



Issue Date: 09 April 2014

CASE NO.: 2014-CBV-00001

In the Matter of:

**APPLICABILITY OF ARM'S-LENGTH PROCEEDINGS
REGARDING THE COLLECTIVE BARGAINING AGREEMENT
BETWEEN ZERO WASTE SOLUTIONS, INC. AND THE
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS LODGE 2771 OF AERONAUTICAL
DISTRICT LODGE 776 AFL-CIO APPLICABLE TO WORK
PERFORMED AT SHEPPARD AIR FORCE BASE, TEXAS**

Appearances:

**Patrick Moudy, Esquire
Wichita Falls, Texas
On Behalf of the Air Force**

**Rod Tanner, Esquire
Fort Worth, Texas
On Behalf of the Union**

**Nichole L. Devries, Esquire
Washington, D.C.
On Behalf of the Employer**

**BEFORE: LARRY W. PRICE
Administrative Law Judge**

DECISION AND ORDER

This is a collective bargaining arm's-length proceeding arising under § 4(c) of the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. § 6701, *et seq.* (hereinafter "the Act"), and its implementing regulations. The applicant, Department of the Air Force (the Air Force), petitioned the Department of Labor for determination of arm's length negotiations for the collective bargaining agreement (CBA), as amended, between Zero Waste Solutions, Inc. (the Employer) and International Association of Machinists and Aerospace Workers Lodge 2771 of Aeronautical District Lodge 776 AFL-CIO (the Union).

On August 26, 2013, the Air Force applied for an arm's-length hearing to the Principal Deputy Administrator, Wage and Hour Division, Department of Labor. On December 19, 2013,

the Administrator referred the case to this Court for a hearing on the sole issue of whether arm's length negotiations occurred.

A formal hearing was held in Wichita Falls, Texas on February 27, 2014. The parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing memoranda. The Air Force offered three (3) exhibits, the Employer offered eighteen (18) exhibits, and the Union offered thirteen (13) exhibits. All were admitted into evidence. This decision is based upon a full consideration of the record.¹

I. STATEMENT OF THE CASE

In 2010, the Air Force contracted with the Employer for refuse and recycling services at Sheppard Air Force Base (AFB) in Wichita Falls, Texas.² The original period of performance was September 1, 2010 through August 31, 2011. The ISWM Contract contained four one-year option periods. At that time, the Employer's workforce was not unionized. On August 30, 2012, the Air Force exercised its second one-year option, which began on September 1, 2012.

On September 6, 2012, the Employer furnished a CBA between itself and its newly unionized workers, which contained provisions for increased wages. The Air Force rejected the CBA as untimely and denied a price adjustment for the difference in wages between the Department of Labor's area-wide wage determination (AWD) and those in the CBA.

The Employer, then, sought to reopen negotiations with the Union. Negotiations began on November 16, 2012.

On January 15, 2013, the Employer furnished memoranda to the Air Force that revised the CBA. The Air Force requested a conference call to discuss the recent development. It appeared to the Air Force that the Employer and the Union "were attempting to take advantage of the wage determination scheme" by reducing the wage rates and shifting rate increases to the following years. The conference call was held on March 4, 2013, and the Employer agreed to attempt to reopen negotiations with the Union to address the Air Force's concerns. The Union refused to do so.

The Employer resubmitted the revised CBA to the government on August 28, 2013 and requested that it be included in the next option period. The Air Force declined, citing its belief that the revised CBA had not been reached as the result of arm's-length negotiations.

¹ References to the record are as follows: Transcript (Tr.); the Air Force's Exhibits (AFX) and Brief (AF's Br.); the Employer's Exhibits (EX) and Brief (Emp.'s Br.); the Union's Exhibits (UX) and Brief (Union's Br.).

² The Integrated Solid Waste Management Contract between the Air Force and the Employer is referred to herein as "the ISWM Contract."

II. SUMMARY OF TESTIMONY

A. Elias Johnson-Saucier

Elias Johnson-Saucier is a senior airman for the Air Force. He works at the 82nd Contracting Squadron as a contracting administrator and contracting officer on the Infrastructure Services Flight. He has been in the Air Force since August 30, 2010 and assigned to the Sheppard AFB in Wichita Falls, Texas on January 25, 2011. (Tr. 13-14).

Johnson-Saucier was the contracting administrator on the ISWM Contract between the Air Force and the Employer and, on occasion, acted as the contracting officer. The ISWM Contract is for refuse and recycling services at Sheppard AFB and was awarded in June 2010. The first performance period of one year began on September 1, 2010. After the first year, the Air Force had four options of renewing the contract for one-year periods if it continued to require refuse and recycling services. (Tr. 14, 15-17).

Three unionized employees work for the Employer. When the contract began in 2010, those employees had not yet been unionized. In August 2012, the Union and the Employer signed the original CBA. Johnson-Saucier received the CBA after the Air Force exercised its second one-year option. (Tr. 17-18).

If there is no CBA in place and the contract is covered by the Service Contract Act (SCA), wages are determined by an area-wide wage determination by the Department of Labor which sets the minimum wage and fringe benefits for particular work classifications. (Tr. 18-19).

The original CBA contained a couple of problems, one of which was the contingency language. Further, it was not furnished to the Air Force until after the option was exercised and performance began. In order for a CBA to be recognized, it must be received prior to the option exercise. The CBA was received on September 6, 2012, and performance began five days earlier on September 1, 2012. (Tr. 19-20).

The Air Force was notified months later that the CBA had been amended by the Employer and the Union. That amendment removed the problematic contingency language and shifted the wage increases contained in the original CBA to the second and third years. The original CBA covered the option period of September 2012 to August 2013 and contained a raise for unionized employees of \$1.50 per hour per position. It also contained raises for the subsequent periods beginning on September 2013 and September 2014. The modification to the CBA eliminated the first year (September 2012) raise. Each position received a 4% raise and an additional 75¢ in the second year (September 2013). In the third year (September 2014), each position received a 3½% raise and, again, an additional 75¢. (Tr. 20-23).

The Air Force understood these amendments to shift the increase of the first year to the second and third years to allow the Employer to request equitable adjustment for those increases prior to the Air Force's exercise of the option. The Air Force rejected the revised CBA and held a conference call with the Employer. In that call, the Air Force suggested reverting to the original

CBA with the Employer absorbing the first year's increase. The Employer was to contact the Union to reopen negotiations. (Tr. 23-25).

Bud Dulworth, the Union's business representative, told Johnson-Saucier that, in order for the Employer to reopen negotiations after the original CBA, the Employer told the union employees that it would have to limit work hours or lay off workers. The Employer would have had to cover the complete cost of the wage increase for the first year rather than obtaining an equitable adjustment and reimbursement from the government. (Tr. 25-26).

As a contracting administrator, the CBA was the only CBA Johnson-Saucier has ever reviewed. During the conference call, Johnson-Saucier inquired about the circumstances surrounding the collective bargaining process between the Employer and the Union. (Tr. 27-28). There is no provision that limits an employer's right to limit its liability in case of a loss. Also, the price adjustment clause allows contractors and unions to make adjustments in wages and benefits. (Tr. 31).

Under the original CBA, the employees were also entitled to an increase in health and welfare benefits from \$3.71 to \$4.50 in addition to the wage increase. Johnson-Saucier understood that the employees received the increases for the months of September, October, and part of November. Since that time, the Employer has not paid the increased wages under either the original or the revised CBAs. (Tr. 33-34).

The Air Force was amenable to a reversion to the original CBA. Bud Dulworth informed Johnson-Saucier that the Union would accept a reversion as well. Johnson-Saucier believed that the Union was forced into the revised CBA by threats by the Employer. (Tr. 34-35).

Johnson-Saucier found the revised CBA not to have been reached through arm's-length negotiation "because of the additional half percent that the Union was able to negotiate" and the Employer's "being able to push off that \$1.50 an hour that [it] should be liable for because of [its] untimeliness for the second and third year allowing [it] to come in for an equitable adjustment for that amount of money." The SCA does permit adjustments to be made in CBAs mid-term. (Tr. 35-36).

The Air Force exercised its second renewal option on August 30, 2012. It communicated that to the Employer via email. However, the government first notified the Employer in June that it intended to exercise the option on or before the anniversary date of the first option period. Even if the Air Force had received the original CBA timely, it would not have been able to honor it. The original CBA contained contingency language. (127-29).

B. Gary Lechman³

Gary Lechman has been the Central Region Air Force Labor Advisor for three and a half years. He is located at the Peterson AFB in Colorado Springs, Colorado. As an advisor, Lechman provides advice and guidance to various contracting squadrons. Much of his time involves

³ In the transcript, Gary Lechman is incorrectly referred to as "Larry." (Tr. 38; EX-2).

administering and interpreting the SCA, the Davis-Bacon Act, and the Walsh-Healey Act. Lechman reviews CBAs on a daily basis. (Tr. 38-39).

Airman Johnson-Saucier forwarded the CBA in this case to Lechman for review. The CBA was untimely, having been submitted after the exercise of the option. The CBA also contained contingency language not allowed by the regulations. If the contingency language were removed, the CBA would be deemed valid and incorporated into the next option period starting September 2013. (Tr. 40-42).

Lechman was made aware of modifications to the CBA, which included removing the contingency language and rolling over the wage increases to following years. He attended the conference call to discuss the wage increase change. (Tr. 42-43).

At a later date, Lechman had spoken with Bud Dulworth and learned that the Employer informed the Union that the untimely, original CBA placed an undue hardship on the Employer. The options posed to the Union were to renegotiate the CBA or suffer reduction in hours or layoffs. (Tr. 44-45).

Lechman originally reviewed the CBA after September 6. The contingency language was contained in Article 24 on pages 19-20. The parties voluntarily removed the language. If the revised CBA had been timely submitted, the Employer would have been due a price adjustment between what was paid on the SCA area wage determination and the wages in the revised CBA. There is no provision in the price adjustment clause that prohibits a union employee from negotiating rates mid-contract term. (Tr. 45-47).

From a labor advisor's position, the renegotiations appeared to be for the purpose of allowing the Employer to circumvent the SCA wage determination to make itself whole. In exchange, the Union workers got a pay raise. From the Air Force's perspective, the revised CBA "looked like a sweetheart deal because both parties were making themselves whole or better than what was originally negotiated in the first CBA." While the Employer was not getting reimbursed from the government for the original CBA wages, that loss was predicated upon the untimely submittal of the CBA. (Tr. 51-53).

Lechman has not seen any evidence that the wages under the revised CBA were pre-determined. (Tr. 54).

To remove the disallowed contingency language in the original CBA, the Employer had to reopen negotiations with the Union. A CBA must be revised bilaterally. (Tr. 55).

C. Bud Dulworth

Bud Dulworth is a business representative of the Union. He negotiates contracts, settles grievances, and conducts arbitrations with the various contracts. Dulworth is responsible for administering 20 CBAs. One is the CBA between the Employer and the Union. (Tr. 56-57).

Dulworth first became involved on September 1, 2012. The original CBA had been negotiated by David Webb. Dulworth got a call in October 2012 and was informed that the CBA had not been submitted timely and that the Employer would not be able to recoup the wages negotiated. The original CBA paid under the area wage determination \$16.78 for two employees and \$16.27 for the third employee. The former were recycling specialists, and the latter was a truck driver. The original CBA provided a raise of \$1.50 per hour for each employee plus an increase in health and welfare benefits from \$3.71 to \$4.50. The health and welfare benefits would increase again in 2013 to \$5.00. The employees received these increases only for a few months. The original CBA was signed in July. (Tr. 57-60).

In October, Union representatives and the Employer had a conference call. The Employer had notified the Union that the CBA had not been timely submitted. In the call, the Employer told the Union representatives that if the Employer could not recoup the wages, it would have to make "cuts on site." The three employees would be reduced to part-time. The Employer suggested paying the first year's wages at the AWD rate and making up the \$1.50 raise in subsequent years. Dulworth negotiated a half-percent increase in the second year and additional health and welfare benefits. (Tr. 61-62).

The negotiations for the revised CBA included four or five different conversations by phone and by email. The wages and benefits in the revised CBA were not predetermined but were the product of negotiation and proposals. (Tr. 65).

Because the government rejected the revised CBA, the Employer has not paid out the wage increases contained therein. As a result, the employees have initiated grievances, which are scheduled to be arbitrated. The employees have had no raise in wages or benefits since they became unionized. Dulworth testified that the revised CBA was not the result of a "sweetheart deal." Negotiations had to be reopened initially to remove the contingency language the government rejected. (Tr. 66-68).

One of the employees, Daniel Jordan, was paid two separate rates for driving the truck and recycling. During renegotiations, the Union representatives obtained a straight rate for Jordan to be paid truck driver wages his entire shift. Dulworth testified that this rate change "might help sell the contract to the guys on renegotiating..." (Tr. 68-70).

Dulworth is at Sheppard AFB about every other week. He represents ten CBAs on base. While not common, Dulworth has had experience renegotiating CBAs mid-contract. (Tr. 70-71).

Under the CBA, the Employer has the right to lay off employees and reduce hours if necessary. Dulworth knew this when the Employer approached him to renegotiate the CBA. He explained to the employees: "We can hold their feet to the fire on this..., but in the meantime, the company can lay everybody off or make you all part-time because the company has that right." (Tr. 72).

After the renegotiations in November and the following January, the Employer approached Dulworth again in June 2013, but he rejected the request to negotiate. There is no requirement that the Union renegotiate with an employer upon the latter's request. (Tr. 72-73).

Dulworth had no involvement in the original CBA. In his experience, a CBA is not renegotiated within months of implementation. Usually, a CBA is in effect for three years until the lapse of the contract. (Tr. 73-74).

The original raise of \$1.50 was spread between September 2013 and September 2014. Dulworth testified that this was not a pre-determination but a way to make up what the employees lost the first year. Also to make up for the loss from the first year, the Union negotiated an additional percentage and more health and welfare benefits. (Tr. 74-75).

The Employer initially paid the \$1.50 raise but stopped because the government only reimbursed the AWD rate. The Union would not have accepted less pay in 2013 and 2014 than was negotiated in the original CBA. (Tr. 76-77).

The \$1.50 lost from the first year was not rolled into any benefits plans. (Tr. 77-78).

Once the Employer stopped paying the increased wages and benefits in 2012, the employee had the right to file grievances. (Tr. 78).

Dulworth does not recall exactly when the increased pay ended. The increased pay may have been paid through November 2 or through the date of the signed Memorandum of Understanding in mid-November. (Tr. 79-81).

D. Paul Leslie Black, Jr.

Paul Black is the directing business representative for the Union. District Lodge 776 is one of many machinists' union districts. The Union is connected with 72 employers. Black has direct oversight of Bud Dulworth and six other business representatives as well as the 72 CBAs. He has personally negotiated approximately 75 CBAs in his career. The Union has been in existence since 1988. Black is familiar with the International Union's constitution and bylaws. (Tr. 81-83).

The Union is one of the most aggressive labor organizations. It was involved in the Eastern Airlines standoff and several strikes with Lockheed Martin Fort Worth. The strike in the 1990s lasted two weeks. The Union's policy is to "go for what [the] membership wants at the table... [and] strive to get there." (Tr. 84-85).

In late 2012, Bud Dulworth and David Webb informed Black about what had transpired with the Employer. Black instructed Dulworth to contact the employees, explain the situation, and tell them of the alternative courses of action. The objective of renegotiating was to obtain the best deal for the three employees. (Tr. 85-86).

The National Labor Relations Act governs the Union's duties and responsibilities at Sheppard AFB. The Union has the duty to represent its membership to the fullest and protect the members' rights as individuals and members of the Union. Black believed the Union had the legal obligation to negotiate a better deal. The members voted to reopen negotiations. Black

made it clear to Dulworth not to settle for anything less than the Union had negotiated in the original CBA. (Tr. 86-88).

There was no collusion between the Union and the Employer. Black is satisfied that Dulworth negotiated the very best deal he could for the employees. (Tr. 88).

The Union is never compelled to agree to any deal put on the table. Neither is the Employer. The Union's duty is to engage in good faith bargaining. Even if it agreed to open negotiations, the Employer and the Union could agree to no agreement. Black saw no evidence of collusion or unfair bargaining. (Tr. 89-97).

The original CBA was valid but was not turned in on time. It is not common for a CBA to be renegotiated within months, although it does happen. The revised CBA is also valid and requires increased wages to be paid as of September 1, 2013. (Tr. 91-92).

The Employer has not paid under the revised CBA. Because the government rejected the revised CBA, the Employer will not be reimbursed the wages. (Tr. 92).

E. Shavila Singh

Shavila Singh has been the president of the Employer for twelve years. The Employer provides waste management services among others. Ninety percent of the Employer's work sites are unionized. As a result, Singh frequently engages in CBAs. (Tr. 94-95).

The Employer had a contract at Sheppard AFB, which began on September 1, 2010. Singh directed her attorney to engage in collective bargaining on the Employer's behalf. An agreement was reached in August 2012. (Tr. 95-97).

The option year always starts on September 1. The government is not required to exercise an option. Singh does not recall receiving notice from the government regarding the exercise of the option. Upon her request, she received the modification documents on September 6, 2012. The CBA was already in place at that time. Singh testified that she submitted the CBA to the government as soon as she received it. The signature from the Union was dated August 20. The CBA was submitted to her via email. (Tr. 97-98).

The Employer began performing the first option year on September 1. The government notified the Employer that the CBA was submitted untimely, a conclusion with which the Employer disagreed. The modification exercising the option was dated September 6. But, the government rejected the Employer's argument. (Tr. 98-100).

In September, the Employer paid the CBA rates to the employees. After three and a half months of doing so, the Employer could not maintain payments financially. The Employer did not approach the Union to renegotiate until the government requested submissions in October to amend the CBA. The employer was losing money by paying the CBA rate. (Tr. 100-02).

In exchange for the rates to be reduced in the first year, the Union requested a flat wage rate for one of its employees. The Union also requested health and welfare benefits to be increased. It took more than three months for the Union and the Employer to come to an agreement. The first Memorandum of Understanding, signed in November, covered wages. The second, signed in January, covered health and welfare benefits and paid holidays. There were no discussions about entering into a sweetheart deal. (Tr. 104-05).

The Employer submitted the revised CBA in late January or early February. Singh wanted to ensure that the revised CBA would be timely and that any changes requested by the government would be made in time for the next option year. (Tr. 106).

From an employer's perspective, Singh wanted to make sure the wages and benefits under the CBA are fair and justified as compared to other employees of the company. The agreement reached between the Union and the Employer was reasonable. (Tr. 106-07).

Singh heard from the government in March 2013 regarding the revised CBA. She received an email regarding the government's concerns that the Employer and the Union escalated the wages in outer years and used a wage determination scheme. Singh requested a conference call, which occurred that same month. On the call, Singh explained why she reopened negotiations. The government requested that Singh again reopen negotiations and revert to the original CBA wages. The Union was not interested. (Tr. 107-11).

Singh has been negotiating with unions for ten years. It is possible to negotiate terms midway through a contract year or a CBA term. Renegotiated terms include health and welfare benefits if there is a classification change. (Tr. 111-12).

The Employer would have experienced financial hardship on the contract if it had to abide by the original CBA. The price under the fixed government contract is about \$80,000 per month. In addition to the labor on site, the Employer provides equipment which requires maintenance. The government does not pay for maintenance or replacement of broken equipment. The contract affords an annual profit of 4-5%. The Employer could not afford to pay the \$1.50 pay raise without reimbursement from the government. (Tr. 112-15).

The Memorandum of Understanding dated November 12, 2012 was negotiated in good faith. The health and welfare benefits were paid through November 15. The employees are being paid pre-CBA rates. The employees have effectively been without any wage increase. Singh admitted that the Employer is not honoring the Memorandum of Understanding. The basis for such nonpayment is that the government did not accept the CBA. Nothing in the CBA authorizes nonpayment for that reason. (Tr. 115-19).

The contract originally began on September 1, 2010. The government exercised the option, and option period one began September 1, 2011. The next option period began on September 1, 2012. Singh does not recall receiving any written notification of the second option exercise, but she received verbal notification that one would be forthcoming. Singh believes that the CBA was timely. (Tr. 119-22).

Singh informed the Union that they would need to renegotiate the CBA in order for the government to accept it. The necessary changes related to holidays and payment of any hours the employees would not be on site. The wage and benefit increases were important in order for the Union to accept a revised CBA. (Tr. 122-24).

The government set forth a list of concerns about the original CBA in an email. The concerns had to be addressed in order for the government to accept the CBA. (Tr. 124-25).

The Employer has the managerial right to reduce hours if needed. (Tr. 125).

III. FINDINGS OF FACT

Based upon the testimony of the witnesses and the exhibits submitted into the record, I find the following:

1. The Air Force and the Employer entered into a firm, fixed-price contract for integrated solid waste management services at Sheppard AFB in Wichita Falls, Texas. The ISWM Contract is subject to the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. § 6701, *et seq.* and was awarded in June 2010, with the first performance period of one year to begin on September 1, 2010. After the first year, the Air Force had four options of renewing the contract for one-year periods if it continued to require refuse and recycling services. (Tr. 14, 15-17, 19, 28, 95-97).

2. At the time the contract was awarded, three employees worked for the Employer and were not unionized. Because no CBA was in place, the wages were determined by an area-wide wage determination by the Department of Labor. (Tr. 17-19).

3. The Air Force exercised its second renewal option on August 30, 2012. The government first notified the Employer in June that it intended to exercise the option on or before the anniversary date of the first option period. (Tr. 127-29).

4. The Employer and the Union entered into a CBA effective September 1, 2012, which was signed by the Employer on August 17, 2012 and by the Union on August 20, 2012. The CBA contained wage rates for the three employees, which were to be increased by \$1.50 on September 1, 2012 and by 3.5% on September 1, 2013 and September 1, 2014. The health and welfare benefits were to be increased from \$3.59 to \$4.50 effective September 1, 2012 and to \$5.00 effective September 1, 2013. This CBA resulted from several back and forth email communications between the parties. (AFX-1; EX-1; UX-1; Tr. 57-60).

5. On October 10, 2012, the Air Force notified the Employer by email that the CBA, which was received on September 6, 2012, was not timely and would not, therefore, be incorporated into the ISWM Contract. In order for a CBA to be recognized, it must be received prior to the option exercise. The CBA was received on September 6, 2012, and performance began five days earlier on September 1, 2012. The CBA also contained contingency language, which was not acceptable to the government. (EX-2; Tr. 19-20, 98-100).

6. On October 16, 2012, the Employer contacted the Union representatives to discuss the untimely CBA and necessary revisions. If the Union and the Employer could not reach an agreement, labor would have to be cut. The options posed to the Union were to renegotiate the CBA or suffer reduction in hours or layoffs. (EX-5; UX-1, p.5; UX-13; Tr. 25-26, 44-45, 57-62, 100-02, 112-15).

7. The Employer had the right to lay off employees or reduce hours. From the Union's perspective, the objective of renegotiating was to obtain the best deal for the three employees in light of the Employer's managerial rights. (Tr. 72, 85-86, 125).

8. The Employer stopped paying the increased CBA wages on November 2, 2012. Since then, the Employer has not paid under the revised CBA. (UX-4; Tr. 92, 100-02, 115-19).

9. Effective November 16, 2012, the Employer and the Union entered into a Memorandum of Agreement amending the original CBA. The health and welfare benefits increased from \$3.59 to \$3.71 effective September 1, 2012 and again to \$5.79 effective September 1, 2013. Pre-CBA wages were to be paid through September 1, 2013, at which time wages would increase by 4% and 75¢. Wages were to increase again by 3.5% and 75¢ on September 1, 2014. Daniel Jordan was to be paid at the truck driver rate. The \$1.50 lost from the first year was not rolled into any benefits plans. (AFX-2, 3; EX-6; Tr. 20-23, 61-62, 68-70, 74-75, 77-78).

10. In order to reach this first Memorandum of Understanding, the Employer and the Union engaged in several email communications, which lasted through November 2012. There were four or five different bargaining conversations. The wage and benefit increases were important in order for the Union to accept a revised CBA. (EX-2-EX-5; Tr. 65, 122-24).

11. The wages and benefits were reasonable in comparison to those paid to employees at other job sites (Tr. 107) and did not meet the variance threshold and were considered within an acceptable value range. (Tr. 29, 30, 59).

12. On November 20, 2012, the Air Force communicated a list of issues in the CBA that needed to be addressed. (EX-7; Tr. 124-25).

13. The Employer contacted the Union on January 3, 2013 to discuss the email received from the Air Force on November 20, 2012. (UX-6).

14. The Employer and the Union signed another Memorandum of Agreement, which was effective on January 14, 2013 and which amended the holiday schedule. (AFX-2; EX-8).

15. The Employer forwarded the CBA revisions to the Air Force on January 15, 2013. The Air Force acknowledged that requested changes had been made and that the wages had been revised to shift the increases from 2012 to the following years. The Air Force found the wage increases had been adjusted arbitrarily in an effort to transfer the liability from the Employer to the government. The wage increases were not accepted by the Air Force. (EX-9; Tr. 106-11).

16. The Employer and the Air Force engaged in a conference call to discuss the Air Force's rejection of the revised CBA. The conference call was held on March 4, 2013. In that

call, the Air Force suggested reverting to the original CBA with the Employer absorbing the first year's increase. (EX-10; Tr. 23-25, 106-11).

17. On May 22, 2013, the Air Force concluded that the negotiation of the wage schedule was a "sweetheart arrangement in which neither the contractor [nor] the union have made concessions." (EX-11).

18. The Employer notified the Union on June 24, 2013 that the government again rejected the CBA as a "sweetheart deal." The Employer suggested reopening the original CBA, which would include discussions of sick leave and vacation. (UX-7–UX-9).

19. The Union rejected the Employer's request to reopen negotiations. The Union representative issued a letter on July 16, 2013, which stated that it had "bargained in good faith and at arm's length in August and December 2012." (EX-14–EX-15; Tr. 72-73).

20. On July 19, 2013, the Employer again requested that the Air Force accept the revised CBA, noting that it had been negotiated in good faith and at arm's length. (EX-16).

21. The Air Force requested an arm's-length hearing on August 26, 2013. (EX-17).

22. On September 11, 2013, the Employer notified the Union that it would not be reimbursed the CBA wages and, as such, would not pay the employees under the CBA. The Employer noted that it would have to discuss exercising Article XXIV of the CBA, "Invalidity." (UX-10).

23. On September 25, 2013, the three employees made grievances because their pay had not been increased in accordance with the revised CBA. On September 30, 2013, the Employer acknowledged receipt of the employees' grievances. It stated that the Employer "cannot provide the requested relief until such time [the Employer] is made whole." (UX-11; UX-12; Tr. 66-68, 115-19).

IV. LAW AND DISCUSSION

A. Burden of Proof

Under the Act, courts have held that the party contesting wage and benefits under a CBA must make a clear showing. *In re Big Boy Facilities, Inc.*, 1989 WL 549943, slip op. at 3-4, 88-CBV-7 (L.B.S.C.A. Jan. 3, 1989) (noting that legislative history requires adopting a "clear showing" standard, citing S. Rep. No. 1131, 92nd Cong., 2d Sess. 4, reprinted in 1972 U.S. Code Cong. & Admin. News 3537); *In re United HealthServ, Inc.*, 1991 WL 733658, 89-CBV-1 (L.B.S.C.A. Fed. 4, 1991); *In re Amer. Guard Servs., Inc.*, 2001-CBV-1, slip op. at 4 (ALJ Apr. 25, 2001).

The Air Force, as the party contesting the revised CBA, must make a clear showing that the wage rates, including prospective increases, provided for in the revised CBA were not the result of arm's length negotiations between the Employer and the Union.

B. Arm's Length Negotiations

41 U.S.C. § 6703(1) provides:

(1) Minimum wage.--The contract and bid specification shall contain a provision specifying the minimum wage to be paid to each class of service employee engaged in the performance of the contract or any subcontract...where a collective-bargaining agreement covers the service employees, in accordance with the rates provided for in the agreement, including prospective wage increases provided for in the agreement as a result of arm's length negotiations....

A subsequent provision of the Act, 41 U.S.C. § 6707(c)(1) (referred to as "Section 4(c)"), contains similar language with respect to succeeding contracts.⁴ It reads:

(1) In general.--Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations.

Neither the Act nor the implementing regulations define "arm's length negotiations," nor do they specify the standard to be applied when determining whether a CBA was negotiated at arm's length.

The regulation at §4.11, "Arm's length proceedings," provides that the statutory provision in Section 4(c) "precludes arrangements by parties to a collective bargaining agreement who, either separately or together, act with an intent to take advantage of the wage determination scheme provided for in sections 2(a) and 4(c) of the Act."

Additionally, whether a CBA contains provisions for "bona fide wages and fringe benefits" is one factor in determining whether arm's length negotiations existed. *Trinity Services, Inc. v. Marshall*, 593 F.2d 1250, n.37 (D.C. Cir. 1978) ("The requirement for 'arms-length

⁴ The Union argues that 4(c) is inapplicable here because there is no successor contractor. However, as this case was referred on the sole issue of whether the parties engaged in arm's-length negotiations, I need not address this argument. As an aside, I note that while Section 4(c) refers to predecessor and successor contracts and is generally invoked in cases involving an incumbent contractor who leaves the business and is replaced by a successor contractor, *see, e.g., Trinity Servs., Inc. v. Marshall*, 593 F.2d 1250 (D.C. Cir. 1978); *Lear Siegler Servs., Inc. v. Rumsfeld*, 457 F.3d 1262 (Fed. Cir. 2006), the regulations provide that a contractor can become a successor to itself, such as when it performs an additional term pursuant to an option exercised by the government. 29 C.F.R. § 4.163(e) ("[Section 4(c)] is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor."); *Guardian Moving and Storage Co., Inc. v. Hayden*, 421 F.3d 1268 (Fed. Cir. 2005).

negotiations' is an important ingredient of ensuring that wage rates and fringe benefits are in general accord with those prevailing in the locality.”).

In *In re Raymond Richardson*, 1994 WL 897725, slip op. at 4-5, BSCA No. 93-03 (L.B.S.C.A. May 6, 1994), the court looked to the relationship between the employer and the union, noting that it “lacked the formalities which usually attend a bona fide collective bargaining relationship.” The employer had selected one of the three employees to be their representative. Further, the bargaining resulted in fictional wages, which were higher than the actual wages paid, being reported to the government, which resulted in a financial windfall to the employer. Specifically, the court held: “this case lacks even the most basic element of a collective bargaining relationship -- that is, that the representatives of management and of labor have ‘at least theoretical parity necessary to represent, respectively, the independent interests of the employer and the independent, collective interests of the workers.’” *Id.*

Further, *Black's Law Dictionary* defines “arm’s-length” as follows “of or relating to dealings between two parties who are not related or are not on close terms and who are presumed to have roughly equal bargaining power.” *Black's Law Dictionary* (3rd Ed. 2006).

To support its argument that there were no arm’s-length negotiations, the Air Force argues that the Employer “coerced the union to reopen negotiations by threatening to cut hours or lay off workers...” (AF’s Br., p.7). However, it is undisputed that the Employer had the right to lay off employees or reduce hours. (Tr. 72, 85-86, 125). And as Dulworth told the Union employees they “could hold their feet to the fire” but the employees chose to renegotiate the CBA. To accept the Air Force’s argument would be, essentially, to invalidate any CBA spurred on by an employer’s exercise of its managerial right. I decline to extend the definition of “arm’s-length” so far.

On October 16, 2012, the Employer contacted the Union representatives to discuss the untimely CBA and necessary revisions. If the Union and the Employer could not reach an agreement, labor would have to be cut. The wages under the original CBA placed a financial hardship on the Employer since it would not be able to recoup the increased wages. The options posed to the Union were to renegotiate the CBA or suffer reduction in hours or layoffs. (EX-5; UX-1, p.5; UX-13; Tr. 25-26, 44-45, 57-62, 100-02, 112-15). Without reopening negotiations, both parties faced potential losses. The union workers would lose money, and the Employer would be strained to satisfy its contractual obligations to the government with a reduced workforce.

In order to reach this first Memorandum of Understanding, the Employer and the Union engaged in several email communications, which lasted through November 2012. There were four or five different bargaining conversations. (EX-2–EX-5; Tr. 65, 122-24). The Union workers were represented by Bud Dulworth, a business representative of the Union. His actions were approved by his supervisor, the directing business representative for the Union. (Tr. 56-60, 81). Unlike *In re Raymond Richardson*, then, there were bona fide representatives unrelated to the employer, bona fide bargaining sessions, and resulting bona fide wages and benefits that are in line with those paid to employees at other job sites.

Further underscoring a finding of arm's-length negotiations are the results of the bargaining sessions. The Union achieved an additional ½% increase in pay for the first year as well as a reclassification for Daniel Jordan and additional health and welfare benefits. (AFX-2, 3; EX-6; Tr. 20-23, 61-62, 68-70, 74-75, 77-78).

The Air Force also cites Memo. No. 159, Dept. of Labor, Emp. Standards Admin., Wage and Hour Div., Jan. 2, 1992. That Memorandum refers to contingent CBA provisions that "generally reflect a lack of arm's-length negotiations." One such contingency is "requiring the contracting agency to adequately reimburse the contractor." (AF's Br., p.6, Atch. 1). While the original CBA contains such language, the revised CBA effectively removed the contingent provision. (Cf. EX-1, ¶XXIV with EX-8, ¶3).

The facts show that the relationship between the Employer and the Union contained the "formalities which usually attend a bona fide collective bargaining relationship." *In re Raymond Richardson, supra*. I had the opportunity to observe Dulworth and Black during their testimony. I had no doubt that their concern during negotiations was to obtain the best deal possible for the three union members. I found no evidence of coercion or collusion. I find the Air Force has not met its burden by a clear showing that the revised CBA was not the result of arm's length negotiations between the Employer and the Union.

V. ORDER

For the foregoing reasons, I find and conclude that the CBA, as amended, was reached by agreement between the Employer and the Union as a result of arm's length negotiations in compliance with the Act and implementing regulations.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge