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 H. Wisely
Chairman, Executive Committee of
ARCTEC Alaska 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
ON MOTION FOR RECONSIDERATION

The government moves for reconsideration of our decision of 13 October 2005 holding that "wages" within the meaning of the FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS (MAY 1989) clause of the contract included "response premium." Response premium was a daily rate of $25 for carrying a cell phone or radio for after-hours response requirements.

The government continues to argue that "wages" for purposes of the cited clause are limited to monetary compensation for working hours and do not include monetary compensation for non-working on-call time. In support of its motion, the government cites the following sentence in 29 CFR § 4.178: "The hours worked which are subject to the compensation provisions of the [Service Contract] Act are those in which the employee is engaged in performing work on contracts subject to the Act." (Gov't mot. at 2) The cited sentence is part of a section of the regulations that specifies how the SCA hourly rate is to be applied when the work week includes work subject to the Act and work not subject to the Act.* Section 4.178 and the cited sentence do not purport to define "wages" for purposes of the Act.

* The sentence immediately following that cited sentence states: "However, unless such hours are adequately segregated . . . compensation in accordance with the Act will be required for all hours of work in any workweek in which the employee performs any work in connection with the contract, in the absence of affirmative

The government also argues that 29 CFR § 785.17 "requires an employee to be engaged in performing work to receive wages" (gov't mot. at 2). We do not agree with that characterization of § 785.17. Section 785.17 states that an employee "who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call." Section 785.17 excludes on-call non-working time from the requirement to pay working time hourly rates. It does not state that other monetary compensation for on-call non-working time is not part of the employee's wages for purposes of the Act.

We also do not agree that the response premium provision in the collective bargaining agreement is an item "such as seniority, grievance procedures, work rules, overtime, etc." which are distinguished from "wages" in 29 CFR § 4.163(a). *See* gov't mot. at 2-3. Seniority, grievance procedures, work rules and overtime regulations do not directly specify rates of pay. The response premium provision does directly specify a rate of pay and, in that respect, is the same type of provision as the hourly rate schedules attached to the collective bargaining agreement. *See* R4, tab 3 at 44, 83-85.

Nor do we agree that payment of the response premium was not mandatory under the SCA. *See* gov't mot at 3. Payment of the response premium was required by the collective bargaining agreement (R4, tab 3 at 44). The collective bargaining agreement was adopted *in toto* in the DOL wage decision in the contract (R4, tab 20). The DOL wage decision in the contract was required by the SCA. *See* 41 U.S.C § 351(a)(1). Finally, we note that the response premium pay was a direct and immediate economic benefit of the employment relationship. As such, it was within the meaning of "wages" for purposes of the collective bargaining provisions of the National Labor Relations Act. *See W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949).

On reconsideration, we reaffirm our original decision on the grounds stated therein.

Dated: 2 February 2006

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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proof to the contrary that such work did not continue throughout the workweek." 29 CFR § 4.178

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