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DECISION

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

FILE: B-145136 DATE: October 31, 1977

MATTER OF: Maybank Amendment

DIGEST:

1. Prohibition, contained in Department of Defense (DOD) Appropriation Act, of payment of contract price differential for relieving economic dislocations must be given effect notwithstanding earlier amendment to Small Business Act which allows such price differentials to be paid.

2. Where Small Business Act amendment sets forth order of preference for procurement set-asides, with first priority for labor surplus area set-asides, and where such labor surplus area set-asides are subsequently prohibited by appropriation act provision, remaining order of preference set forth in Small Business Act is in effect "repealed."

3. While order of preference for procurement set-asides set forth in Small Business Act does not control DOD procurement because of provision in DOD Appropriation Act, civilian agencies of Government are controlled by such order of preference since DOD appropriation act does not apply to them.

4. Prohibition of payment of price differential for relieving economic dislocations does not conflict with Buy American Act preference for domestic over foreign made products. While an award to a labor surplus area firm in accordance with Buy American Act preference serves to relieve economic dislocations, the price differential is paid for the purpose of preferring domestic products and not to relieve economic dislocations.

By letters dated September 14, and September 22, 1977, the Administrator, Office of Federal Procurement Policy (OFPP), with the concurrence of the Department of Defense (DOD) and the Small Business Administration, has requested our opinion whether changes should be made in the small business and labor surplus area set-aside practices of DOD in light of recent legislation.

As background, the preference for award of Government contracts to small business firms and concerns in labor surplus areas originated in the policies declared in the Defense Production Act of 1950, 50 U.S.C. § 2062, and in amendments thereto, and in various Executive orders and supplementary directives issued to implement those policies. The small business preference was thereafter given more express legislative sanction by the enactment of the Small Business Act of 1953, 67 Stat. 232, (amended in 1958 and redesignated the "Small Business Act", 15 U.S.C. §§ 631 et seq.). The labor surplus area award program, however, became the subject of controversy in Congress, resulting in the enactment of the Maybank Amendment in the 1954 Defense Appropriation Act and in succeeding DOD appropriation acts. The Maybank Amendment provides that "no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations."

Under existing authority total small business set-aside awards may be made at prices higher than those otherwise obtainable through unrestricted competition, so long as the award prices are reasonable. See 41 Comp. Gen. 306, 315 (1961); 31 Comp. Gen. 431 (1952) and J.H. Rutter Rex Manufacturing Co., Inc., 55 Comp. Gen. 902 (1976), 76-1 CPD 182.

In our decision of 40 Comp. Gen. 489 (1961), cited in the Administrator's letter, we considered whether total set-asides for labor surplus area firms would be authorized, in view of the Maybank Amendment, under criteria similar to those applicable to small business firms. We concluded that in light of the clear intent of the Congress, as expressed in the Maybank Amendment which had been enacted without change in each DOD appropriation act since 1954, a total set-aside based on obtaining only a "fair and reasonable" price violated the prohibition of paying contract price differentials for the purpose of relieving economic dislocations.

As a result, a total set-aside procedure has not been implemented for labor surplus area firms. Rather the procurement regulations provide for partial set-asides for such firms at prices not higher than those paid on the non-set-aside portions. See Federal Procurement Regulations (FPR) §§ 1-1.800 et seq., and Armed Services Procurement Regulation (ASPR) §§ 1-800 et seq.

As indicated, while the Maybank Amendment has been regularly included in the annual DOD appropriation acts since 1954, efforts have been made in recent years to authorize total set-asides for labor surplus

area concerns. In each of the last 3 years, Senator Hathaway introduced an amendment to the DOD appropriation bill to state explicitly that total labor surplus set-asides are permissible upon a determination that such awards will be made at reasonable prices. See 120 Cong. Rec. S12875 (Remarks of Sen. Hathaway) (daily ed. July 27, 1977). These amendments, however, have not been adopted. This year, for example, the Senate on July 19, 1977, approved the amendment, but the amendment was then dropped in conference. (H.R. Rep. No. 95-565, 95th Cong., 1st Sess. 50 (1977)) and the Magbank Amendment prohibition was left intact.

In addition, the OFPP in 1976 requested our opinion as to the propriety of a proposed test procedure within DOD involving total labor surplus area set-asides. Under the proposed approach, the total set-aside would only be made if it were determined that ample competition existed under the set-aside and the award would only be made if the bid prices were determined to be in the "lowest obtainable" category. We approved the proposed test procedure in Department of Defense's Use of Total Labor Surplus Area Set-Asides B-145136, July 2, 1976, 76-2 CPD 5.

Meanwhile, on August 4, 1977, the Small Business Act was amended by Pub. L. No. 95-89, 91 Stat. 553, to authorize total labor surplus area set-asides when it is administratively determined that "awards will be made at reasonable prices." Specifically, section 502 of Pub. L. No. 95-89 provides, in pertinent part, as follows:

> "(d) For purposes of this section priority shall be given to the awarding of contracts and the placement of subcontracts to concerns which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas. Notwithstanding any other provision of law, total labor surplus area set-asides pursuant to Defense Manpower Policy Number 4 (32A C.F.R. Chapter 1) or any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns that awards will be made at reasonable prices. As soon as practicable and

to the extent possible, in determining labor surplus areas, consideration shall be given to those persons who would be available for employment were suitable employment available. Until such definition reflects such number, the present criteria of such policy shall govern.

"(e) In carrying out labor surplus areas and small business set-aside programs, departments, agencies, and instrumentalities of the executive branch shall award contracts, and encourage the placement of subcontracts for procurement to the following in the manner and in the order stated:

"(1) Concerns which are located in labor surplus areas, and which are also small business concerns, on the basis of a total set-aside.

"(2) Concerns which are small business concerns on the basis of a total set-aside.

"(3) Concerns which are small business concerns, on the basis of a partial set-aside.

"(4) Concerns which are located in labor surplus area on the basis of a total set-aside."

The intent of section 502 was to remove the Maybank Amendment "deterrent" to the labor surplus area set-aside program, as set forth in the GAO decision at 40 Comp. Gen. 489, supra. S. Rep. No. 95-184, 95th Cong., 1st. Sess. 10-11 (1977). As stated by Senator Hathaway in support of section 502 of the bill:

"The clear, unequivocal language in section 502 of the pending measure is not susceptible to any misinterpretation and would require the GAO and all other Federal agencies concerned with procurement to alter their present policies to allow and implement total labor surplus set-asides.

> "Further, the rules of the Senate support this conclusion since rule 16 prevents any appropriation bill from containing legislative language." 123 Cong. Rec. S12874 (daily ed. July 27, 1977).

Similarly, Congressman LaFalce of New York, speaking in support of the Conference report on the bill, viewed the mandate of section 502 as overriding any provision in an appropriation act. He stated that:

> "Since it is impermissible by the rules of the House and Senate to legislate in appropriation bills, any legislation restricting section 502's application to all Federal procurement could not be present in an appropriations measure. Accordingly, the Maybank amendment will not serve as a deterrent to the labor surplus policy's implementation on a total set-aside basis in defense or civilian procurement activities." 123 Cong. Rec. H7806 (daily ed. July 26, 1977).

As stated above, section 502 of Pub. L. No. 95-89 was enacted August 4, 1977. On September 21, 1977, the Department of Defense Appropriation Act, 1978, was enacted as Pub. L. No. 95-111, 91 Stat. 553. Since the Hathaway amendment to section 823 of the DOD Appropriation Bill was not adopted by the conference committee, the Maybank Amendment is included in the usual form in section 823 of Pub. L. No. 95-111.

The OFPP Administrator acknowledges that, on its face, section 823 appears to be inconsistent with the provisions of section 502 of the Small Business Act amendments. He notes that under the general rule of statutory interpretation, the later statute must be construed to repeal any prior inconsistent statute in the absence of a showing of a contrary legislative intent, and that therefore "it would seem that the Maybank Amendment is controlling with respect to procurements funded by 1978 appropriations." He suggests, however, the argument that our 1961 decision (40 Comp. Gen. 489) "constituted only an interpretation and not a reflection of the Congressional intent as expressed in the language of the Maybank Amendment itself, and that such an interpretation should not continue to govern in the face of the language itself and the clear expression of a contrary Congressional legislative intent in Public Law No. 95-89."

Further, the Administrator suggests that, in any case, the expression of congressional intent in Pub. L. No. 95-89 warrants a reconsideration of our 1961 decision which distinguished small business and labor surplus area set-asides and authorized small business set-asides, at least in part, on the basis that Congress had sanctioned total small business set-asides by enactment of the Small Business Act of 1953. In addition, he points out that the two acts (Pub. L. 95-89 and the 1978 DOD Appropriation Act) should be interpreted so far as possible to avoid any inconsistency "and this can be done by equating the required assurance of a fair and reasonable price under Pub. L. No. 95-89 with the prohibition of a price differential under the Maybank Amendment."

Moreover, the Administrator suggests that even if the Maybank Amendment continues to be construed to prohibit total labor surplus area set-asides, this might only affect priorities 1 and 4 of Section 502(e), and that priorities 2 and 3 would not be "repealed" by the Maybank Amendment. On the other hand, the Administrator also believes it could be argued that priorities 1 through 4 "are so interrelated and integrated that they cannot be preserved in part without doing violence to the Congressional intent which * * * was to give greater preferment to labor surplus area firms and not to subordinate them."

In conclusion, the Administrator states that pending our decision in this matter set-asides will continue to be made in accordance with existing regulations rather than on the basis of Pub. L. No. 95-89.

Thus, the question raised concerns the relationship between section 502 of Pub. L. No. 95-89 and the Maybank Amendment as contained in section 823 of Pub. L. No. 95-111. The principle of statutory construction to be applied in such a situation is as follows:

> "Statutes in pari materia, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. But if there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature." 2A Sutherland, Statutes and Statutory Construction § 51.02 (4th ed. C. Sands 1973).

To construe sections 502 and 823 harmoniously would require construing "price differential" as having reference to a reasonable price rather than the lowest obtainable price. To reach this result, we would have to conclude either that our 1961 decision (40 Comp. Gen. 489) was incorrect, or that the Maybank Amendment should be re-interpreted in light of Pub. L. No. 95-89.

As discussed above, our 1961 decision concluded that the "price differential" in the Maybank Amendment was to be measured against the lowest obtainable price, a conclusion which we still believe is fully consistent with the fundamental principles of competitive procurement. At this point, it may be useful to restate our 1961 conclusion in more detail:

> "The language of the proviso leaves little room for doubt, and examination of the legislative history confirms, that the intent of the Congress was that the practice of negotiating contracts with labor surplus area firms which would meet the lowest price offered by any other bidder on a designated procurement might be continued, but that no such contract could be awarded at a price in excess of the lowest available. The prohibition originated as a Senate Committee amendment to the House bill (See S. Rept. No. 601, 83d Cong., 1st sess. p. 11), and in the form proposed by that Committee was apparently intended to prohibit the payment of appropriated funds on any contract negotiated for the purpose of correcting or preventing economic dislocations. On the floor of the Senate a strenuous effort was made to eliminate the proviso, but it was adopted in the form proposed by the Committee. See 99 Cong. Rec. 9499-9508. The House rejected the Senate amendment, and in conference the proviso as finally enacted was substituted. See H. Rept. No. 1015, 83d Congress, 1st session. The intent of the provision is further clarified by debate which occurred in both houses upon adoption of the conference report. See 99 Cong. Rec. 10252-10258; 10342-10348.

> "On the record we must construe the limitation in question as precluding the expenditure by the defense establishment of appropriated funds under any contract awarded on the basis of a labor surplus area situation at a price in excess of the lowest obtainable on an unrestricted solicitation of bids or proposals." 40 Comp. Gen. 489, 490-491.

It will be noted that the above excerpt is replete with references to legislative history, and we believe our conclusion was compelled by any fair reading of that legislative history. We cannot accept the proposition that our 1961 decision was the result of merely our "interpretation", rather than mandated by congressional intent. In any event, had our 1961 decision been perceived as inconsistent with congressional intent, the Maybank Amendment could readily have been revised, as suggested by Senator Hathaway, to negate the effect of our decision. The continued reenactment of the Maybank Amendment without change must therefore be viewed as further indication that our decision was in fact an accurate reflection of congressional intent. See Shapiro v. United States, 335 U.S. 1, 16 (1947).

In analyzing the effect of the inclusion of the Maybank Amendment in Pub. L. No. 95-111, it is of course important to consider that the Congress had very recently enacted section 502 of Pub. L. No. 95-89. In view of the legislative history of Pub. L. No. 95-89 as discussed above, it is clear beyond question that section 502 was intended to eliminate the effect of the Maybank Amendment. The legislative history of section 823 of Pub. L. No. 95-111, as it might relate to section 502, however, is sparse. The original House bill (H. R. 7933) had included the Maybank Amendment in its traditional form. Since this involved no change from prior years, there was no comment in the report of the House Appropriations Committee (H. R. Rep. No. 95-451). The Senate adopted the Maybank Amendment with the additional language proposed by Senator Hathaway, as follows:

> "Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations, except that nothing herein shall be construed to preclude total labor surplus set-asides pursuant to Defense Manpower Policy No. 4 (32A C.F.R. Chapter I) or any successor policy if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices." (Sen. Hathaway's language underscored.)

The Senate Committee on Appropriations noted:

> "Without this additional language, a GAO interpretation of the language in the House Bills, the so-called Maybank Amendment prohibiting the payment of price differentials on Defense contracts, restricts the flexibility of the Secretary of Defense in this area." S. Rep. No. 95-325, 95th Cong., 1st Sess. 283 (1977).

The House version was adopted in conference. The conference report noted merely that "The conferees agreed to delete language proposed by the Senate which would have allowed for the set-aside of Defense contracts to labor surplus areas." H. R. Rep. No. 95-565, 95th Cong., 1st Sess. 50 (1977). In presenting the conference report to the full Senate on September 9, Senator Stennis noted the conference action without further comment. 123 Cong. Rec. S14436 (daily ed. September 9, 1977). Thus, the fact remains that the Maybank Amendment was enacted in its traditional form several weeks after the enactment of Pub. L. No. 95-89.

For several reasons we do not believe it would be proper now to engraft a different interpretation upon the language of the Maybank Amendment. First, as discussed above, the legislative history of Pub. L. No. 95-111 affords no support for any such reinterpretation. Next, the language of the Amendment as contained in section 823 is no different from that used in previous years. Finally, and most significantly, Senator Hathaway's revision to the Maybank Amendment, which was designed to serve the same purpose as section 502, and which had been proposed but not enacted in several previous years, was once again in 1977 expressly deleted in conference with the traditional language left intact. There is no indication, either in the conference report itself or in the ensuing floor debates on the conference report, that the Hathaway language was deleted because it was deemed unnecessary in light of Pub. L. No. 95-89. Therefore, we can find no legal basis to conclude that language which has had a recognized meaning for many years should now be given a different meaning. To conclude otherwise would be to view the Maybank Amendment without the Hathaway language as having the same meaning as the Maybank Amendment with the Hathaway language.

Accordingly, we feel compelled to conclude that the Maybank Amendment as contained in section 823 of Pub. L. No. 95-111 and viewed in its historical context must prevail as the later expression of Congress.

It has been suggested that the Maybank Amendment is rendered ineffective by virtue of Senate Rule XVI and House Rule XXI, which prohibit the inclusion of general legislation in appropriation bills. At the outset, we would note that it is far from clear that the Maybank Amendment constitutes "general legislation." It certainly may be argued the Maybank Amendment is a condition on the availability of the appropriation, which is clearly within the congressional prerogative. In any event, the effect of Senate Rule XVI and House Rule XXI, if they are applicable, is merely to subject the given provision to a point of order (a procedural objection raised by a congressman alleging a departure from rules governing the conduct of business). If a point of order is not raised, or if one is raised but not sustained, the validity of the provision, if enacted, is not affected. The cited rules have no application once the legislation has been enacted.

Also, the validity of section 823 cannot be questioned merely because it is contained in an appropriation act or because of the language "notwithstanding any other provision of law" in section 502. In 1966, for example, we advised Chairman Mahon of the House Committee on Appropriations that:

> "It is fundamental * * * that the Congress is not bound by a statute enacted by it earlier in the same session and that the Congress has full power to direct the purposes for which an appropriation shall be used. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditure of the public money." B-160032, September 13, 1966.

See also United States v. Dickerson, 310 U.S. 554, 555 (1940).

In addition, we do not believe that priorities 2 and 3 as set forth in the amendments to the Small Business Act remain unaffected by the Maybank Amendment. Section 502(e) of Pub. L. No. 95-89, as indicated above, furnishes a listing of priorities for contract award and states "the executive branch shall award contracts, and encourage the placement of subcontracts for procurement * * * in the manner and order stated * * *." (Emphasis added.) While priorities 2 and 3 do not themselves relate to labor surplus area set-asides, they are listed following the initial statutory preference for firms located in labor surplus areas. If priorities 2 and 3 are not "repealed," they would in practical effect become priorities 1 and 2, respectively. The consequence is that awards would

not be made "in the manner and order stated " Moreover, this would alter the current regulatory preference for combined small business and labor surplus area set-asides (See ASPR § 1-706.1) in favor of small business concerns on the basis of a total set-aside (priority 2 of Pub. L. No. 95-89). As the Administrator suggested, this would do violence to the congressional intent expressed in Pub. L. No. 95-89, of which the clear legislative purpose was to enlarge the preference for labor surplus area firms and not to subordinate them.

To reiterate, we believe the Maybank Amendment in section 823 must prevail as the later expression of Congress. The effect of this is to suspend section 502 of Pub. L. No. 95-39 with respect to funds appropriated by Pub. L. No. 95-111. Accordingly, the small business and labor surplus set-aside practices of DOD should not be changed to conform with section 502 of the Small Business Act amendments.

At the same time it is clear that the civilian agencies of the government are subject to the provisions of Pub. L. No. 95-89, since the Maybank Amendment applies only to the Department of Defense. We realize that prior to the enactment of Pub. L. No. 95-89 the civilian agencies, as well as the military departments, in accordance with the provisions of Defense Manpower Policy No. 4 (32A C.F.R. Chapter 1), were precluded from instituting total labor surplus area set-asides. Pub. L. No. 95-89, which is applicable to the civilian agencies, requires that set-asides, as set forth in section 502 be made under the circumstances set forth in subsection (d) of section 502.

Finally, OFPP has also questioned whether the Maybank Amendment bears upon the preferential treatment for American products that is afforded under the Buy American Act. Under the executive implementation of the Buy American Act, price differentials may be paid to achieve the required preferences for American products. In fact, under existing regulations the price differential which may be allowed between the cost of a foreign product and the American product will be increased if the firm submitting the low acceptable domestic bid is a small business concern or a labor surplus area concern. FPR § 1-6.104-4(b) and ASPR § 6-104.4(b).

Nevertheless, we see no basic conflict between the two provisions of law. The stated purpose of the Maybank Amendment is to prohibit the payment of a contract price differential for relieving economic dislocations. The Buy American Act preference, on the other hand, is for the purpose of preferring domestic products over foreign made products. We recognize that the two purposes may overlap in that an award to a labor surplus area firm in accordance with the Buy American Act preference serves to relieve economic dislocations. The price differential, however, is paid for the purpose of preferring domestic products and not to relieve economic dislocations.

R. F. Keller

Acting Comptroller General
of the United States