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

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B-178704

October 3, 1973

Industrial Security Systems, Inc.
14958 Ventura Boulevard
Sherman Oaks, California 91403

Attention: Mr. Thomas W. Wathen
President

Gentlemen:

We refer to your letter of May 16, 1973, and subsequent correspondence, protesting against the award of contract No. F04693-72-C-0048 to the H. L. Yoh Company (Yoh) (initially for fiscal year 1973) and the exercise of an option provision in the above-mentioned contract for fiscal year 1974.

The contract in question resulted from a request for quotations (RFQ) F04693-72-Q-0013, issued by the Los Angeles Air Force Station, Los Angeles, California, for security police services, under which Yoh was the successful offeror. It is your first contention that award of the contract should not have been made to Yoh. You allege that Yoh lacked the proper personnel and refused to honor a wage and fringe benefit provision of an agreement negotiated by the predecessor contractor. This protest was first made to the Secretary of the Air Force and the interim Air Force Systems Command in July of 1972. After several exchanges of correspondence, your protests were denied for the final time in August 1972. You now raise the same protest, nine months after the final adverse agency action, with our Office.

With respect to this contention, section 20.2(a) of the Interim Bid Protest Procedures and Standards states in pertinent part that:

> "* * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely. * * *"

As your first contention now questions an adverse agency action occurring many months ago, this aspect of your protest is clearly untimely and will not be considered.

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You next contend that the Air Force is legally precluded from exercising the option provision which was in the contract awarded to Yoh in June of 1972. It is your belief that the amendment to Army Regulation (AR) 600-50, entitled "Standards of Conduct for Department of the Army Personnel," section 1-12 thereof, entitled "Outside employment of DA personnel," would prohibit such an exercise. Your premise is based upon the following facts. On July 1, 1972, the date Yoh was to begin performance under its contract, Yoh was involved in a labor dispute concerning wages for its employees who were to perform under this contract. As its own employees refused to work, Yoh was unable to perform with its own work force. To remedy this situation, Yoh hired several off-duty military personnel to enable it to perform as required. Your firm then asserted that the utilization of off-duty military personnel was an unfair practice. After giving the matter consideration, the Department of the Army added a new subsection "J" to AR 600-50, section 1-12, to prevent future occurrences such as that at the Los Angeles Air Station. The new subsection reads as follows:

> "Active duty military personnel will not accept initial employment on any military installation with an employer who is currently being struck by his civilian employees on that installation."

You argue that since subsection "J" was promulgated to prevent situations such as mentioned above and that had the regulation been in effect when the contract was awarded, Yoh could not have performed the contract at the time specified. You conclude that the Air Force is therefore precluded from exercising any options in the contract.

However, upon examination of subsection "J," we find no indication that such was intended to have a retroactive effect. The position taken by our Office on the retroactive effect of a regulation was initially stated in 33 Comp. Gen. 318 (1954) and has been reiterated several times since. It is our opinion that the regulations in effect at the time of the execution of a contract fix the rights of the parties under that contract. The adoption of subsequent regulations cannot increase or decrease a party's vested rights. 44 Comp. Gen. 472 (1965). Therefore, as no retroactive intent can be discerned from subsection "J," we will not read such an intent into the provision. Based upon this rationale, subsection "J" should have no effect on contracts executed before its adoption. Therefore, the contract awarded to Yoh under RFQ F04693-72-Q-0013 retains its initial validity.

Further, the adoption of subsection "J" should not alter any of the rights granted under the above contract, including the right to exercise the option provision. In 17A C.J.S., Contracts sec. 349, it is stated that:

> "Generally an option to renew a contract is the right to require the execution of a new contract while an option to extend the term merely operates to extend the term of the original agreement." (Underscoring supplied.)

The provision in the contract in question, Armed Services Procurement Regulation (ASPR) 7-1903.22, is specifically entitled "OPTION TO EXTEND SERVICES." This means that the Government had the contractual right to extend the term of the original contract. Since we have determined that the original contract was not impaired by the passage of subsection "J," neither should any extension of the original contract be so impaired. Therefore, we find no reason why the adoption of subsection "J" should preclude the exercise of the option provision.

Your next contention requests that our Office direct the Air Force to conduct open bidding for this contract in lieu of exercising the option provision under the contract. As stated above, the contract contained an option authorizing the Government to extend the contract period for three additional years, one year at a time. It was reported by the Acting Chief, Security Police, on November 30, 1972, that Yoh had performed satisfactorily during all but the first eleven weeks and anticipated performance was expected to be satisfactory or higher. It was further determined that a more favorable price could not likely be obtained through advertising nor would reprocurement provide improved performance. As a result of these findings, a Notice of Intent to Exercise the Option was issued to Yoh on April 30, 1973, as required by the contract. Your company was informed of this determination by letter of May 1, 1973.

Section 1-1505 of ASPR authorizes contract options to be exercised upon a determination that such action is most advantageous to the Government, price and other factors considered. In this case the contracting officer before exercising the option determined that Yoh's performance had been satisfactory and, based upon an informal examination of the market, that a more favorable price could not likely be obtained through readvertisement. The contracting officer's determination involved a projection based on existing information. As in any projection, it entailed a degree of uncertainty and another person using the same information might have been able to justify a contrary result.

We do not believe that the contracting officer's determination had to be based on overwhelming evidence. We think it sufficient if his determination was made in good faith and was supported by substantial evidence. See B-173461, August 19, 1971. We find these criteria satisfied in this case.

Your final contention requests our Office to direct the Air Force to conduct open bidding for this contract under the newly revised Service Contract Act, Public Law 92-473. It is your belief that Yoh's failure to honor the wage and fringe benefit provisions of the collective bargaining agreement negotiated by the predecessor contractor is a violation of the Service Contract Act and should be taken into consideration before exercising any of the remaining options under the contract.

The determination of whether there are Service Contract Act violations under the contract is not the responsibility of our Office. The Department of Labor is charged with overseeing the Service Contract Act. See 41 U.S.C. 352 and the regulations promulgated thereunder in 29 CFR 4.191. Under this Act, the function of our Office is limited to the listing of persons or firms that the Federal agencies or the Secretary of Labor have found to be in violation of the law. 41 U.S.C. 354. Moreover, under the Act and the regulations, the determination as to whether a contract shall be canceled for violations of the contract labor standards stipulations is a matter for the contracting agency. 41 U.S.C. 352(b) and 29 CFR 4.190. Accordingly, there is no basis for our Office to act upon your request that the contract or option provisions with Yoh be terminated because of the alleged labor violations. See B-177941, September 21, 1973, copy enclosed.

For the foregoing reasons, we find no legal basis to question the administrative action taken in exercising the option to extend the contract with Yoh. Therefore, your protest must be denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

Enclosure