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DECISION

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

FILE: B-189036 DATE: February 9, 1

MATTER OF: Dawson Construction Company, Inc.

DIGEST:

1. Failure of Department of Labor's Atlanta Regional Office to forward to DOL headquarters prevailing wage information received subsequent to time GSA issued wage determination in solicitation is not clerical error permitting amendment of wage rates contained in GSA contract.

2. Decision B-184687, January 20, 1977, holding that contract to be performed in area where union scale prevailed could be modified to include wage rates contained in union agreement which became effective subsequent to time solicitation was issued and prior to award is overruled, since there was no evidence that wage rate determination, as originally issued, was not based on all of evidence available at time of issuance or that wage determination did not contain rates intended at that time.

By letter of May 6, 1977, from its Acting General Counsel, the General Services Administration (GSA) requested a decision by this Office as to whether the wage decision included in contract No. GS-04-B-16543 should be amended to reflect certain wage rate changes.

On July 15, 1976, the GSA Regional Office in Atlanta issued an invitation for bids for phase 4, involving the construction of the superstructure of a Federal building and United States courthouse in Fort Lauderdale, Florida. Included in the invitation was Wage Rate Decision No. FL75-1011, which had been issued by the Department of Labor on January 24, 1975, but which had been superseded by Wage Rate Decision FL76-1043 on April 9, 1976, and modification No. 1 thereto of April 16, 1976. Amendment No. 2 to the invitation, issued on August 16, 1976, deleted the superseded wage rate decision (FL75-1011) and substituted applicable Wage Rate Decision FL76-1043 as changed by modification No. 1. Bids were opened on August 26, 1976, and contract No. GS-04-B-16543 was awarded to Dawson Construction Company, Inc. (Dawson), on September 24, 1976. Notice to proceed was sent to Dawson on October 22, 1976. Dawson commenced work at the site in January 1977.

Sometime during the month of January, the business agent for the International Union of Operating Engineers, Local 675, questioned the wage rates incorporated into Dawson's contract. This was brought to the attention of the Department of Labor (DOL) which on January 27, 1977, issued a letter of inadvertence advising GSA that the rates for power equipment operators were in error and requesting that "appropriate action" be taken.

In a letter dated February 24, 1977, DOL advised GSA that "in the instant case of inadvertent clerical error, the contracting officer must require the contractor to follow the appropriate rate changes made by the Secretary of Labor, including the payment of corrected wages to the affected craftsmen and the appropriate amendment of the minimum wage schedules incorporated in the contract specifications."

Our interpretation of the Davis-Bacon Act, 40 U.S.C. § 276a (1970), is that its provisions contemplate that minimum wage conditions based upon prevailing wage determinations are to become effective only when, as expressly directed, they have been included in advertised or negotiated specifications and that the act does not authorize making such conditions effective in any other way. See Hendry Corporation, B-179871, April 1, 1975, 75-1 CPD 189; 42 Comp. Gen. 410 (1963). However, we have permitted the correction of contract wage rates in instances where the advertised conditions have contained inadvertent errors, i.e., clerical errors, as opposed to errors of judgment. See 29 C.F.R. § 1.7(c) (1976); 40 Comp. Gen. 557 (1961).

Thus, the primary question to be answered is whether the circumstances of the present case indicate an error in judgment, as contended by GSA, or merely a clerical error. In this regard, we have held that clerical errors are those errors resulting from transposition of rates, classifications or figures, and other clerical mistakes in processing the schedules. It has been the position of this Office that the Davis-Bacon Act permits, if it does not require, the correction of these errors. This position was premised on advice received from DOL that unless such errors in the written text of wage schedules can be corrected to accurately and fully reflect rates determined to be prevailing on the basis of the evidence existing at the time the schedules issued, the Department's effort to discharge its wage predetermination responsibilities would be adversely affected. See B-154687, September 22, 1964. However, in regard to the matter of correcting judgment errors,

we have held that the Davis-Bacon Act does not require or permit such corrections, since the act is fully complied with when a contract is awarded on the basis of advertised specifications containing a minimum wage schedule which correctly states the determination actually made at the time. 40 Comp. Gen. supra. The rationale for this holding is that the Supreme Court has pointed out that the language of the act and its legislative history plainly show that it was enacted to protect workers from substandard earnings by fixing a floor under wages on Government projects. United States v. Binghamton Construction Company, 347 U.S. 171, 177 (1954). The statute neither directs nor authorizes adjustment of the wage floor during performance of the contract to conform to changes in the prevailing rates. So far as the fixing of the wage floors included in the specifications is concerned, the statutory function of the Secretary of Labor is exhausted once he has furnished a prevailing wage determination and a contract has been awarded containing a minimum wage schedule based thereon. 40 Comp. Gen., supra.

Concerning the inadvertence involved in the present case, DOL, by letter of June 7, 1977, advised us that the wage determination in question (FL76-1043), which was in the Federal Register issued on April 9, 1976, and modified on April 16, 1976, was based on a survey conducted in 1973, and resulted in a determination that with the exception of the equipment operators, negotiated rates were prevailing for all classifications. Subsequently, all rates except the rates for equipment operators were escalated. According to DOL, general wage determinations, which are published in the Federal Register, are compiled and processed by the National Office of the Wage and Hour Division, whereas project wage determinations are handled by the appropriate Regional Office. However, because contractors and local unions generally are familiar with the Regional Office personnel, they frequently submit payment evidence directly to that office. Under customary procedures, the Regional Office in turn submits payment evidence received for use in general wage determinations to the National Office. In the present case, the Regional Office failed to forward data received in July 1976, which, according to DOL when examined together with data in the National Office, would have resulted in the issuance of negotiated rates for equipment operators.

The failure of the National Office to receive the additional data apparently resulted from the following train of events. By letter of April 1, 1976, the Business Manager of Operating Engineers Local No. 675 submitted Local 675's current collective bargaining

agreement to DOL in Washington, D.C., and advised that verification of wage payments would follow. Payment evidence was submitted to the National Office by letter of May 10, 1976. Because in many cases the forms WD-10 were not completely filled out, and those which were completed were not sufficient by themselves to effect a change in the wage rates, the wage analyst in the National Office called the Business Manager for Local 675 on May 24 and requested that he obtain the necessary additional information. The Business Manager, by letter of July 9, 1976, submitted additional payment evidence to the Area Office of the Wage and Hour Division in Fort Lauderdale, Florida, which in turn forwarded the data to the Regional Office in Atlanta. However, this data was not forwarded to the National Office in Washington, D.C., but rather additional payment evidence was requested from the Business Manager of Local 675. According to DOL, not only did the Regional Office not advise the National Office of the payment evidence that it had received, but it (the Regional Office) was unaware of the fact that the National Office had received some payment evidence directly. Subsequently, in January 1977, the payment evidence in the Regional Office was forwarded to Washington.

Nowhere is it contended that the April 1976 wage determination was not intended by DOL at that time. The contention is that, because of data developed and received after that time, the wage determination should have been modified prior to the bid opening, but was not due to a lack of coordination between the Regional and National Offices. However, this is not a situation where had the data been properly coordinated it would have been a simple clerical task to determine the wage rate. It had not been determined for the prior wage determinations that the negotiated rates for equipment operators prevailed. Therefore, a judgment would have had to have been made that the situation required negotiated rates to apply to subsequent wage determinations. As DOL has indicated, the data from the Regional Office would have had to be "examined together with data in the National Office" to determine that negotiated rates applied. Thus, the situation was not one where prior to April 1976 a determination had been made that negotiated rates applied and through inadvertence or clerical error the negotiated rates were overlooked in processing or fixing the wage determination at that time. Rather the earliest date that DOL (the Area Office) had data which could have been used to change the wage rates was July 9, 1976. It is clear then that the change in wage rates is not clerical and is due to data finally furnished after the April 1976 wage rate determinations.

DOL cites Department of the Air Force inclusion in contract of adjusted Davis-Bacon wage rate and adjustment of contract price, B-154687, January 26, 1977, 77-1 CPD 57, in support of its position that the clerical error was the failure of the Regional Office to forward the payment evidence it had received to the National Office in accordance with normal procedures for general wage determinations. In that decision we held that a contract to be performed in an area where union scale prevailed could be modified to include wage rates contained in a union agreement which became effective subsequent to the time the solicitation was issued and prior to award. Under the normal procedures in the area where that contract was to be performed the wage determination would have been automatically updated to include the rates set out in the union agreement since union scale prevailed in that area. However, for some unexplained reason this was not done. We have reviewed our holding in that case and have concluded that it is erroneous, since there was no evidence that the wage determination, as originally issued, was not based on all of the evidence available at the time of issuance or that the wage determination did not contain the rates intended at that time. Consequently, the union rates incorporated after award amounted to a change of a wage determination properly made at the time when it was initially issued rather than a correction of a clerical error. See 40 Comp. Gen., supra, at 561. Thus, B-154687, January 26, 1977, to the extent that it is inconsistent with the present decision, is overruled.

For the above reasons, it is our conclusion that the so-called "inadvertences" here involved were not mere clerical errors within the category of errors due to transposition of rates, classifications or figures, and other clerical mistakes in processing the schedules. Thus, amendment of the wage determination in the present case would be inappropriate.

R. F. Keller

Deputy Comptroller General
of the United States