ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ARCTEC Alaska	)	ASBCA No. 54946
	)	
Under Contract No. F65501-00-C-0001	)	

APPEARANCE FOR THE APPELLANT: Mr. Fred G. Wisely
Chairman Executive Committee,
ARCTEC Alaska, a Joint Venture

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
MAJ Michael A. Sumner, USAF
Thomas S. Marcey, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

ARCTEC Alaska appeals the contracting officer's denial of a price adjustment for an increase in "response premium" pay required by a Department of Labor (DOL) service contract wage determination. ARCTEC has elected the Rule 12.3 procedure. The parties have submitted the appeal for decision under Rule 11 without oral hearing. Both entitlement and quantum are before us. We sustain the appeal.

FINDINGS OF FACT

1. On 16 November 1999, ARCTEC and the government entered into a service contract for ARCTEC to operate and maintain the Alaska radar system. The initial term of the contract was eight months from 1 February – 30 September 2000 with four successive one-year options thereafter. (R4, tab 1 at 1-42d) All four options were exercised, and the contract ran through 30 September 2004 (compl. & answer ¶ 6).

2. The contract included among other provisions the FAR 52.222-41 SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) clause (hereinafter "the SCA clause"), the FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT — PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) clause (hereinafter "the FLSA/SCA Price Adjustment clause"), and the FAR 52.233-1 DISPUTES (DEC 1998) clause (R4, tab 1 at 59, 61).

3. By Modification No. P00015, effective 1 October 2000, the government, pursuant to the SCA clause, incorporated into the contract a DOL wage determination requiring ARCTEC to pay its covered employees working on the contract the wages and fringe benefits in its current collective bargaining agreement (CBA) (R4, tab 2 at 5). That agreement required, among other things, payment of a response premium of $20 per day "to all employees who are required by the Company to carry a radio or cell phone for response requirements . . . " (R4, tab 2 at 23). The response premium was payable for both working and non-working days, including sick and vacation days, whenever the employee was required to carry the radio or cell phone (R4, tab 13 at 14).

4. On or about 13 May 2003, ARCTEC entered into a CBA for the three years beginning 1 October 2003 (R4, tab 5 at 1). That CBA required, among other things, an increase in the response premium daily rate from $20 per day to $25 per day (R4, tab 3 at 21, 44). By Modification No. P00130, effective 1 October 2003, the government pursuant to the SCA clause incorporated into the contract a DOL wage determination requiring payment of covered employees in accordance with the new CBA. (R4, tab 3 at 1-2, 20)

5. On 8 October 2003, ARCTEC proposed to the government a price increase under the FLSA/SCA Price Adjustment clause for the wage and fringe benefit increases required by the wage determination for the year beginning 1 October 2003 (R4, tabs 7, 8). A Defense Contract Audit Agency (DCAA) audit report on the proposal questioned the amount claimed ($21,670) for the response premium rate increase on the grounds that (i) it was "a payment for non-working time," and (ii) "DOL would likely not enforce such payment due to the small inconvenience involved in being required to carry a cell phone." The audit report did not question that the claimed amount was in fact incurred as a result of the response premium rate increase. (R4, tab 13 at 14-15) We find that the increased response premium rate increased ARCTEC's total wages payable by $21,670.

6. By letter dated 1 October 2004, ARCTEC submitted a claim under the Disputes clause for the $21,670 increase in total wages payable caused by the response premium rate increase (R4, tab 17). The claim was received by the contracting officer on 4 October 2004 (R4, tab 18 at 2). It was denied by final decision dated 29 November 2004, on the ground that "on-call time is not considered hours worked -- so is not compensable by law." (R4, tab 19 at 2) This appeal followed.

DECISION

The issue in this appeal is whether per diem pay for carrying a radio or cell phone during both working and non-working hours to respond to the employer's calls for assistance is "wages" within the meaning of paragraph (d) of the FLSA/SCA Price Adjustment clause of the contract. Paragraph (d) states in relevant part: "The contract price . . . will be adjusted to reflect the Contractor's actual increase or decrease in

applicable wages . . . 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." FAR 52.222-43(d).

Neither the Service Contract Act (SCA), 41 U.S.C. §§ 351-358, nor the implementing DOL regulations at 29 C.F.R. Part 4 nor the SCA clauses of the contract include an express definition of "wages." However, 29 C.F.R. § 4.53 (2003) governing CBA successorship determinations includes in "wages" not only straight time hourly or salary rate but also "any shift, hazardous, and other similar pay differentials." The government cites DOL regulations that define hours "worked" for purposes of payment of the minimum hourly rate for a particular trade or skill.[1] It then argues that the response premium was not similar to shift or hazardous pay differentials because it was not pay for hours worked, and therefore not "wages."

We agree that to the extent response premium on-call time was also off-duty time and not restricted as to location,[2] it was not hours "worked." We do not agree that the response premium that was paid for that time was not an element of the on-call employee's wages for purposes of the FSLA/SCA Price Adjustment clause. The government's contention that only pay for hours "worked" is "wages" is inconsistent with the related FLSA overtime regulations. Those regulations at 29 C.F.R § 778.223 (2003) include pay for off-duty on-call time, not restricted as to location, in the determination of the "regular rate"[3] for overtime pay as follows:

> . . . . If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent "on call" are not considered as hours worked. *Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the*

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[1] Specifically, 29 C.F.R §§ 4.178 and 785.17 (2003). The latter states that an employee who "is merely required to leave word . . . where he may be reached is not working while 'on call.'"

[2] The response premium daily rate, however, was also paid on days that the employee was on duty (working) and required to carry a cell phone or radio. *See* finding 3.

[3] The "regular rate" is the employee's "total remuneration for employment (except statutory exclusions)" divided by the employee's total hours actually worked for the period in question. 29 C.F.R. §§ 778.108, 778.109 (2003).

> *employee's job . . . . The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work* [emphasis added].

The SCA is remedial labor legislation which must be liberally construed. *Midwest Maintenance & Constr. Co. v. Vela*, 621 F.2d 1046, 1050 (10th Cir. 1980). The implementing regulations and contract clauses should be similarly so construed to effect the purposes of the Act. The remedial purpose of the Act is to protect prevailing labor standards. 41 U.S.C. § 353(b). Considering the remedial purpose of the Act, and consistent with above-cited provisions of 29 C.F.R. §§ 4.53 and 778.223 (2003), we interpret "wages" for purposes of the FLSA/SCA Price Adjustment clause as including the on-call response premium specified by ARCTEC's CBA and DOL wage determination. This interpretation is also consistent with the sound procurement policy of eliminating contingencies in bid prices.

The increase in the required response premium for the year beginning 1 October 2003 increased ARCTEC's wages payable by $21,670. *See* finding 5. Pursuant to paragraph (d) of the FLSA/SCA Price Adjustment clause, ARCTEC is entitled to a price adjustment in that amount.

The appeal is sustained in the amount of $21,670 with interest pursuant to 41 U.S.C. § 611 from 4 October 2004.

Dated: 13 October 2005

MONROE E. FREEMAN, JR.
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. 54946, Appeal of ARCTEC Alaska, rendered in conformance with the Board's Charter.

Dated:

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