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Issue Date: 13 July 2011

Case Number: 2011-CBV-00001

In the Matter of:

APPLICABILITY OF WAGE RATES AND FRINGE BENEFITS COLLECTIVELY BARGAINED BY OCEAN SHIPHOLDINGS INC. AND AMERICAN MARITIME OFFICERS, UNDER CONTRACT NUMBER RFP N00033-10-R-3141 FOR OPERATIONS AND MAINTENANCE OF T-5 TANKER USNS LAWRENCE H GIANELLA, DUVAL, DUVAL COUNTY, FLORIDA.

APPEARANCES: Ms. Linda Auerbach Alderdice
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BEFORE: Stephen M. Reilly
Administrative Law Judge

**ORDER GRANTING MOTION OF OCEAN SHIP, INC. TO
DISMISS CLAIM OF MARINE ENGINEERS' BENEFICIAL
ASSOCIATION, AFL-CIO**

These proceedings arise under Section 4(c) of the Service Contract Act of 1965, as amended, (41 U.S.C. §351 *et seq.*). It is alleged by Marine Engineers' Beneficial Association (AFL-CIO) ("MEBA") that wage rates and fringe benefits paid under a collective bargaining

agreement between American Maritime Officers and to Ocean Ships, Inc. (“OSI”) are substantially at variance with the prevailing industry standard.

BACKGROUND

In 2004, the Military Sealift Command (“MSC”) solicited bids to maintain and operate a four ship fleet of tankers. Included in that fleet was the USNS GIANELLA. OSI prevailed on the contract and operated the four ships on a five year contract.

On approximately April 9, 2010, the MSC issued a Request for Proposal (“RFP”) for the operation and maintenance of just the USNS GIANELLA; the other three ships had been taken out of service. The RFP stated that the petroleum tanker would be prepositioned at the U.S. Naval base in Diego Garcia. The final due date for proposals was May 21, 2010.

On May 24, 2010, the Wage and Hour Division of the U.S. Department of Labor (“DOL”) received, from MEBA, a request for a substantial variance hearing concerning issues in this RFP. On December 10, 2010, DOL denied the request. On February 1, 2011, MEBA again requested a substantial variance hearing on the RFP. On February 17, 2011, DOL informed MEBA that “the CBA between Ocean Shipholdings, Inc. and American Maritime Officers, . . . compared with other available data, does support a conclusion that a substantial variance may exist.” After amendments to the RFP, MSC awarded the contract to OSI on April 15, 2011. On May 16, 2011, the Acting Administrator of the Wage and Hour Division issued an Order of Reference commencing these proceedings. On June 1, 2011, OSI began performance on the contract.

During a June 22, 2011 informal telephone conference to schedule the hearing, OSI raised the question of the applicability of the Service Contract Act (“SCA”) and my jurisdiction to hear this case. I ordered the parties to file written briefs on the issue.

In OSI’s brief, it raises two issues. First, OSI argues that DOL “lacks jurisdiction under the Service Contract Act (“SCA”) to hear the MEBA Claim.” OSI’s second issue is “that the proceedings were initiated by the DOL on the basis of erroneous information, so that the reference to the Office of Administrative Law Judges should be recalled.”

OSI raises the applicability of the SCA to the contract in question. OSI argues that the SCA, and regulations promulgated thereunder, is geographically limited to the United States and certain other defined territories and possessions, and that the contract for operation and maintenance of the USNS GIANELLA is to be performed outside the limited geographical coverage of the SCA. OSI also argues that an amendment to the RFP specifically limits the applicability of the SCA. MEBA argues that the contract services are performed pursuant to the SCA. MEBA’s argument relies primarily on the “solicitation and bid history of this contract prior to November 2010.” MEBA Brief at 6.

On July 12, 2011, I conducted a second telephone conference with the parties in which each party had the opportunity to further elaborate on its position.¹ I have reviewed the case file, read the briefs, examined the documents presented and listened to the discussion. For the reasons discussed below, I grant OSI's motion to dismiss for lack of jurisdiction.

APPLICABLE STATUTES AND REGULATIONS

The applicability and limits of the SCA are present in the first sentence of the statute: "Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. § 351(a). The statute gives a specific geographical definition of the United States that includes "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country." 41 U.S.C. § 357(d).

The regulations provide extensive interpretation and guidance regarding the application of the SCA. *See* 29 C.F.R. §§ 4.101 through 4.156. The regulations at 20 C.F.R. § 4.112(a) specifically address the issue before me, the meaning of the term "in the United States." This section identifies most of the same locations identified in the SCA itself and also limits the applicability in other territories under the jurisdiction of the United States, as well as on bases or possessions in foreign countries. Section 4.112(a) adds a telling provision: "Services to be performed exclusively on a vessel operating in international waters outside the geographic areas named in this paragraph would not be services furnished 'in the United States' within the meaning of the Act." In 20 C.F.R. § 4.112(b), the regulation specifically states: "A service contract to be performed in its entirety outside the geographical limits of the United States as thus defined is not covered and is not subject to the labor standards of the Act."

FINDINGS OF FACT

1. OSI is a wholly-owned subsidiary of Ocean Shipholdings, Inc. of Houston, Texas. For more than 30 years, OSI has operated and maintained Navy ships.
2. MEBA is a union that represents Ship Officers.

¹ During the July 12, 2011 call, I frequently asked MEBA to point out contract provisions in support of their argument (mostly concerning the claim that the contract indicated SCA governs and the claim that the current contract is a continuation or extension of the earlier contract). During the call, MEBA could not locate the contractual terms that supported their position. MEBA requested time to do a more complete examination of the documents, which I granted. Rather than receiving the requested information, I received a "clarification of MEBA's position regarding the Service Contract Act (SCA) as it relates to the USNS GIANELLA." Although MEBA was not authorized to file additional argument, in the interest of thoroughness, I reviewed their argument. It was unavailing and failed to change my view.

3. OSI held a previous contract to operate and maintain a fleet of four T-5 petroleum tankers for the Navy. One of these ships was the USNS GIANELLA.
4. OSI provided officers to these ships under a collective bargaining agreement with the American Maritime Officers.
5. At the end of the contract term for operation and maintenance of the four ship fleet, three of the ships were taken out of service and one, the USNS GIANELLA, was sent to drydock for refurbishing. The drydock was located in the middle east.
6. On April 9, 2010, the MSC issued an RFP for the operation and maintenance of the USNS GIANELLA. Under the terms of the RFP, the USNS GIANELLA was to be assigned to the prepositioned fleet in Diego Garcia.
7. On November 24, 2010, MSC issued an amendment to the RFP indicating that the USNS GIANELLA would be forward deployed for the length of the contract, which, in its view, limited applicability of the SCA. MSC made clear that wages consistent with the SCA would apply.
8. On April 15, 2011, the Department of the Navy awarded the contract to OSI.
9. On June 1, 2011, OSI commenced performance on the contract.

DISCUSSION

Addressing the second question first, I deny OSI's request to dismiss based on its claim that the information on which the Order of Referral was based is erroneous. This claim is comparable to a Summary Judgment Motion. Summary Judgment is appropriate only when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The parties dispute whether the information on which the Order of Referral was based is erroneous. Furthermore, the information in dispute is material because whichever party's information is correct regarding the wage and fringe benefits prevails in the underlying question of whether there is a substantial variance from the requirements of the SCA. In order to determine the accuracy of this information a hearing is necessary. Therefore, I deny OSI's request to dismiss based on its claim that the information on which the Order of Referral was based is erroneous.

Regarding the jurisdiction question, MEBA's reliance on the contract provisions, particularly the provisions of the earlier contract, is misplaced. MEBA seems to forget that the issue before me is one of jurisdiction, not contract interpretation. Once I have determined I have jurisdiction, i.e., that the SCA applies to this contract, I can interpret the contract.

During the July 12 telephone conference, MEBA argues that the current contract, RFP N00033-10-R-3140, is a continuation or extension of the contract awarded based on the 2004 RFP. MEBA could not point to any statement or provision in RFP N00033-10-R-3140 that supports this position. Furthermore, MEBA could not confirm whether the clauses in the two

contracts were substantially identical. There is ample evidence demonstrating significant differences between the two contracts leading me to conclude that contract RFP N00033-10-R-3140 stands on its own and is a distinct contract from the 2004 contract (RFP N00033-04-5350), not a continuation or extension of the previous contract. This evidence included the fact that N00033-10-R-3140 is for one ship rather than the four ships in the earlier contract and that N00033-10-R-3140 indicates that the USNS GIANELLA is now part of the prepositioned fleet based in Diego Garcia. I find that contract RFP N00033-10-R-3140 is not a continuation or extension of the 2004 contract (RFP N00033-04-5350) and, absent a specific incorporation by reference must be interpreted within the four corners of the document. However, even if the current contract was a continuation or extension of the earlier contract, it would not change the results. As discussed below, the contract does not determine coverage of the SCA.

In numerous places in its brief, MEBA argues that the contract requires, and OSI agreed to, wages in compliance with SCA, and therefore, the SCA governs the contract. Assuming arguendo that the contract contains such a clause and that OSI agreed to it, I still would not conclude that the SCA governs this contract. Parties may agree to a contract term that mandates the parties follow the provisions of a statute or regulation; such an agreement does not place the entire contract under the control of the statute. A contract term indicating that OSI agrees to pay wages in compliance with the requirements of SCA is a benchmark indicating the minimum level of wages it will pay, not a statement that the SCA governs the entire contract. Furthermore, even if the contract between MSC and OSI contained a specific provision stating that the SCA governs the contract, under the facts before me, I could not find jurisdiction. Parties may not create jurisdiction by agreement. The SCA requires that the services be performed “in the United States,” as that term is defined in the statute, 41 U.S.C. § 351(a); the contract indicates that the services will not be performed “in the United States.” Therefore, the SCA does not govern this contract and I have no jurisdiction to hear this case.

Although not controlling, the Department of the Navy’s November 24, 2010 letter explaining Amendment 0006 to the RFP gives insight into their intent regarding the contract. OSI Brief Exhibit E. The Navy intends for the USNS GIANELLA to be forward deployed for the duration of the contract. The Navy also acknowledges that “SCA compliance is not required for worked preformed outside the United States” but indicates that the wage and fringe benefit level required under the contract is that that would be required under the SCA “in the interest of attracting and retaining the best qualified/experienced civilian mariners and to reduce performance risk.”

The jurisdiction to hear a case arises from the words of a statute and the facts in a particular case. As noted above, the SCA limits its jurisdiction based on the situs of where the work will be performed. In this case, the work is to be performed in Diego Garcia, which is outside the geographic coverage of the SCA. Therefore, the SCA does not govern this contract and I do not have jurisdiction under the SCA to hear and decide this case.

CONCLUSION

For the reasons discussed above, the Service Contract Act does not govern the contract between Ocean Ship, Inc. and the Department of the Navy, Military Sealift Command awarded under RFP N00033-10-R-3140.

ORDER

The motion of Ocean Ship, Inc. to dismiss the claim of the Marine Engineers' Beneficial Association (AFL-CIO) ("MEBA") that wage rates and fringe benefits paid under a collective bargaining agreement between American Maritime Officers and Ocean Ships, Inc. ("OSI") are substantially at variance with the prevailing industry standard is GRANTED. The claim is DISMISSED.

SO ORDERED.

A

STEPHEN M. REILLY
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL: Within 10 days after the date of the decision of the Administrative Law Judge, any interested party who participated in the proceedings before the Administrative Law Judge and desires review of the decision shall file a petition for review by the Administrative Review Board pursuant to 29 C.F.R. Part 8. The petition shall refer to the specific findings of fact, conclusions of law, or order excepted to. 29 C.F.R. § 6.57. The Administrative Review Board may be served at: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Ave., N.W., Washington, D.C. 20210.