract on February 5, 1976, and that this invitation was subsequently cancelled when problems arose over the contract specifications. The Department of Labor issued Wage Determination 74-1025(Rev.-2) on March 5, 1976, in response to a notification from the Navy of its intent to contract. This determination was issued pursuant to Section 4(c) of the Service Contract Act and was based on a collective bargaining agreement negotiated by the Laborers International Union of North America, who represented the workers both at the Naval Air Station and the Naval Supply Center.

"On April 1, 1976, W. M. Grace, Inc., was brought in to perform janitorial services at the Air Station when Eastern Service Management Co. was terminated. Until a new contract covering both locations could be awarded, W. M. Grace, and Surf Cleaners, whose contract at the Supply Center had expired, were performing on month to month extensions. Wage Determination 74-1025(Rev.-2) was applied to these contracts and subsequent extensions.

"An IFB, containing WD 74-1025(Rev.-2), was again issued for the combined contract on August 9, 1976, without proper notice to this office. Bids were opened on September 3, 1976. Subsequent to the opening of bids it is our understanding that certain bidders filed formal protest with the * * *[General] Accounting Office. These protests necessitated final award of this contract being delayed until April 29, 1977, at which time E. C. Professional Services received the award.

"During the period between April 1, 1976, and May 16, 1977, the date E. C. Professional Services took over the contract, W. M. Grace and Surf Cleaners

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performed custodial services on a month to month basis. Each one of these extensions in effect constituted a wholly new contract. See Section 4.145 of 29 CFR 4 in this regard. The Department of Labor was never advised of this situation and no effort was made by the Navy to insure that WD 14-1025(Rev.-2) was the appropriate WD for the numerous contract extensions and the readvertisement on August 9, 1976.

"On March 7, 1977, W. M. Grace and the Laborers International Union of North America entered into a collective bargaining agreement, with wages and fringe benefits that were to become effective on April 1, 1977. Under Section 4(c) of the Service Contract Act this bargaining agreement would then have established minimum wage rates and fringe benefits to be paid by any successor contractor. Had the Department of Labor received proper notification of the contract extension effective April 1, 1977, a revised wage determination would have been issued based on the aforementioned collective bargaining agreement. This wage determination would have been applicable to the remainder of the W. M. Grace - Surf Cleaner contract and would then have had application to the successor, E. C. Professional Services under N62470-76-C-0181 as revised."

Further, Labor has advised the Navy that "*** steps should have been taken to insure that the proper wage determination was incorporated into the awarded contract ***" and that "All necessary steps should be taken *** to retroactively incorporate ***" the revised wage determination into the contract.

Therefore, except for the failure of the Navy to submit a new request for a wage determination (SF 98) pursuant to ASPR § 12-1005.8(b), there would have been a new wage determination, effective April 1, 1977, 1 month prior to the award to ECPS, included in ECPS's contract.

We have recognized that affording protection to service workers and thereby furthering the purpose of the Service Contract


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Act may be regarded as a compelling reason to cancel an IFB after bid opening in order to resolicit on a revised wage determination. Square Deal Trucking Company, Inc., B-182436, February 19, 1975, 75-1 CPD 103. Also, we have held that where a revised wage determination is issued after bid opening, but prior to award, and the contract is awarded on the basis of the old wage determination and subsequently amended to include the revised determination, corrective action should be taken. See Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, affirmed on reconsideration in Tombs & Sons, Inc., B-178701, November 20, 1975, 75-2 CPD 332, and High Voltage Maintenance Corp., 56 Comp. Gen. 160 (1976), 76-2 CPD 473. We believe the rationale of those cases is applicable here since Navy failed to insure that the contract as awarded included the proper wage determination and has been told by Labor to make the appropriate revision to the contract. In Dyneteria, supra, we also noted that speculation as to the effect on competition of a change in specifications, including a new wage determination, is dangerous and should be avoided as the proper way to determine such effect is to compete the procurement under the new rates.

Accordingly, we believe the contract with ECPS should be terminated for the convenience of the Government and the requirement resolicited under a proper wage determination.

Based on the foregoing, it is not necessary to consider the other issues raised by GCI in its protest.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.


Acting Comptroller General
of the United States



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

J. Veckins
P. I.

IN REPLY
REFER TO: B-187671

September 29, 1977

The Honorable Floyd D. Spence
House of Representatives

Dear Mr. Spence:

We refer to your letter to our Office dated May 10, 1977, in regard to the protest of Government Contractors, Inc., concerning the award of a contract under invitation for bids No. N62470-76-B-0181 issued by the Department of the Navy.

By decision of today, copy enclosed, we have sustained the protest.

Sincerely yours,

R. W. K. Miller
Acting Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20418

J. Vickens
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IN REPLY
REFER TO: B-187671

September 29, 1977

The Honorable John L. McClellan
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of decision B-187671 of today in the matter of Government Contractors, Inc., wherein we recommend that the contract awarded under invitation for bids N62470-76-B-0181 be terminated for the convenience of the Government because it did not include the proper wage determination under the Service Contract Act (41 U.S.C. § 351 (1970)).

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Sincerely yours,

Prokett
Acting Comptroller General
of the United States

Enclosure



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

J. Vick
P. I

IN REPLY
REFER TO:

B-187671

September 29, 1977

The Honorable
The Secretary of the Navy

Dear Mr. Secretary:

Enclosed is a copy of our decision of today in the matter of Government Contractors, Inc., wherein we recommended that the contract awarded under invitation for bids N62470-76-B-0181 be terminated for the convenience of the Government because it did not include the proper wage determination under the Service Contract Act (41 U.S.C. § 351 (1970)).

As the decision contains a recommendation for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires your agency to submit to the named committees within prescribed times written statements of the action taken on the recommendation.

We would appreciate advice of whatever action is taken on the recommendation.

Sincerely yours,

Acting

John K. Miller
Comptroller General
of the United States

Enclosure



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

J. Vickers
P. I.

IN REPLY
REFER TO: B-187671

September 29, 1977

The Honorable Jack Brooks
Chairman, Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of decision B-187671 of today in the matter of Government Contractors, Inc., wherein we recommend that the contract awarded under invitation for bids N62470-76-D-0181 be terminated for the convenience of the Government because it did not include the proper wage determination under the Service Contract Act (41 U.S.C. § 351 (1970)).

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Sincerely yours,

W. K. ...
Acting Comptroller General
of the United States

Enclosure



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

J. Vickers
P. I.

IN REPLY
REFER TO: D-187671

September 29, 1977

The Honorable George H. Mahon
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of decision B-187671 of today in the matter of Government Contractors, Inc., wherein we recommend that the contract awarded under invitation for bids N62470-76-B-0181 be terminated for the convenience of the Government because it did not include the proper wage determination under the Service Contract Act (41 U.S.C. § 351 (1970)).

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Sincerely yours,

R. W. K. 1/1/77
Acting Comptroller General
of the United States

Enclosure



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

J. Vickers
PL I

IN REPLY
REFER TO: B-187671

September 29, 1977

The Honorable Abraham A. Ribicoff
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of decision B-187671 of today in the matter of Government Contractors, Inc., wherein we recommend that the contract awarded under invitation for bids N62470-76-B-0181 be terminated for the convenience of the Government because it did not include the proper wage determination under the Service Contract Act (41 U.S.C. § 351 (1970)).

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Sincerely yours,

Ray K. ...
Acting Comptroller General
of the United States

Enclosure