ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Thomas & Sons Building Contractors, Inc.	)	ASBCA No. 51590
	)	
Under Contract No. N62472-90-C-0410	)	

APPEARANCE FOR THE APPELLANT: Mr. James H. Thomas
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney

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

At issue is the Government's motion to dismiss the appeal insofar as it relates to appellant's claim of improper wage rate assessments for lack of jurisdiction. We grant the motion.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTION TO DISMISS

On 30 July 1991, the Department of the Navy awarded appellant Contract No. N62472-90-C-0410 at a fixed-price of $118,569.00 to remove and replace the roof at the Naval Marine Corps Reserve Center, Wilmington, DE (R4, tab 1).

The contract incorporated labor standards provisions for construction contracts, including FAR 52.222-6 DAVIS-BACON ACT (FEB 1988) and FAR 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988). FAR 52.222-6 requires contractors to classify and pay workers in accordance with Department of Labor (DOL) wage determinations. FAR 52.222-14 provides that "disputes concerning labor standards requirements" are to be resolved by DOL, and not pursuant to the Disputes clause of the contract. (Gov' t br., attach. 5)

Also incorporated was the DOL wage determination, General Wage Decision No. DE91-2, including Modification Nos. 1 and 2, which established the wage rates and fringe benefits applicable to buildings and heavy construction. DE91-2 contained the basic hourly wage rates and fringe benefits for laborers and roofers. (Gov' t br., attach. 4)

By a letter dated 3 June 1992, the Navy notified appellant that its review of "submitted payrolls on the subject contract" indicated some inconsistencies and advised that: "All employees connected with the removal of old and the application of new roofing systems shall be classified as roofers" (R4, tab 20). Appellant disputed this statement regarding the classification of its employees and the Navy responded in letter dated 16 June 1992, which further advised that: "The area practice defined by D.O.L. governs the work classification of employees, if not clearly defined by the wage decision. Wage determination DE91-2 does not include in its laborers definition a work procedure involving roofs" (App. supp. R4, tab 8).

In two letters dated 22 June 1992, appellant asserted to the Navy that it had "faithfully complied" with DE91-2. It further asserted that the Roofer's Union, Local 30, had informed the Navy of DOL's position that only roofers were to be used on the contract and that this requirement should have been included in the bid package. (R4, tabs 27, 28)

In response to an inquiry by the Navy, DOL confirmed in a letter dated 9 July 1992 that Davis-Bacon Act classifications are made by determining the area practices followed by employers subject to collective bargaining act agreements. The letter concluded that: "Laborers are used only for the total demolition of a roof or for tending and clean-up duties performed on the ground." (R4, tab 31) On 13 July 1992, the Navy advised appellant that DOL had confirmed "that workers involved in the removal of roofing debris, tearing and/or scraping off of old roofing systems or in the re-installation of a new roofing system should be classified and paid as 'roofers' [not] 'laborers'" and that it would continue to withhold contract funds in the estimated amount of the back wages due appellant's employees until appellant provided satisfactory evidence that the workers had been properly compensated. The letter further advised appellant that it could file a protest with the Wage and Hour Division of DOL if it disagreed with the Navy's determination. (R4, tab 33)

Appellant continued to protest to the Navy that it had not violated the Davis-Bacon Act wages required by DE91-2 when it classified and paid workers on the roof as laborers (R4, tabs 34, 36, 41, 52, 54). Additionally, appellant's attorney met with representatives of the DOL Wage and Hour Division. On 9 August 1995, the Regional Administrator, Wage and Hour Division, found reasonable cause to believe that alleged violations of the Davis-Bacon Act on the Navy contract and another contract with the Air Force (Contract No. F36629-93-C-0007) constituted a disregard of obligations to employees. (R4, tab 56) The Air Force contract was for the removal and replacement of roofs on two Air Force buildings at the Pittsburgh International Airport, and is the subject of a separate appeal docketed as ASBCA No. 51577.

Appellant requested, and was granted, a DOL evidentiary hearing before an Administrative Law Judge (ALJ) at which the labor standards issues associated with both the Navy and Air Force roofing contracts were consolidated and evidence regarding relevant

area classification practices was presented. Among the issues addressed during the hearing was "[w]hether enumerated employees under the Naval Reserve contract were performing work properly classified as 'roofer' and being paid at ' kettleman' and ' laborer' rates." (Gov' t br., attach. 1)

Additionally, on 8 April 1998, appellant submitted a three-part claim to the Navy contracting officer. Claim No. 2 sought the release of contract payments due and owing which had been withheld for what appellant alleged were improper wage rate assessments relating to employees it had used for demolition of the roof and paid as laborers under DE91-2. Appellant asserted that DE91-2 did not "state or mandate" the requirement that employees engaged in the removal of the old and application of the new roofing systems be classified as roofers. An appeal from a deemed denial of appellant's claim was filed with the Board on 15 June 1998 and docketed as ASBCA No. 51590.

On 30 July 1988, the DOL ALJ issued a DECISION AND ORDER FINDING VIOLATION OF PREVAILING WAGE DETERMINATIONS AND RECOMMENDING DEBARMENT which contained the following conclusion for both contracts:

> [Thomas & Sons Building Contractors, Inc. and James H. Thomas individually and as a corporate officer] underpaid their employees, as alleged, and willfully disregarded their obligations to their employees, under the Davis-Bacon Act, by misclassifying employees as "laborers" on the two government roofing replacement contracts . . . and not classifying and paying them the higher wages of "roofers." The area practices of both contract situs, based upon the practices of signatories to collective bargaining agreements, required classification of workers on roof replacement projects, performing "roofers" work, as "roofers." . . . The testimony clearly establishes that roofers are an "unassisted" trade and that the tasks performed by the employees named herein and classified as "laborers" were, in fact, "roofers" work.

(Gov' t br., attach. 1 at 48) Appellant was ordered to pay $5,643.88 in back wages to seven employees who had worked on the Navy contract (*id*. at 50).

A Petition for Review of the ALJ' s DECISION AND ORDER was filed with the DOL Administrative Review Board. The Petition did not challenge the merits of the ALJ' s findings that appellant had misclassified and underpaid its workers; rather, the Petition asserted that the ALJ had erred when he found that the Secretary of Labor had the authority to decide the labor standards dispute. On 19 October 1999, the Petition was denied in a FINAL DECISION AND ORDER which stated in pertinent part:

> . . . [R]elevant precedent plainly affirms the Secretary's (and the ALJ's) authority to determine the correct trade classifications for Thomas and Sons' employees on the [Navy and Air Force] contracts. Furthermore, because the question presented in this matter arises out of the labor standards provisions of the contracts, it is not subject to the general contract disputes clause of the procurements contracts.

(Gov' t br., attach. 2 at 9)

DECISION

The Government has moved to dismiss that part of the appeal which is based upon Claim No. 2 for lack of jurisdiction. The Government relies upon our decision in *Thomas & Sons Building Contractors, Inc.*, ASBCA No. 51577, 00-2 BCA ¶ 31,086, *aff'd on recon.* (Nov. 21, 2000), in which we dismissed a claim regarding DOL's finding that appellant had misclassified and underpaid its employees on the Air Force contract.

Appellant concedes that DE91-2 is "the crux of this portion" of this appeal (app. br. at 1). It asserts that after 10 months of performance, the Navy improperly directed it to classify as roofers all employees involved with the removal of the old and application of the new roofing system. According to appellant, DE91-2 does not contain any description of the work laborers can perform on the roof and specifically does not prohibit their use. It asserts that it used laborers for exactly the work described in the 9 July 1992 DOL letter, *i.e.*, "for the total demolition of a roof or for tending and clean-up duties performed on the ground." Appellant further contends that because the classification requirement imposed upon it by the Navy was not addressed prior to contract award, it should be entitled to a contract price adjustment.

We agree with the Government that our decision regarding the Air Force contract in *Thomas & Sons, supra*., controls this case and that we have no jurisdiction over Claim No. 2. Both appeals involve roofing contracts in which the misclassification of employees performing roofing work was alleged. Here, as there, "the essence of [appellant's] complaint relates to the wage rate it had to pay all workers doing roofing work, and the listing of job categories and wage rates in the contract[] is surely one of the labor standards provisions." *Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425, 1429 (Fed. Cir. 1991).

FAR 52.222-14 provides that disputes concerning labor standards requirements are to be resolved by DOL. That is precisely what DOL has done regarding this dispute over the classification of roofers. Following a consolidated hearing at which evidence of the relevant area practices was presented, the DOL ALJ found that appellant had misclassified

its employees as laborers, rather than roofers, on both the Air Force and Navy contracts. That decision was affirmed in a DOL FINAL DECISION AND ORDER.

CONCLUSION

The Government's motion is granted and that portion of the appeal relating to alleged improper wage rate assessments is dismissed for lack of jurisdiction.

Dated: 4 January 2001

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. 51590, Appeal of Thomas & Sons Building Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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