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United States General Accounting Office
Washington, DC 20548

B-300222

March 28, 2003

The Honorable John McCain
United States Senate

Subject: *Use of Fiscal Year 2003 Funds for Boeing 737 Aircraft Lease Payments*

Dear Senator McCain:

This responds to your letter of October 28, 2002, concerning section 8147 of the Department of Defense Appropriations Act for Fiscal Year 2003, Pub. L. No. 107-248, 116 Stat. 1519, 1572 (2002). Section 8147 provides that none of the funds appropriated by the Department of Defense Appropriations Act for Fiscal Year 2003 may be used for leasing of transport/VIP aircraft “under any contract entered into under any procurement procedures other than pursuant to the Competition [in] Contracting Act.” You asked whether the Department of Defense, in light of section 8147, is authorized to use fiscal year 2003 funds to incur or liquidate obligations for lease payments for Boeing 737 aircraft. For the reasons given below, we conclude that section 8147 does not preclude the Department of Defense from using fiscal year 2003 funds to incur or liquidate obligations for lease payments for Boeing 737 aircraft since DOD conducted the procurement under the provisions of the Competition In Contracting Act of 1984 (CICA)¹, which by its own terms authorizes the use of noncompetitive procedures.

BACKGROUND

Section 8159 of the Department of Defense (DOD) Appropriations Act for Fiscal Year 2002 provided as follows:

¹ Pub. L. No. 98-369, Div. B, tit. VII, §§ 2701-2753, 98 Stat. 1175 (1984) (among other things, the Competition in Contracting Act amended Title 31 of the U.S. Code to give the General Accounting Office bid protest authority and Title 10 of the U.S. Code with regard to requirements for defense agency procurements).

The Secretary of the Air Force may, from funds provided in this Act or any future appropriations Act, establish and make payments on a multi-year pilot program for leasing general purpose Boeing 767 aircraft and Boeing 737 aircraft in commercial configuration.

Defense Appropriations Act for Fiscal Year 2002, Pub. L. No. 107-117, § 8159(a), 115 Stat. 2230, 2284 (2002). On March 15, 2002, the Air Force synopsis² its intent to award under section 8159 a sole-source contract to the Boeing Company for the lease of, and maintenance support for, “four commercial Boeing 737 special mission aircraft (C-40B/C),” on the basis that “[t]he Boeing Company is the manufacturer of the C-40B and C-40C special mission aircraft and the only contractor that has demonstrated the expertise and working knowledge necessary to provide these aircraft.” Federal Business Opportunities (FedBizOpps), Mar. 15, 2002. On June 5, 2002, the Assistant Secretary of the Air Force for Acquisition executed a justification and approval (J&A) for award of a contract to Boeing on a sole-source basis for up to four Boeing 737 (C-40) aircraft. The J&A justified use of noncompetitive procedures on the basis that Boeing was the only source capable of furnishing the aircraft and services. On September 17, 2002, the agency awarded a contract to Boeing for the lease of two C-40 aircraft, with options for two additional aircraft.

On October 23, 2002, the DOD Appropriations Act for Fiscal Year 2003 was enacted. Section 8147 of that Act provides that: “None of the funds appropriated by this Act may be used for leasing of transport/VIP aircraft under any contract entered into under any procurement procedures other than pursuant to the Competition [in] Contracting Act.” Pub. L. No. 107-248, § 8147, 116 Stat. 1519, 1572 (2002). On October 28, 2002, you requested our opinion on whether, in light of section 8147, the Department of Defense is authorized to use fiscal year 2003 funds to incur or liquidate obligations for lease payments for Boeing 737 aircraft. By letter of November 4, 2002, we asked the General Counsel of DOD for his opinion on the question and for further information regarding the Air Force’s lease of the Boeing 737 aircraft.³ Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to William J. Haynes III, General Counsel, DOD, Nov. 4, 2002.

² Both statutory and regulatory provisions require agencies to publish (synthesize) proposed contract actions, in this case the award of a sole-source contract, to allow interested parties the opportunity to participate or bid on the contract. 41 U.S.C. § 416 and 48 C.F.R. § 5.201 (2002).

³ As we explained to your staff at that time, our practice, whenever possible, is to seek and consider the views of relevant agency counsel in developing our decisions and opinions.

On December 23, 2002, EADS North America, Inc. filed a bid protest with GAO under authority of CICA, 31 U.S.C. §§ 3551-3556,⁴ alleging, in part, that DOD's obligation of fiscal year 2003 funds for the lease payments to Boeing for Boeing 737 aircraft violated section 8147. In both its response to our letter on January 14, 2003, and in its reply to the EADS protest required by CICA, 31 U.S.C. § 3553(b)(2), DOD defended its actions stating that it complied fully with CICA in awarding the lease contract. Letter from Douglas P. Larsen, Deputy General Counsel (Acquisition & Logistics), DOD, to Susan A. Poling, Managing Associate General Counsel, GAO, Jan. 14, 2003. Because of the similarity of the issue raised in the EADS protest and the question you asked us, and in order to protect EADS' statutory right under CICA to a decision on the bid protest, we explained to your staff in early January that we would await resolution of the bid protest before responding to your request.

EADS argued that DOD's obligation of fiscal year 2003 funds for the lease payments to Boeing for Boeing 737 aircraft violated section 8147 because that contract was not entered into on the basis of full and open competition, which EADS believed section 8147 mandates. We issued our bid protest decision on March 26, 2003, dismissing the protest on the grounds that EADS' protest furnished no basis for GAO to challenge DOD's actions with respect to the C-40/Boeing 737 lease contract awarded to Boeing. EADS North America, Inc., B-291805, Mar. 26, 2003.

ANALYSIS

By its plain terms, section 8147 provides that none of the funds appropriated by the Act may be used for leasing of transport/VIP aircraft "under any contract entered into under any procurement procedures other than pursuant to the Competition [in] Contracting Act." Pub. L. No. 107-248, § 8147, 116 Stat. 1519, 1572. CICA, to which the section apparently refers, permits an agency to "use procedures other than competitive procedures" under certain limited circumstances. 10 U.S.C. § 2304(c). These circumstances include where the property and services needed by the agency are available from only one responsible source. 10 U.S.C. § 2304(c)(1). Therefore, CICA does not require that an agency acquire goods and services only through the use of competitive procedures. The J&A executed by the Assistant Secretary of the Air Force for Acquisition justified the sole-source award to Boeing on the grounds that only Boeing could furnish the property and services needed by the agency.⁵

⁴ Pub. L. No. 98-369, Div. B, tit. VII, § 2741(a), 98 Stat. 1175, 1201 (1984).

⁵ It appears from a review of the J&A and discussions with the Air Force, that only one additional source replied to the Air Force's synopsis of its proposed action. Apparently, that source determined that it was not interested in meeting the Air Force's needs. Under these circumstances, the Air Force is not required to seek additional sources. See generally Amtech Systems Corp., B-252414, Jun. 29, 1993, 93-1 CPD ¶ 500.

Since section 8147 required only that the transport/VIP aircraft lease in issue here be entered into pursuant to CICA – making no mention of the use of competitive versus noncompetitive procedures – and DOD conducted the procurement under the provisions of CICA authorizing the use of noncompetitive procedures, DOD’s actions were consistent with section 8147.

We recognize that statements in the Act’s legislative history encourage us to read section 8147 as requiring procurement of the lease through competitive procedures. See, e.g., 148 Cong. Rec. S7709 (July 31, 2002); 148 Cong. Rec. S10520 (Oct. 16, 2002). In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of the Congress. If it does, the matter ends there, for the unambiguously expressed intent of the Congress must be given effect. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); B-289209, May 31, 2002 (referring to the obligation to give an act’s words their plain and ordinary meaning). While views expressed in a statute’s legislative history may sometimes be relevant in statutory interpretation, those views are not a substitute for the statute itself where the meaning of the statute appears plain on its face. AAA Eng’g and Drafting, Inc., B-225605, May 7, 1987, 87-1 CPD ¶ 488 at 5. Since section 8147, by its plain terms, only requires compliance with CICA, and does not provide that competitive procedures must be used for the leasing of transport/VIP aircraft, we find no basis for reading such a requirement into the provision.

CONCLUSION

Section 8147 does not preclude DOD from using fiscal year 2003 funds to incur or liquidate obligations for lease payments for Boeing 737 aircraft where DOD conducted the procurement under the provisions of CICA authorizing the use of noncompetitive procedures.

I trust that you will find this opinion useful. If you have any questions regarding this matter, please telephone Susan A. Poling or Thomas H. Armstrong of my staff at 202-512-5644.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel

DIGEST

Statutory provision precluding the use of appropriated funds to lease aircraft “under any contract entered into under any procurement procedures other than pursuant to” the Competition in Contracting Act of 1984 (CICA) does not preclude the Department of Defense from using fiscal year 2003 funds to incur or liquidate obligations for lease payments for aircraft where the Department of Defense awarded the lease under the provisions of CICA authorizing the use of noncompetitive procedures.