

ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.  
Engineer Chief Trial Attorney  
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Engineer Trial Attorney  
U.S. Army Engineer District, Louisville

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY  
PURSUANT TO RULES 11 AND 12.3

These appeals arise from deemed denials of two claims submitted by Overstreet Electric Co., Inc. (Overstreet) to recover amounts withheld by the Government for alleged labor violations under the captioned contracts. Overstreet contends that the Government's investigation of the alleged labor violations and its withholdings of contract funds were improper. The parties submitted these appeals on the record pursuant to Board Rule 11 and appellant requested accelerated consideration under Board Rule 12.3. We deny the appeals.

SUMMARY FINDINGS OF FACT

Contract Nos. DACA27-96-C-0084 and DACA27-96-C-0068 were awarded to Overstreet by the Army Corps of Engineers (Corps) for electrical upgrade work at Wright-Patterson Air Force Base, Ohio, in the amount of \$3,586,000 (ASBCA No. 51653) and for electrical modification work at Fort Knox, Kentucky, in the amount of \$3,038,756 (ASBCA No. 51715). Both contracts were administered by the Louisville District of the Corps. (ASBCA 51653 R4, tab 1; ASBCA 51715 R4, tab 1)

Both contracts contained the following relevant 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 AND 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).

The Withholding of Funds clause provided in relevant part:

The Contracting Officer shall, upon his or her own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Contractor under this contract . . . , so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages required by the contract. . . .

The Contract Work Hours and Safety Standards Act clause similarly authorizes withholding for unpaid wages and liquidated damages by the contracting officer. FAR 52.222-4(c).

Delegations of administrative contracting officer (ACO) authority were issued by Ms. Janet M. Henderzahs, the contracting officer on the Fort Knox contract, to Mr. Dave Klinstiver and by Ms. Denise A. Bauer, the contracting officer on the Wright-Patterson contract, to Messrs. Kenneth A. Stegall and Richard A. Markwell. Copies of all three ACO delegations were provided to and acknowledged by Overstreet. Additionally, Ms. Henderzahs designated Messrs. Craig Meuter, resident engineer, and Lewis H. Graham, project engineer, to be contracting officer's authorized representatives (COR) on the Fort Knox contract and Ms. Bauer designated Mr. Kerry M. Kennedy, project engineer, to be a contracting officer's authorized representative on the Wright-Patterson contract. Copies of all three COR designations were provided to and acknowledged by Overstreet. (Gov't reply br., attachs.)

The affidavits of both Ms. Henderzahs and Ms. Bauer also establish that the office of counsel of the Louisville District of the Corps is responsible for the administration and enforcement of the labor standards provisions of construction contracts in the Louisville District (Gov't br. exs. B and C at ¶¶ 1-3). Attorneys and industrial relations specialists in the office of counsel provide advice to contracting officers on labor standards matters, including the administration and enforcement of contractual labor standards clauses which involves the investigation of alleged complaints and potential violations and the issuance of requests for restitution from contractors (Gov't br. exs. B and C at ¶¶ 4-9). The authority to act on behalf of the contracting officer on these matters is encompassed within the duties and responsibilities of attorneys and industrial relations specialists, and no specific authority is delegated on an individual contract basis (Gov't br. exs. B and C at ¶¶ 6-7). Matters not resolved by office of counsel personnel are elevated to the contracting officer (Gov't br. exs. B and C at ¶ 10).

The Electrical Workers Local No. 369 lodged a complaint asserting Davis-Bacon Act violations for failure to properly classify and compensate workers on both the Wright-Patterson and the Fort Knox contracts. As a result of the complaint, the Government commenced an investigation which was conducted initially by Ms. Mary A. Crabtree, a contract industrial relations specialist in the office of counsel, Louisville District. (ASBCA 51653 R4, tab 2; ASBCA 51715 R4, tab 2)

By a letter dated 31 October 1997, Ms. Crabtree notified Overstreet that a “compliance review” of the Fort Knox contract had revealed violations of the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act resulting from the misclassification of five workers. The letter provided the details of each misclassification violation, requested restitution and advised Overstreet that contract funds in the amount of \$35,052.36, consisting of back wages and \$390.00 in liquidated damages, would be withheld pending proof of restitution. That same day, Ms. Crabtree submitted an administrative request to have \$35,052.36 withheld on the Fort Knox contract. (ASBCA 51715 R4, tab 2) Although the record does not make clear the timing, this amount evidently was withheld.

In a letter dated 13 November 1997, Overstreet contested her specific findings regarding the five labor misclassifications and asserted that it was in full compliance with “all of its Davis-Bacon and other wage/hour obligations” (ASBCA 51715 R4, tab 3).

Also on 13 November 1997, Ms. Crabtree notified Overstreet that an investigation had been initiated to determine compliance with contract labor provisions on the Wright-Patterson contract. The letter explained that she had found a “failure to properly classify and compensate workers for actual work performed . . . irregularities concerning the use of one electrician apprentice and [a] failure to adhere to the apprenticeship program ratio of three journeymen for one apprentice,” which she considered to be violations of the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act. (ASBCA 51653 R4, tab 2) She requested restitution, advised Overstreet that \$50,000 would be withheld for back wages pending a complete review of current payrolls, and invited Overstreet to call her to discuss the matter. (*Id.*) The following day, she submitted an administrative request to have \$50,000 withheld on the Wright-Patterson contract (ASBCA 51653 R4, tab 3). This amount evidently also was withheld.

Both the Wright-Patterson and Fort Knox labor violations were discussed by Ms. Crabtree and counsel for Overstreet on 25 November 1997. In a letter dated 26 November 1997, Overstreet summarized these discussions, which consisted largely of disagreements regarding the classifications of superintendents, apprentice electricians, and laborers. (ASBCA 51653 R4, tab 4)

In December 1997 Ms. Crabtree retired and the labor compliance issues associated with both contracts were assigned to Mr. Robert W. Pessolano, Assistant District Counsel

for the Corps, Louisville District. Mr. Pessolano had been officially designated as an authorized representative of the contracting officer on 10 September 1986. The designation letter was signed by Col. Robert L. Oliver, commanding contracting officer, and stated in pertinent part:

1. You are hereby designated as Authorized Representative of the Contracting Officer for all construction, service, and supply contracts . . . for the purpose of performing all actions of the Contracting Officer under such contracts concerning legal matters, labor, bonds and insurance, except for the execution or approval of contractual documents or changes therein. This delegation includes but is not limited to, . . . enforcement of labor provisions of the contract and the applicable laws, . . . .
2. This appointment will continue while holding your present positions (assignments) unless sooner revoked.

(Gov't br. ex. D)

By letters dated 23 January 1998 and 9 March 1998, Mr. Pessolano provided Overstreet with further details of the alleged labor violations associated with the misclassifications of employees on the Fort Knox and Wright-Patterson contracts. The letters included calculations of the number of hours worked by the affected employees and what the Government asserted were the correct hourly wage rates. The Corps advised that, pending restitution, it would continue to withhold \$35,052.36 for the Fort Knox contract, including \$390.00 in liquidated damages, and that the amount withheld under the Wright-Patterson contract was now \$72,979.84. (ASBCA 51653 R4, tab 6; ASBCA 51715 R4, tab 5)

Having received no response to his 23 January and 9 March 1998 letters, Mr. Pessolano wrote another letter, dated 7 April 1998, to Overstreet which reiterated the request to make restitution in the stated amounts. He advised that Overstreet's "[f]ailure to respond and make said payments by May 8 will necessitate submitting this matter to the U.S. Department of Labor for determination and resolution and transferring withheld funds to GAO for distribution to affected employees." (ASBCA 51715 R4, tab 6)

Overstreet responded with lengthy letters dated 8 and 13 April 1998, both of which asserted that its disputes with the Government involved the proper administration of its contracts and charged that the Government had failed to follow the procedures outlined in part 22 of the FAR and that Government personnel (*i.e.*, Ms. Crabtree and Mr. Pessolano) did not have the authority to make labor violation determinations and withhold contract payments. Overstreet also disputed the Government's findings regarding the specific misclassification violations and declined to make restitution. It concluded with a request

that the contracting officer declare the correspondence associated with the investigations “null and void.” (ASBCA 51653 R4, tab 7; ASBCA 51715 R4, tab 7)

By letter dated 8 May 1998, Mr. Pessolano formally invited Overstreet to submit a rebuttal to the Corps findings. He characterized the matter as involving the enforcement of the labor provisions and assured Overstreet that both he and Ms. Crabtree were authorized representatives of the contracting officer “for purposes of handling these kinds of labor situations.” (ASBCA 51653 R4, tab 8; ASBCA 51715 R4, tab 8)

Overstreet responded on 12 May 1998 with a request for copies of delegation letters, signed by the contracting officer, indicating the authority granted to Mr. Pessolano and Ms. Crabtree on the Fort Knox and Wright-Patterson contracts (ASBCA 51653 R4, tab 9). No such delegation letters were provided to Overstreet because, as Mr. Pessolano stated in his 22 May 1988 reply:

The Louisville District does not specifically, customarily, and routinely write such letters. It is tacitly understood that the position of Contract Industrial Relations Specialist inherently carries with it the responsibility to investigate and enforce the labor standards provisions in the contract. It is on this basis that Ms. Crabtree conducted the investigation, and it is on this basis that I am continuing her enforcement effort to ensure that the employees working for you are properly classified and paid.

(ASBCA 51653 R4, tab 11; ASBCA 51715 R4, tab 10)

By letters dated 15 May and 8 June 1998, Overstreet requested contracting officer final decisions under the Disputes clause on disputes involving the withholding of its funds resulting from an allegedly improperly conducted labor investigation. It requested that: (1) all withholdings be released and that no further funds be withheld pending compliance with FAR 22.406-8; (2) interest be paid on all withholdings from the date of the claim; (3) the actions taken by Mr. Pessolano and Ms. Crabtree be declared null and void; (4) no future authority be delegated to Mr. Pessolano and Ms. Crabtree on these contracts; (5) it be afforded a reasonable period of time for rebuttal following a properly conducted investigation; and (6) the preliminary findings take into consideration the legal points it had previously addressed (ASBCA 51653 R4, tab 10; ASBCA 51715 Notice of Appeal, attach.).

By letter dated 23 June 1998, the ACO for the Wright-Patterson contract informed Overstreet that no final decision would be issued under the Disputes clause because the matter involved contract withholdings resulting from a labor investigation which was subject to the Disputes Concerning Labor Standards clause and would be referred to the

Department of Labor (DOL) (ASBCA 51653 R4, tab 16). Overstreet filed a Notice of Appeal dated 20 July 1998 which was docketed as ASBCA No. 51653 on 24 July 1998.

By letter dated 21 August 1998, Ms. Henderzahn, the contracting officer on the Fort Knox contract, advised Overstreet that she had reviewed the investigation of the alleged labor violations on that contract and summarized her findings concerning each allegation. She concluded that \$35,042.36 should be withheld and that the matter would be referred to DOL if Overstreet did not make restitution and provide proof thereof by 4 September 1998. (ASBCA 51715 R4, tab 14) Overstreet filed a Notice of Appeal dated 24 August 1998 which was docketed as ASBCA No. 51715 on 28 August 1998 and subsequently consolidated with ASBCA No. 51653.

By letter dated 31 August 1998, Ms. Bauer, the contracting officer on the Wright-Patterson contract, advised Overstreet that she had reviewed the investigation into the alleged labor violations on that contract and summarized her findings concerning each. She concluded that \$72,979.84 should be withheld and that the matter would be referred to DOL if Overstreet did not make restitution and provide proof thereof by 11 September 1998. (ASBCA 51653 R4, tab 21)

It is undisputed that the Corps did not refer these matters to DOL for resolution under the Disputes Concerning Labor Standards clause (app. br. at 9-10; Gov't br. at 6).

Of relevance to the issues in these appeals are several general FAR and DFARS provisions: FAR 1.602-2 RESPONSIBILITIES, which provides in paragraph (c) that contracting officers are to “[r]equest and consider the advice of specialists in . . . law . . . and other fields, as appropriate;” FAR 52.202-1 DEFINITIONS, which provides in paragraph (f) that the term “Contracting Officer” includes “certain authorized representatives . . . acting within the limits of their authority. . . ;” DFARS 202.101 DEFINITIONS, which further explains that a COR is someone “designated and authorized in writing by the contracting officer to perform specific technical or administrative functions;” and, DFARS 201.602-2 RESPONSIBILITIES, which provides in paragraph (5) that a copy of the COR’s designation specifying the extent of the authority and identifying the limitations and period covered by the delegation must be provided to the contractor.

Also of relevance are two FAR regulations relating to labor investigations. FAR 22.406-8(a) authorizes contracting agencies to conduct labor standards investigations of all aspects of the contractor’s compliance with contract labor standards. Paragraph (b) requires the contracting officer to review the investigation report and make preliminary findings. Paragraph (c)(1) then provides that the contracting officer provide written notice “concerning the preliminary findings, proposed corrective actions, and the contractor’s right to request that the basis for the findings be made available and to submit written rebuttal information within a reasonable period of time.”

FAR 22.406-9(a) requires the contracting officer to withhold payments due the contractor in an amount equal to the estimated wage underpayment and liquidated damages due under the Contract Work Hours and Safety Standards Act if the contracting officer believes a violation exists and to adjust the withholding as necessary if subsequent investigation confirms the violations.

Also of relevance is DFARS 22.406-8 INVESTIGATIONS, which provides in paragraph (c)(4)(A) that the agency investigator notify the contractor by certified mail of any finding that it is liable for liquidated damages under the Contract Work Hours and Safety Standards Act and in (c)(4)(A)(1) that the contractor has “60 days after receipt of the notice to appeal the assessment of liquidated damages . . . .”

### DISCUSSION

At issue in these appeals is whether the Corps properly administered FAR 22.406-8 and 22.406-9 when it withheld contract funds under FAR 52.222-4 and 52.222-7. Overstreet asserts that the provisions were not administered by the contracting officer or an authorized representative of the contracting officer and that, even if authorized persons did administer the provisions, they did not comply with the applicable requirements (app. br. at 10-11). It contends that the Government’s failures constitute a breach of its contractual obligations. The Government’s position is that it fully complied with its contractual obligations.

In order for Overstreet to prevail upon its breach claim, it must show that the conduct of the contracting officers associated with the withholdings of contract funds constituted an abuse of discretion, bad faith, malfeasance or misfeasance in the administration of the contract. *M.E. McGreary Co.*, ASBCA No. 36788, 90-1 BCA ¶ 22,512. *See also, STR Painting, Inc.*, ASBCA No. 35770, 88-3 BCA ¶ 21,102; *Steven E. Jawitz*, ASBCA No. 33610, 87-3 BCA ¶ 20,011. The record in these appeals discloses no such conduct by the contracting officers or their representatives.

Overstreet argues that, under FAR 52.202-1 and DFARS 201.602-2 and 202.101, a COR must be designated and delegated authority in writing to perform specific technical or administrative functions and that copies of the designation must be furnished to the contractor. Absent such delegations, it concludes that neither Ms. Crabtree nor Mr. Pessolano was authorized to administer FAR 22.406-8 and 22.406-9.

The argument reflects confusion about the role of the COR with the role of personnel who provide advice to contracting officers. The record establishes that proper ACO and COR delegations and designations on both contracts were provided to and acknowledged by Overstreet. It also establishes that, consistent with FAR 1.602-2, the office of counsel of the Louisville District was responsible for the administration and enforcement of the labor standards provisions of the contracts, with unresolved matters

referred to the contracting officer for final action. The matters at issue here were the responsibility of the attorneys and industrial relations specialists employed in the office of counsel, and not the ACO or COR.

In any event, Overstreet concedes that, under FAR 22.406-8, the Corps, through Ms. Crabtree, could conduct labor investigations, prepare investigative reports and make preliminary findings (app. br. at 11, 23). The record establishes that she performed those functions on both contracts before her retirement, after which the administrative responsibility for these matters fell to Mr. Pessolano, who had been officially designated as an authorized representative of the contracting officer on 10 September 1986 for the purpose of performing all actions under construction contracts concerning labor matters, specifically including the “enforcement of labor provisions.”

Overstreet urges us to disregard Mr. Pessolano’s delegation letter because it has not been explained by affidavit or other supporting documentation and because it does not comply with DFARS 201.602-2. As we explained above, the delegation is not subject to that regulation. The delegation is an official Government record and Overstreet has offered no evidence to contradict it. We conclude that Overstreet’s contention that the FAR provisions were not administered by an authorized representative of the contracting officer is without merit.

Overstreet further argues that the Corps failed to comply with FAR 22.406-8. It contends that the letters dated 31 October and 13 November 1997 did not provide the notice under FAR 22.406-8(c)(1) of its right to request the basis for the labor violation findings and to submit written rebuttal information. The record reflects that Ms. Crabtree’s 31 October 1997 letter provided details of the Fort Knox violations, that her 13 November 1997 letter invited Overstreet to call to discuss the Wright-Patterson violations, that Overstreet did call and that the violations associated with both contracts were discussed and that, by letters dated 13 and 26 November 1997, Overstreet submitted written responses to the Corps’ findings. Mr. Pessolano’s letters dated 23 January and 9 March 1988 provided further details of the violations and Overstreet’s lengthy responses by letters dated 8 and 13 April 1998 charged the Corps with improper administration of the contracts and disputed the misclassification findings. Notwithstanding these responses, as Overstreet concedes, the Corps then issued a specific invitation for rebuttal on 8 May 1988 (app. br. at 23). Instead of providing any additional information, Overstreet requested final decisions from the contracting officers.

The Corps’ obligations under FAR 22.406-8(c)(1) were to provide notice of the labor violation findings, the basis for these findings and an opportunity to rebut them. We are satisfied that there was no malfeasance or misfeasance in the administration of FAR 22.406-8(c)(1). Overstreet was advised of the Corps’ findings of labor violations and the details thereof and responded fully on several occasions. It has shown no prejudice.

Overstreet's final argument is that the Corps' requests to make restitution did not contain a written statement advising it that it had 60 days to request relief from the liquidated damages assessment as required by FAR 22.406-8(c)(4) (app. br. at 22). This allegation relates to only the Fort Knox contract, where \$390 was withheld as liquidated damages under the Contract Work Hours and Safety Standards Act. The record reflects that the Corps' 31 October 1997 letter clearly stated that \$390 would be withheld as liquidated damages, that Overstreet's 26 November 1997 letter asserted full compliance with its "wage/hour obligations," that the Corps' 23 January 1998 letter advised that \$390 was being withheld as liquidated damages, and that Overstreet's 8 April 1998 letter requested that the investigation be declared "null and void."

The Corps' duty under FAR 22.406-8(c)(4) was to provide notice that liquidated damages would be withheld under the Contract Work Hours and Safety Standards Act and to provide Overstreet with 60 days to request relief from the assessment. The record is clear that notice of the liquidated damages assessment was provided and that Overstreet requested relief from the assessment. Overstreet was afforded a full opportunity to request relief from the assessment of liquidated damages and it availed itself thereof. We again conclude that Overstreet was not prejudiced.

Finally, the contracting officers on both contracts reviewed the respective labor investigations. They concluded that the withholdings should not be released and that the matters should be referred to DOL. Overstreet was advised of these conclusions.

Having found that the Corps did not breach its obligation to properly administer these contracts, the only remaining issues in these appeals relate to Overstreet's classification of its employees. These issues are subject to the sole jurisdiction of DOL. *See Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425 (Fed. Cir. 1991).

#### CONCLUSION

The appeals are denied.

Dated: 2 November 2001

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

I concur

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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 Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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