



Issue Date: 12 December 2011

Case Number: 2011-CBV-00002

In the Matter of:

IN THE MATTER OF APPLICABILITY OF WAGE RATES COLLECTIVELY BARGAINED BY NEVER QUIT ENTERPRISES, INC. (NQEI) AND SERVICE EMPLOYEES INTERNATIONAL UNION/NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES (SEIU/NAGE), LOCAL 679, UNDER CONTRACT W91249-08-D-0001 FOR JANITORIAL SERVICES FOR THE DEPARTMENT OF ARMY AT MISSION INSTALLATION CONTRACTING COMMAND IN FORT GORDON, GA 30905-5719.

DECISION AND ORDER

This matter arises under Section 4(c) of the Service Contract Act of 1965 (“SCA”), as amended (41 U.S.C. § 6701 *et seq.*) from a substantial variance hearing request by Audrey W. Rischbieter, Contracting Officer, Department of the Army, submitted on June 10, 2011. On September 19, 2011, the Deputy Administrator, Wage and Hour Division issued an Order of Reference pursuant to the provisions of 29 C.F.R. §§ 4.10(c); 6.51. This matter was then transmitted to the Office of Administrative Law Judges for a hearing.

On November 16, 2011, I conducted an on-the-record pre-hearing conference in this matter. After going on the record, as required by 29 C.F.R. § 6.54(f), the parties were afforded the opportunity to present arguments. At the conclusion of the pre-hearing conference, I determined, upon agreement of all the parties, that no hearing was necessary, and the matter would be decided based upon the record and written argument submitted by the parties.

Pursuant to 29 C.F.R. § 6.53(c), I must render my final decision forthwith when the parties agree that no hearing is necessary. As indicated in the Order of Reference, the sole issue before me is whether the wage rates to be paid to janitorial service employees employed by the contractor and any subcontractors under the contract identified in the caption are, pursuant to the SCA and Wage Determination CBA-2010-3586 (Rev. 0), issued July 19, 2010, thereunder, required to be paid not less than the wages provided for in the collective bargaining agreement between Never Quit Enterprises, Inc. (NQEI) and the Service Employees International Union/National Association of Government Employees (SEIU/NAGE), Local 679, substantially at variance with those which prevail for services of a character similar in the locality. The regulation precludes my authority to hear or decide any other issue pertaining to the Service Contract Act. 29 C.F.R. § 4.10(c).

Findings of Fact and Conclusions of Law

At issue in this matter are two predecessor service contracts for custodial services at Fort Gordon, awarded by the Mission and Installation Command, Installation Contracting Office ("MICC"). The first contract provides for custodial services for the Child Development Center by Good Vocations, Inc. Good Vocations has provided these services since January 1, 2006, under Contract No. W911SE-06-S-0025. MICC extended this contract until December 31, 2011.

The second contract provides for installation custodial services by Never Quit Enterprises, Inc., from October 2007 to June 2010. Never Quit has a Collective Bargaining Agreement with the Service Employees International Union/National Association of Government Employees (SEIU/NAGE), Local 679. The Collective Bargaining Agreement expired July 31, 2011, but provided for automatic renewal unless either party gave 30 days notice before expiration. On September 8, 2010, the Secretary of State for the State of Georgia mailed notice that Never Quit was administratively dissolved or its certificate of authority revoked for failure to file its annual registration. However, without knowledge of the Secretary's action, MICC terminated the Never Quit contract and awarded a contract to Good Vocations, Contract No. W91249-10-D-0002, to commence on August 1, 2010. MICC extended this contract several times, and its sixth extension is in effect until December 31, 2011. Since August 1, 2010, Good Vocations has paid the minimum wages and benefits under the Collective Bargaining Agreement, as a successor contractor.

On March 15, 2011, MICC issued a solicitation to Good Vocations for a consolidated contract for the Child Development Center and installation custodial services, RFP No. W91249-11-R-0001, for the period of April 1, 2011, to March 31, 2012. MICC submitted an SF 98 to the Department of Labor. In response, the Department of Labor advised MICC that the Collective Bargaining Agreement applicable to the installation contract would also apply to the consolidated contract. The Army then requested a variance hearing. Currently, the consolidated contract is on hold pending the outcome of these proceedings.

Arguments

1. Applicability of Collective Bargaining Agreement

In response to the Order of Reference and my Notice of Pre-Hearing Conference and Hearing, the Department of the Army submitted a Statement of Agency's Case on October 20, 2011, and November 4, 2011. The Army argues the Department of Labor should not make the Collective Bargaining Agreement applicable to the consolidated contract. Furthermore, the Army asserts the Department of Labor should declare the issue moot and then issue a prevailing in the locality wage determination for the consolidated contract. In support of these arguments, the Army states Good Vocations has performed under the successor, installation contract for more than one year. Any subsequent periods would not be covered by the Collective Bargaining Agreement because the successor contract rule only applies to the base period, for no more than the base year of the contract. 29 C.F.R. §§ 4.143, 4.145. *See also*, Department of Labor Wage and Hour Division, Q & A's (stating collective bargaining rates are generally effective for the first year of the successor contract). The Collective Bargaining Agreement at issue expired on or

before July 31, 2011, and Good Vocations has paid its employees in accordance with the Collective Bargaining Agreement since August 1, 2010.

In support of the “one year rule,” the Army cites to a November 7, 1995, letter from the Department of Labor, Employees Standards Division, Wage and Hour Division. The letter states:

Where an incumbent (predecessor) contractor is performing on an existing contract prior to award of a multi-year contract for continuation of those same contract services and that incumbent is performing under a CBA, a section 4(c) wage determination would be issued for application the first year (successor) year of the multi-year contract.

The Army also cites to a decision by the Board of Service Contract Appeals, in which the Board dismissed a case as moot where the contract had an initial one-year term, the collective bargaining agreement had expired, and the wage determination in the collective bargaining agreement would also have expired. *See In the Matter of: Northern Virginia Service Corporation, Contractor*, BSCA No. 92-18 (August 26, 1992). Additionally, in a decision by the Administrative Review Board, the Board found it could not provide retroactive relief for an expired collective bargaining agreement. ARB No. 06-049, ALJ 2006-CNV-0001 (July 31, 2008). Similarly, the Army argues the consolidated contract is a different contract, and thus, not covered by the Collective Bargaining Agreement. Accordingly, the Department of Labor should not apply the Collective Bargaining Agreement and should issue a prevailing in the locality wage.

In response, the Deputy Administrator, Wage and Hour Division, argues that Section 4(c)'s successor obligations apply to the Army's consolidated, full-term contract. *See* 29 C.F.R. § 4.163(h) (interruption of contract services); 29 C.F.R. § 4.163(g) (contract reconfigurations). The Deputy Administrator maintains that the time period for the Section 4(c) successor obligation has not yet run, citing to 29 C.F.R. § 4.163(h). Section 4.163(h) provides in relevant part:

[T]here is no requirement that the successor contract commence immediately after the completion or termination of the predecessor contract.... Contract services may be interrupted because the Government facility is temporarily closed for renovation, or because a predecessor defaulted on the contract.... In all such cases, the requirements of section 4(c) would apply to any successor contract which may be awarded after the temporary interruption or hiatus. The basic principle in all of the preceding examples is that successorship provisions of section 4(c) apply to the full term successor contract. Therefore, temporary interim contracts, which allow a contracting agency sufficient time to solicit bids for a full term contract, also do not negate the application of section 4(c) to a full term successor contract.

29 C.F.R. § 4.163(h). The Deputy Administrator also cites to *In re: General Servs. Admin.*, ARB Case No. 97-052 (Nov. 21, 1997), in which the Board found that under Section 4.163(h)

temporary contracts lasting 9 months did not undermine successorship requirements to the full term contract that followed, and DOL Wage-Hour Opinion Letter SCA-5 (April 8, 1988), which stated that a temporary interruption of contract services, regardless of length, does not break the Section 4(c) successorship claim. Therefore, the Deputy Administrator argues the SCA successor obligations apply to the full-term contract because the obligations have not been satisfied by the temporary, interim contracts.

The Deputy Administrator also refutes the Army's contention that the consolidated contract is a different contract than the one covered by the Collective Bargaining Agreement. The Deputy Administrator argues that under such circumstances, the protections provided employees under Section 4(c) are not negated because of a contract reconfiguration. *See* 20 C.F.R. 4.163(g) (protections under Section 4(c) are negated because of contract reconfigurations, and predecessor contractor's collectively bargained rates follow identifiable contract work requirements into new or consolidated contracts); *In Re: General Servs. Admin.*, ARB Case No. 97-052 (Nov. 21, 1997). For these reasons, Section 4(c)'s successor obligations apply to the Army's consolidated, full-term contract.

2. Substantial Variance of Wages in the Locality

If the Department of Labor finds the Collective Bargaining Agreement applicable to the consolidated contract, then the Army asserts that the Collective Bargaining Agreement wages and fringe benefits are at substantial variance with those that prevail for janitorial services in this locality. Referencing to the BLS Occupational Outlook, \$10.17 is the national mean hourly rate for Maids and Housekeeping Cleaners, category 37-2012. However, the Army argues it is appropriate to apply regional wage estimates in this case. For example, the median hourly rate for Janitors and Cleaners, category 37-2011, for the Augusta-Richmond County, GA-SC metropolitan statistical area is \$9.82. Additionally, according to the Georgia Department of Labor statistics, the average hourly wage for Janitors and Cleaners, category 37-2011, is \$9.45, with a median wage of \$8.85.

The Army argues that the standard of proof is a "clear showing." In a Board of Service Contract Appeals decision, the Board found Section 4(c) obligations apply unless the record demonstrates by a clear showing that the collectively bargained wages and fringe benefits are substantially at variance with those prevailing in the locality for similar service. BSCA No. 88-CBV-7 (Jan. 3, 1989). The Army points out that the wage under the relevant Collective Bargaining Agreement is \$11.78. Accordingly, the Army asserts that a review of the various wages pertaining to the MICC contracts demonstrate that the Collective Bargaining Agreement wages are at a substantial variance with the prevailing wages in this area.

Analysis:

Section 4(c) of the SCA imposes an obligatory wage and fringe benefit floor on successor contracts in the event that the predecessor contract has specified collectively bargained rates and these provisions are self-executing. 41 U.S.C. § 353(c); 29 C.F.R. § 4.10(a). *See also Rasputin, Inc.*, ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), *aff'd. in relevant part sub. nom., Johnson v. U.S. Dep't. of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio,

Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (district court added that a successor company is liable even where the collective bargaining agreement did not become effective until after expiration of the predecessor's contract). Additionally, when a successor contractor accepts a predecessor's employees, it automatically assents to those employees' collectively bargained benefits and their expressly calculated fringe benefits. 29 C.F.R. § 4.163(b). See *Houston Building Services, Inc. and Jason Yoo*, ARB Case No. 95-041A, 1991-SCA-30 (ARB, Aug. 21, 1996) (successor contractors obliged to provide the employees of the predecessor contractor a severance allowance required by the predecessor's contract).

The Army argues the Collective Bargaining Agreement of the second installation contract is not applicable to the consolidated contract because Good Vocations has performed under the successor contract for more than one year and the successor contract rule only applies to the base period, for no more than the base year of the contract. In response, the Deputy Administrator argues that Section 4(c)'s successor obligations apply to the Army's consolidated, full-term contract.

As previously stated, Fort Gordon has two separate contracts for custodial services with Good Vocations. The first contract provides services for the Child Development Center, which MICC extended as follows:

Initial Term of Contract:	January 10, 2006 – September 30, 2006
Option Years:	October 1, 2006 – September 30, 2011
Contract Extension:	October 1, 2011 – December 31, 2011

The second contract provides for installation custodial services. Good Vocations took over as a successor contractor for the installation contract on August 1, 2010. MICC extended the contract as follows:

Initial Term of Contract:	August 1, 2010 – September 30, 2010
First Option Period:	October 1, 2010 – November 30, 2010
Second Option Period:	December 1, 2010 – January 31, 2011
First Extension:	February 1, 2011 – March 31, 2011
Second Extension:	April 1, 2011 – April 30, 2011
Third Extension:	May 1, 2011 – May 31, 2011
Fourth Extension:	June 1, 2011 – July 31, 2011
Fifth Extension:	August 1, 2011–September 30, 2011
Sixth Extension:	October 1, 2011–December 31, 2011

Good Vocations and the Army are currently operating under extension periods for both contracts, which do not expire until December 31, 2011. However, the Army now wants to enter into a consolidated contract with Good Vocations to cover the period of April 1, 2011, to March 31, 2012.

In *Fort Hood Barbers Ass'n*, the Administrative Review Board held that, pursuant to Section 4(c) of the SCA, a successor contractor is liable for the collective bargaining agreement of a predecessor contractor for one contract period only. ARB Case No. 96-181 (ARB, Nov. 12,

1996), *aff'd*, 137 F.3d 302 (5th Cir. 1998). In that case, Fort Hood entered into a five-year concessionaire contract with Gino Morena Enterprises, commencing March 21, 1991. The Department of Labor issued a wage determination, stating that the wage and fringe benefits to be paid by Morena were subject to the collective bargaining agreement in the predecessor contract. Then in 1993, the Department of Labor issued a new wage determination, reflecting the prevailing rates in the locality. However, the Plaintiffs, members of the barbers association, argued that the collective bargaining rates should apply to the full five years of the contract. Morena and the Plaintiffs never negotiated a new collective bargaining agreement.

Citing to 41 U.S.C. § 353(d), the Deputy Administrator and the Board upheld the Department of Labor's 1993 wage determination. Section 353(d) states that government service contracts may be for a term of years, not to exceed five years, if each contract provides for the periodic adjustment of wages and fringe benefits no less than every two years during the contract. *See also* 29 C.F.R. § 4.145(b). Therefore, the collective bargaining agreement of the predecessor contract only applied to the first two years of Morena's contract. Furthermore, at the beginning of the third year, Morena became its own predecessor contractor with no existing collective bargaining agreement. Accordingly, the Deputy Administrator's finding that Section 4(c) did not apply after the first two-year contract period was upheld as reasonable and proper.

Similarly, in *Int'l Union of Operating Eng'rs*, the Administrator, relying on 29 C.F.R. § 4.145(a), treated a multi-year contract with basic year and option periods as separate contracts, rather than a single contract. BSCA Case No. 92-23, Jan. 27, 1993. Accordingly, the Board affirmed the Administrator's finding that the predecessor's collective bargaining agreement did not apply to the first option year. *Id.*

In the instant case, the Army argues that the Collective Bargaining Agreement for the second installation contract only applied for one year and does not apply to any subsequent periods. As stated in *Fort Hood Barbers Ass'n* and *Int'l Union of Operating Eng'rs*, a successor contractor is liable for the collective bargaining agreement of a predecessor contractor for one contract period only. Accordingly, the Collective Bargaining Agreement would only apply to one contract period, and any subsequent periods would not be covered by the Collective Bargaining Agreement. However, in this case, the parties continued to renew the installation contract through the option and extension periods without a new wage determination or collective bargaining agreement. The initial term of the contract period ended September 30, 2010. However, MICC exercised the first and second option periods from October 1, 2010, until January 31, 2011, and then extended the contract for six extension periods, currently in effect until December 31, 2011. Since August 1, 2010, Good Vocations has continued to pay the wage rates under the Collective Bargaining Agreement.

I note the Collective Bargaining Agreement expired on July 31, 2011, but provided for automatic renewal unless either party gave 30 days notice before expiration. By exercising the option periods and entering into six extension periods, the Army and Good Vocations, in essence, continued to accept the Collective Bargaining Agreement with each renewal or extension. Additionally, the record contains no evidence of a new wage determination or collective bargaining agreement. Therefore, I find the parties bound to the terms of the Collective Bargaining Agreement until the end of the current, sixth extension period, December 31, 2011.

The parties had the opportunity to provide 30 days notice to avoid automatic renewal; however, the record contains no evidence of either party providing such notice. Accordingly, I find the parties are still bound to the Collective Bargaining Agreement under the sixth extension period in effect until December 31, 2011.

The Army also argues that the Collective Bargaining Agreement wages are at a substantial variance with the prevailing wages in this area. However, because I have already found the parties bound to the terms of the Collective Bargaining Agreement until December 31, 2011, I find this issue to be moot. Therefore, I decline to examine this issue further.

ORDER

Accordingly, the Department of the Army's petition is hereby **DENIED** and this case is hereby **DISMISSED**.

IT IS SO ORDERED.

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CHRISTINE L. KIRBY
Administrative Law Judge