



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

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B-178159

June 6, 1973

Spillyard Machinery Company, Inc.
227 East Cevallos
San Antonio, Texas 78204

Attention: Mr. Rick Cox
President

Gentlemen:

Reference is made to your telegram of March 8, 1973, protesting the inclusion of the provisions of the Davis-Bacon Act in Invitation for Bids (IFB) No. F41699-73-B-0158, issued December 4, 1972, by the Department of the Air Force, Directorate of Procurement and Production, Base Procurement Division, SAAMA, Kelly Air Force Base, Texas.

The subject IFB solicited bids for a Mechanized Materials Handling System to be furnished and installed at the referenced installation in accordance with the Statement of Work incorporated into the IFB.

By modification No. M06, dated March 7, 1973, the IFB was amended to include, inter alia, the standard clauses of the Davis-Bacon Act (40 U.S.C. 276a to a7) as set forth in Armed Services Procurement Regulation (ASPR) 7-602.23(a)(1), February 1972.

The opening of bids on April 2, 1973, revealed the submission of bids from eight firms, ranging in price from the low bid of \$1,319,410.41 to the highest bid of \$2,934,000.00 submitted by your firm.

You have contended that the Davis-Bacon Act should not be applicable to this procurement since it is for supplies and services rather than construction. You allege that the inclusion of the act will cost the Government an additional \$250,000, and will further preclude small businesses from bidding on this procurement unless they are in the construction business.

ASPR 12-106.1(a) requires that contracts involving both construction and nonconstruction work are subject to the requirements of Section XVIII, Part 7, and must include the appropriate clauses

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of ASPR 18-703 (herein the Davis-Bacon Act) if the contract contains specific requirements for substantial amounts of construction work, or it is ascertainable that a substantial amount of construction work will be necessary for the performance of the contract. Furthermore, the appropriate clause of ASPR 18-703 must also be included if the construction work is physically or functionally separate from the other work called for by the contract.

The procuring activity has reported that at least 30 percent of the work and 40 percent of the dollar value of the equipment to be installed represents construction work. Included in the record is an exhaustive analysis of those items of the specifications requiring construction work, including but not limited to, the attachment of equipment to the building, all the electrical work of Paragraphs 3.12 and 4.1.13, the installation of all parts of the compressed air systems, the construction of the mezzanine and all on-site welding. In view thereof, we have no basis upon which to dispute the agency's position that the prospective contract involves substantial amounts of construction work.

Additionally, the unrefuted report of the contracting officer states that the construction work to be performed at the job site is, for the most part, functionally separable from the other work called for by the contract.

In view of the foregoing, we must concur with the Department of the Air Force that the Davis-Bacon Act was required to be included in the IFB by virtue of the cited sections of the regulations. Also, there is no evidence of record to support your contention that inclusion of the Davis-Bacon Act will cost the Government additional monies, or in any manner preclude small businesses from bidding on the requirement. The primary responsibility for determining whether Davis-Bacon Act provisions should, or should not be included in a particular contract rests with the contracting agency. 47 Comp. Gen. 192 (1957). Consequently, there is no legal basis upon which we may object to the inclusion of that act in the subject IFB.

Accordingly, your protest must be denied.

Sincerely yours,

Paul G. Dambitow

For the Comptroller General
of the United States