



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 27, 2018

CBCA 5837

ALCAZAR TRADES, INC.,

Appellant,

v.

NUCLEAR REGULATORY COMMISSION,

Respondent.

Jonathan M. Bailey and Kristin E. Zachman of Bailey & Bailey, P.C., San Antonio, TX, counsel for Appellant.

Ruth Kowarski Cooke, Shelbie R. Lewman, and Robin A. Baum, Office of the General Counsel, Nuclear Regulatory Commission, Washington, DC, counsel for Respondent.

SOMERS, Board Judge (Chair).

The Nuclear Regulatory Commission (NRC) awarded a task order for janitorial services to Alcazar Trades, Inc. (ATI) under a General Services Administration (GSA) schedule contract. After award, ATI negotiated a new collective bargaining agreement (CBA). ATI submitted this agreement to the NRC contracting officer (CO) and requested an equitable adjustment for all option years. The contracting officer denied the claim and ATI appealed. In lieu of filing an answer, NRC filed a motion to dismiss for lack of jurisdiction. For the reasons explained below, we grant the motion to dismiss.

Background

On October 23, 2105, the NRC requested quotations from holders of GSA schedule contracts for the provision of custodial services for multiple locations in Montgomery County, Maryland. The request for quotations (RFQ) contemplated the award of a firm fixed-price/time and material hybrid task order, with a cost reimbursable line for reimbursable work, not to exceed \$75,000 per year, for a base year with four option years. ATI responded to the RFQ. On April 12, 2016, the NRC awarded a task order to ATI for the services in question.

The Service Contract Act of 1965, 41 U.S.C. §§ 6701-6707 (2012), mandates that under certain contracts with federal government agencies, contractors must pay, at a minimum, the wages and fringe benefits identified in a wage determination issued by the Department of Labor (DOL). The Act applied to ATI's schedule contract and the task order with NRC incorporated DOL's wage determination 05-2013, revision 16, dated August 8, 2015.

The contract incorporated by reference Federal Acquisition Regulation (FAR) clause 52.222-41, Service Contract Labor Standards (2014) (SCLS), which includes the following relevant provision:

(t) *Disputes Concerning Labor Standards.* The U.S. Department of Labor has set forth in 29 CFR parts 4, 6, and 8 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

48 CFR 52.222-41 (2015). The schedule contract also included FAR clause 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards–Price Adjustment (Multiple Year and Option Contracts) (May 2014).

In December 2016, Local 99 of the International Union of Operating Engineers, representing ATI's employees, sought to negotiate a new CBA. After successful negotiations, ATI entered into a new agreement with the union, to be effective April 1, 2017.

On February 1, 2017, NRC informed ATI that it planned to exercise the first option year of the contract, which it did through contract modification issued on February 6, 2017. On February 17, 2017, ATI attempted to contact NRC's contracting officer about the new collective bargaining agreement, but apparently used an incorrect email address. Using the correct email address on February 28, 2017, ATI informed NRC's contracting officer about the new collective bargaining agreement and asked for an equitable adjustment to cover the increases in wages and benefits. The record does not include evidence that DOL had issued a new wage determination incorporating the collective bargaining agreement at that time.

On March 20, 2017, ATI asked the NRC contracting officer about the status of its request for equitable adjustment. The contracting officer responded on March 27, stating that "a majority of the contract per month and year is fixed price The labor rate, fringe, wage and benefits etc., are all built into that fixed price. The NRC and [ATI] agreed to that fixed price when the contract was signed and therefore the NRC is not obligated to increase the ceiling of the contract no matter what increase there is to the collective bargaining agreement/wage and benefits."

Later, on April 4, 2017, the NRC contracting officer asked the GSA contracting officer about ATI's new collective bargaining agreement. The GSA contracting officer explained that, at some unidentified date, ATI had submitted a collective bargaining agreement with an economic price adjustment modification to GSA for consideration, that GSA had "rejected" the collective bargaining agreement, and that ATI was supposed to resubmit at a later date but had not done so.

On June 27, 2017, ATI submitted a claim to the NRC seeking \$32,316.65 as an equitable adjustment for anticipated increased costs resulting from the collective bargaining agreement. Two days later, the NRC contracting officer forwarded a copy of the claim to the GSA contracting officer.

Email correspondence between the GSA and the NRC reflected an ongoing dialogue about the status of the claim but no resolution. From July 18, 2017, until August 7, 2017, GSA informed NRC that GSA was handling the claim, and that GSA understood that ATI intended to withdraw its claim with NRC. Ultimately, ATI never did.

Consequently, on August 17, 2017, the NRC contracting officer issued a final decision denying ATI's claim, stating, in pertinent part, that resolution of the claim required interpretation of ATI's GSA schedule contract and that the record to date reflected the fact that GSA had not approved ATI's proposed price increases. ATI timely appealed, requesting a modification of the task order to incorporate the new wage determination from the latest collective bargaining agreement and an equitable adjustment in the amount of \$32,316.65.

Discussion

As noted above, the present task order, as well as the underlying FSS contract, is subject to the Service Contract Act, which requires contractors or subcontractors entering into service contracts in excess of \$2500 to pay no less than the prevailing wage rates set forth in either a DOL wage determination or the rates contained in an applicable collective bargaining agreement. 41 U.S.C. § 6702(a) ; *see Call Henry, Inc. v. United States*, 855 F.3d 1348, 1350 (Fed. Cir. 2017). If the prevailing wage rates or the collective bargaining wage rates are subject to an increase during a period of contract performance, the contractor is entitled to “a price increase in the option years if a *new wage determination* causes the contractor to pay increased wages or benefits.” *SecTek, Inc. v. National Archives and Records Administration*, CBCA 5036, 17-1 BCA ¶ 36,735, at 178,903 (emphasis added); FAR 52.222-43.

Here, the parties have not presented any evidence that a new wage determination based upon the new collective bargaining agreement had been issued when ATI filed its claim. ATI seeks to apply the new collective bargaining agreement to “its contract with GSA and first option year under ATI’s task order with NRC.” Deciding “whether a particular CBA ‘should be the basis of a revised wage determination’ applicable to the option year” has, in the past, been left to DOL. *SecTek, Inc. v. National Archives Records Administration*, CBCA 5084-R, 16-1 BCA ¶ 36,466, at 177,693 (quoting *JL Associates, Inc. v. General Services Administration*, GSBCA 11922, 93-3 BCA ¶ 25,939, at 129,011). 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” and that “the regulations leave it to DOL to decide whether the . . . CBA should have formed the basis of a wage determination for the contracting officer to apply when considering a price adjustment”. *JL Associates, Inc.*, 93-3 BCA at 129,012

ATI asserts that it is the CO’s responsibility to obtain the wage determination upon exercising any option to extend the contract, and this Board has jurisdiction because the CO failed to fulfill his duty. ATI argues that, under *Tecom, Inc.*,¹ because the CO failed to fulfill her duties under FAR 22.1007², the new collective bargaining agreement could be

¹ ASBCA 51591, 01-1 BCA ¶ 31,156 (2000)

² In 2000, at the time of the *Tecom* decision, FAR 22.1007 stated that “the contracting officer shall submit Standard Forms 98 and 98a, ‘Notice of Intention to Make a Service Contract and Response to Notice’ . . . to the Administrator, Wage and Hour

retroactively incorporated into the contract. The facts here are distinguishable from those in *Tecom*. In *Tecom*, the contracting officer *did* timely submit a SF 98 form to obtain a wage determination, but failed to timely notify the parties, which is, in part, why the Armed Services Board of Contract Appeals permitted incorporation of the wage determination based upon the new CBA. *Tecom, Inc.*, 01-1 BCA at 153,901. Here, the CO never obtained a wage determination.

In sum, because we hold that it is within DOL's jurisdiction to decide whether ATI's new CBA should form the basis of a wage determination, we need not address ATI's alternative argument.

Decision

For the foregoing reasons, respondent's motion to dismiss is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge

Division" for service contracts over \$2500 and contract modifications bringing the contract over \$2500. FAR 22.1007 (1999). The 2015 version simply states that the contracting officer "shall obtain wage determinations" for the previously mentioned contracts. FAR 22.1007 (2015).