DECISION

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

50707
97270

FILE: B-146824 DATE: May 28, 1975

MATTER OF: D. E. Clarke

DIGEST:

Concerning contracts for both construction and non-construction work, GAO has had no objection to contracting officers following applicable criteria set forth in ASPR § 12-106.1 which provides that Davis-Bacon Act, 40 U.S.C. 276a, is applicable where contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at contract date that substantial amount of construction work will be necessary for contract performance, or construction work is physically or functionally separate from other contract work.

By letter dated April 30, 1975, the Assistant Administrator, Employment Standards Administration, Wage and Hour Division, Department of Labor, requested an interpretation of a certain portion of the D. E. Clarke decision, B-146824, October 17, 1974, relating to the application of the Davis-Bacon Act, 40 U.S.C. 276a, to construction work performed pursuant to specifications contained in operation and maintenance contracts subject to the Service Contract Act, 41 U.S.C. 351, et seq.

The decision of October 17, 1974, contained the following statement, which was quoted from one of our earlier decisions, 40 Comp. Gen. 565 (1961):

"* * * it is not necessarily the nature of specific work but contract content which governs applicability; whether or not the work to be done is in the nature of repairs or maintenance is not the sole determinative factor. A proper test to determine applicability would be whether or not a contract essentially or substantially contemplates the performance of work described by the enumerated items. [construction, alteration, and/or repair, including painting and decorating]."

It has been pointed out that this is inconsistent with section 12-106.1 of the Armed Services Procurement Regulation (ASPR), which provides:

"(a) Contracts involving both construction and nonconstruction work are in general subject to the requirements of Section XVIII, Part 7, and must include the appropriate clauses in 7-602.23 and 7-603.26 if:

"(i) the contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at the contract date that a substantial amount of construction work will be necessary for the performance of the contract (the word 'substantial' relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract); and

"(ii) the construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract; and

"(iii) the requirements are otherwise applicable to the contract (see 18-701).

"(b) Even though the contract contains construction labor clauses pursuant to (a) above, the nonconstruction work under the contract is not subject to those clauses, because they provide that they are applicable to the contract work only to the extent that the work is subject to the labor standards statutes involved."

It has been the consistent position of our Office that the responsibility for determining whether Davis-Bacon Act provisions

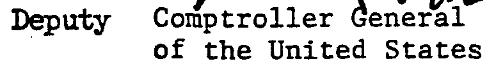
should or should not be included in a particular contract, as in the case of other appropriate contract provisions, rests primarily with the contracting agencies which must award, administer and enforce the contract. 44 Comp. Gen. 498, 502 (1965). Our only concern is whether the decision to either include or not include the Davis-Bacon provisions is based on appropriate criteria. In 40 Comp. Gen., supra, we concurred in the action taken by a contracting officer, stating that:

> "In the circumstances, we find no room to disagree with the contracting officer's decision that the work subcontracted to W. H. Nichols & Company, Inc., fell within a reasonable interpretation of 'servicing and maintenance' as these terms are used in the Regulations. * * *"

While recognizing that the contracting officer's actions under the criteria, as established by the applicable law and regulations then in existence, were proper, this did not mean that under different criteria our holding in 40 Comp. Gen., supra, would necessarily be the same. We recognize that the criteria under which the contracting officer operates can, and do, change. An example of this is the above-quoted regulations which were promulgated on November 15, 1963, as ASPR § 12-402.2, and established different criteria for contracting officers to follow in determining the applicability of the Davis-Bacon Act. In decisions rendered subsequent to the promulgation of the above regulations, we have recognized that the contracting officer was applying different criteria. This is exemplified by our holding in B-178159, June 6, 1973, involving a procurement where 30 percent of the work called for by the specifications was construction work. The procuring activity included the Davis-Bacon Act provisions since ASPR § 12-106.1 requires the inclusion of the provisions where the contract contains specific requirements for substantial amounts of construction. We held that our Office had "no basis to dispute the agency's position that the prospective contract involves substantial amounts of construction work." See also 50 Comp. Gen. 807 (1971) involving a similar provision in the Federal Procurement Regulations (§ 1-12.402-2). In that decision, we stated that since it appeared that substantial amounts of construction, alteration or repair work might be involved

in the procurement we were calling to the attention of the procuring activity the provisions of § 1-12.402-2 of the Federal Procurement Regulations for use as a guideline in determining whether, and to what extent, if any, the Davis-Bacon Act provisions should be included in a resolicitation of the contract. Thus, we have had no objection to a contracting officer making a determination, based on the criteria set forth in ASPR § 12-106.1, to either include, or not include, the Davis-Bacon Act provisions in a contract, when the determination was, in fact, made pursuant to such criteria.

Accordingly, while the quotation from 40 Comp. Gen. 565 in D. E. Clarke, October 17, 1974, was inappropriate, recognition of ASPR § 12-106.1 would not have changed the result in view of the determined minor nature of the construction work.



Deputy Comptroller General
of the United States