

ARMED SERVICES BOARD OF CONTRACT APPEALS

Petition of --)
)
Adventure Group, Inc.) ASBCA No. 52687-877
)
Under Contract No. DABT31-98-C-0010)

APPEARANCE FOR THE PETITIONER: Thomas J. Kelleher, Jr., Esq.
Smith, Currie & Hancock, LLP
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
CPT Ryan M. Zipf, JA
Trial Attorney

ORDER PURSUANT TO RULE 1(e)
DIRECTING CONTRACTING OFFICER TO ISSUE DECISION

Adventure Group, Inc. (AGI) petitions the Board pursuant to Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(4) and Board Rule 1(e), for an order directing the contracting officer to issue a final decision on its claim regarding misclassification of employees under the Davis-Bacon Act. The Government has filed a motion to dismiss the petition as premature since the Department of Labor (DOL) has not issued a final wage determination.

AGI was awarded Contract No. DABT31-98-C-0010 to install radiator and pump bypass valves at Fort Leonard Wood, Missouri. The contract included the clause at FAR 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988) which states:

The United States Department of Labor has set forth in 29 CFR Parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(Gov't mot., ex. 2)

AGI states that it had predicated and confirmed its bid using classifications and rates for plumbers and plumber's helpers published in the wage determinations for the contract (app. pet. at 2). After receiving a complaint alleging misclassifications, the contracting

officer notified DOL (Gov't mot., ex 1). DOL began a preliminary investigation of the classifications and, subsequently, requested that the contracting officer withhold all payments to AGI pending the outcome of the investigation. The contracting officer complied, withholding the remaining payments, \$105,690.55, owed AGI on the contract. By letter dated 22 February 2000, DOL informed AGI that it owed \$113,581.45 for paying employees classified as "plumber's helpers" for performing the work of a "pipe fitter" (app. pet., ex. C). The record does not reflect that AGI has responded to DOL's 22 February 2000 letter or that DOL has issued a final determination on AGI's contract.

By letter dated 10 January 2000, AGI submitted a certified claim requesting a contracting officer's final decision and seeking reformation of the contract and an increase in the contract price of \$105,690.55. On 21 January 2000, the contracting officer declined to issue a final decision because DOL had not issued a final determination. By letter dated 16 March 2000, AGI filed a petition requesting the Board to direct the contracting officer to issue a final decision by 17 April 2000 on its claim.

DECISION

The Government moves to dismiss the petition as premature. The Government argues that appellant's petition is premature because DOL has not rendered a final determination on the wage classification issues. Petitioner opposes the motion arguing that a final determination by DOL is not a prerequisite for asserting a claim under the Disputes clause.

The Government's argument and the cases cited in support thereof address whether *appeals* may proceed in certain cases involving DOL wage determinations. We do not have before us an *appeal*. We have before us a *petition* that seeks a contracting officer's decision on a certified claim.* A contracting officer's decision (or a deemed denial) is, of course, a prerequisite to the filing of an appeal. The Government's arguments are not material to the issue of whether petitioner is entitled to a contracting officer's decision pursuant to 41 U.S.C. § 605(c)(4). If the contracting officer perceives an impediment to considering a claim on the merits, he may deny the claim on that basis and the claimant may then proceed to appeal. It is only after an appeal has been filed that we may determine if it is premature. The CDA does not permit the contracting officer to indefinitely postpone the issuance of a contracting officer's decision.

We order the contracting officer to issue a decision within 30 days from the date of this order.

* This is not a situation where there is no claim before the contracting officer. See *Production Corporation*, ASBCA No. 49122-812, 96-1 BCA ¶ 28,053, *aff'd on reconsider.*, 96-1 BCA ¶ 28,181; *Water Works and Sanitary Sewer Board of the City of Montgomery*, ASBCA No. 47924-794, 95-1 BCA ¶ 27,362.

This order completes all necessary action by the Board. If the contracting officer fails to comply with this order, such failure will be deemed a decision by the contracting officer denying the claim and petitioner may appeal to this Board or sue in the United States Court of Federal Claims pursuant to the CDA, 41 U.S.C. §§ 605(c)(5), 606, or 609, as appropriate.

Dated: 28 June 2000

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

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Order Pursuant to Rule 1(e) of the Armed Services Board of Contract Appeals in ASBCA No. 52687-877, Petition of Adventure Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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