UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RECONSIDERATION GRANTED; DISMISSED FOR LACK OF JURISDICTION:
August 3, 2016

CBCA 5084-R

SECTEK, INC.,

Appellant,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

Respondent.

Daniel B. Abrahams and Aidan J. Delgado of Brown Rudnick LLP, Washington, DC, counsel for Appellant.

Jennifer Klein and Stephani Abramson, Office of General Counsel, National Archives and Records Administration, College Park, MD, counsel for Respondent.

Before Board Judges **SHERIDAN**, **WALTERS**, and **CHADWICK**.

CHADWICK, Board Judge.

SecTek, Inc. filed a timely motion for relief from our decision denying its appeal, *SecTek, Inc. v. National Archives & Records Administration*, CBCA 5084, 16-1 BCA ¶ 36,403. SecTek argues for the first time, among other things, that we should have dismissed its appeal for lack of jurisdiction. *See* Board Rule 27(a)(5) (48 CFR 6101.27(a)(5) (2016)). We agree and accordingly grant reconsideration, rescind our merits decision, and dismiss the appeal.

Background

Familiarity with our prior decision is assumed. In September 2015, SecTek submitted a certified claim under the contract's Disputes clause, seeking a price adjustment pursuant to Federal Acquisition Regulation (FAR) clause 52.222-43(d), Fair Labor Standards Act and Service Contract Act–Price Adjustment (Multiple Year and Option Contracts) (48 CFR 52.222-43(d) (2014)), for increased labor costs under a collective bargaining agreement (CBA) that SecTek signed with its unionized employees in June 2015. In November 2015, the contracting officer issued a "determination" that the CBA would not be incorporated in SecTek's fixed-price contract as a wage determination pursuant to the Service Contract Act, 41 U.S.C. §§ 6701-6707 (2012). SecTek did not consider this response a decision on its claim, and it filed this appeal under the Contract Disputes Act (CDA) from a deemed denial. *See* 41 U.S.C. § 7103(f)(5). Although the contracting officer later issued a decision (or a revised decision) on SecTek's claim, neither party questioned our CDA jurisdiction. The Board resolved the appeal on cross-motions for summary relief.

Discussion

SecTek now points out that FAR clause 52.222-41, Service Contract Labor Standards, which was incorporated in the contract, stated that disputes about labor standards must be resolved pursuant to Department of Labor (DOL) disputes procedures, "not [under] the Disputes clause," 48 CFR 52.222-41(t), and that the Court of Appeals for the Federal Circuit and at least one of our predecessor boards have held that disputes about applicable labor standards and wage determinations lie within the exclusive jurisdiction of DOL. *See Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425, 1429 (Fed. Cir. 1991) ("[T]he specific Disputes provision, stating that disputes arising out of labor standards are not to be subject to the general disputes clause, but are to be resolved in accordance with the procedures of [DOL], predominates over the general provision that the Board has jurisdiction to decide any appeal from a contracting officer."); *Kass Management Services, Inc.*, GSBCA 8819, 88-3 BCA ¶ 20,891, at 105,619 ("Queries by appellant as to the correct wage determination applicable to its contracts . . . must be addressed to the DoL.").

SecTek posits that *JL Associates, Inc. v. General Services Administration*, GSBCA 11922, 93-3 BCA ¶ 25,939, in which the General Services Board of Contract Appeals (GSBCA) granted the agency's motion to dismiss for lack of jurisdiction, is "remarkably similar" to this appeal. We substantially agree. *JL Associates* differed slightly from this appeal, in that the issue there was when the CBA was executed, rather than, as here, what the CBA's terms were. The contracting officer received an unsigned CBA with typographical errors before the start of the option year and a signed, "corrected" copy during the option period. Believing that the CBA did not exist before the option period, he did not incorporate

it in the contract or forward it to DOL to obtain a wage determination. *See* 48 CFR 22.1008-1(d)(2)-(3) (contracting officer may either "prepare a wage determination referencing" an incumbent contractor's CBA, or "request that [DOL] make the . . . wage determination"). The contractor submitted a CDA claim for an increase in the option price and appealed from the denial of its claim. The GSBCA held that "whether the minimum wage, applicable to the first option period of this contract, should have been established in accordance with" the disputed CBA "is not an issue that can be decided by this Board. . . . Whether or not the collective bargaining agreement should be the basis of a revised wage determination is a decision which is solely within the jurisdiction of [DOL]." 93-3 BCA at 129,011.

The respondent, the National Archives and Records Administration (NARA), opposes SecTek's request for reconsideration but does not cite or discuss *JL Associates* or any other decision on which SecTek relies. NARA cites three decisions that shed no light on our jurisdiction here. In *USProtect Corp. v. Department of Homeland Security*, CBCA 65, 08-1 BCA ¶ 33,782, we ruled we had jurisdiction in an appeal from a deemed denial of a claim for a wage adjustment, but we did not mention the DOL dispute procedures. *Cf. Huston v. United States*, 956 F.2d 259, 262 (Fed. Cir. 1992) (noting courts are not bound by prior exercises of jurisdiction where a jurisdictional issue was not raised). Further, as the GSBCA explained in *Merit Construction Co. v. General Services Administration*, GSBCA 12426, 94-3 BCA ¶ 26,969, in both *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993), and in *Merit*, "labor standard issues" that were acknowledged to be "*within the exclusive jurisdiction of the DOL* form[ed] the partial *factual predicate* of the dispute between the parties." 94-3 BCA at 134,334 (emphasis added). In *Burnside-Ott*, DOL had ordered the contractor to reclassify certain employees and pay them higher wages. The question of the contractor's entitlement to an equitable adjustment for the increased costs due to that wage determination was properly before the courts under the CDA. *Burnside-Ott*, 956 F.2d at 1580. Similarly, in *Merit*, the GSBCA had jurisdiction to decide whether the contractor's obligation to pay certain workers in accordance with a DOL wage determination amounted to a contract change. 94-3 BCA at 134,333-34. In both cases, DOL had issued a final wage determination, and the CDA litigation concerned the *effect* of the wage determination on the parties' contractual rights and obligations.

Here, by contrast, the merits issue is the same as in *JL Associates*—whether a particular CBA "should be the basis of a revised wage determination" applicable to the option year. 93-3 BCA at 129,011. We agree with SecTek and our predecessor board that this issue is not for us to decide. The DOL regulations in 29 CFR part 7 "set forth the [exclusive] procedure for appellant to follow if it has any questions concerning the correct wage determination to be used in its contract." *JL Associates*, 93-3 BCA at 129,012.

NARA argues that the question here "is not what the appropriate wage determination is," but "whether NARA is required to adjust the task order price" for the option year, which NARA argues is within our jurisdiction to decide. We conclude that those two issues are not so easily separated, and that the contract and regulations leave it to DOL to decide whether the 2015 CBA should have formed the basis of a wage determination for the contracting officer to apply when considering a price adjustment under FAR clause 52.222-43(d).

Decision

RECONSIDERATION of our June 22, 2016, decision is **GRANTED**. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

KYLE CHADWICK
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

RICHARD C. WALTERS
Board Judge