DECISION

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

c0400

FILE: B-184803, B-184804, B-184805 DATE: January 19, 1976

MATTER OF: ENSEC Service Corp.

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DIGEST:

Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) is denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Government. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act.

ENSEC Service Corp. (ENSEC) has protested the award of any contracts under three General Services Administration (GSA) invitations for bids (Nos. 03C5086901, 03C5094201, and 03C5085301) for the provision of security guard services at various locations in the Washington, D.C. area (GSA Region 3).

Bids on these procurements were opened during August 1975. ENSEC, the incumbent contractor at the locations covered by the three solicitations, was determined to be the 5th, 11th, and 3rd low bidder respectively. GSA has withheld making award on each of these procurements pending resolution of the protests.

ENSEC's protests are based on its assertion that incumbent contractors are placed at a competitive disadvantage because of the participation by competing firms in the Work Incentive Program (WIN) administered by the Department of Labor (DOL). Under WIN, employers hiring welfare recipients participating in the program are reimbursed by DOL for up to 50 percent of such employees' wage rates for the first 26 weeks of employment. In addition, employers can claim tax credits covering 20 percent of the total wages paid to WIN employees. ENSEC alleges that non-incumbent contractors intending to utilize WIN personnel may offer substantially lower bids than they would otherwise because of the "subsidy" provided by the

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Government under WIN. ENSEC claims that this would not only place it at a competitive disadvantage, but would also be contrary to the Service Contract Act of 1965, 41 U.S.C. 351 et seq. (1970), which ENSEC contends is intended to protect against the displacement of long term employees.

The Secretary of Labor has provided our Office with the following analysis of WIN and its relationship to the Service Contract Act:

> "Under the Work Incentive Program under Title IV of the Social Security Act, employers who employ welfare recipients who are participating in a WIN on-the-job training program (OJT) are compensated for the special costs of training such employees, including the loss in productivity inherent in trying to train such employees. Reimbursement for the employer is fixed 50% of an employee's wage rate for the first 26 weeks of employment. This is directly related to the general inexperience and training status of the WIN employee workforce.
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> "The WIN Tax Credit was enacted as Title VI of the Revenue Act of 1971 (Pub. L. 92-178) and is administered by the Internal Revenue Service under regulations at 26 CFR Parts 1 and 301. The Welfare Tax Credit enacted by the Tax Reduction Act of 1975 does not directly apply to the WIN program. Rather, it gives to employers who employ welfare recipients, who may or may not be WIN participants, the opportunity to take a tax credit as an incentive to employing such persons. This credit, too, is administered by the Internal Revenue Service with some collaboration by the Department of Health, Education, and Welfare. The Welfare Tax Credit is temporary and will expire on July 1, 1976.
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> "The WIN Tax Credit is not temporary. It does, however, have several limitations. To qualify for the WIN Tax Credit an employer must retain a former WIN employee for one year. Otherwise the credit is subject to recapture except in

> certain instances, such as if the employee is terminated because of misconduct on the employee's part. Finally, the maximum credit * * * may only be 20% of the employee's gross wages, with, however, the additional limitation that an employer's total annual credit may not exceed $25,000 plus 1/2 of the amount of creditable expenses in excess of $25,000.
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> "The McNamara - O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 351-358, is designed to assure adequate compensation levels for employees of government service contractors. Section 2 of the Act sets forth standards for wages, fringe benefits and working conditions.
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> "Theoretically, a McNamara - O'Hara employer could also take full advantage of the WIN and Welfare Tax Credits as could his competitor. The incumbent government contractor, however, may have difficulty hiring new people due to his well-established work force."

The Secretary further advises that while "an incumbent service contractor could conceivably be underbid by a competitor making use of WIN and welfare employees, a check of the Department's records * * * indicates that this does not seem to have occurred with sufficient frequency to create a problem of any magnitude."

We have carefully considered this matter and have concluded that the record affords no basis for upholding the protests. A close reading of ENSEC's submissions reveals that ENSEC has not claimed that any of its competitors on these procurements has in fact placed it at the competitive disadvantage by bidding on the basis of actual or intended participation in WIN. ENSEC has asserted only the possibility that this could have happened or might happen in the future. Such a speculative and conjectural argument does not provide an adequate basis for sustaining a protest. Furthermore, even if it were shown that a competitor's participation in WIN did place ENSEC at a competitive disadvantage, the protests could not be sustained on that basis alone. We have long recognized that certain firms may enjoy a competitive advantage by virtue of their

incumbency or their own particular circumstances or as a result of Federal or other public programs. B-175496, November 10, 1972; B-175834, December 19, 1972; Houston Films, Inc., B-184402, December 22, 1975. See also 53 Comp. Gen. 86 (1973) and 43 id. 60 (1963). As we said in B-175496, supra:

> "* * * it is obviously not possible to eliminate the advantage which might accrue to a given firm by virtue of other Federal, state or local programs. We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected."

Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the "result of preference or unfair action by the Government." B-175834, supra. We do not see how the Government's implementation of WIN could constitute such action.

With regard to the alleged conflict between WIN and the Service Contract Act, we point out that while a possible ramification of WIN could be inconsistent with one of the purposes of the Act, WIN itself is the result of statutory enactments and its implementation does not appear to be directly contrary to any provision of the Service Contract Act. We therefore are unable to sustain the protest on this basis.

In our view, the problem complained of by ENSEC, should it ultimately prove to be significant, is one that must be resolved by DOL, which is responsible for administering both WIN and the Service Contract Act, or, if need be, by the Congress. In this regard, the Secretary of Labor has advised us that if "significant problems arise from the interaction of the two programs (WIN and Service Contract Act) which cannot be handled by the service contractors and their employees, [DOL] will * * * take appropriate action to insure that the matter is resolved."

R. F. Keller

Deputy Comptroller General
of the United States