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

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B-178773 (1)

December 6, 1973

DLG06515

Lockheed Aircraft Service Company
Ontario International Airport
Post Office Box 33
Ontario, California 91761

Attention: Mr. M. H. Greene
Vice President

CNG00532
DLG00302

Gentlemen:

This is in reply to your telefax message of May 30, 1973, and subsequent correspondence, protesting the award of a contract to E-Systems, Incorporated, by the Department of the Air Force under request for proposals (RFP) No. F34601-73-R-7150, issued by the Oklahoma City Air Materiel Area, Tinker Air Force Base, Oklahoma.

Your protest is grounded on the Air Force's failure to include in the solicitation and resulting contract provisions applying the Service Contract Act of 1965 to this procurement. You assert that the Air Force, by not including such provisions, did not comply with the requirements of that Act and that the contract awarded to E-Systems is therefore illegal. The Air Force, on the other hand, denies that it violated the Service Contract Act in the handling of this procurement, a position in which it is supported by counsel for E-Systems. The Department of Labor (DOL), whose views we solicited in connection with this matter, agrees with you and urges us to uphold your protest. For the reasons set forth below, we are of the opinion that the protest must be denied.

Initially, we must consider the assertions of the Air Force and E-Systems that the protest was untimely filed. The record shows that the solicitation, calling for offers to provide aircraft modification and programmed depot maintenance work for the Special Air Mission (SAM) fleet based at Andrews Air Force Base, was issued on December 15, 1972. The RFP contained the standard Walsh-Healey Public Contracts Act provision, but contained no provision regarding the Service Contract Act. Proposals were submitted by Lockheed (which, according to the Air Force, had been the sole-source and only contractor for the SAM fleet maintenance requirements for more than 20 years prior to 1973), E-Systems, and other offerors, and after a period of negotiation and evaluation, a contract was awarded to E-Systems on May 11, 1973. By letter dated May 18, 1973, which you

[Protest of Air Force Failure To Include Service Contract Act Provisions in IFB]

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submitted to the Air Force subsequent to a debriefing conference held on May 22, 1973, you asked the contracting officer to state whether a determination had been requested from either the Secretary of Labor or the Air Force Deputy Chief of Staff, Systems and Logistics, as to the applicability of the Service Contract Act to the procurement. The Air Force informed you by letter dated June 15, 1973, that no such determination had been requested. In the interim, you filed a protest with this Office on May 31.

Our Interim Bid Protest Procedures and Standards require that protests "based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of proposals shall be filed prior to * * * the closing date * * *. In other cases, bid protests shall be filed not later than five days after the basis for protest is known or should have been known, which is earlier." 4 CFR 20.2. That section also states that if a protest initially is filed with the contracting agency, a subsequent protest to this Office must be filed "within five days of notification of adverse agency action." Both the Air Force and E-Systems maintain that your protest involves the absence from the RFP of Service Contract Act provisions and therefore should have been filed prior to the closing date for receipt of proposals. Air Force also contends that in any event your protest should have been filed within five days of your receipt of notification of the award to E-Systems. You claim, however, that the absence from the solicitation of a Service Contract Act clause did not automatically indicate a violation of law, since the omission "may have been sanctioned by the Department of Labor." You further claim that only after you began to suspect that this was not the case that you asked the Air Force if in fact DOL had been queried as to the applicability of the Service Contract Act, and that your grounds for protest became known only after you received a negative reply from the Air Force.

We think your protest must be regarded as untimely filed. Although we agree that the absence of a Service Contract Act provision from the RFP did not necessarily indicate any illegal or improper action by the Air Force, our rules contemplate that any questions you might have regarding a solicitation will be raised prior to the closing date for receipt of proposals. This includes questions regarding the absence of a particular provision from a solicitation. B-178206, April 4, 1973. Therefore, it was incumbent upon you to query the Air Force about the basis for the non-inclusion of a Service Contract Act clause in the RFP prior to the date set for receipt of proposals, rather than after award was made to another firm, and your failure to have done so renders your protest untimely.

However, 4 CFR 20.2(b) provides that we may consider any protest which is not filed timely if the protest "raises issues significant to procurement practices or procedures," which we have said refers "to the presence of a principle of widespread interest." 52 Comp. Gen. 20, 23 (1972). We think this protest raises such an issue. It calls into question the legality of a contract awarded without Service Contract Act clauses when the Department of Labor believes the contract is subject to the Act. That this case does not represent an isolated instance in which this question has arisen is evidenced by the fact that at least two other protests involving this issue recently were filed with this Office. Furthermore, although we declined to consider the merits of one of those cases when the protester also requested substantive judicial relief, B-178463, June 29, 1973, the Court in that suit stated that GAO's dismissal of the protest was "a reversal of deference" in view of the desirability of having cognizant administrative agencies, including GAO, review matters prior to judicial resolution. Curtiss-Wright Corp. v. McLucas, Civil Action No. 807-73, D.N.J., September 14, 1973, n. 20. We gather from that statement that the Court may be interested in our views with respect to the primary issue involved in both this case and the Curtiss-Wright matter. Therefore, in accordance with our policy of considering protest issues when a Court has expressed interest in our views, see 52 Comp. Gen. 161 (1972), we think it appropriate for us to decide this case on the merits.

The Service Contract Act of 1965, as amended, 41 U.S.C. 351 et. seq., provides that every contract entered into by the United States in excess of $2,500, subject to certain exceptions set forth in 41 U.S.C. 356, "the principle purpose of which is to furnish services in the United States through the use of service employees," shall contain provisions specifying the minimum wages to be paid and fringe benefits to be furnished service employees "in the performance of the contract," as determined by the Secretary of Labor. The Act further provides that in no event shall a contractor pay his service employees under a service contract less than the minimum wage specified by the Fair Labor Standards Act, 29 U.S.C. 206(a)(1). Implementing regulations, setting forth the specific provisions to be included in contracts and providing for contracting agencies to notify DOL of their intent to award service contracts, have been promulgated by the Secretary of Labor and adopted by the Department of Defense. 29 CFR 4.4-4.6; ASPR 12.1004, 12.1005. These regulations require contracting officers to file with DOL, at least 30 days prior to the issuance of a solicitation leading to the award of a contract "which may be subject to the Act," a Standard Form 98, Notice of Intent to make a Service Contract. DOL then notifies the contracting agency "of any determination of minimum monetary wages and fringe benefits

applicable to the contract," ASPR 12-1005.2. Any such determination is then included in the solicitation and resultant contract, ASPR 12-1005.3, which would also include the standard Service Contract Act clause requiring employees to be paid not less than the wages set forth in the determination. If there is no wage determination, the clause requires employees to be paid not less than the statutory federal minimum wage specified in the Fair Labor Standards Act.

The Air Force states that the primary purpose of the contract awarded to E-Systems "is to supply the Air Force with end products; that is, a serviceable, overhauled, rebuilt and modified aircraft," and that any "services performed in the execution of the contract are secondary to its primary purpose of supplying a serviceable overhauled aircraft." The Air Force further states that it has always included the Walsh-Healey Public Contracts Act provision in this type of contract because it viewed the contract as one for the procurement of supplies, and that this "policy did not change with the enactment of the Service Contract Act in 1965." Thus it maintains that since the contract is for supplies and not principally for furnishing services, the Service Contract Act and implementing regulations are inapplicable. On the other hand, DOL, after reviewing the contract specifications, has concluded that the contract is principally for services and that it cannot agree with the Air Force's "self-determined policy" that the contract is primarily for supplies.

The Air Force and E-Systems argue that DOL is not correct in its interpretation of various provisions of the Service Contract Act or of the E-Systems contract. The Air Force also argues that even if DOL's views are regarded as correct, the missing Service Contract Act clause should be read into the contract in accordance with the doctrine enunciated in G. L. Christian and Associates v. United States, 160 Ct. Cl. 1,312 F. 2d 418, cert den 375 U.S. 954 (1963), 376 U.S. 929, 377 U.S. 1010 (1964), so that the validity of the contract could be preserved. In our view, resolution of these issues is not necessary for a proper disposition of this and similar protests. DOL, whose views we have carefully considered, recommends that we sustain the protest essentially because it has now determined, after contract award and the filing of a protest, that the contract is subject to the Service Contract Act. However, although the Service Contract Act is applicable by its terms to all contracts (in excess of $2,500) which are principally for services, the regulatory scheme envisions an initial determination by the procuring agency as to whether a proposed contract "may be subject to the Act." 29 CFR 4.4; ASPR 12-1005.2. Thus, if the agency believes a contract may be subject to the Act, it is required to notify DOL by submission of a Standard Form 98. If the agency does not believe a

contract may be subject to the Act, however, then there is no duty on its part to submit anything to DOL or to include a Service Contract Act clause in the solicitation. Accordingly, we think the only issue that must be determined is whether or not the Air Force contracting officer had a reasonable basis for believing that this procurement was not one that "may be subject to the Act."

The Air Force, relying on what it regards as (and what reasonably appear to be) a significant amount of rebuilding or replacement of aircraft components called for by the contract specifications, has traditionally treated this type of contract, both before and after enactment of the Service Contract Act, as subject to the Walsh-Healey Act. Section 7 of the former Act specifically exempts from its provisions "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contract Act," 41 U.S.C. 356, and as the Air Force points out, the statutory history of the Service Contract Act suggests that the Act's purpose was to fill a "void" and therefore would not apply to contracts already covered by the Walsh-Healey Act. H. Rept. No. 948, 89th Cong., 1st sess. 5; S. Rept. 798, 89th Cong. 1st sess. 2. The Air Force states that it continued to subject its aircraft depot maintenance and modification contracts to the requirements of the Walsh-Healey Act after passage of the Service Contract Act because:

> "(1) The end items generated were not services of the type apparently contemplated by the SCA [Service Contract Act], and (2) the employees performing these contracts appeared to be adequately protected by existing labor standards legislation--and thus not within the void sought to be filled by the Congress when it passed the SCA."

Several judicial and DOL decisions, which appear to treat reasonably similar type of work as subject to the Walsh-Healey Act, are cited by the Air Force to support its determination that the Walsh-Healey Act, and not the Service Contract Act, was applicable to this type of procurement. It claims that it was not until July, 1973, that DOL's position on this matter became clear, and that it was therefore not on any kind of effective notice that the Service Contract Act might be applicable to aircraft overhaul work.

We think the record reasonably supports the Air Force position. With one exception, we are not aware of any DOL regulation or ruling which called into question, prior to the awarding of this contract, the Air Force policy with respect to Service Contract Act applicability to this type of procurement. It is true that DOL, contrary to the Air Force view, indicated that both the Service Contract Act and the Walsh-Healey Act could be applicable to the same contract, provided that the

principal purpose of the contract was for furnishing services, 29 CFR 4.132. However, DOL also recognized that "no hard and fast rule can be laid down as to the precise meaning of the term 'principal'" and that whether "the principal purpose of a particular contract is the furnishing of services * * * is largely a question to be determined on the basis of all the facts in each particular case." 29 CFR 4.111. In 29 CFR 4.130, DOL set forth a list "illustrative" of the types of services called for which "have been found to come within the coverage of the Act." We see nothing in that list which suggests that aircraft modification and overhaul contracts might be considered as within the coverage intended by the Service Contract Act.

The one exception referred to above is a letter dated May 22, 1969, in which DOL advised the National Aero Space Service Association that a Navy contract for the overhaul of S-2 series aircraft was regarded as "chiefly for the furnishing of services and subject to the Service Contract Act." DOL also stated in that letter that it did "not contemplate the issuance of any wage determination that would be applicable to this or any contract of a similar nature." The Air Force concedes that under the DOL interpretation implicit in this ruling "the Service Contract Act might apply to part or all of some overhaul and modification contracts." However, since the DOL ruling contained no explanation as to why the Navy contract was viewed as one chiefly for services, the Air Force "assume[d] that the contractor's overhaul and component supply responsibilities in that case were not of the same magnitude as those here." In addition, the Air Force explains its reaction to the DOL ruling as follows:

> "It seemed clear, however, that the DOL would not issue wage determinations in these cases, but rather would rely on the minimum wage established under the Fair Labor Standards Act. Since most, if not all, of our modification and overhaul contractors were in interstate commerce, and therefore were automatically subject to the Fair Labor Standards Act, it was obvious that the inclusion of the SCA would have no effect on the wages paid service employees. Accordingly, we continued our practice of including only the Walsh-Healey Act."

We agree with DOL that its failure to issue a wage determination for the Navy S-2 procurement did not relieve the Air Force of its obligation to submit a Standard Form 98 whenever it was otherwise required to do so, especially in view of the 1972 amendment to the Service Contract Act which requires DOL to issue wage determinations for all service contracts under which more than 20 service employees are to be employed during

fiscal year 1974. Public Law 92-473, approved October 9, 1972, 41 U.S.C. 358. However, in view of the history of this type of procurement, both prior to and subsequent to the S-2 ruling, as well as the statutory history of the Service Contract Act and the various judicial and administrative rulings which suggested the applicability of the Walsh-Healey Act to this procurement, we do not think that the Air Force acted unreasonably in not considering the S-2 ruling as mandating the submission of a Standard Form 98 to DOL for this procurement. Furthermore, DOL has not claimed that it ever put the Air Force on notice, prior to issuance of the solicitation or award of the contract, that it regarded this type of procurement as subject to the Service Contract Act. In fact, in its letter to us, DOL refers only to the S-2 ruling and then to the reaffirmation of its position in that case in a letter to the Air Force on July 18, 1973, which of course was after this contract was awarded.

It is also important to realize that it is primarily for the contracting agencies to decide what provisions should or should not be included in a particular contract. 44 Comp. Gen. 498 (1965); 47 Comp. Gen. 192 (1967). This, as has been previously noted herein, is the thrust of the applicable regulations which require the initial decision as to possible applicability of the Service Contract Act to be made by the procuring agency. Even DOL has recognized the primacy of an agency's function in this respect. For example, our file contains a copy of a letter dated April 19, 1971, from the Administrator of DOL's Wages and Hours and Public Contracts Division to the Federal Aviation Administration. That letter, sent in response to the submission of Standard Form 98, stated that "the contract may be principally for the manufacture or furnishing of materials, supplies, articles or equipment, and thus may be subject to * * * the Walsh-Healey Public Contracts Act * * *." The letter further stated:

> "If upon reconsideration you conclude that the contract will in fact be primarily for services performed by service employees and thus subject to the * * * Service Contract Act, please return the notice * * * to this Office with a notation to that effect." [Emphasis added.]

Therefore, on the basis of the record before us, we conclude that the contracting officer acted in good faith in regarding the Service Contract Act as not applicable to this procurement, that his failure to include a Service Contract Act clause in the solicitation and to submit a Standard Form 98 to DOL was not a deliberate, arbitrary attempt to circumvent any statutory or regulatory provision, and that

the contract was not awarded illegally. In addition, the fact that DOL subsequently made it clear to the Air Force that it regards the contract awarded to E-Systems as subject to the Act does not render that contract void, since it was awarded in good faith and in accordance with the regulatory provisions implementing the Service Contract Act. See, in this connection, Kentron Hawaii, Ltd. v. Warner, No. 71-2038, D. C. Cir., June 15, 1973, and our decisions at 51 Comp. Gen. 72 (1971) and 52 Comp. Gen. 161 (1972), in which it was held that the validity of a service contract was not affected by the absence therefrom of a DOL wage determination when that absence was not due "to any misfeasance or nonfeasance on the part of the contracting agency." 51 Comp. Gen. 72,76. We do not think the record in this case shows misfeasance or nonfeasance on the part of the Air Force.

Although we cannot agree with DOL that the protest should be upheld, we share its obvious concern with respect to affording service contract workers the protection envisioned by the Service Contract Act. We note that 29 CFR 4.5(c) provides that if a contracting agency does not notify DOL of its intent to make a service contract within the time prescribed by 29 CFR 4.4, "the contracting agency shall exercise any and all of its power that may be needed (including * * * its power to negotiate, its power to pay any necessary additional costs, and its power under any provision of the contract authorizing changes) to include in the contract any wage determinations communicated to it within 30 days of the filing of such notice or of the discovery by the Employment Standards Administration, U. S. Department of Labor, of such omission." We think a similar provision, specifically pertaining to the situation in which DOL, subsequent to contract award, disagrees with a determination by a contracting agency that the Service Contract Act and therefore the notice requirements of 29 CFR 4.4 were not applicable to the procurement, would protect the workers concerned and would provide for the orderly resolution of the type of dispute involved herein without the potential disruption of the procurement process. Accordingly, we are suggesting to the Secretary of Labor that consideration be given to the development and promulgation of such a provision. A copy of our letter to the Secretary is enclosed.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States