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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-192215

[Cancellation of Solicitation Following Revised Wage Determination]

MAR 28 1979

Colonel Arthur Daoulas, GS
Assistant Deputy for Material Acquisition
Department of the Army

Dear Colonel Daoulas:

We refer to your letter of January 26, 1979, requesting clarification of our position that where a wage determination included in a solicitation in accordance with the Service Contract Act of 1965 is superseded by a new determination after bid opening but prior to award that, rather than making an award thereunder, the solicitation should be canceled and a new one issued incorporating the new determination.

You note that 29 C.F.R. § 4.5(a)(2) (1978) provides that a revised wage determination received by an agency less than 10 days before bid opening may be disregarded if the agency determines that there is not reasonable time still available to notify bidders of the revision. You maintain that under this Department of Labor (DOL) regulation, and in conjunction with 29 C.F.R. § 4.5(c), a contracting officer need not incorporate into a solicitation a wage determination received less than 10 days before bid opening unless he finds there is reasonable time to notify the bidders or the notice of intent to make a service contract has been improperly or untimely filed. Based on this, you believe that to require cancellation of a solicitation, as we do, solely because of receipt of a revised wage determination after bid opening and before award, even though notice of intention to make a service contract was properly and timely filed, is in apparent conflict with DOL's regulations and unnecessarily impairs the conduct of Government business.

Your request for clarification was prompted by our letter of October 25, 1978, to the Secretary of the Army, in reference to the facts presented in our decision in Intrastate Cleaning Associates, B-192215, October 25, 1978, 78-2 CPD 300. There, a new wage determination was issued after bid opening but prior to award. Before award was made, the Army and Intrastate agreed to negotiate a bilateral modification of the contract which would incorporate this

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latest revision into the contract. However, the parties were not able to agree on a new contract price, and Intrastate then filed a protest with our Office.

In this connection, in Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, where a revised wage determination was also issued after bid opening but prior to award, we stated:

> "The rule that the contract awarded should be the contract advertised is well established. See Prestex, Inc. v. United States, 320 F. 2d 367, 162 Ct. Cl. 620 (1963). Competition is not served by assuming that the new wage rates would affect all bids equally. It may well be that another bidder was already paying wages at or above those in the new determination so that his prices to the Government would not have increased at all. Thus, it is possible that the contract as amended no longer represents the most favorable prices to the Government. Speculation as to the effect of a change in the specifications, including a new wage determination, is dangerous and should be avoided where possible. See B-177317, supra. The proper way to determine such effect is to compete the procurement under the new rates."

Although DOL has revised its regulations since the Dyneteria decision, and this change is reflected in Defense Acquisition Regulation § 12-1005.3(a)(i) and (ii), we have continued to follow the reasoning of that decision in order to protect the equality of competition. Government Contractors, Inc.--Reconsideration, B-187671, February 22, 1978, 78-1 CPD 146.

However, we do not maintain that a solicitation must be canceled whenever a new wage determination is issued less than 10 days before bid opening or after bid opening but prior to award. If the procuring activity awards the contract under the old wage determination and the contract is to be performed under that old wage determination then the contract awarded is the contract advertised and there is no need to cancel the solicitation. If, on the other hand, the procuring activity intends, either before or after award, to incorporate the new wage determination into the contract then under the reasoning in the Dyneteria decision the solicitation should be canceled and readvertised in order to protect the equality of competition.

Clearly, then, we are not questioning the validity of the DOL regulations, but that of a specific practice which has developed under those regulations.

Therefore, we reaffirm our position that, when a revised wage determination is received after bid opening but before award, the integrity of the competitive bidding system requires that rather than modifying the contract to incorporate this new wage determination, the solicitation should be canceled and readvertised. To hold otherwise may result in a contract being awarded which is different from the one advertised.

We trust that this clarifies our letter of October 25, 1978, to the Secretary of the Army.

Sincerely yours,

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Milton J. Socolar
General Counsel