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

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December 3, 1973

The Honorable
The Secretary of the Air Force

Dear Mr. Secretary:

This is in reply to the October 12, 1973, letter from the Acting Assistant Secretary of the Air Force (Installation & Logistics), requesting our opinion as to the propriety of making disbursements in accordance with Department of Labor (DOL) Wage Determination No. 73-594 (Rev. 3) under a cost-reimbursable service contract entered into by the Air Force with Pan American World Airways, Incorporated, for the operation and maintenance of the Eastern Test Range, Brevard County, Florida.

The contract in question encompassed the period from September 1, 1972, through June 30, 1973, and contained priced options for each of the next two fiscal years and unpriced options for each of two additional years. The Air Force, intending to exercise the option for fiscal year 1974, submitted to DOL on March 16, 1973, a Standard Form 98, Notice of Intention to Make a Service Contract, pursuant to ASPR 12-1005.8(b) and 29 CFR 4.145, which treat the exercise of renewal options as new procurements for purposes of the Service Contract Act of 1965 (SCA).

On May 22, 1973, DOL issued Wage Determination No. 73-594, which reflected wage rates called for in the collective bargaining agreements entered into by Pan American and several unions. The unions, however, claimed that the wage rates were lower than those prevailing in the locality and requested DOL to conduct a formal hearing pursuant to section 4(c) of the SCA. On May 31, 1973, DOL determined that a hearing was warranted and issued a notice to that effect. After a hearing on June 27 and 28, 1973, in which the Air Force participated, the Administrative Law Judge issued a decision on August 7, 1973, which upheld the unions' position. As a result, Wage Determination No. 73-594 (Rev. 3), setting forth increased wages and fringe benefits, was issued on September 17, 1973, with a notation that the revised rates "have application from July 1, 1973" to the Pan American contract. In the meantime, the Air Force had exercised the option effective July 1, 1973, so that when the revised wage determination was issued there was already in being a formal contract which called for wage payments in accordance with the wage determination issued in May.

[Propriety of Disbursements]

PUBLISHED DECISION
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The Service Contract Act of 1965, P. L. 89-286, 79 Stat. 1034, as amended by P. L. 92-473, 86 Stat. 789, 41 U.S.C. 351 et seq. was enacted to provide wage and safety protection for employees working under Government service contracts. The Act requires service contractors to pay their employees in accordance with wage determinations issued by DOL and made a part of their contracts awarded by the various Federal procurement agencies. Section 2 of the Act requires Federal service contracts to include a provision specifying the minimum wages and fringe benefits as determined by the Secretary of Labor "in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations." 41 U.S.C. 351. Section 4(c) of the Act provides:

> "(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." 41 U.S.C. 353(c).

Your Department takes the position that section 4(c) of the Act has no applicability to this contract and, therefore, the hearing and resulting issuance of a revised wage determination were contrary to statute. Specifically, it is claimed that section 4(c) "is addressed solely to the issue of relieving a successor contractor of the obligation to pay wage rates bargained for by his predecessor when such rates are substantially higher than those prevailing in the locality," and not to the situation where, as here, bargained-for wage rates are lower than the prevailing local wages. It is also claimed that section 4(c) is not applicable to a situation in which the predecessor contractor and successor contractor are one and the same.

In undertaking a review of the issues raised by the Air Force, we recognize that the issuance of wage determinations is vested by statute exclusively in the Department of Labor, and once issued, the correctness of the wage determination is not open to review. United States v. Binghamton Construction Co., Inc., 347 U.S. 171 (1954). However, when the legality of a wage determination is questioned, we will consider whether that determination was issued in accordance with the applicable statutory and regulatory provisions so as to warrant its inclusion in a Government contract. 49 Comp. Gen. 186 (1969); 47 id 192 (1967). Accordingly, our first concern here is whether DOL acted in accordance with the SCA in issuing Wage Determination No. 73-594 (Rev. 3).

Both section 2 and section 4(c) of the SCA establish collectively bargained for wage rates as the standard for determining what wage rates are to be paid employees working under a Government service contract. Section 2 requires the Secretary of Labor to base wage determinations on collective bargaining agreements covering service employees of the class to be employed under a Federal contract. Section 4(c) provides that no contractor may pay his employees less than that to which they would have been entitled under a predecessor contract, unless those wages vary substantially from those prevailing in the locality. Thus, in situations involving a predecessor contractor who was a party to a collective bargaining agreement, both sections 2 and 4(c) of the SCA have reference to that same agreement, so that DOL's wage determination should reflect the same wage levels that section 4(c) establishes as the minimum payable under a successor contractor. DOL recognizes that the minimum level set by section 4(c) is applicable even if a wage determination is not issued. 29 CFR 4.6(d)(2)). Accordingly, it is apparent that sections 2 and 4(c) must be considered together in determining the minimum wages payable under a service contract, and that the proviso of section 4(c) relieving a successor contractor of paying wages in accordance with his predecessor's wage rates is necessarily applicable to any wage determination based on those predecessor wage rates. This construction has not only been recognized and applied by DOL, see 29 CFR 4.3(b), 4.10(a), but is also indicated by the legislative history of P. L. 92-473 (Service Contract Act Amendments of 1972), which added section 4(c) and the requirement in section 2 to recognize collective bargaining agreement wage levels to the basic Act. The Senate report accompanying the bill which became P. L. 92-473 described the proviso as going to both section 4(c) and to section 2, S. Rept. 92-1131, 92nd Cong. 2d sess. 3, and also stated:

> "Sections (2)(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme. It is the intention of the committee that sections 2(a)(1) and 2(a)(2) and 4(c) be so construed that the proviso in section 4(c) applies equally to all the above provisions." S. Rept. 92-1131, 92nd Cong., 2d sess. 4.

Thus, we think it is clear that section 4(c) provides a procedure for challenging the applicability of a predecessor contractor's wage rates even when those rates were used as the basis for a wage determination issued pursuant to section 2.

We think it is also reasonably clear that the section 4(c) procedure permits consideration of claims that a predecessor contractor's wage levels were lower, as well as higher, than those prevailing in the locality. The proviso, of course, refers only to wages and benefits which are "substantially at variance" with those locally prevailing, which literally encompasses rates which are both higher and lower than the prevailing rates. The proviso was added to the proposed section 4(c) after concern was expressed in Congress that incorporation of the successor contractor doctrine in the SCA would lead predecessor contractors to increase wages to artificially high levels in order to discourage competitors who would be bound to pay those high rates if awarded a contract. Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, on S. 3827 and H.R. 15376, 92nd Cong., 2d sess. 23, 76-77, 97. However, the bill passed by the House of Representatives subsequent to those hearings did not contain the section 4(c) proviso. 118 Cong. Rec., August 7, 1972, H. 7257-7263. The proviso was added to the measure by the Senate, an action with which the House agreed. 118 Cong. Rec., September 27, 1972, H. 8803-04. The purpose of the proviso was explained in the Senate Committee report as follows:

> "However, the committee was concerned about safeguarding against any possible abuse. There are certain unusual circumstances where predetermination of wages and fringe benefits contained in such a collective agreement might not be in the best interest of the worker or the public.
>
> "Thus, service employees should be protected against instances where the parties may not negotiate at arm's length. For example, a union and an employer may enter into a contract, calling for wages and fringe benefits substantially lower than the rates presently prevailing for similar services in the locality. Likewise, a union and employer may reach an agreement providing for future

increases substantially in excess of any justifiable increases in the industry. Finally, it is possible that over a long period of time, predetermined contractual rates might become substantially at variance with those actually prevailing for services of a character similar in the locality.

"The committee concluded that the dual objectives of protecting the service worker and safeguarding other legitimate interests of the Federal Government could be best achieved by requiring the Secretary to predetermine the wages and fringe benefits contained in the collective agreement, except in the instance where he finds, after notice to interested parties, and a hearing, that * * * such contractual wages and fringe benefits are substantially at variance with those prevailing for services of a character similar in the locality." S. Rept. 92-1131, 92nd Cong., 2d sess. 4-5.

We think this makes it clear that Congress contemplated that the section 4(c) remedy would be available for challenging predecessor wage rates whenever those rates were either substantially higher or substantially lower than those prevailing in the locality.

We also believe that section 4(c) is applicable to the situation where a contractor is both the predecessor and successor contractor. The operative words of section 4(c) refer to "contract", not "contractor" ("no contractor or subcontractor under a contract, which succeeds a contract * * *." [Emphasis added.]). Thus, the statute is applicable by its terms to a successor contract, without regard to whether the successor contractor was also the predecessor contractor, and, as noted previously, the exercise of an option, as was done here, is treated as the award of a new contract under the SCA. Furthermore, the fact that a successor contractor (whether or not he was also the predecessor contractor) has its own collective bargaining agreement does not negate the clear mandate of the statute that the rates called for by the predecessor contract shall be the minimum rates payable under the new contract unless DOL decides otherwise pursuant to section 4(c). As we have stated previously:

"The fact that a particular contractor may be obligated by an independent agreement to pay higher or lower wage rates than those stipulated in a Government contract as minimum rates, pursuant to statute, does not affect either the validity of the rates established by the contract or the contractor's duty to comply therewith * * *." 48 Comp. Gen. 22, 23-24 (1968).

We do not disagree with the Air Force position that the primary purpose of section 4(c) was to require successor contractors to honor collective bargaining agreements in effect at a particular work site unless those agreements contained unreasonably high rates. However, as indicated above, the language of section 4(c) clearly permits the action taken in this case by DOL. While the Air Force argues that DOL's action is contrary to the Congressional intent of preserving, rather than providing a vehicle for challenging the wage rates established in collective bargaining agreements, we note that the wage rates involved herein were arrived at prior to enactment of the 1972 Amendments, and were lower than those previously agreed to in order to enable the incumbent contractor to offer a competitive proposal. DOL's action here rectifies that situation by raising the wage rates to the level prevailing in the Cape Kennedy locality. Now that the 1972 Amendments are in effect, it is unlikely that this situation would again arise, since the Act as amended requires that successor contractors pay wages in accordance with a predecessor's collective bargaining agreement.

Accordingly, we are of the opinion that Wage Determination No. 73-594 (Rev. 3) was issued in accordance with the provisions of the SCA and the procedures contemplated therein.

There remains for consideration whether that wage determination can be made applicable to the contract in question. Wage determinations have generally been regarded as inapplicable to previously awarded contracts, 29 CFR 4.164(c); 48 Comp. Gen. 719, 721 (1969), with certain possible exceptions not directly relevant here. See ASPR 12-1005.3(b); 29 CFR 4.5(c). However, we think it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved. To hold otherwise would completely thwart the statutory scheme. As Congress appears to have envisioned it, DOL would implement section 4(c) by "providing for expeditious hearings and decisions", and that—

> "* * * contractual wages and fringe benefits shall continue to be honored * * * unless and until the Secretary finds, after hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services." S. Rept. 92-1131, 92nd Cong., 2d sess. 5.

Obviously, once it is found that the contractual wages and benefits do substantially vary from those locally prevailing, the contractor would no longer be obligated to pay those wages. We agree with DOL that the SCA then requires the issuance of a new wage determination (based on

the wages and fringe benefits locally prevailing), 29 CFR 4.10(d), which is to be applied to the contract in place of any wage determination previously issued.

We are aware that neither the regulations promulgated by the Secretary of Labor and the Department of Defense nor any contract clauses provided for by such regulations specifically deals with the application of a revised wage determination resulting from a section 4(c) proceeding to an existing contract subject to the SCA. We believe that regulations explicitly providing for contract clauses authorizing such application should be issued as soon as practicable, and we are pleased to note that DOL has advised us of its intention to revise its regulations further to provide for this type of situation.

Notwithstanding the absence of current regulatory provisions directly bearing on this matter, we do not believe that application of Wage Determination 73-594 (Rev. 3) to the current cost-type contract is precluded by any provision of law. Accordingly, and in view of the purpose and intent of the SCA, we would not view as improper the inclusion of the revised wage determination in the current contract.

For your information, we are enclosing a copy of our letter of today to the Secretary of Labor.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

Enclosure