

MALASPINA INVESTMENTS, INC.,

AGBCA Nos. 2003-180-1  
2004-190-1

Appellant

**Representing the Appellant:**

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**Representing the Government:**

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**DECISION OF THE BOARD OF CONTRACT APPEALS**

February 15, 2005

**Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge WESTBROOK.**

These appeals arise out of Contract No. 50-0116-2-00529 between Malaspina Investments, Inc., of Yakutat, Alaska (Appellant) and the U. S. Forest Service, Tongass National Forest, Alaska (FS). The FS is an agency of the U. S. Department of Agriculture (USDA). The contract was to retrofit a warehouse at the FS's administrative site in Yakutat. The work included reconstructing the warehouse roof, designing and constructing walls on existing bays, constructing a wood shelf and replacing siding on back walls. (Appeal File (AF) 9-10.)<sup>1</sup>

AGBCA No. 2003-180-1 is the appeal of a decision of the Contracting Officer (CO) denying Appellant's claim for \$46,009.84 for payment of Davis-Bacon Act wage rates. In a ruling dated November 12, 2003, the Board held that the Board has jurisdiction because the appeal was timely filed by a subcontractor, Sampson Steel Company, Inc. (Sampson), acting with the authorization of the prime contractor. A subsequent untimely appeal from the prime contractor (AGBCA No. 2003-189-1) was dismissed. Malaspina Investments, Inc., AGBCA Nos. 2003-180-1, 2003-189-1, 04-1 BCA ¶ 32,418. These appeals are being prosecuted by the subcontractor with the permission of the prime contractor.

<sup>1</sup> References to the record use the sequential handwritten numbering on the bottoms of pages in the AF (similar to "Bates" numbers). In places, such references may differ from the scheme used in the Government's brief.

Appellant's complaint increased its Davis-Bacon Act claim to \$84,356, and included a claim of \$14,025 for bond costs. The FS's answer included an affirmative defense that no claim for bond costs had been presented to the CO. This issue was raised to Appellant in a telephonic conference with the Board. When Appellant was unable to provide evidence that such a claim had been made, he was informed that the Board could not consider that portion of his claim. Appellant requested a decision on the claim for bond costs and the CO issued the decision June 4, 2004. Appellant made a timely appeal which was docketed as AGBCA No. 2004-190-1.<sup>2</sup>

The parties elected to submit the appeals for decision pursuant to Board Rule 11.

The Board's jurisdiction derives from the Contract Disputes Act of 1978, 41 USC §§ 601-613, as amended.

### **FINDINGS OF FACT**

1. Contract No. 50-0116-2-00529, awarded to Appellant June 25, 2002, was issued as a direct award to Appellant pursuant to a Memorandum of Understanding between the Small Business Administration (SBA) and the FS. (Exhibit 1 to the Government's Brief (Ex. 1), paragraph (para.) 4; AF 26.) The CO's decision to award to Appellant had its genesis in a telephone conversation between the CO and Mr. Eric Ohlson, a representative of Appellant, in early June 2002. The call was initiated by Mr. Ohlson, who was seeking to generate FS work for Appellant. The CO and Mr. Ohlson had one or more discussions after the original call. Among other things, the CO told Mr. Ohlson that most FS contracts were road or facility construction projects subject to Davis-Bacon Act wage regulations and Miller Act bonding requirements. Mr. Ohlson represented himself as having experience performing SBA Section 8 (a) contracts. He also told the CO that Appellant had ample bonding capacity. (Ex. 1, para. 3.)
2. On or about June 20, 2002, the CO informed Mr. Ohlson that he would consider awarding Appellant a reroofing project in Yakutat, Alaska, as an SBA Section 8 (a) set-aside, provided Mr. Ohlson could quickly propose a reasonable price. The reason for the need to award quickly was to avoid having funds transferred to a fire suppression account if unobligated by June 30. The CO subsequently sent Mr. Ohlson the government estimate and specifications and drawings for the contract. (Ex. 1, para. 4; and Appellant's December 4, 2003 letter to the Board and attachment B thereto (12/4/2003 ltr., att. B). After Mr. Ohlson sent a proposal within the government estimate, the CO formally set aside the project as a negotiated Section 8 (a) project. The CO did not issue a solicitation or accept bids in a formal manner. (Ex. 1, para. 4).
3. Appellant's proposal in the amount of \$227,933.45 for items 1-5 was submitted June 25, 2003, signed by Appellant's president, Mr. Lowell Petersen (AF 10). The CO awarded items 1-4 in the proposed amount of \$168,478.45. Standard Form (SF) 26, referencing "Contract Clauses" in the Table of Contents was transmitted to Appellant for Mr. Petersen's signature on the same date. (AF 9.) Contract documents were forwarded to Mr. Petersen the same day (Ex. 1, para. 5). An unsworn letter from Mr. Bruce Morgan, president of Sampson, the subcontractor, to the Board states that the contract documents were not furnished to Appellant until September 2002, and to Sampson by Appellant until December, 2002 (12/04/2002 ltr., p. 2). The record contains statements from neither Mr. Ohlson nor Mr. Petersen.
4. The contract includes FAR 52.252-2, CLAUSES INCORPORATED BY REFERENCE (FEB 1988). Among those clauses are FAR 52.222-6, Davis-Bacon Act (FEB 1995) and FAR 52.222-13, Compliance with Davis-Bacon and Related Act Regulations (FEB 1988). These clauses are required by FAR 22.407(a) to be inserted in contracts in excess of \$2000 for construction within the United States. The contract also included FAR 52.228-15, Performance and Payment Bonds (JUL 2000).
5. The CO's June 25, 2002 letter informing Appellant that the FS was accepting its proposal for items 1-4 and forwarding copies of the contract, also informed Appellant that in accordance with FAR 52.228-15, performance and payments bonds were required prior to issuance of the Notice to Proceed (AF 50). By letter dated July 22, 2002,

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<sup>2</sup> The Board did not require submission of an additional AF. However, it has added the CO's decision to the AF in AGBCA No. 2003-180-1, as pages 214-16.

a bond broker informed the CO that Appellant's bond request was being processed (AF 53). The record contains Sampson's August 23, 2002 letter to Appellant stating that the easiest and fastest way to secure a bond was for Sampson to provide a "cash bond." That letter inquired if this were something Appellant wished Sampson to pursue. An irrevocable letter of credit was furnished to the FS in early September, 2002 (AF 54). By invoice #0002, dated November 11, 2003, Appellant requested payment of \$14,662.50 for \$12,750 "sub-contractor provided bond cost" plus Appellant's 15% mark-up (AF 60). The invoice was transmitted by a November 10, 2002 letter from Appellant that neither Appellant nor Sampson saw bonding as necessary or required in the "bid package paperwork" (AF 61). By e-mail on November 12, 2002, the CO cited the requirement for bonding in FAR 52.228-15, and stated that reimbursement is conditioned on the contractor furnishing evidence of full payment to the surety. Evidence of a premium paid or assessment made by the bank (in the case of a letter of credit as here) needed to be furnished. (AF 64.) At no time during this period did Appellant suggest that it was not required to furnish performance and payment bonds.

6. The Davis-Bacon Act wage rate issue arose in December 2002, when the CO reviewed certified payrolls and noted that incorrect wage rates were used for carpenters and laborers. About this time, the CO received complaints from Sampson's employees that they had been paid less than prevailing wages. A series of telephone conversations and other communications ensued. A December 26, 2002 telephone message to the CO from Mr. Ohlson stated that Sampson had not included Davis-Bacon Act wage rates in its price to Appellant. Although Mr. Ohlson acknowledged that he understood that such rates were "implied" in federal contracts, he quoted Mr. Morgan as saying he had worked many federal jobs where he did not have to pay Davis-Bacon rates. The CO reminded Mr. Ohlson that the project was not "bid" but was a negotiated Section 8 (a) set-aside. Mr. Ohlson stated that he had not seen a copy of the contract. The CO verified that the contract had been sent to Appellant and inquired whether Appellant's sub-contract with Sampson included the required flow-down clauses, such as those pertaining to the Davis-Bacon Act. The conversation concluded with Mr. Ohlson agreeing to review the contract, have further discussions with Sampson, and get back with the CO. (AF 1, 67-68.)

7. In his declaration submitted with the FS's brief, the CO affirms that during his early conversations with Mr. Ohlson, Mr. Ohlson stated that he was well acquainted with government construction contracts. The CO also affirms that he told Mr. Ohlson that most FS construction projects were subject to the Davis-Bacon Act requirements. (Ex. 1, para. 3.) Also, on November 7, 2002, before the dispute arose, Sampson's foreman informed the CO's Representative (COR) that Sampson's bookkeeper was well acquainted with submitting weekly certified payrolls, as Sampson had performed many government contracts (AF 166).

8. The parties agree that on February 20, 2003, Appellant presented a claim to the CO in person for the difference between what Appellant intended to pay its employees and what it was required under the Davis-Bacon Act clause in the contract (AF 1, 154-55). The record, however, does not identify a written claim of that date, and it is unclear exactly what form this claim may have taken. By an e-mail message dated March 25, 2003, Appellant's representative, Mr. Ohlson, referenced the February 20, 2003 request and asked when a response could be expected (AF 154). By a letter the following day, the CO acknowledged receipt of both the claim and the inquiry regarding the time frame for response. He indicated that since he then had a written request, he would render a decision no later than May 24, 2003. He also stated that he already had begun an analysis of the claim. (AF 155.)<sup>3</sup> The CO's decision denying the Davis-Bacon Act wage claim in the amount of \$46,009.84 was issued May 20, 2003 (AF 1). The appeal of it was docketed at the Board as AGBCA No. 2003-180-1.

9. Appellant's claim for bonding costs in the amount of \$14,662.50 was presented to the CO in a letter dated May 12, 2004. The CO denied the claim in a decision dated June 14, 2004 (AF 214). It was timely appealed and

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<sup>3</sup> It is not clear in the record exactly what had been presented and was being analyzed. To date, the dollar amount of Appellant's claim is still not clear. The CO's decision recites that Appellant seeks to recover \$46,009.84 (AF 1). An internal FS e-mail of May 19, 2003 refers to a claim of about \$46,000 (AF 156). An April 8, 2003 invoice from Sampson to Appellant enumerated the amount of \$37,406 for "adding 'prevailing wage' to our contract requirement" and \$8,494 for "workman's compensation insurance for changing our workers from 'carpenters' to 'ironworkers'" (AF 159). Appellant's brief claims that it is due an equitable adjustment of \$83,356 for increased wage costs.

the appeal docketed as AGBCA No. 2004-190-1.

**DISCUSSION**

The Miller Act, 40 U.S.C. §§ 270a-270f, with limited exceptions, requires prime contractors on federal construction projects to furnish performance and payment bonds for the protection of the United States and suppliers of labor and material. The contract incorporates by reference FAR 52.228-15, Performance and Payment Bonds-Construction (JUL 2000).

The Davis-Bacon Act, 40 U.S.C. §§ 276a-276a5 requires that laborers or mechanics on federal public works projects be paid no less than the prevailing wage in the area where the contract is to be performed. The contract incorporates by reference FAR 52.222-6.

Appellant argues that it and its subcontractor, Sampson, are entitled to an equitable adjustment for the costs of providing Miller Act bonds and paying Davis-Bacon wage rates because these were not required at the time the contract was solicited and Appellant's cost proposal was accepted.

Solicitation and award of this contract took place over a very short period of time. There was no formal solicitation process for this negotiated SBA Section 8 (a) set aside contract (Findings of Fact (FF) 2). The solicitation package, which did not contain the contract clauses, was provided to Appellant sometime between June 20 and June 25, 2002. Appellant's proposal was submitted to the CO June 25. The same day, the award document and contract clauses were forwarded to Appellant. Thus, while Appellant had not seen the clauses when it prepared its proposal, they were forwarded to Appellant the same day that the award document was forwarded for signature (FF 3). In any event, the weight of the evidence is that Appellant's representatives were aware of the statutory requirements to provide Miller Act bonds and to pay Davis-Bacon Act wage rates (FF 1, 5-7).

Appellant's, or its subcontractor's, actual knowledge, however, is not determinative of this appeal. The clauses were not omitted from the contract. They were, in fact, included in the contract signed by Appellant's president. The fact that they were not forwarded with the technical specifications provided for receipt of a proposal during the shortened and informal negotiation period does not invalidate the statutory requirements or the contract requirements. The contractor is not entitled to additional compensation to perform work falling within the scope of the signed contract.

**DECISION**

The appeals are denied.

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**ANNE W. WESTBROOK**

**Concurring:**

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**HOWARD A. POLLACK**  
Administrative Judge

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**JOSEPH A. VERGILIO**  
Administrative Judge

**Issued at Washington, D.C.  
February 15, 2005**