U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

JUN - 3 2004

Ms. Miriam Israel Moses
Executive Director
REBOUND
2700 First Avenue, Suite 103
Seattle, Washington 98121

Dear Ms. Moses:

This is response to your letter requesting reconsideration of the former Immigration and Naturalization Service's (INS) position regarding the applicability of the Davis-Bacon Act (DBA) labor standards provisions to the construction of a detention facility in Tacoma, Washington, which is being constructed in response to a solicitation for contract No. ACL-2-C-0004 issued by the INS on August 12, 1999.

Correctional Services Corporation (CSC) of Sarasota, Florida submitted an offer on December 1, 1999, which was accepted by contract award on July 26, 2002. Construction of a new detention facility began August 12, 2002. We understand that the construction work is complete and operation of the facility began April 24, 2004. The facility will include four detention buildings along with three office or medical buildings, consist of a floor area of 158,000 total square feet, and be capable of housing up to 500 detainees. The owner of the building, and the property on which the building would rest, is CSC.

The contract provides that INS is seeking "to obtain a requirements contract for the temporary housing, safekeeping, transportation, and stationary guard services for detainees of all nationalities in its custody. The successful offerer is responsible for acquiring and operating a facility which is capable of housing up to a total of 500 (estimated maximum) detainee aliens." (Emphasis added.) Contract, B-2. The contract contains numerous requirements concerning the operator of the facility and the treatment and care of the detainees, and incorporates the provisions of the McNamara-O'Hara Service Contract Act (SCA), but not the DBA provisions. The contract has a base period of one (1) year with four (4) one-year option periods.

The requirements for the physical plant include that it be located within a radius of 25 miles of the Sea-Tac International Airport, be capable of housing 500 detainees, and comply "with the requirements of the ACA Standards for Adult Local Detention Facilities, and all applicable state, county, and local codes. The facility should be capable of providing medium to maximum security for INS detainees and meet the requirements set forth in Chapter 9 of the SOW (Statement of Work)." Contract, C-15. The facility also has to meet the "Standards for Adult Local Detention Facilities" and certain "Hold Room Design Standards".

The contract further specifies that the physical plant must contain a variety of facilities, e.g. an infirmary, examination room, various rooms to store records and other items, isolation rooms, specified bathing and shower areas, a pharmacy, a general library, an intake/release area separate from housing units with a processing area, medical screening room, secure vault or room, interview/visitation room, space for administrative, professional, and clerical staff, including conference room, employee lounge, male/female locker rooms with toilets, public lobby with toilet facilities, separate indoor exercise area for INS detainees, kitchen area, lunch room for government and contractor employees, an emergency facility lockdown system, and additional specified office and administrative space, including two courtrooms.

The consideration to be received by the contractor is primarily based upon a unit price per detainee. For example, in the base year the estimated compensation to be paid CSC is $22,172,985.00. This is based upon a detainee unit price per day of $162.00 for up to 350 detainees, $25.00 per day for 351-500 detainees, and additional man-hour and transportation expenses allocated for guard services while a detainee is receiving medical treatment outside the detention facility. A contract modification dated March 6, 2003 called for the "redesign and addition of administrative office space and PHS medical space in the proposed facility as requested by the INS and PHS". CSC was compensated for these additional construction costs by an increase in the daily detainee unit price.

In this matter, you argued in favor of DBA coverage based upon the rationale that this contract should be treated as a lease/construction contract. The criteria applicable to that analysis are set forth in AAM 176, and include the length of the lease, the extent of government involvement in the construction process, the extent to which the costs of construction will be fully paid for by the lease payments, the extent to which the building is used for private rather than public purposes, and whether the lease is written to evade the requirements of the Davis-Bacon Act. Our review of the facts as applied to the lease factors suggests that the issue of Davis-Bacon coverage is a close question, but that a determination of no coverage is supported by the facts that the contract is only for five (5) years, INS appears to have had limited involvement in construction of the facility, and there is no indication the contract was written in a manner to avoid application of DBA. As a result of this analysis, the INS could have reasonably concluded in good faith that there was no DBA coverage.

Although this contract has some similarities to a lease, we believe such an analytical approach is inappropriate and that the criteria found at 29 CFR 4.116(c)(2) would be more applicable in this instance. The INS has appropriately viewed the principal purpose of the contract as furnishing services, and has included the SCA provisions in the contract. As stated under the contract's "Objectives" the "INS is seeking a detention services contract for the housing and safekeeping of prisoners". Contract, C-7. As discussed earlier, the contract contains a myriad of requirements for operating the facility and caring for the detainees. The term of the contract, with a base year and (4) four one year options, is also comparable to a typical SCA contract.

Under an SCA contract, the DBA provisions are applicable where:

(i) The contract requirements contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work (hereinafter referred to as construction) or it is ascertainable that a substantial amount of construction work will be necessary for the performance of the contract (the word "substantial" relates to types and quantity of construction work to be performed and not merely to the total value of construction work (whether in absolute dollars or cost percentages) as compared to the total value of the contract); and

(ii) The construction is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract.

Emphasis added.

Although the solicitation did not specifically require the construction of a new facility, INS stated in correspondence to the Department that it had not canvassed the Seattle area and was unaware of any existing facility which could be utilized. Certain contract terms indicate construction was clearly anticipated, including that the contractor was to "begin accepting detainees no later than 90 days after final completion of construction," and that final construction drawings were to be delivered within 180 days after award. Contract, C-15, F-3. Given the uniqueness of this facility and the many specific requirements imposed by the solicitation, it appears that either construction of a new facility or substantial renovation of some existing physical plant would be necessary to comply with the solicitation requirements. Thus, we conclude that it was clearly "ascertainable that a substantial amount of construction [would be] necessary for performance of the contract." In addition, the construction work is plainly physically and functionally separate from performance of the service work.

It is further reasonable to conclude that the contract payments made by INS to *** will either partially or completely reimburse CSC for its construction cost. Given the very limited purpose of the facility, it would appear implausible for *** to have agreed to contract consideration which did not provide for some form of construction cost reimbursement. Further evidence of this is indicated by the previously mentioned modification to the contract which provided for an increase in the detainee unit price based solely on an INS request for the redesign and addition of certain space in the facility.

Although I conclude construction of the facility is subject to DBA under the criteria of 29 CFR 4.116(c)(2), the question remains as to whether I should exercise my discretion, as authorized by the Department of Labor regulations at 29 C.F.R. 1.6(f), to require retroactive application of the DBA provisions and the applicable wage determination. Section 1.6(f) provides that the "Administrator may issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates

determined in accordance with the Davis-Bacon Act". The Administrator may consider a number of factors that vary on a case-by-case basis in determining the application of section 1.6(f) to a particular case. In this particular matter, factors which I considered in deciding whether to exercise my discretion pursuant to section 1.6(f) include the reasonableness or good faith of the contracting agency's coverage decision, the status of the procurement (i.e. to what extent the construction work has been completed), the understanding of the contractual parties as to the possible retroactive application of the DBA provisions and the possible disruptions to procurement in deciding on remedies. With regard to the factors relevant to the exercise of my discretion, construction of the facility has been largely completed and the parties agreed upon contract consideration based upon the assumption that DBA did not apply. It appears that INS reasonably in good faith concluded that the DBA was inapplicable. Therefore, I conclude it is appropriate not to require retroactive application of the DBA provisions to the construction of the facility under this contract. However, I would caution the Department of Homeland Security (successor to INS) that the DBA provisions and appropriate wage determinations should be applied to any future contract modifications involving construction work that is substantial and capable of being performed on a segregated basis.

This letter constitutes a final ruling. Pursuant to 29 C.F.R. 7.9, any interested party may file for review of this final determination with the Administrative Review Board. Any appeal should be addressed to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S4309, Washington, D.C. 20210.

Sincerely,

Tammy D. McCutchen
Administrator

cc: ******* , INS