



Issue Date: 23 November 2016

CASE NO.: 2017-CBV-00001

In the Matter of:

**ARM'S-LENGTH PROCEEDINGS REGARDING THE
COLLECTIVE BARGAINING AGREEMENT
BETWEEN GINO MORENA ENTERPRISES, LLC AND
FORT BLISS BARBERS ASSOCIATION FOR WORK
PERFORMED AT FORT BLISS, TEXAS AND MCGREGOR
RANGE, NEW MEXICO UNDER A CONTRACT WITH THE
ARMY AND AIR FORCE EXCHANGE SERVICE**

DECISION AND ORDER DISMISSING MATTER

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, the Army & Air Force Exchange Service (AAFES), petitioned the Department of Labor for determination of arm's length negotiations for the collective bargaining agreement (CBA), between Gino Morena Enterprises, LLC (Morena) and Fort Bliss Barbers Association (the Association).

On October 17, 2016, Gino Morena submitted a Response Before Hearing. Therein, Morena asserted that the AAFES's request for a hearing was untimely and that matter should be dismissed. Morena argued the request for a hearing "shall not be considered" for an advertised contract, unless received "prior to ten days before the award of the contract," except in those situations where the Administrator determines that "extraordinary circumstances exist." 29 C.F.R. § 4.11(b)(2)(i).

On October 27, 2016 the Court issued an Order to Show Cause as to why the requested relief should not be granted. AAFES, the Administrator and Sheffield Barbers, LLC (Sheffield), an unsuccessful bidder, have filed responses.

STATEMENT OF THE CASE¹

AAFES issued Solicitation No. PS 14-004-15-208 inviting proposals to operate the barber shops at Fort Bliss, Texas, and McGregor Range, New Mexico. The Solicitation included

¹ The following facts are undisputed and are taken from the Response Before Hearing filed by AAFES.

a CBA between Morena and the Association. The AAFES contracting officer opened the proposed offers on May 21, 2015 and AAFES awarded Contract No. BLS 15-208 (the Contract) on June 6, 2015, to Morena.

On June 12, 2015, AAFES received a protest from Sheffield. Sheffield bid on the contract unsuccessfully. During the post-award protest, Sheffield made certain allegations, including that the Association is not a lawful organization distinctly formed and operated by its alleged members. Sheffield further alleged they received information from current employees that the Association is orchestrated and directed by Morena. Sheffield further alleged the terms for all collective bargaining agreements are drafted, controlled and are at the sole discretion by and for the benefit of Morena. The protest was denied by the AAFES contracting officer and the appellate authority.

On July 21, 2015, AAFES submitted an Arm's Length Determination Request in accordance with 29 C.F.R. Part 4 § 4.11(b) for the CBA. On September 20, 2016, the Administrator issued an Order of Reference on the issues of whether the CBA is a collective bargaining agreement and whether the CBA is a result of arm's length negotiations. Nowhere in the Order of Reference is there any mention of the timeliness of the Arm's Length Determination Request or any mention of extraordinary circumstances to justify an exception to the timeliness requirement.

DISCUSSION

The regulations governing request for arm's length determinations include explicit procedural time limitations for filing the request. A request may be made by a contracting agency (here AAFES) or other affected or interested persons including prospective contractors. 29 C.F.R. § 4.11(b)(2)(i) provides:

(2) . . . (R)request for a hearing shall not be considered unless received as specified below except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract.

The underlying goal of the time limitation is to insure efficiency and certainty in the procurement process. *In the Matter of U.S. Dept. of State*, ARB Case No. 98-114, 2000 WL 424186 (Feb. 16, 2000).

AAFES and Sheffield acknowledge that AAFES's request for arm's length determination was untimely pursuant to 29 C.F.R. § 4.11(b)(2)(i). The contract was awarded on June 6, 2015, and the Request was not submitted until July 21, 2015. However, AAFES and Sheffield argue that the untimeliness should be excused because the Administrator made a determination that extraordinary circumstances exist to justify an exception to the timeliness requirement.

AAFES, the Administrator and Sheffield do not cite any statement in the Order of Reference or any other document that support this argument. All merely argue that by referring

the case to the Chief ALJ, the Administrator must have determined that extraordinary circumstances existed to justify the untimely filing. Nor do AAFES, the Administrator or Sheffield cite any legal authority to support their argument. While I agree with AAFES that the Administrator has the authority to determine timeliness, there is nothing in the record to show the Administrator did determine timeliness and what, if any, extraordinary circumstances existed to justify the untimely filing.

The Court is not persuaded by any argument made by Sheffield, the unsuccessful bidder on the barber shop contract. AAFES Determination Request appears to be largely predicated on allegations made by Sheffield. In its Response Before Hearing, AAFES states that though the appellate authority denied Sheffield's protest, "the decision letter included a commitment to submit the issues to DOL for a determination on the validity of the Relevant CBA."

While it *may* be that extraordinary circumstances existed to prevent AAFES from making a timely Determination Request, Sheffield had all the information required to support a timely arm's length determination request. According to Sheffield's Response Before Hearing "In connection with its bid, Sheffield uncovered evidence that the predecessor employer, [Morena], dominated the [Association] and that the collective bargaining agreement ("the Morena CBA") was not the result of arm's length negotiations." As a prospective contractor, Sheffield could have requested an arm's length determination at least as early as May 21, 2015, the date AAFES opened the proposed offers. But despite the fact that it had "uncovered evidence" that would support an arm's length determination request, Sheffield chose to wait until after the award to contest the CBA. This is exactly the type of situation the time limitations were intended to avoid. *See In the Matter of U.S. Dept. of State.*

ORDER

For the foregoing reasons, I find and conclude that the Arm's Length Determination Request was untimely and that the Administrator has not determined that extraordinary circumstance exist to justify the late filing. Accordingly, the matter is hereby **DISMISSED**.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge

NOTICE: To appeal, you must file a written petition for review with the Administrative Review Board (“ARB”) pursuant to 29 C.F.R. Part 8 within 10 days after the date of this decision. The petition shall refer to the specific findings of fact, conclusions of law, or order excepted to and the specific pages of transcript relevant to the petition for review. *See* 29 C.F.R. § 6.57.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

