ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Guardian Moving and Storage Company, Inc.	)	ASBCA Nos. 54248, 54479
	)	
Under Contract No. MDA904-01-C-0105	)	

APPEARANCE FOR THE APPELLANT: Jeffrey P. Hildebrant, Esq.
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APPEARANCES FOR THE GOVERNMENT: Patricia Cox White, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TODD
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND
THE GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Appellant has filed a motion for summary judgment asserting that there are no genuine issues of material fact and it is entitled to judgment as a matter of law on its appeals from the contracting officer's denial of certified claims for $389,359.69 for increased wages under the Price Adjustment clause in the contract. The government argues that there is a genuine issue of material fact in opposing appellant's motion and has submitted its cross-motion for summary judgment on the grounds that the government was not required to adjust the contract price under the circumstances of these appeals.

STATEMENT OF FACTS

On 20 November 2000, the Maryland Procurement Office, National Security Agency (NSA) awarded Contract No. MDA904-01-C-0105 to appellant Guardian Moving and Storage Company, Inc. (Guardian) for cartage and drayage services on a level-of-effort basis at various NSA facilities in Maryland. The base period of performance of the contract was from 20 November 2000 through 30 September 2001. The contract included options to extend the period of performance for up to four government fiscal years (1 October through 30 September). (R4, tab 1)

The contract was subject to the requirements of the Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq*. (SCA), which requires that certain minimum

compensation be paid to service employees in accordance with wage determinations issued by the Department of Labor (DOL). The contract made applicable Wage Determination (WD) 1986-1348, Revision 11 (Rev. 11), dated 13 October 2000, and a Collective Bargaining Agreement (CBA), dated 26 December 1995, as extended on 6 November 1997 and supplemented on 20 September 2000. (R4, tab 1 at 23) The contract incorporated by reference FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED, and FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS). (R4, tab 1 at 28)

The government exercised an option to extend the period of performance for fiscal year (FY) 2002 ending 30 September 2002 (R4, tab 11).

On 11 July 2002, NSA issued Notice No. A0163566, entitled "Notice of Intention to Make a Service Contract and Response to Notice," on Standard Form 98 (SF 98) to DOL regarding a new solicitation that it would issue on or about 1 August 2002 with some new labor categories of service employees. The effect of the SF 98 Notice is to request and receive a wage determination for a contract. NSA identified Guardian as the incumbent contractor, WD 1986-1348 (Rev. 11) as applicable to the Guardian contract, and the name of the Union because the services were being performed under a CBA. NSA attached a copy of the applicable CBA. (R4, tab 18)

On 11 July 2002, NSA provided written notice to Guardian (1) of an anticipated award date of 1 October 2002 for a new contract and (2) that it did not plan to exercise the option to extend the period of performance for FY 2003 because of the change in the requirements. (R4, tab 16) On the same date, NSA provided written notice to the Union that it planned to issue a new solicitation for cartage and drayage services currently being performed by Guardian which would include labor categories not covered under the current CBA (R4, tab 18).

The DOL response, dated 7 August 2002, to Notice No. A0163566 re-issued WD 1986-1348 (Rev. 11) and added WD 1994-2103 (Rev. 26) for the new labor categories (R4, tab 18).

On 6 September 2002, NSA requested that Guardian agree to extend the existing contract's period of performance through 30 November 2002 (R4, tab 19).

On 24 September 2002, Guardian sent NSA a copy of a new CBA, dated 24 September 2002, between Guardian and the Union covering the period 1 October 2002 to 30 October 2004 (R4, tab 26). The new CBA was a conditional agreement:

> **Section 20.1 Conditional Agreement.** This Agreement is made on the condition that, and shall be effective only if, the U.S. Department of Labor ("DOL") issues a wage determination with an effective date of October 1, 2002, made applicable to the

> contract(s) under which Union employees are performing at the NSA facility at Fort Meade, which adopts the provisions herein regarding wages and health and welfare benefits.

(R4, tab 25)

On 26 September 2002, NSA issued Notice No. A0163557 on SF 98 to DOL with a copy of the new CBA. NSA raised its concern that the CBA included a contingency clause. (R4, tab 26)

Bilateral Modification No. P00017, dated 18 October 2002, extended the period of performance through 30 November 2002 and provided additional effort and funding to the contract. The modification did not add a new wage determination nor incorporate the new CBA. (R4, tab 31)

On 29 October 2002, NSA requested that Guardian agree to extend the existing contract's period of performance through 31 January 2003 (R4, tab 32).

The DOL response, dated 12 November 2002, to Notice No. A0163557 issued WD 1986-1348 (Rev. 12) which states that employees on the contract are to be paid wage rates and fringe benefits set forth in the new CBA effective 1 October 2002 through 30 October 2004 and WD 1994-2103 (Rev. 28) (R4, tab 36; app. mot. ¶ 17; gov't resp. ¶ 17).

On 18 November 2002, NSA requested that DOL respond to the concerns it stated about the CBA, including the contingency provision, in its letter, dated 26 September 2002. NSA renewed this request in a telephone conversation on 2 December 2002. (R4, tabs 37, 39)

Bilateral Modification No. P0019, dated 10 December 2002, extended the period of performance through 31 January 2003 and provided additional effort and funding to the contract. The modification did not add a new wage determination nor incorporate the new CBA. (R4, tab 41)

On 18 December 2002, DOL notified NSA that WD 1986-1348 (Rev. 12) was rescinded because it was issued on the basis of a CBA with a contingency clause. The DOL letter stated:

> . . . Upon further review of the CBA, it was determined that the CBA does contain contingency language and WD 86-1348 (Rev. 12) has been rescinded . . . .

(R4, tab 42 at 1) DOL enclosed a letter, dated 21 January 1992, explaining its contingency language policy: DOL will not issue a wage determination specifying the wage rate in a CBA if a contingency in the CBA would limit a contractor's obligations by requiring

issuance of a wage determination to obtain contracting agency reimbursement because such an agreement reflects a lack of arm's-length negotiations. As stated in the DOL policy letter:

> Prospective wage rate and fringe benefit increases negotiated in CBA's [sic] that contain these contingencies essentially attempt to limit a contractor's obligations to comply with the provisions of section 4 (c) [of the SCA] to those situations where the contractor is reimbursed by the contracting agency. As such, because this constitutes an apparent attempt to take advantage of the wage determination scheme provided in sections 2 (a) and 4 (c) of the [SCA], . . . [DOL] has concluded that these provisions typically do not reflect arm's-length negotiations.

(*Id.* at 4)

On 18 December 2002, DOL also advised NSA that it was notifying Guardian and the Union of its finding that the CBA was not negotiated at arm's length and that they had three options: (1) remove the contingency clause(s) from the 24 September 2002 CBA and request that the agency resubmit an SF 98 to DOL, (2) accept and apply WD 1986-1348 (Rev. 11), or (3) appeal the finding that the CBA did not reflect arm's-length negotiations pursuant to the regulations in 29 CFR Part 4.11. The notice stated that if the contingency clause were removed, the self-executing provision of section 4(c) of the SCA would be applicable, and the payment of wages and benefits pursuant to the CBA would not be dependant on issuance of a wage determination or incorporation in a successor contract. (R4, tab 43; supp. R4, tab 1)

On 10 January 2003, Guardian and the Union amended the CBA by addendum to remove the contingency clause, back-date the CBA to 1 August 2002, and include all the new labor categories (R4, tab 46). On 13 January 2003, NSA issued SF 98, Notice No. A0163559 to DOL with a copy of the CBA addendum, dated 10 January 2003, noting these changes (R4, tab 47).

Bilateral Modification No. P0021, dated 23 January 2003, extended the period of performance through 14 February 2003. The modification did not incorporate the new CBA or its addendum. (R4, tab 51)

Bilateral Modification No. P0022, dated 11 February 2003, extended the period of performance through 28 February 2003. The modification did not incorporate the new CBA or its addendum. (R4, tab 52)

The DOL response, dated 14 February 2003, to Notice No. A0163557 re-issued WD 1986-1348 (Rev. 12) and WD 1994-2103 (Rev. 28) with no change from the prior issuance on 12 November 2002 (R4, tabs 36, 53; app. mot. ¶ 28; gov't resp. ¶ 31). On the

same date, NSA requested DOL address the effect of the changes made by the 10 January 2003 addendum to the CBA (R4, tab 54).

Bilateral Modification No. P0023, dated 21 February 2003, extended the period of performance through 7 March 2003. The modification did not incorporate the new CBA or its addendum. (R4, tab 58)

On 5 March 2003, NSA received WD 1986-1348 (Rev. 13), dated 27 February 2003, which added to the language in WD 1986-1348 (Rev. 12) that the CBA was "amended on January 10, 2003" (R4, tab 57 at 3). NSA did not request a hearing at DOL based on a consideration that the wages and fringe benefits contained in the new CBA, as amended, were not reached as a result of arm's-length negotiations.

Bilateral Modification No. P0024, dated 6 March 2003, extended the period of performance through 14 March 2003. The modification did not incorporate the new CBA or its addendum. (R4, tab 59)

Bilateral Modification No. P0025, dated 14 March 2003, extended the period of performance through 28 March 2003. The modification did not incorporate the new CBA or its addendum. (R4, tab 60)

Bilateral Modification No. P0026, dated 28 March 2003, was issued to extend the period of performance through 29 March 2003 and incorporate the new CBA and new wage determination. The modification made WD 1986-1348 (Rev. 13) and the CBA, dated 24 September 2002, and its addendum, dated 10 January 2003, applicable to the contract. (R4, tab 61)

On 5 May 2003, the contracting officer received Guardian's certified claim, dated 29 April 2003, for $372,897.82 for the cost of increased wages incurred pursuant to Guardian's obligations under its CBA with the Union for work performed under the contract during the period 1 October 2002 through 28 March 2003. Guardian submitted documentation showing back pay to its employees for this period. Appellant's chief financial officer verified the inclusion in the claim of a calculation of the pay increases and a payroll register showing the new payments made to employees attributable to the new CBA. (R4, tab 62; supp. R4, tabs 4, 7)

On 7 July 2003, the contracting officer issued a final decision denying a price adjustment for the period 1 October 2002 through 14 March 2003, on the ground that the government was not required to reimburse the contractor for retroactive application of a CBA. The contracting officer stated that she did not have sufficient information to determine the amount Guardian might be entitled to for the period of performance from 14 March 2003 through 28 March 2003 and deferred making a decision on that portion of the claim. (R4, tab 63)

On 14 July 2003, appellant filed a timely appeal that was docketed ASBCA No. 54248.

On 26 August 2003, Guardian submitted a letter to DOL requesting clarification of WD 1986-1348 (Rev. 13) and confirmation that it was required to pay its employees in accordance with the new CBA retroactively to 1 October 2002 (supp. R4, tab 2). On 24 September 2003, DOL responded, stating in pertinent part:

> . . . Once the contingency clause(s) has been deleted, the self-execution provision of Section 4(c) [of the SCA] is applicable. In this case Guardian Moving and Storage, Inc. is required to pay the wages and benefits to its employees in accordance with the CBA, as amended, and it is retroactive to the effective date of October 1, 2002.

(Supp. R4, tab 4) The letter does not state that NSA was required to provide a price adjustment to the contract and does not state that the wage determination was to be applied retroactively to the contract.

On 18 September 2003, Guardian filed a certified claim for $18,346.67 for increased wages incurred pursuant to Guardian's obligations under its new CBA with the Union for work performed under the contract during the period 14 March 2003 through 28 March 2003. Guardian submitted the supporting basis for the claim and stated that the costs were a portion of the claim, dated 29 April 2003, that was previously submitted to the contracting officer. (Supp. R4, tab 3) On 23 September 2003, appellant amended its complaint in ASBCA No. 54248 to revise the amount claimed for the period 1 October 2002 through 14 March 2003 to $354,551.15. On 14 October 2003, the contracting officer responded to appellant's new claim for the March 2003 period that the number of hours that the affected individuals worked during that period was underestimated. The government requested that appellant submit information necessary to substantiate the requested payment, including the rationale for determining the number of hours that were expended. (Supp. R4, tab 6)

On 21 October 2003, Guardian withdrew its claim, dated 18 September 2003, and submitted a revised certified claim in the amount of $34,808.54 under the Price Adjustment clause in the contract (FAR 52.222-43) (supp. R4, tab 8).

On 17 December 2003, the contracting officer issued a final decision denying a price adjustment for the period 14 March 2003 through 28 March 2003, on the ground that the wage determination did not apply to a short-term extension of the contract. On 16 January 2004, Guardian filed a timely appeal that was docketed ASBCA No. 54479. The Board ordered the appeals consolidated. The total amount at issue in both appeals is $389,359.69.

POSITIONS OF THE PARTIES

Appellant has filed a motion for summary judgment asserting that there are no material facts in dispute and it is entitled to an equitable adjustment for increased costs incurred to comply with WD 1986-1348 (Rev. 13), which the SCA made applicable to the contract as of 1 October 2002. Appellant argues that it is entitled under the Price Adjustment clause, FAR 52.222-43, to reimbursement for compliance with a wage determination either as "'applicable on the anniversary date' of the contract, or 'otherwise applied to the contract by operation of law'" (app. reply at 6). Appellant maintains that DOL determined that NSA received notice of the changed terms of the CBA as of the date of receipt of the new 24 September 2002 CBA, not the 10 January 2003 amendment modifying the CBA to delete the contingency clause, and, therefore, the wage determination was applicable to the contract retroactively to 1 October 2002. According to appellant, this DOL determination is evidenced by issuance of WD 1986-1348 (Rev. 12) on 14 February 2003 and WD 1986-1348 (Rev. 13) on 27 February 2003. Appellant submits the DOL determination is beyond the jurisdiction of the Board to review.

The government opposes appellant's motion for summary judgment on the ground that DOL should rescind WD 1986-1348 (Rev. 13) issued on the basis of the new CBA as modified on 10 January 2003 because the CBA was still contingent on a DOL wage determination and a contract modification to incorporate the wage determination in the contract. The government submits that whether the contingency remained is a genuine issue of material fact that precludes a grant of summary judgment for appellant. The government refers to supporting documents and an affidavit concerning the actions of the parties and requests discovery before it decides whether to refer the matter to DOL for consideration of the contingency issue.

The government submits that it is entitled to summary judgment if the Board finds no genuine dispute regarding the contingency issue. The government asserts that appellant is not entitled to a price adjustment for increased wages because neither the new CBA nor the new wage determination was incorporated into the contract. According to the government, it was not required to incorporate the new wage determinations or the new CBA for retroactive application in the bilateral modifications that extended appellant's contract before award of a full-term successor contract. The government also maintains that it was not required to apply the wage determinations or the CBA to the bilateral short-term extensions of appellant's contract because they did not constitute successor contracts. The government argues that the wage determinations were received after applicable contract actions, and, thus, no price adjustment is required.

DECISION

Summary judgment is appropriate where no material facts are genuinely in dispute, and the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. A material fact is one which may affect the outcome of the case. We must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Griffin Services, Inc.*, ASBCA No. 53802, 03-1 BCA ¶ 32,200 at 159,165.

The Board has jurisdiction under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* (CDA), to hear an appeal involving determinations by DOL under the SCA when the dispute "centers on the parties' mutual contract rights and obligations, . . . even though matters reserved to and decided exclusively by the Department of Labor are part of the factual predicate." *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1578 (Fed. Cir. 1993). When the DOL administrative process regarding the issuance of wage determinations has been completed, and a contractor claims a price adjustment for the effects of the DOL wage determination, the Board has jurisdiction over the contractor's claim. *MMC Construction, Inc./Rockford Corporation, J.V. and Aleutian Constructors, J.V.*, ASBCA Nos. 50863, 50864, 50865, 99-1 BCA ¶ 30,322.

Appellant's claims under the Price Adjustment clause in these appeals involve analysis of DOL wage determinations issued on the basis of a new CBA and DOL's clarifying letter to appellant to decide whether NSA was required by the contract to compensate appellant for the actual wage increases it paid pursuant to the new CBA beginning 1 October 2002. The wage determination (1986-1348 (Rev. 12)) based on the new CBA, initially issued by DOL to be effective 1 October 2002, was rescinded because the CBA included a contingency clause. DOL determined that the wage increases were not the result of arm's-length negotiations. The 10 January 2003 addendum to the CBA was the subject of WD 1986-1348 (Rev. 13) and was addressed in the 24 September 2003 letter in which DOL advised appellant that it was required to pay increased wages retroactively to 1 October 2002.

The Service Contract Act clause in the contract, FAR 52.222-41, provides in relevant part:

> (c) *Compensation.* (1) Each service employee employed in performance of this contract by the Contractor . . . 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.

Such DOL wage determinations are required to be in accordance with the rates and benefits in an applicable CBA, including prospective increases provided for in such agreement as a result of arm's-length negotiations. 41 U.S.C. § 351(a)(1), (2). Wage determinations are reviewed periodically and modified to reflect changes made in CBAs. 41 U.S.C. § 353(d). The government must receive a new or amended CBA prior to the applicable contract action for the changes to be effective in a contract. FAR 52.222-41(f).

The pertinent Price Adjustment clause in the contract, FAR 52.222-43, provides in relevant part:

> (c) The wage determination, issued . . . by the . . . U.S. Department of Labor, current on the anniversary date of a multiple year contract or 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 or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:
>
> > (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period . . . .
> >
> > (2) An increased or decreased wage determination otherwise applied to the contract by operation of law . . . .

Thus, a price adjustment is required when a contractor pays increased wages and benefits in compliance with a wage determination current at the beginning of a new term of the contract or a wage determination otherwise applied to the contract by operation of law.

Successor contractors are generally required by the SCA to pay service employees the wages and fringe benefits provided for in a CBA.[1] More specifically, Section 4(c) of the SCA states in pertinent part:

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[1] The services must be substantially the same in the same locality. These conditions for applicability of a CBA are not in issue in this appeal.

> 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. . . 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 . . .

41 U.S.C. § 353(c). DOL regulations at 29 C.F.R. § 4.163(b) state, in relevant part:

> Section 4(c) is self-executing. Under section 4(c), a successor contractor in the same locality as the predecessor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which were contained in the predecessor contractor's collective bargaining agreement. This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement.

Thus, the wages and benefits in a CBA are required to be recognized as the minimum wages and benefits for subsequent new contracts by operation of law.

When an option is exercised to provide for services for a new or different period of time, the contract for the additional period is a wholly new contract with respect to application of the SCA and its regulations. 29 C.F.R. § 4.145(a). Similarly, modifications of a contract to extend the period of performance, as NSA and Guardian executed in the circumstances of these appeals, are new contracts for SCA purposes. 29 C.F.R. § 4.143(b); *Telesec Library Services,* ASBCA No. 42968, 92-1 BCA ¶ 24,650; *Suburban Industrial Maintenance Co.,* ASBCA No. 22875, 79-1 BCA ¶ 13,731 at 67,322.

J&L Janitorial Services, Inc., ASBCA No. 31245, 88-3 BCA ¶ 21,137, is instructive given the circumstances of these appeals. In *J&L,* the Board considered whether the government was required to provide a price adjustment for increased wages and benefits paid by the contractor J&L Janitorial Services, Inc. (J&L) pursuant to an amended CBA that was not submitted to the contracting officer for a revised wage determination from DOL. The contract included a 1980 WD that J&L argued contemplated a 1982 Addendum to its CBA. J&L did not request price increases before the contract was extended by modification or before a new contract was awarded, but asserted its right to recover its costs on the basis that the contracting officer had failed to secure wage determinations that would have recognized the 1982 Addendum to the CBA. The Board decided that a new wage

determination would not have applied to the initial term of the contract because revised wage determinations to reflect new CBAs are first applicable to subsequent new contracts. The parties' bilateral modifications extending the contract term were new contracts, but the 1982 Addendum was not in effect on the date the subject modifications were executed, and were not, therefore, a basis for entitlement to a price adjustment. Appellant was also not entitled to recover the costs of the 1982 Addendum under the new contract award because J&L never proposed price increases prior to award of the contract in negotiating the unit price of services to be performed or by submitting the new CBA to request a revised wage determination. The government was, however, required to reimburse J&L under extensions of the new contract that were executed after the 1982 Addendum was reported to the contracting officer in August 1982. The Board concluded that the wages and benefits in the CBA Addendum submitted to the contracting officer were required to be recognized as the minimum wages and benefits for subsequent new contracts, and J&L was entitled to a price adjustment. There was no retroactive application of the CBA Addendum according to its effective date to any contract or extended term of the contract before the contracting agency had notice of the CBA Addendum.

Accordingly, we reject the government argument that the extensions which did not obligate additional funds to the contract were not new contracts because they did not impose any obligation on Guardian that Guardian did not already have before the extensions were issued (gov't opp. at 20). Similarly, we reject the government's proposition that Section 4(c) of the SCA does not apply to short-term contract extensions. None of the contract extensions received by Guardian was a "temporary interim contract" within the meaning of 29 C.F.R. § 4.163(h). Whenever the term of an existing contract is extended, pursuant to an option clause or "otherwise," the contract extension is considered to be a new contract for purposes of application of the SCA provisions. 29 C.F.R. § 4.143(b). The fact that government agencies typically award contracts for a base year with options for additional years and wage determinations are required to be periodically adjusted at intervals of no less than two years,[2] does not prevent application of Section 4(c) of the SCA to contract extensions that are of shorter duration.

With respect to the government's allegation that there is an issue of material fact regarding the arm's-length negotiations of the CBA, there is no dispute as to whether appellant was required to pay wages as agreed upon in the new CBA, as amended, ultimately approved in WD 1986-1348 (Rev. 13), and incorporated in Modification No. P0026, the last bilateral modification of appellant's contract. Furthermore, under Section 4(c) of the SCA, the CBA is self-executing. NSA could have requested an arm's-length hearing at DOL under FAR 22.1020(c), but did not. Untimely assertion of a right to appeal to DOL is only speculative. It would have to be based on a NSA claim of

[2] Section 4(d) of the SCA, 41 U.S.C. § 353(d); 29 C.F.R. § 4.145(b).

"exceptional circumstances" under FAR 22.1021(d), which we cannot reasonably infer exist in the circumstances of these appeals. In the absence of a determination from DOL that the new CBA as amended by the addendum has not resulted from arm's-length negotiations, the Board considers that the government has effectively agreed to the wage determination embodying the wages and benefits in the CBA, and it will proceed to dispose of these appeals. *J&L Janitorial Services, Inc., supra.* There is no reason here to grant the government additional time for discovery. NSA did not appeal the DOL determination and cannot oppose appellant's motion or suspend the prosecution of these appeals by now asserting to the Board that the CBA could not be the basis for a DOL wage determination. The allegation of a contingency in the CBA has been resolved by DOL and is not relevant to the issues now before us. There are no genuine issues of material fact that preclude summary judgment in the circumstances of these appeals.

Appellant and the Union agreed to increased wages and provided notice to the government as required. NSA duly requested the wage determination from DOL. Receipt of the 24 September 2002 CBA with a contingency clause was ineffective because DOL found it did not result from arm's-length negotiations. Receipt of the 10 January 2003 addendum to appellant's CBA rendered the government obligated to reimburse appellant for prospective wage increases under the bilateral modifications that were subsequent new contracts. When it received the 10 January 2003 addendum to the new CBA, NSA became obligated to incorporate a new wage determination in its new contracts. The next contract extension was issued on 23 January 2003, for the period beginning 1 February 2003.

A contracting agency is not required to incorporate a wage determination into a contract or grant a contractor a price adjustment where a CBA providing increased wages was negotiated after contract award. A revised wage determination incorporating a retroactive CBA does not relate back to a previous contract period. *Ameriko, Inc. d/b/a Ameriko Maintenance Company,* ASBCA No. 50356, 98-1 BCA ¶ 29,505; *Suburban Industrial Maintenance Co., supra*, 79-1 BCA at 67,322. The DOL clarification that referred to the CBA as being retroactive to 1 October 2002 did not provide for retroactive application of the wage determination to the contract. Where DOL determines that the contracting agency has made an erroneous determination concerning application of the SCA, it may require retroactive application of a wage determination to the contract. 29 C.F.R. § 4.5(c)(2). DOL did not exercise this authority in a direction to NSA.

Thus, appellant is not entitled to retroactive application of the wage determinations to 1 October 2002, either as the renewal date of the contract or under the self-executing provisions of Section 4(c) of the SCA. Wage and benefit increases that the government is obligated to reimburse under the Price Adjustment clause are to be prospective and are to be implemented in accordance with the wage determination scheme in the SCA and regulations related thereto. The contracting agency is entitled to notice of new CBAs for inclusion in new contracts. The effective date of a new wage determination in these appeals could be no earlier than the issuance of a new contract after 10 January 2003, the date appellant and the Union executed the addendum to the new CBA required for issuance of a revised wage

determination. As we stated in *J&L Janitorial Services, Inc., supra,* "[a]ppellant's theory would allow the parties to change the wage determination upon agreeing to changes in a CBA" which would be contrary to the statute vesting the making of wage determinations in the Secretary of Labor. 88-3 BCA at 106,725.

We have reviewed the record evidence and all the parties' arguments to consider appellant's claims, but deem it unnecessary to discuss the arguments in the parties' lengthy briefs in further detail.

We have concluded that there are no genuine issues of material fact and appellant is entitled to a price adjustment for wage increases paid for the period 1 February 2003 through 28 March 2003. Appellant's motion for summary judgment as it relates to ASBCA No. 54248 is granted in part and otherwise denied. Appellant's motion for summary judgment as it relates to ASBCA No. 54479 is granted. The government's cross-motion for summary judgment is denied. ASBCA No. 54248 is sustained in part and denied in part. ASBCA No. 54479 is sustained. The matter is remanded to the parties for negotiation of quantum.

Dated: 23 September 2004

LISA ANDERSON TODD
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

CAROL N. PARK-CONROY
Administrative Judge
Acting 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. 54248, 54479, Appeals of Guardian Moving and Storage Company, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals