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DECISION

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

FILE: B-196356.2 DATE: February 4, 1982

MATTER OF: T.W.P. Company--Reconsideration

DIGEST:

Prior decision, holding that individual members of a partnership, serving as a subcontractor, who perform the work of laborers or mechanics on a project subject to the Davis-Bacon Act are covered thereunder, will not be followed pending action by Department of Labor.

The Department of the Air Force requests reconsideration of our decision in the matter of T.W.P. Company, 59 Comp. Gen. 427 (1980), 80-1 CPD 295.

In that decision, we denied the protest holding, in part, that:

(1) Since the Air Force found the successful bidder responsible, there was no basis to question the award merely because the successful bidder submitted a below-cost bid; and

(2) Since the successful bidder took no exception to the solicitation's Davis-Bacon Act provisions, the question of whether the bidder would comply with the Davis-Bacon Act was a matter of contract administration and not for consideration under our Bid Protest Procedures.

The Air Force does not object to either one of these findings. What the Air Force does question is our third finding regarding the application of the Davis-Bacon Act, 40 U.S.C. § 276a (1976), to the individual members of a partnership, serving as a subcontractor, performing the work of laborers or mechanics

on a project subject to the act. We held that under such circumstances the individual members of the partnership must be paid no less than the prevailing Davis-Bacon wage rates specified in the contract and that the Air Force should take whatever steps are necessary to ensure compliance with the various requirements of the act.

On reconsideration, the Air Force argues, essentially, that we have misinterpreted the statutory provision in question and that our recommendation is impractical and places an undue administrative burden on both the contractor and the contracting agency. While we do not agree that we have misinterpreted the Davis-Bacon Act, for reasons discussed below, we modify our prior decision.

The pertinent facts of the case are that Mather Air Force Base, California, issued an invitation for bids soliciting bids for the repainting of family house interiors. Of the five bids received, Bill Ward Painting & Decorating (Ward), the incumbent contractor, submitted the lowest bid with the T.W.P. Company (TWP) submitting the second low. In the past, Ward had subcontracted the work to Gorman and Sons Painting (Gorman), a partnership consisting of a husband, wife and two sons as coequal partners. Gorman was scheduled to perform the work under this contract as well. TWP protested that: (1) Ward's bid was below cost; (2) in the past the Air Force had not required Ward to comply with the Davis-Bacon Act's minimum wage or payroll reporting requirements and did not intend to make Ward comply under this solicitation either; and (3) because the Air Force did not intend to enforce the Davis-Bacon requirements in regard to Ward, the bidders had not competed on an equal basis.

As indicated above, we denied TWP's protest on the merits and made no recommendation that would disturb the contract award, noting parenthetically that the record indicated that the dollar amount designated for labor by Gorman was more than the Davis-Bacon wages. We then went on to say:

"However, we believe it is incumbent upon us to comment on the Air Force's position that the Davis-Bacon Act does not apply to subcontractors such as Gorman. It is Air Force policy that to the extent contract work is performed by coequal partners of a bona fide partnership, no Davis-Bacon coverage is applicable to those partners since they are not 'laborers' or 'mechanics' within the meaning of the act. Consequently, the Air Force has not and will not require Ward to comply with the Davis-Bacon Act, despite the Davis-Bacon provision contained in the IFB. The Air Force states that it instituted this policy because the Department of Labor has not provided any current guidance regarding the applicability of Davis-Bacon wage rates when the work is to be performed, as here, by coequal partners rather than by individuals working for an hourly wage.

"The Davis-Bacon Act provides that the prevailing wage will be paid to all laborers and mechanics 'regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics.' In other words, the purposes of the act cannot be defeated by a claim that, due to some contractual relationship, an individual is an independent contractor although he is in fact performing the work of a laborer or mechanic. The controlling element, therefore, is the type of work performed, not the contractual relationship between the parties. See 41 Op. Att'y Gen. 488 (1960); and cf. United States v. Landis & Young, 16 F. Supp. 832 (W.D. La. 1935).

"In view of the above, each of Gorman's coequal partners should be paid no less then the prevailing Davis-Bacon wage when actually performing the work on this project. Therefore, the Air Force should take whatever steps are necessary to ensure compliance with the various requirements of the act. In addition, the Air Force should ensure that, in the future, whenever a member of a partnership performs the work of a laborer or mechanics on a project that falls within the scope of the Davis-Bacon Act, the prevailing wage determination is applied."

The Air Force argues that we have misinterepreted the provision in 40 U.S.C. § 276a which provides that the prevailing wage will be paid to all laborers and mechanics "regardless of any contractual relationship which may bo alleged to exist between the contractor or subcontractor and such laborers and mechanics." Further, the Air Force notes that the Department of Labor (DOL) issued "All Agency Memorandum No. 123" in June 1976 which did in fact apply the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act to working partners or owners of a subcontracting firm. The Air Force points out, however, that on August 30, 1976, DOL withdrew Memorandum No. 123 because of the administrative difficulties it had created for the contracting agencies. According to the Air Force, it has been unable tc obtain any further guidance from DOL; therefore, the Air Force has followed its earlier policy of not applying the Davis-Bacon requirements to working partners.

Upon receipt of the Air Force's request for reconsideration, we sent a letter to DOL requesting its views on the issues raised because of DOL's responsibility under the act. However, after repeated followup letters, DOL has yet to furnish our Office with a formal statement of its views. Since there is no indication that DOL will respond in the near future, we will consider the Air Force's request without the benefit of DOL's views.

As indicated above, we do not agree with the Air Force's interpretation of the act because of the possibility that the purposes of the act may be defeated through such an interpretation. Nevertheless, in view of DOL's responsibility in this area, and since DOL withdrew Memorandum No. 123--requiring application of the act to working partners or owners of a subcontracting firm--because of the difficulties it had created for the contracting agencies, we will not insist upon adherence to our decision pending action by DOL.

Our prior decision is modified accordingly.

Milton J. Socolar

Acti..g Comptroller General
of the United States