Timmerman

The Comptroller General
of the United States

Washington, D.C. 20548

136492

Decision

Matter of: Tenavision, Inc.

File: B-231453

Date: August 4, 1988

DIGEST

Although solicitation for rental of washers and dryers contains requirement for maintenance and installation, the Service Contract Act does not apply because the proposed contract is not principally for services.

DECISION

Tenavision, Inc., protests the Army's determination that the Service Contract Act is not applicable to request for proposals (RFP) No. DAKF40-88-R-0403, for the rental of washers and dryers including maintenance and installation for troop housing at Fort Bragg and Camp McKall, North Carolina. The protest is denied.

Tenavision, the incumbent contractor, contends that since the Army is renting, not buying, the equipment and the RFP requires equipment maintenance, the agency is mainly purchasing services and the contract is therefore subject to the Service Contract Act. Tenavision states that the current contract for essentially identical equipment and maintenance was made subject to the Service Contract Act and challenges the Army's determination.

The Army asserts that the Walsh-Healey Act, not the Service Contract Act, is applicable to this procurement since the contractor is primarily furnishing equipment. In this regard, the agency states that the value of the services to be supplied is only one quarter the value of the required equipment. The agency has also included in its report a letter from the Department of Labor concluding that the RFP "does not have as its principal purpose the furnishing of services through the use of service employees, and thus would not be subject to SCA [Service Contract Act]." According to the Army, although the prior procurement was made subject to the Service Contract Act, its recent review of the requirement has led it to determine that the

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principal purpose of the contract is the furnishing of washers and dryers.

The Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1982), requires federal contractors performing service contracts entered into by the United States to pay minimum wages and fringe benefits, as determined by the Secretary of Labor, while the Walsh-Healey Act, 41 U.S.C. § 35-45, provides for the payment of minimum wages to employees performing federal contracts for the manufacture or furnishing of materials, supplies, articles and equipment. The regulatory scheme implementing these statutes envisions an initial determination by the contracting agency as to which statute applies to a particular procurement. If the contracting officer believes that a proposed contract "may be subject to" the Service Contract Act, he is required to notify the Department of Labor (DOL) of the agency's intent to make a service contract so that DOL can provide the appropriate wage determination. 29 C.F.R. § 4.4 (1987). If the agency does not believe a contract may be subject to the Service Contract Act, then there is no duty on its part to notify DOL or to include Service Contract Act provisions in the solicitation. 53 Comp. Gen. 412 (1973). When a protester challenges an agency's decision that the Service Contract Act does not apply to a particular procurement, the determination to be made is whether the agency acted reasonably. Id. Moreover, since the primary responsibility for interpreting and administering the Service Contract Act is vested in DOL, 29 C.F.R. § 4.101(b); Associated Naval Architects, Inc., B-221203, Dec. 12, 1985, 85-2 CPD ¶ 652, we will not substitute our judgment as to the applicability of the Act unless DOL's position is clearly contrary to law. See B.B. Saxon Co., Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD ¶ 410.

In this case, we do not believe that the determination that this contract is primarily for rental of machines, rather than their maintenance or installation, and therefore is subject to Walsh-Healey rather than Service Contract Act requirements, is clearly unreasonable or contrary to law. The Service Contract Act is applicable to contracts the "principal purpose" of which is to furnish services through service employees. 41 U.S.C. § 351. Since the value of the equipment being rented is far in excess of the costs associated with the required maintenance of the equipment, the agency reasonably could view the contract as one principally for the acquisition, on a rental basis, of equipment rather than as one principally for services. We do not agree, as the protester argues, that since these machines are to be leased rather than purchased outright the contract is one for services rather than supplies. The method of obtaining the equipment does not change the nature of the

contract. See 4 C.F.R. §§ 4.131 and 4.134 for examples of contracts involving equipment rental that do and do not have as their principal purpose the furnishing of services. Further, the fact that a prior similar contract was classified as subject to the Service Contract Act does not make the more current determination unreasonable. The agency simply says that upon further study, it found that the prior contract was improperly classified. Finally, as indicated above, DOL agrees with the Army's determination. There is absolutely nothing in the record suggesting that DOL's position is clearly contrary to law.

The protest is denied.

James F. Hinchman
General Counsel