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J. Vachon
Proc I

DECISION



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

FILE: B-189495

DATE: March 31, 1978

MATTER OF: P. J. Stella Construction Corp. -
Reconsideration

DIGEST:

Prior decision is affirmed notwithstanding allegation in request for reconsideration that contract was first Federal construction contract, performed by contractor, subject to Davis-Bacon Act, because while procuring activity should have designated which wage schedule in IFB applied, wage schedule applied by contractor clearly noted it was only for use in residential work, not applicable here and, therefore, IFB was not so deficient as to warrant equitable contract adjustment.

Associated General Contractors of Massachusetts, Inc. (AGC), on behalf of P. J. Stella Construction Corp. (Stella), has requested reconsideration of our decision in the matter of P. J. Stella Construction Corp., B-189495, January 17, 1978, 78-1 CPD 35.

Our prior decision held that while the Army had improperly incorporated into the solicitation a "Residential" wage rate under the Davis-Bacon Act, in addition to a "Building" wage rate, and had not designated which rate was to apply, Stella was not justified in assuming the lower "Residential" rates applied to a contract for expansion of a military reserve center.

AGC's request for reconsideration argues that while we recognized that the Army had failed to follow the procedures set forth in Department of Labor Memorandum No. 68 and section 13-704.2(f) of the Armed Services Procurement Regulation (ASPR) (1976 ed.),

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Stella is being made to suffer the consequences of the Army's shortcomings. The memorandum and ASPR section require the contracting officer to indicate in the invitation for bids which particular wage schedule is considered applicable to the contract work.

In our decision of January 17, 1979, we concluded:

"Thus, while the contracting activity was remiss in not designating the schedule of rates which was to apply to the contract, there was no justification for Stella to assume that a military reserve center was intended for 'predominantly residential use' and that 'Residential' rates applied."

AGC states that Stella should be permitted an equitable adjustment under the contract to make it whole for having to pay the higher "Building" rates rather than the "Residential" rates, a remedy not considered in our prior decision, which held that the proper rate to apply was "Building."

In general, a request for equitable relief should be accompanied by clean hands as to the matter under consideration. Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945). However, that doctrine does not represent a rigid formula to be applied to the exclusion of all countervailing equitable considerations. Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944). Accordingly, the facts of each case must be examined on their own merits.

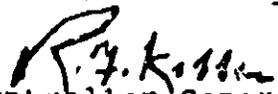
While our Office has permitted equitable adjustment in contract price for any increase in the cost of performance resulting from increase of wage rates in certain circumstances (the only advertised wage rates included in the solicitation contained inadvertent error--Department of the Air Force's inclusion

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In contract of adjusted Davis-Bacon wage rate and adjustment of contract price, B-154687, January 26, 1977, 77-1 CPD 57; contractor had used lower wage rate in connection with other Government contracts-- 45 Comp. Gen. 532 (1966)), we do not believe the circumstances of the instant case are analogous.

Here, the Army was in error in not designating the schedule which applied to the construction. However, notwithstanding the assertion of AGC that this was the first Federal contract Stella had which utilized Davis-Bacon wage determinations, we do not believe it required a sophisticated bidder to decide which of the two wage schedules applied and to compute its bid accordingly. The wage schedule in controversy here stated the rates applied to "All work, including demolition, repair and alteration of any existing structure which is intended for predominantly residential use," whereas the work called for was the expansion of a military reserve center.

Accordingly, we do not find the solicitation was so deficient as to justify an equitable adjustment in Stella's contract and our prior decision is affirmed.


Deputy Comptroller General
of the United States