ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Phoenix Management, Inc.	)	ASBCA No. 53409
	)	
Under Contract No. F41691-97-D-0008	)	

APPEARANCE FOR THE APPELLANT: Jonathan M. Bailey, Esq.
Theodore M. Bailey, P.C.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
MAJ Max D. Houtz, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
UNDER RULES 11 AND 12.3

In this appeal under an option contract, appellant seeks reimbursement for increased labor costs allegedly resulting from compliance with a Department of Labor wage determination. Respondent denies liability, contending that the wage determination resulted in an initial conformance of wages for which no adjustment is due. Both parties have elected to submit the appeal under Rule 11, and appellant has elected Rule 12.3 disposition. We sustain the appeal.

FINDINGS OF FACT

1. By date of 25 February 1997, respondent awarded appellant Contract No. F41691-97-D-0008 to provide airfield management services at Randolph Air Force Base, TX. The contract was awarded on a firm fixed price basis with a base period of seven months, from 1 March 1997 through 30 September 1997, and four option periods of one year each. (R4, tab 1 at pp. 2, 4-8 of 18) Only the option years designated as fiscal year (FY) 2000 (1 October 1999 through 30 September 2000) and FY 2001 (1 October 2000 through 30 September 2001) are at issue.

2. The contract contained various standard clauses, including FAR 52.222-41 SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989), and FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT - PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) (*id*. at 13 of 18).

3. At the time of award, Wage Determination No. 94-2521, Revision No. 10, dated 14 August 1996, was incorporated into the contract (*id*., tab 1 at 1a). It is undisputed that this wage determination did not include the positions of airfield manager and assistant airfield manager.

4. On or about 30 January 1999, appellant entered into a collective bargaining agreement with Local 286 of the United Automobile, Aerospace and Agricultural Implement Workers of America (R4, tab 7). It is undisputed that the agreement provided that the bargaining unit represented by the union included all identified Randolph Air Force Base employees and added two new job classifications: airfield manager and assistant airfield manager.

5. By letter dated 8 February 1999, appellant forwarded the collective bargaining agreement to the contracting officer (R4, tab 4). He in turn forwarded it to the Department of Labor by letter dated 20 August 1999, stating that he "non-concur[red]" with the inclusion of management personnel in the agreement (*id*., tab 5). We find that, with his letter, the contracting officer submitted standard form 98/98a, Notice of Intention to Make A Service Contract and Response to Notice (*id*.). We find no evidence, however, that appellant submitted to the contracting officer, or that he in turn submitted to the Department of Labor, a standard form 1444, Request for Authorization of Additional Classification and Rate, to seek a conformance.

6. By date of 1 September 1999, respondent issued unilateral Modification No. P00010, exercising the option to extend performance for FY 2000, effective 1 October 1999 (*id*., tab 2a).

7. By date of 22 September 1999, without apparently responding to the contracting officer's concern (*see* finding 5), the Department of Labor issued Wage Determination No. 99-0337, Revision No. 00, incorporating "the current collective bargaining agreement . . . through 9-30-2002" (*id*., tab 7 at 1).

8. We find no evidence that the contracting officer sought further review before the Department of Labor of the inclusion of the airfield manager and assistant airfield manager positions into Wage Determination No. 99-0337 through the incorporation of the collective bargaining agreement into the determination.

9. By date of 1 October 1999, the contracting officer issued unilateral Modification No. P00011, incorporating Wage Determination No. 99-0337 into the contract effective as of that date (*id*., tab 2b).

10. By letter to respondent dated 20 October 1999, appellant submitted a request for equitable adjustment for the increased costs of complying with Wage Determination

No. 99-0337 (*id*., tab 8). Appellant thereafter provided additional payroll data in support of its request (*id*., tab 9).

11. By memorandum to appellant dated 30 August 2000, the contracting officer advised that no reimbursement would be made for employees in the airfield manager and assistant airfield manager positions, asserting that the parties had treated these positions as exempt salaried personnel and hence appellant was seeking "an initial conformance of minimum pay rates for these classes of workers" (*id*., tab 13 at 1).

12. By date of 14 September 2000, the parties entered into bilateral Modification No. P00012, in part "[t]o process increases associated with the addition of Wage Determination (WD) No. 99-0337, dated 09/22/1999 as a result of Collective Bargaining Agreement" (*id*., tab 2c at 2, 3). It is undisputed that the modification did not include adjustments associated with the airfield manager and assistant manager positions. By letter to respondent dated the same day, appellant's vice president stated that "[s]igning the bilateral modification does not release [appellant's] right to take necessary action to continue to process for inclusion of [those two positions] in the wage adjustment" (*id*., tab 14).

13. By date of 15 September 2000 and effective on that date, respondent issued unilateral Modification No. P00013, exercising the option to extend performance for FY 2001, beginning 1 October 2000 (*id*., tab 2d). The modification provided that Wage Determination No. 99-0337 "is attached hereto and made a part hereof" (*id*. at 2).

14. By letter from its counsel to the contracting officer dated 6 March 2001, appellant submitted its claim for $39,166.66, consisting of $19,583.33 for FY 2000, and $19,583.33 for FY 2001, for alleged failure to compensate appellant properly for increased labor costs recoverable under the Fair Labor Standards Act and Service Contract Act clause (*see* finding 2) for the assistant airfield manager and airfield manager positions (*id*., tab 20 at 1, 6). Thereafter, the contracting officer denied the claim (*id*., tab 21) and this timely appeal followed.

15. By bilateral Modification No. P00015 dated 7 June 2001, the parties agreed "to adjust for a Wage Determination for the period of 01 Oct 00 through 30 Sep 01" (supp. R4, tab G-3 at 2). The modification included a release which provided, in its final sentence, that "[t]his release does not affect the claim submitted on 6 Mar 2001 in the amount of $39,166.66 for the FY 2000 wage adjustment" (*id*. at 4).

16. Appellant has submitted the affidavit of its vice president, Donna Jacques, setting forth appellant's calculations for the adjustments claimed for FY 2000 and FY 2001. She attested that

> [t]he total amount of adjustments due for each year was $49,229.33 for all three positions of Flight Data Assistant, Assistant Airfield Manager, and Airfield Manager. The Government has already given a price adjustment of $29,646.00 for each year. Accordingly, the amount sought by [appellant] in this appeal is the difference, or $19,583.33 per year for FY2000 and FY2001, for a total claimed amount of $39,166.66.

(App. supp. R4, tab 1) Respondent has not controverted the calculations set forth in this affidavit.

17. Respondent submitted the affidavit of its labor advisor, Frank Dean. He expressed respondent's position that the treatment of the airfield manager and assistant airfield manager positions as exempt for FY 1997, 1998 and 1999 "pre-empts any price adjustment entitlement for the first effective year of the wage determination (FY 00) because in the prior year (FY 99) a [Service Contract Act] minimum rate of pay did not apply to these positions." (Dean affidavit, ¶ 10) While stating that his analysis for FY 2000 "would impact any adjustment entitlement for this same differential in FY 01," Mr. Dean appears to concede that appellant is entitled to some adjustment for FY 2001 (*id*., ¶¶ 9, 10). In addition to Mr. Dean's affidavit, respondent submitted the affidavit of the contracting officer. He reiterated the points made by his labor advisor and expressed "Air Force policy that price adjustments will not be made for initial conformances" of minimum pay rates. (Guess affidavit, ¶ 8) The contracting officer further opined that appellant's request for FY 2000 "is for a differential between a period when no [wage determination] existed and the initially established minimum and therefore [the Fair Labor Standards Act and Service Contract Act clause] FAR 52.222-43 is inapplicable" (*id*., ¶ 11).

DECISION

A. *Contentions of the Parties*

In seeking an equitable adjustment for both FYs 2000 and 2001, appellant contends that the increased labor costs attributable to the assistant airfield manager and airfield manager positions fit squarely within the formulation of the Fair Labor Standards Act and Service Contract Act clause (*see* finding 2). Appellant also disputes that wage determination No. 99-0337 represented a conformance within the meaning of FAR 22.1019. Appellant further stresses that its quantum calculations are unchallenged and reliable. (App. br. at 7-12)

Respondent counters that the airfield manager and assistant airfield manager positions were never before part of a wage determination, that appellant voluntarily chose to include them in the collective bargaining agreement, and that, with respect to FY 2000, appellant's compliance with wage determination No. 99-0337 "resulted in an initial

conformance for the positions." In addition, with respect to FY 2001, respondent insists that appellant released any further claim to additional compensation for wage determination No. 99-0337 by executing Modification No. P00015. (Gov't br. at 2, 8-13)

We conclude that the appeal must be sustained. We reach this conclusion for slightly different reasons regarding each of the two disputed years, which we address below after resolving a preliminary matter.

B. *Preliminary Matter*

In its brief, respondent has asserted for the first time that appellant's claim for the cost of complying with wage determination 99-0337 in FY 2001 is barred by the release in Modification No. P00015 (*see* finding 15). Respondent did not interpose the defense in its answer, but stresses in its brief that "[t]he intention of the parties [to bar the FY 2001 portion of the claim] is clear from the language of this release." (Gov't br. at 13) Appellant has moved to strike the defense as dilatory, noting that respondent filed its brief asserting the defense concurrent with the date specified in our scheduling order for supplementation of the record. (App. motion to strike at 1-2)

We grant the motion to strike the defense. Under our Rule 6(b), "any affirmative defenses available" must be pled in the answer. We have declined to consider affirmative defenses raised so late in the day. *E.g., Reflectone, Inc.*, ASBCA No. 42363, 98-2 BCA ¶ 29,869 at 147,826-27 (defense of accord and satisfaction regarding certain modifications stricken as untimely and prejudicial)*; Varo, Inc.*, ASBCA No. 47945, 47946, 98-1 BCA ¶ 29,484 at 146,321, *rev'd on other grounds sub nom. VHC, Inc. v. Peters*, 179 F.3d 1363 (Fed. Cir. 1999) (defense of failure to submit timely termination claim not considered because first raised on third day of trial). Accordingly, we disregard the release in modification P00015 in evaluating entitlement for FY 2001.

C. *FY 2000*

We conclude that appellant is entitled to a price adjustment for the FY 2000 option year. By their terms, paragraphs (d) and (d)(1) of the Fair Labor Standards Act and Service Contract Act clause (*see* finding 2) provide for a price adjustment "to reflect the Contractor's actual increase . . . in applicable wages and fringe benefits to the extent that the increase is made to comply with . . . [t]he Department of Labor wage determination applicable . . . at the beginning of the renewal option period." Here, wage determination No. 99-0337, with its inclusion of the airfield manager and assistant airfield manager positions, was issued by date of 22 September 1999 and incorporated into the contract by date of 1 October 1999, at the beginning of the renewal option period for FY 2000 (findings 6, 7, 9). Appellant is only seeking increased wages that it paid in FY 2000 for the airfield manager and assistant airfield manager positions caused by compliance with that wage determination (findings 10, 12, 14).

Our reading of the Fair Labor Standards Act and Service Contract Act clause here comports with the analysis in other cases. Thus, in *United States v. Service Ventures, Inc.*, 899 F.2d 1, 3 (Fed. Cir. 1990), the court of appeals held that the clause entitled a contractor to increased vacation benefits payable in an option year because they "were due entirely to [a wage determination] applicable at the beginning of the renewal option period." In *IBI Security Services, Inc.*, ASBCA No. 38960, 91-1 BCA ¶ 23,435 at 117,547, we held that the Government had improperly refused to reimburse a contractor for increased wage payments to supervisory employees where a wage determination incorporated a collective bargaining agreement provided for the supervisory positions "during the contract option periods at issue." Similarly, in *Sterling Services, Inc.*, ASBCA No. 40475, 91-2 BCA ¶ 23,714 at 118,699-700, we concluded that a contractor was entitled to an adjustment for an option period where a wage determination was made applicable at the beginning of that period. This holding is in keeping with *International Service Corp.*, ASBCA No. 20971, 77-1 BCA ¶ 12,396 at 60,044, where we concluded that resolution of a classification dispute during performance of a contract with no option period did not fall within an earlier version of the clause because, in part, there was no "Department of Labor determination of minimum prevailing wages and fringe benefits being applied at the beginning of a renewal option period."

We also cannot give dispositive significance to the opinions expressed in the affidavits of Mr. Dean and the contracting officer (*see* finding 17). While we regard the affidavits as authoritative expressions of respondent's policy, our difficulty is that we cannot harmonize that policy with the Fair Labor Standards Act and Service Contract Act clause and the cases interpreting it.

We reject respondent's argument that the clause should be read differently because appellant's compliance with wage determination No. 99-0337 "resulted in an initial conformance for the positions of Airfield Manager and Assistant Airfield Manager," precluding an adjustment. (Gov't br. at 2) The conformance process is set forth both in paragraph (c)(2) of the Service Contract Act clause (*see* finding 2) and in FAR 22.1019(a). *See also Burnside-Ott Aviation Training Center v. United States*, 985 F.2d 1574, 1576 n.2 (Fed. Cir. 1993) (describing process); *Spectrum Sciences & Software, Inc.*, ASBCA No. 49769, 00-1 BCA ¶ 30,663 at 151,394-95, *aff'd*, 2001 U.S. App. LEXIS 6261 (Fed. Cir. 2001) (mem.) (same). The record does not reflect that this process was followed. While a conformance is initiated by a contractor's submission of a standard form 1444, Request for Authorization of Additional Classification and Rate, to the contracting officer, FAR 22.1019(a), FAR 53.301-1444, there is no evidence that appellant did so (finding 5). Nor is there evidence that the contracting officer, in the words of FAR 22.1019(a), "submit[ted] the completed SF 1444 . . . and all other pertinent information to the Wage and Hour Division" of the Department of Labor (*id*.). Instead, the contracting officer did no more than to submit the collective bargaining agreement to the Department of Labor with a standard form 98/98a (*id*.); that form is employed, *inter alia*, for each modification to a service contract which

"[e]xtends the existing contract pursuant to an option exercise or otherwise." FAR 22.1007(b)(1). In addition, the wage determination on its face conveys no indication that the Department of Labor intended it to be a conformance.

Appellant has presented quantum calculations in support of its claim to an adjustment of $19,583.33 for FY 2000 (finding 16). Those calculations are uncontroverted (*id*.), and we accept them.

Accordingly, we conclude that appellant is entitled to recover $19,583.33 for the costs of complying with Wage Determination No. 99-0337 for the positions of airfield manager and assistant airfield manager in FY 2000, together with interest from the date of receipt of the claim.

D. *FY 2001*

The FY 2001 portion of appellant's claim, like the portion for FY 2000, results from an option exercise that incorporated Wage Determination No. 99-0337 (finding 13). As with the FY 2000 portion, the FY 2001 portion is confined to $19,583.33 that appellant paid in FY 2001 for the airfield manager and assistant airfield manager positions caused by compliance with that wage determination (finding 14).

Aside from release, respondent does not articulate any other defense in its brief to entitlement to the FY 2001 portion of the claim. As with FY 2000, appellant has presented quantum calculations in support of its claim to an adjustment of $19,583.33 for FY 2001 (finding 16). As with FY 2000, those calculations are uncontroverted (*id*.), and we accept them.

Accordingly, we conclude that appellant is entitled to recover $19,583.33 for the costs of complying with Wage Determination No. 99-0337 for the positions of airfield manager and assistant airfield manager in FY 2001, together with interest from the date of receipt of the claim.

CONCLUSION

The appeal is sustained in the amount of $39,166.66, together with interest from the date of receipt of the claim.

Dated: 13 December 2001

ALEXANDER YOUNGER
Administrative Judge

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. 53409, Appeal of Phoenix Management, Inc., rendered in conformance with the Board's Charter.

Dated:

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