The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Agriculture--Request for Advance Decision

File: B-223329

Date: October 17, 1986

DIGEST

1. Fixed-priced construction contracts executed before January 1, 1986 may not be modified without consideration to delete the requirement for payment of premium rates for overtime worked in excess of 8 hours a day in order to conform to Pub. L. No. 99-145, which eliminated the requirement from contracts executed after January 1, 1986. Neither the statute nor its legislative history reflects congressional intent to have the statute applied retroactively.

2. The desire to conform old contracts to a new statute which amended overtime pay laws does not constitute sufficient consideration to delete provisions for the payment of premium pay for overtime worked in excess of 8 hours a day from the contracts which were awarded before the effective date of the statute. Modification of contract to delete daily overtime provisions requires that adequate consideration should be negotiated between agency and individual contractors.

DECISION

The Soil Conservation Service (SCS), Department of Agriculture, has requested an advance decision from our Office approving its proposal to modify certain fixed-price construction contracts executed before January 1, 1986. SCS desires to remove the provisions requiring premium payments for hours worked by contractors' employees in excess of 8 hours a day without requiring consideration from the contractors. This request arises because Section 1241 of the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, 99th Cong., 1st Sess. (1985) (hereinafter referred to as the Act), amended the Contract Work Hours and

Safety Standards Act (CWHSSA), 40 U.S.C. § 328(a) (1982), and the Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. § 35(c) (1982), by deleting the requirement for payment of not less than 1-1/2 times the basic rate of pay for hours worked in excess of 8 per day. The amendment, which was enacted on November 8, 1985 and became effective on January 1, 1986, did not change the requirement for premium pay for hours worked in excess of 40 hours a week. Thus, this amendment permits contractors to establish flexible work schedules for their employees assigned to government contracts executed after January 1, 1986.

SCS states that many of its contractors are insisting that their pre-January 1, 1986 contracts be amended to remove the provisions for premium payments for daily overtime and that no consideration be required from them. The contractors argue that these contract provisions have been rendered void by the act. SCS points out that one of its contractors has already submitted a claim under the disputes clause of its contract demanding that SCS delete or not enforce the daily overtime pay requirement. SCS expects similar claims in the future that could result in costly and time-consuming negotiations in arriving at equitable adjustments because of the wide diversity in the sizes of the contracts and the degrees of completion. SCS contends that the matter is further complicated, because the Department of Labor (DOL) has stated its position (DOL Memorandum No. 143, Dec. 23, 1985) that, although certain contractors may continue to be obligated to pay daily overtime compensation pursuant to state or local laws, collective bargaining agreements, or employment contracts, DOL will take no action to enforce the daily overtime payment provisions in the pre-January 1, 1986 contracts, since that is a "question of contract law between the parties independent of the Department of Labor's authority under CWHSSA and PCA."

The first issue is whether the statutory amendments should be construed as having retroactivity as well as prospective application; that is, does the Act apply to contracts executed prior to January 1, 1986. The courts generally "indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only" unless the contrary intention of the legislature is clearly apparent. 73 Am. Jur. 2d, Statutes, § 350 (1974); Slade v. United States of Mexico, 617 F. Supp. 351 (D.D.C. 1985). We find nothing in the wording of the Act

or in its legislative history reflecting a specific congressional intent to have the Act applied to contracts executed before its expressed effective date of January 1, 1986. Thus, we have no basis upon which to conclude that Congress intended that the daily overtime provisions in contracts executed before January 1, 1986 should be considered void and unenforceable.

The next issue is whether SCS may delete the requirement for premium payments for daily overtime from contracts executed before January 1, 1986 without consideration from the contractors. In this regard, we point out that our Office has a long-standing position that in the absence of a statute so providing, no officer or agent of the government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the government without adequate legal consideration or a compensatory benefit to the United States. See Economic Development Administration-Compromise Authority, 62 Comp. Gen. 489 (1983); Department of Agriculture--Request for Advance Decision, B-207165, May 3, 1982, 82-1 CPD ¶ 416; 39 Comp. Gen. 725 (1960); 20 Comp. Gen. 448 (1941). There is no provision in the statute which authorizes SCS to waive the contractual rights which have accrued to the government in the pre-January 1, 1986, contracts or to modify them without receiving adequate consideration. At the time these contracts were executed, the existing laws and the contract provisions agreed to by the contractors and the SCS required payment of overtime premiums for work performed in excess of 8 hours a day. Since the statutory amendments appear to be prospective in nature, SCS may not relinquish the government's contractual rights, for which the government is presumably paying since compliance with the overtime requirement makes performance more expensive, and the contractors are obligated to pay daily overtime rates of pay where appropriate unless the government receives adequate consideration for such contractual modifications. In other words, deletion of the daily overtime provisions would generally result in a decrease in the contractors' costs of performing the contract, and, since the contracts in question are fixed-price contracts, the government should receive the benefit of any reduction in costs.

This, in fact, is what is required by current regulations. The Federal Acquisition Regulation (FAR), as amended by Federal Acquisition Circular (FAC) 84-14, Mar. 31, 1986, 51 Fed. Reg. 12,292 (1986), which revised FAR Parts 22, 52

and 53, provides for use of a revised clause, § 52.222-4, Contract Work Hours and Safety Standards Act--Overtime Compensation, which eliminates the requirement to pay premium payments for daily overtime. The circular specifically provides:

> "For existing contracts, overtime for hours worked in excess of 8 hours per day may still be required by existing collective bargaining agreements and State or local laws, in addition to the old CWHSSA clause. Contracting officers should not modify existing contracts to substitute the revised clause unless the modification: (a) will result in a reduction of contract cost or price or other consideration, and (b) is agreed to by the contractor." (Emphasis added.)

This is consistent with our holding above as well as with the previously referenced DOL Memorandum No. 143.

With regard to SCS's statement that it is faced with outdated contracts without enforcement processes in place and current contracts with more favorable terms, we refer to our decision in a similar case, 46 Comp. Gen. 874 (1967), where the old contracts also differed from the new contracts. There, the agency sought authorization to modify certain storage contracts awarded in 1965 to compensate for the increased labor costs the contractors felt, as a practical matter, they had to pay as a result of the enactment of the Service Contract Act of 1965. This act, however, did not apply to contracts executed before its effective date of January 20, 1966. The storage contracts were fixed-price contracts and contained options for 5 additional 1-year periods at the prices specified for the initial contract. The agency no longer required the contractors to bind themselves to fixed-price contracts for such long periods, and it argued that the contractors' adherence to the new policy reflected by the act constituted valuable consideration from the contractors. We rejected this argument and stated that any furtherance of the policy set out in the act resulting from payment of higher wages than would otherwise be required would not constitute sufficient consideration to support the modifications. We believe that the difference between the overtime provisions in the pre- and post-January 1, 1986 contracts and the desire to make the old contracts conform to the overtime amendments are not sufficient justification for modifying the old contracts without adequate consideration.

We recognize, as SCS points out, that the effect of a deletion of the daily premium payment provision could vary greatly among the contractors. For example, a contractor

whose employees regularly work more than 8 hours in a day would have its labor costs reduced by deletion of the daily overtime provisions significantly more than a contractor whose employees never work more than 8 hours in a day.

Under these circumstances, the kind and amount of the consideration required to modify the contract will vary greatly and should be negotiated between SCS and the individual contractors.

Accordingly, SCS should not modify pre-January 1, 1986, contracts by deleting daily overtime pay provisions without receiving adequate consideration in return.

James F. Hinchman

for Comptroller General
of the United States