ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Tecom, Inc. | ) | ASBCA No. 51591 |
| | ) | |
| Under Contract No. F09650-97-C-0005 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON MOTIONS FOR SUMMARY JUDGMENT

Appellant, Tecom, Inc. (Tecom), has moved for summary judgment on its appeal from a contracting officer's final decision denying its claim for a contract price adjustment in the amount of $155,755.71. The Government has advised the Board that its response to appellant's motion should be treated as a cross-motion for summary judgment. In a supplemental brief, it also contends, in the alternative, that there are genuine issues of material fact in dispute. Only entitlement is before us. We grant the appellant's motion and deny the Government's cross-motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 4 September 1996, the Department of the Air Force and appellant entered into a service contract, Contract No. F09650-97-C-0005, for the performance of ground support maintenance at Robins Air Force Base, Georgia. The contract included a base year, starting 1 October 1996, and four option years. (R4, tab 1)

2. The contract contained the following Federal Acquisition Regulation (FAR) clauses standard to service contracts: 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989); 52.222-41 SERVICE CONTRACT ACT OF 1965, AS AMENDED (SCA) (MAY 1989); 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT

ACT -- PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989); and 52.243-1 CHANGES -- FIXED PRICE (AUG 1987) (R4, tab 1).

3. The option clause, FAR 52.217-9, states in relevant part:

> (a) The Government may extend the term of this contract by written notice to the Contractor . . . on or before the last day of Basic Contract period, provided that the Government shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

4. The SCA clause, FAR 52.222-41, in relevant parts, states:

> (c) *Compensation*. (1) Each service employee employed in the performance of this contract . . . shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, or authorized representative, as specified in any wage determination attached to this contract.
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> . . . .
>
> (f) *Successor Contracts*. If this contract succeeds a contract subject to the Act under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, in the absence of the minimum wage attachment for this contract setting forth such collectively bargaining wage rates and fringe benefits, neither the Contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work . . . less than the wages and fringe benefits provided for in such collective bargaining agreement, to which such employee would have been entitled if employed under the predecessor contract . . . . No Contractor or subcontractor under this contract may be relieved of the foregoing obligation unless the limitations of 29 CFR 4.1b(b) apply . . . .
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> . . . .

> (m) *Collective Bargaining Agreements Applicable to Service Employees.* If wages to be paid or fringe benefits to be furnished any service employees employed . . . under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the . . . Contractor shall report such fact to the Contracting Officer, together with full information as to the application and accrual of such wages and fringe benefits, including any prospective increase, to service employees . . . , and a copy of the collective bargaining agreement. . . . [I]n the case of such agreements . . . effective at a later time during the period of contract performance such agreements shall be reported promptly after negotiation thereof.

(*See also* 41 U.S.C. § 353(c), finding 18, *infra*)

5. The price adjustment clause, FAR 52.222-43, provides, in relevant portion:

> (a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.
>
> . . . .
>
> (c) The wage determination, issued under the Service Contract Act . . . , by the . . . Department of Labor, current on . . . the beginning of each renewal option period, shall apply to this contract. . . .
>
> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase . . . in applicable wage and fringe benefits to the extent that the increase is made to comply with . . . :
>
> > (1) The Department of Labor wage determination applicable . . . at the beginning of the renewal option period . . . ;

> (2) An increased or decreased wage determination otherwise applied to the contract by operation of law; . . . .

6. The United Food and Commercial Workers Union (union) (Local No. 1063) had represented the employees of the previous contractor, K&M Maintenance, Inc. (K&M). For union workers, the wage and fringe benefit terms of the collective bargaining agreement (CBA) between K&M and the union were incorporated into the base year of Tecom's contract by Wage Determination No. 79-0046 (Rev. 16), dated 20 July 1995. Wage Determination No. 94-2139 (Rev. 4), dated 30 August 1995, the Department of Labor (DOL) area wage determination, was incorporated to apply to non-union workers. The CBA between K&M and the union was effective until 30 September 1997. (R4, tabs 1, 6)

7. On 19 March 1997, the union and Tecom executed a successorship Memorandum of Agreement which adopted the K&M CBA, subject to a number of changes which included the substitution of Local 1996 of the union for Local 1063 and the substitution of Tecom for K&M. The Tecom successorship CBA, like the K&M CBA, was effective until 30 September 1997. Appellant concedes that a copy of this successorship Memorandum of Agreement was not provided to the contracting officer (app. reply to Gov't supp. br. at 4-6, exs. 1-3).

8. On 30 September 1997, the Government unilaterally executed Modification No. P00031 to exercise the first option, covering the period 1 October 1997 through 30 September 1998. Modification No. P00031 incorporated the DOL area Wage Determination No. 94-2139 (Rev. 10), dated 7 July 1997. Tecom received Modification No. P00031 that same date. (R4, tab 2)

9. Relative to this first option period, Tecom was both a predecessor (incumbent) contractor and a successor contractor (aff. of Ruth A. Paauwe at 2 (attach. to Gov't supp. br.); *see also* 29 C.F.R. § 4.143(b) (2000)).

10. FAR 22.1007 REQUIREMENT TO SUBMIT NOTICE (SF 98/98a) directs the contracting officer to submit the Standard Form (SF) 98/98a "Notice of Intention to Make a Service Contract and Response to Notice" (Notice) to DOL for service contracts. FAR 22.1007(b) applies to each contract modification which brings the contract above $2,500 and "(1) extends the existing contract pursuant to an option clause . . . ." FAR 22.1012-1 GENERAL provides that the DOL will issue a wage determination in response to a Notice and directs the contracting officer to incorporate the wage determination into the solicitation or contract.

11. FAR 22.1008-7 REQUIRED TIME OF SUBMISSION OF NOTICE provides in relevant part:

> (a) If the contract action is for a recurring or known requirement, the contracting officer shall submit the Notice not less than 60 days (nor more than 120 days . . .) before the . . . .
>
> . . . .
>
> (4) Issuance of modification for exercise of option . . . .

12. Prior to executing Modification No. P00031, the contacting officer had submitted a blanket SF 98 Notice to DOL requesting an area wage determination within the time required by FAR 22.1008-7(a). When she gave this Notice, she was not aware that Tecom had negotiated a successorship CBA with the union and she incorrectly assumed that there was no existing CBA. The DOL had responded to the request with area Wage Determination No. 94-2139 (Rev. 10). (R4, tab 6; Paauwe aff. at 2)

13. FAR 22.1010 NOTIFICATION TO INTERESTED PARTIES UNDER COLLECTIVE BARGAINING AGREEMENTS states:

> (a) The contracting officer should determine whether the incumbent prime contractor's . . . service employees performing on the current contract are represented by a collective bargaining agent. If there is a collective bargaining agent, the contracting officer shall give both the incumbent contractor and its employees' collective bargaining agent written notification of --
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> . . . .
>
> (2) The forthcoming contract modification and applicable acquisition dates (exercise of option . . .) . . . .
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> . . . .
>
> (b) This written notification must be given at least 30 days in advance of the earliest applicable acquisition date . . . in order for the time-of-receipt limitations in paragraph[] 22.1012-3 . . . (b) to apply. . . .

14. The contracting officer did not provide to Tecom the 60-day written preliminary notice required by FAR 52.217-9(a). She also did not provide the 30-day written notification required by FAR 22.1010(a) to either Tecom or the employees' collective bargaining agent. (Complaint ¶ 13; answer ¶ 13; R4, tab 12; *see* findings 3, 13, *supra*)

15. Negotiations had been conducted for a new CBA between Tecom and the union on 18 and 19 September 1997, but a new CBA was not completed and signed until 17 November 1997. The new CBA was retroactively effective on 1 October 1997. (R4, tabs 3, 5)

16. By letter dated 20 November 1997, Tecom transmitted the new CBA to the contracting officer and requested that "the previous [sic] approved conformed classifications, hourly wages and fringe benefits be increased the same percentage as the union member receives in the CBA" (R4, tab 3). Then, by letter dated 29 December 1997, Tecom specifically requested that "the contracting officer request a wage determination from the Department of Labor reflecting the rates/benefits outlined in the [new] CBA and incorporate the [w]age determination into the contract retroactive [to] October 1, 1997" (R4, tab 5).

17. On 12 January 1998, the Assistant Regional Administrator (ARA) of the Air Force's Labor Advisors Office responded. Like the contracting officer, she did not know that Tecom had a successorship CBA with the union. She therefore explained that the protections of Section 4(c) of the SCA were not applicable. She further informed appellant that "[t]he contracting officer has no authority to insert a revised wage determination, including a new CBA-type wage determination, that came into being after the start of performance on the contract period." She cited FAR 22.1012-2 and 22.1012-3, and 29 C.F.R. Part 4, and advised Tecom that its new CBA would not be incorporated into the contract for the first option year. (R4, tab 6)

18. Section 4(c) of the SCA, 41 U.S.C. § 353(c), relates to successor contracts. It provides:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, 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, to which such service employees

> would have been entitled if they were employed under the predecessor contract. . . .

(*See also* FAR 52.222-41, finding 4, *supra*) We find that Section 4(c) was applicable to the exercise of the first option for the successor contract because Tecom was a predecessor contractor with an existing CBA (*see* findings 7, 9).

19. Section 4(c) of the SCA is implemented by 29 C.F.R. § 4.1b, PAYMENT OF MINIMUM COMPENSATION BASED ON COLLECTIVELY BARGAINED WAGE RATES AND FRINGE BENEFITS APPLICABLE TO EMPLOYMENT UNDER PREDECESSOR CONTRACT. It provides in relevant part:

> (b) . . . The wage rates and fringe benefits provided for in any collective bargaining agreement applicable to the performance of work under the predecessor contract which is consummated during the period of performance of such contract shall not be effective for purposes of the successor contract under the provisions of section 4(c) of the Act or under any wage determination implementing such section issued pursuant to section 2(a) of the Act, if --
>
> . . . .
>
> (2) Notice of the terms of a new or changed collective bargaining agreement is received by the agency after award of a successor contract to be entered into . . . as a result of the execution of a renewal option . . . , provided that the contract start of performance is within 30 days of such . . . renewal option . . . .
>
> (3) The limitations in paragraph (b) . . . (2) of this section shall apply only if the contracting officer has given both the incumbent (predecessor) contractor and his employees' collective bargaining representative written notification at least 30 days in advance of all applicable estimated procurement dates, including . . . commencement date of a contract resulting from a[n] . . . option . . . .

20. FAR 22.1008-3 SECTION 4(C) [OF THE SCA] SUCCESSORSHIP WITH INCUMBENT CONTRACTOR COLLECTIVE BARGAINING AGREEMENT is also relevant in the following respects:

(a) Early in the acquisition cycle, the contracting officer shall determine whether section 4(c) of the Act affects the new acquisition. The contracting officer shall determine whether there is a predecessor contract and, if so, whether the incumbent . . . contractor . . . and [its] employees have a collective bargaining agreement.

. . . .

(c) The application of section 4(c) of the Act is subject to the following limitations:

. . . .

(2) If the incumbent contractor enters into a new or revised collective bargaining agreement during the period of the incumbent's performance on the current contract, the terms of the new or revised agreement shall not be effective for purposes of section 4(c) of the Act under the following conditions:

. . . .

(i) . . . .

(B) For contractual actions other than sealed bidding, the contracting agency receives notice of the terms of the collective bargaining agreement after award, provided that the start of performance is within 30 days of award (see 22.1012-3(b)); and

(ii) The contracting officer has given both the incumbent contractor and its employees' collective bargaining agent timely written notification of the applicable acquisition dates (see 22.1010).

(d) If Section 4(c) of the Act applies, the contracting officer shall obtain a copy of any bargaining agreement between an incumbent contractor . . . and its employees. . . . The contracting officer shall submit a copy of each collective bargaining agreement together with any related documents

> specifying the wage rates and fringe benefits currently or prospectively payable under each agreement with the Notice.
>
> (e) Section 4(c) of the Act will not apply if the Secretary of Labor determines . . . (2) that the wages and fringe benefits . . . are not the result of arm's length negotiations. . . .

We find that the contracting officer did not determine whether Tecom was an incumbent contractor with a CBA and did not obtain a copy of Tecom's successorship CBA (findings 12, 17, *supra*).

21. FAR 22.1012-2 RESPONSE TO TIMELY SUBMISSION OF NOTICE - NO COLLECTIVE BARGAINING AGREEMENT states:

> (c) For contractual actions other than sealed bidding where a collective bargaining agreement does not exist, a revision of a wage determination received by the contracting agency after award of a new contract or a modification as specified in 22.1007(b) shall not be effective provided that the start of performance is within 30 days of the award. . . .
>
> (d) The limitations in paragraph . . . (c) . . . shall apply only if a timely Notice required in 22.1008-7(a) . . . has been submitted.

We find that FAR 22.1012-2 is not applicable here because Tecom and the union had executed a successorship Memorandum of Agreement (*see* finding 7, *supra*).

22. FAR 22.1012-3 RESPONSE TO TIMELY SUBMISSION OF NOTICE – WITH COLLECTIVE BARGAINING AGREEMENT states in relevant part:

> (b) For contractual actions other than sealed bidding, a wage determination or revision based on a new or changed collective bargaining agreement shall not be effective if notice of the terms of the new or changed collective bargaining agreement is received by the contracting agency after award of a successor contract or a modification as specified in 22.1007(b), provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification. . . .

> (c) The limitations in paragraph . . . (b) of this subsection shall apply only if timely Notices and notifications required in 22.1008-7 and 22.1010 have been given.

23. Appellant's 2 February 1998 reply to the contracting officer's 12 January 1998 letter pointed out that, under FAR 22.1010, the contracting officer was required to provide 30 days notification to both the contractor and the union prior to its exercise of the option. However, it did not challenge the validity of the Government's option exercise because of the lack of the 60-days notice required by FAR 52.217-9. Tecom requested that the contracting officer issue a "modification providing for payment of the increased prevailing wage rates during the option period based on the new CBA." (R4, tab 9) By a letter dated 3 February 1998, it again requested that the Government incorporate the terms and conditions of the new CBA, with an effective date of 1 October 1997 (R4, tab 11).

24. Thereafter, the Government took the position that failure to give the notification required by FAR 22.1010 did not absolve Tecom and/or the union of the responsibility of providing to the contracting officer a copy of their new CBA by 1 October 1997 (R4, tab 13). It did acknowledge, however, that the FAR 22.1010 requirement for 30 days notification prior to exercising the option "permits the parties to complete any open business should they choose to do so" (R4, tab 14).

25. Tecom paid its employees the wages and fringe benefits required by the new CBA it provided to the contracting officer on 20 November 1997 for the first option year of the contract (Paauwe aff. at 5). On 15 April 1998, Tecom submitted a certified claim in the amount of $155,755.71, which it asserted represented the increased costs it had incurred under the new CBA for the first option year and were allowable under the price adjustment clause, FAR 52.222-43 (R4, tab 19).

26. Tecom's claim was denied by final decision dated May 27, 1998. This appeal timely followed. (R4, tab 23)

27. On 10 August 1998, the DOL issued Wage Determination No. 98-0411 (Rev. 00), which provided:

> In accordance with Section 2(a) and 4(c) of the Service Contract Act, as amended, employees employed by the contractor in performing the above [maintenance] services and covered by the collective bargaining agreement between Tecom Maintenance Inc. and United Food and Commercial Workers Local No. 1996 are to be paid wage rates and fringe benefits set forth in the current collective bargaining

agreement effective, October 1, 1997 through September 30, 2000.

On 8 September 1998, the contracting officer unilaterally executed Modification No. P00065 to exercise the second option, covering the period 1 October 1998 through 30 September 1999. The modification incorporated Wage Determination No. 98-0411 (Rev. 00) effective 1 October 1998. (App. reply to Gov't supp. br., ex. 4)

28. The Government's supplemental brief also addresses three additional FAR provisions: FAR 22.1012-4 RESPONSE TO LATE SUBMISSION OF NOTICE – NO COLLECTIVE BARGAINING AGREEMENT; FAR 22.1012-5 RESPONSE TO LATE SUBMISSION OF NOTICE - WITH COLLECTIVE BARGAINING AGREEMENT; and FAR 22.1015 DISCOVERY OF ERRORS BY THE DEPARTMENT OF LABOR.

## DISCUSSION

Summary judgment is appropriate where, as here, there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Tecom's motion for summary judgment is based upon the Government's failure to give it and the employees' collective bargaining agent 30-days written notification of its decision to exercise its option as required by FAR 22.1010 (*see* finding 13). Its argument rests principally upon *Raytheon Service Co.*, ASBCA Nos. 28721, 29668, 86-3 BCA ¶ 19,094, a case with facts similar to those present here.

As in this case, Raytheon had replaced a prior contractor and had executed a successorship CBA with the union which expired at the end of the base contract period. The contract in *Raytheon* incorporated the DAR price adjustment clause, DAR 7-1903.41 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT - PRICE ADJUSTMENT (MULTI-YEAR AND OPTION CONTRACTS) (1979 SEP), which preceded FAR 52.222-43. Both Raytheon and the union were aware that the Government intended to exercise the contract's first option, beginning 1 October 1982, and the contracting officer knew that Raytheon and the union were negotiating a new CBA. He gave 60 days preliminary notice to Raytheon, but did not give Raytheon and the union the 30 days notification of intent to exercise the option required by subparagraph (b)(2) of DAR 12-1005.2 CONTRACTING OFFICER RESPONSIBILITIES - PREPARATION OF SOLICITATIONS AND CONTRACTS. He submitted the successorship CBA to DOL to obtain a wage determination.

The modification exercising the option was executed without a wage determination. Negotiations for a new three-year CBA were completed on 13 October 1982, but the CBA itself was not submitted to the contracting officer until 20 December 1982. The Government then refused to incorporate the wage and fringe benefit provisions of the new CBA and, on 21 January 1983, executed a modification incorporating a wage determination which was based upon the old CBA and had been effective during the base period of the contract.

Quoting *ITT, ITT Defense Communications Div. v. United States*, 453 F.2d 1283 (Ct. Cl. 1972), we observed that: "Notice provisions with respect to options have been strictly enforced." 86-3 BCA at 96,527. We concluded that Raytheon was entitled to seek a revised wage determination based upon its new CBA under DAR 12-1005.3, APPLICABILITY OF WAGE DETERMINATION - SUBSEQUENT TO AWARD, and that the contract price should be adjusted to reflect the amounts Raytheon had paid for increased wages and fringe benefits under the new CBA. 86-3 BCA at 96,528.

In attempting to distinguish this case from *Raytheon,* the Government's cross-motion relies upon a number of mistakes about the underlying facts of both *Raytheon* and the present appeal. And, while there are some differences in the facts and the relevant DAR and FAR provisions, we are persuaded that these differences do not require us to depart from the result we reached in *Raytheon.* On the contrary, these differences provide further support for concluding that Tecom is entitled to have a wage determination based upon its new CBA incorporated into the first option year of its contract.

In *Raytheon*, DAR 12-1005.2(b)(2) required the contracting officer to give 30 days notification to the contractor and the bargaining agent representing service contract employees prior to commencement of performance of an option period, if the contracting officer had reason to believe the incumbent contractor was negotiating or had completed negotiation of a CBA. 86-3 BCA at 96,523.

The successor FAR provisions applicable in this case require substantially more of the contracting officer. FAR 22.1010 not only provides for the same 30 days notification to the contractor and collective bargaining agent, but it also places an affirmative duty on the contracting officer to determine whether the service contract employees are represented by a union before giving the notification (finding 13). FAR 22.1008-3(a) further provides that the contracting officer "shall" determine whether Section 4(c) of the SCA applies to the option period and "shall" determine whether there is a predecessor contract and, if so, whether there is an existing CBA (finding 20). We found that Section 4(c) of the SCA does apply in this case because Tecom was both an incumbent/predecessor contractor with an existing successorship CBA and the contractor for the succeeding option contract (finding 18). Under FAR 22.1008-3(d), the contracting

officer was therefore obligated to obtain a copy of the existing successorship CBA and submit it to DOL with the SF 98 Notice regardless of the contractor's obligations under FAR 52.222-41(m) (findings 4, 20).

The contracting officer, however, did not give 60 days preliminary notification as required by FAR 52.217-9(a) and she was not aware of the successorship CBA, unlike the circumstances in *Raytheon* (findings 12, 14). Additionally, despite the clear mandates contained in FAR 22.1008-3, she did not determine whether Section 4(c) of the SCA applied and she did not determine whether there was a CBA, much less whether Tecom and the union were negotiating changes to it. She also did not obtain a copy of the existing CBA for submission to DOL (finding 20). Instead, she submitted a blanket SF 98 Notice to DOL requesting an area wage determination (finding 12). As in *Raytheon*, she submitted the Notice without ever having given the required 30 days notification to either appellant or the union (finding 14).

In *Raytheon*, DAR 12-1005.3 provided a regulatory basis for allowing the contracting officer extra time to obtain a revised wage determination and incorporate it into the contract. The failure to provide the 30-day notification required by DAR 12-1005.2 was among the reasons identified in DAR 12-1005.3 for permitting incorporation of an untimely wage determination. 86-3 BCA at 96,528.

In the absence of a corresponding FAR successor provision to DAR 12.1005.3, the Government contends that FAR 22.1012-4, FAR 22.1012-5 and FAR 22.1015 provide the only means to incorporate a new wage determination after contract award. It goes on to assert that none of these provisions applies in this case. (Gov't supp. br. at 2) We agree that none of the provisions cited by the Government is applicable.

FAR 22.1012-4 and FAR 22.1012-5 both address circumstances in which the contracting officer has not filed the SF 98 Notice with DOL within the time prescribed by FAR 22.1008-7. Here, the contracting officer did file a SF 98 Notice within the time specified (finding 12). Additionally, FAR 22.1012-4 is not applicable because Tecom had executed a successorship CBA. For this same reason, the Government's contention that the lack of a base year CBA in this case distinguishes it from *Raytheon* is factually incorrect. We note that the Government's further contention on this issue, that there was an agreement to incorporate the new CBA into the option contract in *Raytheon*, is likewise incorrect. *See* 86-3 BCA at 96,522. Finally, since FAR 22.1015 only authorizes DOL to correct errors it has discovered relating to a contracting officer's failure to include an appropriate wage determination, it too is not applicable. Nevertheless, FAR 22.1015 does lend support to our conclusions inasmuch as it also recognizes that such errors can be corrected by retroactive incorporation of the applicable wage determination with an appropriate contract adjustment.

We are not persuaded, however, that FAR 22.1012-4, FAR 22.1012-5, and FAR 22.1015 provide the only regulatory method for incorporating a new wage determination after contract award. Rather, we are satisfied that, as appellant asserts, a new wage determination based upon its new CBA should have been incorporated into the first option year of the contract via FAR 22.1012-3 (app. corrected supp. br. at 8-9).

The price adjustment clause in *Raytheon*, DAR 7-1905(b), contained the same requirements as those contained in FAR 52.222-43: namely, the contract price will be adjusted to reflect actual increases in wages and fringe benefits made to comply with an applicable DOL wage determination at the beginning of the renewal option period, or as otherwise applied to the contract by operation of law. (*See* 86-3 BCA at 96,521-22; finding 5)

Subparagraph (b) of FAR 22.1012-3, which applies to situations in which a timely SF 98 Notice has been submitted to DOL, provides that the terms of the new or changed CBA will not be effective if they are not received by the agency until after award of a successor contract or modification under FAR 22.1007(b), provided the start of performance is within 30 days of the award of the contract or modification. Subparagraph (c), however, specifically restricts this limitation to situations in which timely Notice has been given to DOL under FAR 22.1008-7 and timely notification has been given to the contractor and the union under FAR 22.1010. (Finding 22) In this case, the contracting officer did not provide the 30-days written notification to the contractor and the union representative required by FAR 22.1010. Thus, under FAR 22.1012-3(c), there is no restriction against incorporation of a new or changed CBA received after contract award. In short, the FAR 22.1012-3(b) deadline does not apply.

The same result is reached under FAR 22.1008-3 and 29 C.F.R. § 4.1b. Because the contracting officer also failed to perform the duty imposed upon her by FAR 22.1010 and FAR 22.1008 to determine whether Tecom had an existing CBA before giving notification, she was not aware that Tecom was the incumbent (predecessor) contractor and that Section 4(c) of the SCA was applicable. Thus, if a new CBA had not been negotiated, Tecom would have been obligated to pay its service employees in accordance with the successorship CBA it executed with the union, and not the general area wage determination that was actually incorporated by Modification No. P00031.

Since Section 4(c) of the SCA was applicable, however, we look to the guidance provided by FAR 22.1008 and 29 C.F.R. § 4.1b with respect to its implementation. Like FAR 22.1012-3(b), both provide that a wage determination based upon the terms of a new or revised CBA received by the contracting officer after the start of performance will not apply, provided that performance begins within 30 days of award. *See* FAR 22.1008-3(c)(2)(i)(B) and 29 C.F.R. § 4.1b(b)(2). Also like FAR 22.1012-3(c), both provide that the limitation is not applicable if the contracting officer has not provided the

30-days notification required by FAR 22.1010. *See* FAR 22.1008-3(c)(2)(ii) and 29 C.F.R. § 4.1b(b)(3). (Findings 19, 20, 22)

The Government acknowledges that the 30-day notification requirement is intended to give reasonable time to the contractor and the union to complete their business before the start of the new contract. It contends, however, that its failure to comply with the notification requirements was merely technical and non-prejudicial and did not absolve appellant of its responsibility to submit its new CBA before the start of the first option period.

The Government's attempt to shift liability to Tecom fails for several reasons. First, the duty imposed upon the contracting officer by FAR 22.1010(a) to give 30 days written notification is mandatory. As we observed in *Raytheon*, notice requirements with respect to options are strictly enforced. 86-3 BCA at 96,527. This policy of strict enforcement is reflected in FAR 22.1012-3(c), FAR 22.1008-3(c)(2)(ii) and 29 C.F.R. § 4.1b(b)(3), all of which eliminate the restriction against incorporation of a wage determination based upon a new CBA received after the start of performance where notification has not been provided. It is also reflected in FAR 22.1010(a) and FAR 22.1008-3(a) and (d), which direct the contracting officer to determine whether there is an existing CBA under the incumbent/predecessor contract. Further, as our decision in *Raytheon* makes clear, the 30-days notification requirement is intended to benefit the contractor: "[S]ince the [Government] did not provide the notice, which would have been for [Tecom's] benefit, the [Government] cannot at the same time benefit from its failure to abide by the regulations by denying [Tecom] the opportunity to obtain a revised waged determination based upon the new CBA." 86-3 BCA at 96,527.

Nor does the statement in *Raytheon* commenting that the "untimeliness of the new wage determination was due to the failure to give the notice required, within the meaning of DAR 12-1005.3" make the holding of *Raytheon* inapplicable here as the Government also asserts. DAR 12.1005-3 provided the regulatory basis for incorporating an untimely wage determination if the contracting officer had failed to provide 30 days notification to contractor and the union bargaining agent. Similarly, FAR 22.1012-3(c), FAR 22.1008-3(c)(2)(ii) and 29 C.F.R. § 4.1(b)(3) remove the restriction against incorporation of a wage determination based upon a new or revised CBA received after contract award if the 30 days notification has not been given.

In sum, under FAR 22.1010, FAR 22.1012-3, FAR 22.1008-3 and 29 C.F.R. § 4.1b, there is no limitation against incorporation of a revised CBA received by the contracting officer after execution of a modification exercising an option if the mandatory 30 days written notification has not been given to the contractor and the union representative. Accordingly, we conclude that, as in *Raytheon*, Tecom was entitled to

seek a revised wage determination based upon its new CBA for the first option year of the contract and that a contract price adjustment is appropriate under FAR 52.222-43.

Having so concluded, we need not address Tecom's alternative arguments: (a) that the SF 98 Notice to DOL was invalid and ineffective within the meaning of FAR 22.1008-7 because the contracting officer incorrectly assumed and represented to DOL that there was no existing CBA; and (b) that the Government's exercise of its option was invalid due to its failure to give the 60 days written notice of its intent to extend the contract as required by FAR 52.217-9, an argument which Tecom raised for the first time in its supplemental brief.

Finally, we reject two alternative arguments raised by the Government. The first is that Tecom's failure to consummate its bargain with the union in sufficient time for the CBA to be incorporated into the contract raises a genuine issue of material fact. Any factual issues associated with this argument are not relevant to the legal duty imposed upon the contracting officer to determine whether there was an existing CBA and to give both 60 days preliminary notice and 30 days notification of the "forthcoming contract modification and applicable acquisition dates." It is uncontested that the contracting officer did not comply with these regulatory duties. The second is that the new CBA was not the result of "arm's length negotiations." The argument appears to be conclusory statement. *See Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993). In any event, DOL issued Wage Determination No. 98-0411 (Rev. 00) based upon the new CBA for the second option period and the Government has made no contention that the Secretary of Labor has otherwise determined that the CBA was not the result of arm's length negotiations as required by FAR 22.1008-3(e).

## CONCLUSION

In the absence of any genuine issue of any material fact, and for the reasons discussed, we grant appellant's motion for summary judgment and deny the Government's cross-motion and supplemental opposition. The appeal is sustained and the matter returned to the parties for resolution of quantum.

Dated: 25 October 2000

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

I concur

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

I concur

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 No. 51591, Appeal of Tecom, Inc., rendered in conformance with the Board's Charter.

Dated:

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