ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Hunt Building Company, Ltd.	)	ASBCA No. 55157
	)	
Under Contract No. DACA61-02-C-0002	)	

APPEARANCE FOR THE APPELLANT: Martin W. Lester, Esq.
Ketchel & Lester
Shalimar, FL

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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U.S. Army Engineer District,
Philadelphia

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
UNDER RULE 12.3

Hunt Building Company, Ltd. (Hunt) appeals the refusal of the contracting officer to decide its claim for interpretation of a term in the Wage Rates section of the contract. Hunt has elected the Rule 12.3 procedure. The government moves to dismiss for lack of jurisdiction. We dismiss the appeal as premature.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 15 April 2002, the Corps of Engineers (COE) awarded Hunt the captioned contract for the demolition of existing, and construction of new family housing and related utilities at Dover Air Force Base, Delaware (R4, tab 3 at 00010-2). The "Contract Clauses" section of the contract included, among other provisions, the FAR 52.222-4 CONTRACT WORK HOURS AND SAFETY STANDARDS ACT – OVERTIME COMPENSATION (SEP 2000) clause, the FAR 52.222-6 DAVIS-BACON ACT (FEB 1995) clause, the FAR 52.222-7 WITHHOLDING OF FUNDS (FEB 1988) clause, the FAR 52.222-11 SUBCONTRACTS (LABOR STANDARDS) (FEB 1988) clause, the FAR 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988) clause and the FAR 52.233-1 DISPUTES (DEC 1998) clause. (R4, tab 3 at 00700-25, -26, -29, -66)

2. The Wage Rates section (00810) of the contract contained two Department of Labor (DOL) general wage decisions. General Decision Number DE010003 specified the prevailing labor rates for "RESIDENTIAL CONSTRUCTION PROJECTS." General Decision Number DE010005 specified the prevailing labor rates for "HEAVY CONSTRUCTION PROJECTS." The Wage Rates section also included the following provision:[1]

> All demolition (including asbestos abatement) and utility main replacement work (as required by the RFP) is covered under General Decision Number DE010005. All other work is covered under General Decision Number DE010003.

(R4, tab 3 at 00810-i – 00810-9, tab 3b at 51-55)

3. On 17 June 2002, Hunt requested the COE to verify that "we will be able to utilize the 'Residential Construction Wage Rates' for all phases of our construction." On 18 June 2002, the COE replied that demolition and "utility main replacement work" were covered by decision "DE 020005" and that "all other work was covered by decision "DE 020003."[2] (Gov't resp., attach. 2)

4. On 9 August 2002, the COE requested the DOL to provide "a determination regarding the proper schedule of wage rates for [the Hunt contract]" (R4, tab 12). By letter dated 9 September 2002, the DOL affirmed that (i) the demolition of the existing housing, utility mains and laterals and the construction of the new utility mains were heavy construction, and that (ii) the construction of the new housing "and the installation of utilities to these newly constructed housing units" was residential construction (R4, tab 11).

5. On 20 December 2002, Hunt awarded a subcontract to PowerPlus Electric, Inc. for "Complete job of site and building electric." On 14 January 2003, PowerPlus acknowledged to the government that its subcontract included the same labor standards clauses as the prime contract. (Gov't resp., attach. 3)

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[1] This provision appears in the awarded contract but not in the RFP or in any amendment thereto (R4, tabs 1, 3a, 3b). The provision was highlighted in the fifth paragraph of the notice of award with the words "Please note" followed by a substantially verbatim quote (R4, tab 3 at 1).

[2] Wage decisions DE020003 and DE020005 were initially published by DOL on 1 March 2002, but were not incorporated into Hunt's contract until Modification No. P00001 was issued on 6 January 2003. *See* Statement of Facts, paragraph 6.

6. On 6 January 2003, the COE in unilateral Modification No. P00001 exercised an option for additional housing demolition and replacement ("Phase 2") and incorporated into the contract general wage decisions DE020003 (residential construction) and DE020005 (heavy construction) for the Phase 2 work. With respect to the new wage decisions, Modification No. P00001 stated: "The wage determination shall apply as specified in the contract and award letter dated 15 April 2001 [sic]." (R4, tab 4 at 15, 16)

7. On 7 February 2005, the DOL notified the contracting officer that an investigation had disclosed a failure of Hunt, several subcontractors and a lower tier subcontractor to pay the prevailing wage rates and/or fringe benefits required by the labor standards requirements of the contract. DOL estimated that the amount of back wages due was $199,560 and requested the contracting officer to withhold that amount from contract payments otherwise due Hunt. (R4, tab 10)

8. Included in the amount withheld from Hunt was $36,967.17 for PowerPlus allegedly failing to pay the heavy construction rates on all parts of its subcontract work where the DOL considered those rates applicable. This amount was withheld from PowerPlus by Hunt. PowerPlus alleges that based on the labor standards requirements in the prime contract and the construction drawings provided by Hunt, it bid its subcontract on the basis that "only the work along High Street would be covered by Wage Decision DE01005 [sic], Heavy," and that it paid its workers accordingly. (App. opp. at 4-5; R4, tab 9 at 9-10) For purposes of this motion we accept that allegation as correct.

9. By letter dated 10 August 2005, PowerPlus requested Hunt to sponsor a claim on its behalf for a final decision by the contracting officer "on the very narrow issue of the correct definition of the term 'utility main replacement work' as that term was used by the CO in the Notice of Award letter and as that term applies to the physical work on this particular project." (R4, tab 9 at 3) PowerPlus did not claim a sum certain or otherwise claim an equitable adjustment of the contract price for complying with the apparent DOL findings that heavy construction rates applied to work beyond High Street.[3] To the contrary, the PowerPlus claim letter stated that it "had not paid any additional money to any of its employees, nor forfeited any money to the Government." (R4, tab 9 at 1, 15)

10. On 12 August 2005, Hunt sent the PowerPlus claim letter to the contracting officer with a statement that it was sponsoring the claim and requesting a final decision (R4, tab 9 at 2). By letter dated 26 August 2005, the contracting officer refused a decision on the ground that the contract required that disputes concerning labor standards

[3] At this time the DOL findings were only apparent from the withholding request. The formal investigation findings have not yet been issued. *See* Statement of Facts paragraph 11 below.

requirements be resolved by the DOL in accordance with 29 CFR Parts 5, 6 and 7 (R4, tab 8). This appeal followed.

11. By letter dated 23 November 2005, the DOL informed government counsel in this appeal that the DOL investigation of the alleged labor standards violations of Hunt and its subcontractors was nearing conclusion and that when completed: "All firms, prime and subcontractors, will be formally advised of the investigation findings and of their right to a hearing before one of the Department of Labor's Administrative Law Judges if they wish to contest those findings." (Gov't resp., attach. 1) The investigation findings have not been issued and there has been no final DOL ruling on the alleged violations to date.

DECISION

The government moves to dismiss the appeal on the ground that the substance of the dispute is the interpretation of a labor standards requirement of the contract that is within the exclusive jurisdiction of the DOL. In support of its motion, the government cites the DISPUTES CONCERNING LABOR STANDARDS (FEB 1988) clause of the contract, *Herman B. Taylor Construction Co. v. Barram*, 203 F.3d 808, 811 (Fed Cir. 2000) and *Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425 (Fed. Cir. 1991) (gov't mot. at 5-7). The DISPUTES CONCERNING LABOR STANDARDS (FEB 1988) clause states:

> The United States Department of Labor has set forth in 29 CFR Parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(FAR 52.222-14)

The claim before us in this appeal is the 10 August 2005 claim of PowerPlus submitted and sponsored by Hunt to the contracting officer on 12 August 2005. That claim expressly stated that it was a claim for interpretation of the term "utility main replacement work." It did not claim a sum certain or otherwise state that it was a claim for an equitable adjustment in the contract price. *See* Statement of Facts, paragraphs 9, 10. However, while masquerading as a claim for interpretation only, the PowerPlus claim was essentially a claim for money, *i.e.* the release of the $36,967.17 or an equitable price adjustment in that amount, and must be submitted as such. *See Reflectone, Inc.*,

ASBCA No. 34093, 87-1 BCA ¶ 19,656 at 99,543. Moreover, where labor standards are involved, a necessary predicate for collateral monetary relief under the contract is a final DOL ruling on the labor standards at issue. There has been no such ruling to date. *See* Statement of Facts, paragraph 11; *Source AV Inc.*, ASBCA No. 45192, 94-1 BCA ¶ 26,293 at 130,783. Therefore, the appeal is premature and must be dismissed.

Appellant's reliance on *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993); *Overstreet Electric Company, Inc.*, ASBCA Nos. 51653, 51715, 00-2 BCA ¶ 31,038; *Petroleum Tank Services, Inc*., ASBCA No. 43137, 92-1 BCA ¶ 24,682; *Woodington Corp.*, ASBCA No. 34053, 87-3 BCA ¶ 19,957; and *Dahlstrom & Ferrell Construction Company, Inc.*, ASBCA No. 30741, 85-3 BCA ¶ 18,371 is misplaced. In *Burnside-Ott, Petroleum, Woodington* and *Dahlstrom*, the contractors were seeking collateral contractual relief on the basis of a final DOL ruling or final settlement with the DOL on the labor standards at issue. *See* 985 F.2d at 1580; 92-1 BCA at 123,128; 87-3 BCA at 101,032; 85-3 BCA at 92,164. In *Overstreet* the contractor was seeking relief from an allegedly improper withholding of funds by the contracting officer on the basis of labor investigations by unauthorized personnel in violation of regulations. 00-2 BCA at 153,271. Those facts are not present here.

The appeal is dismissed.

Dated: 7 February 2006

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. 55157, Appeal of Hunt Building Company, Ltd., rendered in conformance with the Board's Charter.

Dated:

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