DECISION

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

60453

FILE: B-184093, B-184178 DATE: January 30, 1976

MATTER OF: Central Data Processing, Inc.

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DIGEST:

GAO will not object to inclusion by contracting agency of Service Contract Act provisions in solicitations for data processing services, even though U.S. District Court has ruled that Act is not applicable to such services, since Department of Labor (DOL), which has responsibility for administering Act, has declined to follow the decision in all other jurisdictions and has been supported in its position by cognizant congressional committee, and since there is conflict within same judicial circuit as to whether decisions by DOL regarding coverage of the Act are judicially reviewable.

Central Data Processing, Inc. (CDP) has protested the inclusion of Service Contract Act (Act) provisions and Department of Labor (DOL) Wage Determinations in invitations for bids (IFB) Nos. F05602-75-B-0042 and F05602-75-B-0046 issued by the United States Air Force (USAF) Accounting and Finance Center, Denver, Colorado. CDP states that the Act is not applicable to these procurements, which involve data conversion services, because only white collar labor will be employed. Awards were made to the low bidders on June 27, 1975, notwithstanding the pendency of the protests, after the USAF determined that the services were urgently needed and that no alternate means of procuring them were available.

The Service Contract Act of 1965, as amended, 41 U.S.C. 351 (1970) 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 principal 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. Implementing regulations, setting forth the specific provisions to be included in contracts and providing for 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 C.F.R. 4.4-4.6 (1975); Armed Services Procurement Regulation (ASPR) 12.1004, 12.1005 (1975).

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Although the USAF states that it has complied with our previous decisions, it points out that those decisions preceded the Court's decision in Descomp, Inc. v. Sampson, supra, and suggests that we may want to reconsider our position, especially since DOL refuses to follow the Court's decision outside of Delaware. The USAF position is stated thusly:

> "Since the Federal District Court for the District of Delaware has now ruled that the DOL position is contrary to the law, the GAO may now wish to review its previous conclusion. The Air Force is particularly concerned about this situation, because the DOL position is currently unsupported by any ruling of a court, and because the Air Force expects repetitive litigation of the matter unless the 'white collar' issue is resolved. In addition, the Service Contract Act is now administered in one way for the State of Delaware, and in another way for the other 49 states. This can only lead to conflict and confusion, especially where the competition for certain contracts extends over a multi-state area."

We continue to be of the belief that the application of the Act to "white collar" clerical workers, even though not specifically prohibited by the language of the Act, is of doubtful propriety. Our belief in this regard is of course buttressed by the District Court's decision in Descomp, Inc. v. Sampson, supra. However, as noted, DOL does not agree with the Court's decision and is refusing to follow it outside the District of Delaware.

In Hewes Engineering Company, Incorporated, supra, we recognized that under 41 U.S.C. 353 the Secretary of Labor is responsible for administering the Act and for promulgating implementing regulations. DOL continues to include under the coverage of the Act workers in clerical operations, office machine operation, data processing and other similar work. In addition, we note that DOL's position has been supported by the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, which strongly disagrees with the Descomp, Inc. v. Sampson decision. The Subcommittee stated the following in an April 1975 report:

Pursuant to these regulations, contracting officers file with DOL a notice of intent to award a service contract whenever they intend to issue a solicitation leading to the award of a contract "which may be subject to the Act," and DOL issues, when appropriate, a wage determination setting forth minimum wages and fringe benefits. The wage determination is included in the solicitation and resulting contract. These procedures were followed in the two procurements being protested.

The protester's position is based on the holding in Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D. Del. 1974). In that case, it was held that "white collar" keypunch operators were not service employees within the meaning of the Act even though they were performing services, and that the Act therefore was inapplicable to the contract in dispute. See also 53 Comp. Gen. 370 (1973), in which we expressed doubt that the Act was applicable to clerical workers and recommended that clarifying legislation be obtained. It is not disputed that the contracts are to be performed primarily by "white collar" keypunch operators and other clerical workers.

The USAF position in this matter is that these procurements were conducted in accordance with the ground rules established in Descomp, Inc., B-178956, B-179672, January 31, 1974, 74-1 CPD 44 and Hewes Engineering Company, Incorporated, B-179501, February 28, 1974, 74-1 CPD 112. In Descomp, Inc. we denied a protest against the inclusion of Service Contract Act wage determinations in two solicitations calling for keypunching services, saying that while the applicability of the Act to clerical workers was a matter of serious doubt, the statutory language did not specifically prohibit DOL from classifying clerical workers as service employees. Furthermore, in Hewes Engineering we concluded that notwithstanding our doubts, until clarifying legislation was obtained contracting agencies must give due regard to DOL's position when determining whether a particular procurement may be subject to the Act "unless those views are clearly contrary to law."

USAF reports that DOL's views are clear. According to USAF, DOL, by letter dated August 7, 1974, requested that all future contracts for the conversion of legal texts to magnetic tapes include provisions implementing the Act. As a result of the request from DOL, the contracting officer, prior to issuing the instant solicitation, forwarded a Notice of Intention to Make a Service Contract to DOL, expressing his reservations as to the applicability of the Act. DOL responded by issuing the wage determination which was included in the solicitations.

"That the court in Descomp placed a construction upon the language of the statute that is clearly not there is well supported by statements of Congressional intent in the 1974 Oversight Hearings. * * *

"Descomp * * * established an incorrect test for defining a service employee based upon a distinction between so-called 'blue' and 'white' collar employees. * * *

"The Subcommittee rejects the holding in Descomp and endorses the government's position in the case with regard to the use of the words 'any' and 'all' in the § 8(b) definition of service employee, that it evidenced a legislative intent to give an expansive scope to the coverage of the Act and the definition of 'service employee.'

* * * * *

"As problems have now arisen concerning white collar workers, the Subcommittee accordingly recommends that § 2(a)(5) be amended to require inclusion of the schedule of pay that would be applied to white collar employees if the general schedule pay rates (5 U.S.C. § 5332) governed." Staff of the Subcommittee on Labor - Management Relations, House Committee on Education and Labor, 94th Cong., 1st Sess., Congressional Oversight Hearings: The Plight of the Service Worker Revisited 11-12 (Committee Print 1975).

Moreover, we note that there is a conflict within the Third Judicial Circuit (in which the Descomp court sits) with respect to the reviewability of the Secretary of Labor's determination as to the coverage of the Act. See Curtiss-Wright Corporation v. McLucas, 364 F. Supp. 750 (D. N.J. 1973), in which the court held that the Secretary's determination was "not judicially reviewable." 364 F. Supp. at 769. The court in Descomp specifically declined to follow the Curtiss-Wright case. 377 F. Supp. at 259.

Under these circumstances, we think it would be inappropriate at this time for this Office to decide that as a matter of law the Act must be construed only as the court construed it in the Descomp case.

With regard to the instant protests, the USAF, relying on our prior decisions and on DOL's interpretation of the Act, complied with the implementing regulations and included the wage determinations in the solicitations. For the reasons stated above, we do not find such actions to be legally objectionable.

In light of the foregoing, the protests are denied.

R. F. Keller

Deputy Comptroller General
of the United States