

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Overstreet Electric Company, Inc.) ASBCA Nos. 51653 and 51715
)
Under Contract Nos. DACA27-96-C-0068)
DACA27-96-C-0084)

APPEARANCE FOR THE APPELLANT: Terrance R. Ketchel, Esq.
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APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
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U.S. Army Engineer District,
Louisville

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON THE GOVERNMENT'S MOTIONS TO DISMISS
FOR LACK OF JURISDICTION

The Army Corps of Engineers (Corps) filed Motions to Dismiss for Lack of Jurisdiction contending that, because the dispute in these appeals involves Davis-Bacon Act violations, the Board lacks subject matter jurisdiction. Overstreet Electric Company, Inc. (Overstreet), opposes the motions arguing that matters of contract administration are at issue. We deny the motions.

STATEMENT OF FACTS FOR PURPOSES OF THIS MOTION

Contract Nos. DACA27-96-C-0084 and DACA27-96-C-0068 were awarded to Overstreet by the Corps for electrical upgrade work at Wright-Patterson Air Force Base, Ohio (ASBCA 51653 R4, tab 1) and modifications to the electrical distribution system at Fort Knox, Kentucky, respectively (ASBCA 51715 R4, tab 1).

Both contracts contained the following clauses: FAR 52.222-4, CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION (JUL 1995); FAR 52.222-6, DAVIS-BACON ACT (FEB 1995); FAR 52.222-7, WITHHOLDING OF FUNDS (FEB 1988); FAR 52.222-13, COMPLIANCE WITH DAVIS-BACON AND RELATED ACT REGULATIONS (FEB 1988); FAR 52.222-14, DISPUTES CONCERNING LABOR STANDARDS

(FEB 1988); and FAR 52.233-1 DISPUTES (OCT 1995) (ASBCA 51653 R4, tab 1; ASBCA 51715 R4, tab 1).

Complaints were received by the Corps involving alleged Davis-Bacon Act and Contract Work Hours and Safety Standards Act violations for failure to properly classify and compensate workers on both the Wright-Patterson and Fort Knox contracts. Mary A. Crabtree, a Contract Industrial Relations Specialist for the Corps, notified Overstreet that investigations had been initiated to determine compliance with contract labor provisions. Ms. Crabtree determined that workers had been misclassified, requested restitution from Overstreet and recommended withholding of contract funds. (ASBCA 51653 R4, tabs 2, 3; ASBCA 51715 R4, tab 2)

Ms. Crabtree then retired and Mr. Robert Pessolano, Assistant District Counsel for the Corps, continued the investigation. He confirmed Ms. Crabtree's preliminary findings and invited Overstreet to provide a rebuttal to the findings. (ASBCA 51653 R4, tabs 6, 8; ASBCA 51715 R4, tabs 5, 6, 8) Meanwhile, the Corps withheld \$72,979.84 from the Wright-Patterson contract and \$35,052.36 from the Fort Knox contract for the alleged labor violations (ASBCA 51653 R4, tab 6; ASBCA 51715 R4, tab 5).

Overstreet responded by asserting that Mr. Pessolano had failed to follow the procedures outlined in FAR Part 22, APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS and related DFARS regulations, and challenging the authority of both Mr. Pessolano and Ms. Crabtree to make labor violation determinations and withhold contract payments. Overstreet asked for delegation letters signed by the contracting officer, as required by DFARS 222.406-8(a)(E), indicating the authority granted to Mr. Pessolano and Ms. Crabtree as authorized representatives of the contracting officer. Overstreet went on to explain why it disagreed with the specific findings of the investigations finding misclassification violations. (ASBCA 51653 R4, tabs 4, 7; ASBCA 51715 R4, tabs 3, 4, 7, 9)

Mr. Pessolano responded that both he and Ms. Crabtree were authorized representatives of the contracting officer "for purposes of handling labor problems and investigations," but provided no documentation of that authority. No letters of authority were provided because, according to Mr. Pessolano, "the Louisville District does not specifically, customarily, and routinely write such letters" since it is "tacitly understood" that their positions carried with it the requisite authority to investigate and enforce the labor standards provisions in the contract (ASBCA 51653 R4, tab 11; ASBCA 51715 R4, tab 10). The policies and procedures of the Corps concerning enforcement of labor standards are not part of the records in these appeals.

By letters dated 15 May 1998 and 8 June 1998, Overstreet requested a contracting officer's final decision under the Disputes clauses of the contracts and asked: (1) that all

funds previously withheld be refunded and no further withholdings occur pending compliance with FAR 22.406-8, INVESTIGATIONS; (2) that interest be paid on all withholdings; (3) that actions taken by Mr. Pessolano and Ms. Crabtree be declared null and void; (4) that neither Mr. Pessolano and Ms. Crabtree be delegated contractual investigative authority in the future; (5) that Overstreet be provided with a reasonable rebuttal time after a properly conducted investigation; and (6) that the findings take into consideration the legal points Overstreet provided (ASBCA 51653 R4, tab 10; ASBCA 51715, Notice of Appeal, attach.).

By a letter dated 23 June 1998, the Administrative Contracting Officer (ACO) for the Wright-Patterson contract informed Overstreet that, because the matter involved withholdings of contract earnings as a result of a labor investigation, the dispute was subject to FAR 52.222.14, DISPUTES CONCERNING LABOR STANDARDS, and that no final decision would be issued (ASBCA No. 51653 R4, tab 16).

By letter dated 21 August 1998, the contracting officer on the Fort Knox contract notified Overstreet that she had reviewed the Davis-Bacon Act labor violations investigation and adopted Ms. Crabtree's findings. She advised Overstreet that she would continue to withhold \$35,042.36 until proof of restitution was provided, absent which the matter would be referred to the Department of Labor (DOL). The amount withheld included liquidated damages assessed under FAR 52.222-4, CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION. (ASBCA 51715 R4, tab 14)

By letter dated 31 August 1998, the contracting officer on the Wright-Patterson contract referenced the investigation of alleged Davis-Bacon Act labor violations conducted by Ms. Crabtree and Mr. Pessolano, adopted their findings, and likewise advised Overstreet that she would continue to withhold \$72,979.84 until proof of restitution was provided, absent which the matter would be referred to DOL (ASBCA 51653 R4, tab 21).

The Government has not referred these disputes to DOL for resolution (ASBCA 51653 Gov't mot. at 5; ASBCA 51715 Gov't resp. at 10).

Overstreet filed notices of appeal on 24 July 1998 and 24 August 1998 on the Wright-Patterson and Fort Knox contracts, respectively. The appeals were docketed as ASBCA Nos. 51653 and 51715.

DECISION

Overstreet asserts that the sole issue in these appeals is the "effect of unauthorized directives by Government agency officials on the contract and the obligation of the

Appellant contractor to follow such unauthorized directives” (app. resp. dated 19 Jan 1999). It is appellant’s position that the Government did not comply with applicable regulations while investigating alleged labor violations. It contends that the actions taken by agency personnel, Mr. Pessolano and Ms. Crabtree, were unauthorized because both lacked letters of delegation from the contracting officer.

The Corps argues that this is a dispute about whether appellant has violated the Davis-Bacon Act labor provisions of the contract which must be decided under the Disputes Concerning Labor Standards clause by DOL. It has not addressed whether the way in which the Corps, in general, and Ms. Crabtree and Mr. Pessolano in particular, administered the contract’s labor clauses complies with agency regulations.

Disputes arising out of the labor standards provisions of contracts are within the exclusive jurisdiction of DOL. *Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425 (Fed. Cir. 1991). However, the Board has jurisdiction over disputes which are centered upon the parties’ contract rights and obligations, even though matters reserved to DOL may be part of the factual predicate. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993).

We have found jurisdiction in a number of cases involving underlying Davis-Bacon Act factual issues. *See, e.g., Central Paving, Inc.*, ASBCA No. 38658, 90-1 BCA ¶ 22,305 (jurisdiction to decide dispute concerning whether there was a mistake as to the applicability of Davis-Bacon Act to contractor’s employees); *Woodington Corporation*, ASBCA No. 34053, 87-3 BCA ¶ 19,957 (jurisdiction to determine whether the Invitation for Bids contained adequate information to alert contractor as to nature of the work to calculate the labor component of its bid); *Sealtite Corporation*, ASBCA No. 30353, 87-1 BCA ¶ 19,469 (finding jurisdiction, *inter alia*, to determine whether the withholding of funds for Davis-Bacon Act violations was proper); *Dahlstrom & Ferrell Construction Company, Inc.*, ASBCA No. 30741, 85-3 BCA ¶ 18,371 (jurisdiction found where DOL wage determination contained a clerical error and the contracting officer later directed contractor to pay higher wage rates based upon the correction).

Overstreet asserts that the dispute in these appeals is not over the DOL Davis-Bacon Act wage determinations, but rather the manner in which the Corps withheld contract funds. It argues that the Corps did not follow the procedures found in FAR Part 22 and related DFARS regulations in its investigation of Overstreet’s purported labor standards violations, in particular, that unauthorized agency personnel conducted the investigations and took action which caused it economic harm by improperly withholding contract funds, absent proper delegated authority. We agree with Overstreet that these are matters which concern its contractual rights and the

Government's contractual obligations and, therefore, are within our jurisdiction. *See, Sealite, supra.*

CONCLUSION

We deny the motions to dismiss for lack of jurisdiction.*

Dated: 24 July 2000

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51653 and 51715, Appeals of Overstreet Electric Company, Inc., rendered in conformance with the Board's Charter.

Dated:

* We express no opinion in the decision on the availability of some of the specific remedies requested in appellant's claims.

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals