

Board of Contract Appeals

General Services Administration

Washington, D.C. 20405

MOTION TO DISMISS FOR LACK OF
JURISDICTION DENIED: May 26, 2005

GSBCA 16587-EPA

MYERS INVESTIGATIVE & SECURITY SERVICES, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Lawrence J. Sklute of Sklute & Associates, Washington, DC, counsel for Appellant.

A. Neil Stroud, Office of General Counsel, Environmental Protection Agency,
Research Triangle Park, NC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

HYATT, Board Judge.

Appellant, Myers Investigative & Security Services (Myers), has appealed a contracting officer's decision to assess liquidated damages in the amount of \$12,650 under

a contract with the Environmental Protection Agency (EPA) for the provision of security guard services. EPA has moved to dismiss the appeal for lack of jurisdiction.

Background¹

1. Contract number 68-D-01-50, for the provision of security guard services for EPA's facilities in Research Triangle Park, North Carolina, was awarded to appellant on August 9, 2001, with a start date of October 1, 2001. Myers was the incumbent contractor for the previous contract for the same services provided to the same procuring agency. Contract; Appellant's Opposition to the Motion to Dismiss (Appellant's Opposition).

2. The contract contained the mandatory labor standards clauses, including Federal Acquisition Regulation (FAR) clause 52.222-4, Contract Work Hours and Safety Standards Act - Overtime Compensation, and FAR clause 52.222-41, Service Contract Act of 1965, as amended. The contract also incorporated by reference FAR clause 52.233-1, Disputes Alternate I; the Price Adjustment clause, FAR 52.222-43; and the Changes clause, FAR 52.243-1, Alternate I. Contract at §§ I-1, I-2.

3. Prior to September 20, 2001, EPA received a copy of the negotiated addendum to the Collective Bargaining Agreement (CBA), dated August 1, 2001, under which the guards employed by Myers, a small, minority-owned business, were covered. Myers began paying its union employees the increased wages reflected in that addendum and repeatedly asked EPA to incorporate the addendum in the contract as required by applicable law. EPA did not act on Myers' request, which put Myers in a precarious financial position. Myers informed the union that because of EPA's failure to incorporate the CBA addendum in the current contract, Myers could no longer continue to pay the increased wages required by that addendum. Myers further advised the union that it would be forced to reduce wages and benefits to their prior levels and would collect back from the employees the increases that had been paid through that date. Appellant's Opposition; Notice of Appeal, Exhibit 2.

4. The union grieved this action. Prior to arbitration, the grievance process was suspended to give Myers a further opportunity to explain to EPA that the agency was required to modify the contract to incorporate the addendum's wage rates. EPA continued to disregard Myers' requests to do this. Appellant's Opposition.

¹ The record for purposes of resolving respondent's motion consists of a copy of the contract, the notice of appeal and exhibits thereto, the motion to dismiss for lack of jurisdiction, appellant's opposition to the motion and the exhibits that accompany the motion and the opposition.

5. In 2003, the Department of Labor (DOL) conducted an investigation of the matter. It found that EPA had failed to incorporate the wage rates provided in the addendum in Myers' contract and that this failure violated FAR 22.1012-3(b).² In accordance with 29 CFR 4.5(c), in a letter dated March 11, 2003, DOL instructed EPA to retroactively amend its contract with Myers to include the higher wage rates set forth in the CBA addendum effective October 1, 2001. Notice of Appeal, Exhibit 2.

6. On April 30, 2003, following receipt of DOL's letter, EPA issued modification number 0024 to the contract, attaching the CBA addendum and describing the modification as follows:

The attached Wage Determination number 2003-0050, Rev. 1, dated 03/11/2003, is incorporated into the contract for the base period of performance (October 1, 2001 through September 30, 2002). This wage determination is based on the collective bargaining agreement addendum with the wage and benefits effective date of October 1, 2001.

²

This provision provides:

For contractual actions other than sealed bidding, a wage determination or revision based on a new or changed collective bargaining agreement shall not be effective if notice of the terms of the new or changed collective bargaining agreement is received by the contracting agency after award of a successor contract or a[n applicable] modification [to an existing contract], provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification, or if contract performance does not commence within 30 days of the award of the contract or of the specified modification, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the work shall be effective for purposes of the successor contract under section 4(c) of the [Service Contract] Act.

Following issuance of this contract modification, Myers paid its employees in accordance with the CBA addendum rates, including the back wages then due. Appellant's Opposition and Exhibit.

7. On March 17, 2004, the Department of Labor (DOL) notified EPA that it had determined that Myers, in the course of performance of this contract, had violated pertinent provisions of the Service Contract Act and the Contract Work Hours and Safety Standards Act (CWHSSA). DOL stated that Myers had made full restitution to its employees, but that DOL had also determined that liquidated damages of \$12,720 (later reduced to \$12,650, after a clerical error was identified) under the CWHSSA were owed by Myers. Liquidated damages were calculated at the rate of \$10 per day for each employee who was underpaid. Respondent's Motion to Dismiss, Exhibit A.

8. Upon receipt of this letter from DOL, EPA's contracting officer, by letter dated April 8, 2004, informed Myers that liquidated damages were required to be assessed under the CWHSSA and demanded payment. Respondent's Motion to Dismiss, Exhibit B. Myers responded to the contracting officer, in a letter dated June 18, 2004, advising that Myers disputed the liquidated damages assessment and alleging that the need to pay back wages had been attributable to EPA's failure to incorporate a collective bargaining agreement rate increase in the contract. *Id.*, Exhibit C.

9. In a letter dated August 3, 2004, the contracting officer again notified Myers that it owed liquidated damages in connection with the CWHSSA violations identified by DOL and explained that this liability was in addition to the payment of the back wages. He also advised that "FAR 22.302(c) discusses the possibility that our Agency Head could reduce the liquidated damages amount," and stated that if Myers wanted consideration of a reduction in the assessment under this provision it should submit its request by August 23, 2004. Respondent's Motion to Dismiss, Exhibit D.

10. On August 21, 2004, Myers responded to EPA's letter of August 3, contesting the assessment of liquidated damages for a number of reasons, including EPA's failure to provide the method used to calculate the amount assessed. Myers argued that DOL had closed the investigation without requiring any further payment and that EPA had not had to pay out the amounts it sought to collect from Myers. Respondent's Motion to Dismiss, Exhibit E.

11. In a letter dated November 12, 2004, another EPA official addressed the issues raised in Myers' August 21 communication, providing a more detailed explanation of the liquidated damages assessment and enclosing copies of DOL's worksheets computing the amount. This letter referred Myers to FAR clause 52.222-4, providing for liquidated

damages in the event of a violation of the CWHSSA, and pointed out that, under FAR 22.302(a), the contracting officer “must assess liquidated damages at the rate of \$10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess . . . of 40 hours without paying overtime wages.” Finally, Myers was reminded that the head of EPA could reduce or waive the liquidated damages, up to the amount of \$500,³ if the amount of those damages was determined to be incorrect or if it was determined that the contractor’s failure to comply was inadvertent despite the exercise of due care, but added that, as yet, EPA had not received any information to consider in this regard. Respondent’s Motion to Dismiss, Exhibit F.

12. Myers replied to EPA’s November 12 letter on November 15, 2004, asking that the liquidated damages be waived for the following two reasons:

1. Myers is not culpable for the violation which prompts the liquidated damages, in fact, Myers paid the proper amount to employees required under the existing contract #68-D-01-050.
2. It was not until eighteen months later that the DOL required EPA to retroactively include a modification to the contract which increased the wages for the period of October 1, 2001 - September 30, 2002. However, at no time during the period upon which EPA was refusing to pay the increased wage did Myers not pay the contract amount for overtime.

Respondent’s Motion to Dismiss, Exhibit G.

13. By letter dated January 3, 2005, the EPA official designated by the head of the agency to exercise the authority to waive CWHSSA liquidated damages declined to do so, taking the position that Myers was obligated to comply with CWHSSA under its fixed-price contract regardless of whether EPA agreed to a proposed modification of wage rates and that the violation was, therefore, not inadvertent. Respondent’s Motion to Dismiss, Exhibit H.

14. After receipt of that letter, Myers filed an appeal at the Board, challenging the assessment of liquidated damages as set forth in EPA’s November 12, 2004, letter. Myers

³ For amounts over \$500, the Agency Head or designee is authorized to recommend to DOL that liquidated damages be waived or reduced. 41 CFR 22.302(c).

contends in its appeal that the assessment of liquidated damages based on wages paid is improper because EPA breached the contract itself by failing to incorporate the proper collective bargaining agreement (CBA) terms in Myers' contract. In its appeal, Myers states in pertinent part:

DOL determined that EPA incorporated the wrong wages in the contract, and that EPA was required to incorporate in the contract the wage rates reflected in the CBA addendum, and instructed EPA to comply if EPA agreed that the factual information presented in DOL's letter "is correct." . . . EPA agreed with the facts presented in DOL's letter, and as a consequence, pursuant to DOL's direction, EPA incorporated the CBA addendum wage rates in the contract. However, EPA's contracting officer is now seeking to collect from Myers liquidated damages for paying the wage rates that EPA erroneously included in the contract, rather than the CBA addendum wage rates that EPA refused to include in the contract. . . . As reflected by DOL's . . . letter, EPA breached the aforesaid contract by failing (and affirmatively refusing) to incorporate in the contract the wage rates that are reflected in the CBA addendum.

Appellant's Opposition.

Discussion

EPA has moved to dismiss this appeal for lack of jurisdiction on the ground that the dispute is properly denominated as one concerning labor standards and as such is not a contract action eligible for resolution under the Contract Disputes Act. EPA contends that the DOL, in conjunction with its enforcement authority, investigated Myers and found violations of law. DOL then notified EPA that liquidated damages in connection with the underpayment of overtime wages must be assessed,⁴ and EPA complied with this directive. Myers, in accordance with DOL procedures, appealed to the agency head's designee, who considered Myers' position and found no evidence to warrant recommending a grant of relief

⁴ It is not entirely clear from the record whether Myers' violation of the CWHSSA is based on the failure to pay overtime in accordance with the higher hourly rate under the CBA addendum or on the failure to pay overtime wages at all. For purposes of resolving this motion it does not matter, however.

from the assessed liquidated damages. Thus, EPA asserts, the proper forum to decide Myers' objections to the assessment of liquidated damages is the DOL Administrative Review Board. Pursuant to 29 CFR 5.8(c), the contractor may petition the Administrative Review Board for review of the matter. Myers disagrees, countering that its appeal, as stated, is properly brought to the General Services Board of Contract Appeals because Myers is not challenging any action taken by DOL, but rather is contending that, because EPA breached the contract, it is not entitled to collect liquidated damages from Myers.

In essence, EPA argues that this claim comes within the rule established by the Federal Circuit in *Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425 (Fed. Cir. 1991), to the effect that boards of contract appeals lack jurisdiction over labor standard matters that are reserved exclusively for resolution by the DOL. *See, e.g., Chem-Care Company, Inc.*, ASBCA 53614, 04-1 BCA ¶ 32,593 (citing *DOSCO Manufacturing, Inc.*, ASBCA 40404, 91-2 BCA ¶ 23,955). The Federal Circuit clarified its *Emerald Maintenance* ruling in *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993), however. This decision explains that while DOL is vested with exclusive jurisdiction over labor standards matters, the Court of Federal Claims and boards of contract appeals may still entertain a dispute that centers on the mutual contract rights and obligations of the parties even though matters reserved to and decided exclusively by the DOL are part of the "factual predicate." *Id.* at 1580; *see also Reddick & Sons, Inc. v. United States*, 31 Fed. Cl. 558 (1994); *Active Fire Sprinkler Corp. v. General Services Administration*, GSBCA 15318, 00-2 BCA ¶ 31,124; *Twigg Corp. v. General Services Administration*, GSBCA 14639, 99-1 BCA ¶ 30,217; *P.M. Hagel & Associates, Inc. v. General Services Administration*, GSBCA 10742, 94-1 BCA ¶ 26,568 (1993). Appellant relies on the rationale of *Burnside-Ott* to support its contention that its case belongs here.

In elaborating on its position, EPA maintains that Myers is in fact challenging an underlying DOL ruling, since DOL directed the contracting officer to assess liquidated damages. DOL relies specifically in the following provision of the contract, FAR clause 52.222-4(b), under which

[T]he responsible Contractor . . . [is] liable for unpaid wages if [it] violate[s] the terms in paragraph (a) of this clause [requiring payment of one and one-half times the basic rate of pay for hours worked in excess of forty in any given workweek]. In addition, the Contractor . . . [is] liable for liquidated damages payable to the Government. The contracting officer will assess liquidated damages at the rate of \$10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of 40 hours without paying

overtime wages required by the Contract Work Hours and Safety Standards Act.

EPA also refers us to FAR subpart 22.3, which prescribes policies and procedures applicable to the requirements of the CWHSSA. Specifically, FAR 22.302(a) states:

When an overtime computation discloses underpayments, the responsible contractor . . . must pay the affected employee any unpaid wages and pay liquidated damages to the Government. The contracting officer must assess liquidated damages at the rate of \$10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of 40 hours without paying overtime wages required by the Act.

Based on the letter sent to EPA by DOL, and in light of the above provisions, EPA's contracting officer assessed the requisite liquidated damages. Thus, in EPA's view, this matter can only be reviewed by DOL.

Myers counters that this dispute is properly before this Board because it is not disputing the calculation of the liquidated damages assessment but rather is asserting that EPA's own conduct in breaching the contract, which placed Myers in a financial predicament and jeopardized its ability to perform the contract, negates the Government's right to impose liquidated damages. According to Myers, EPA either breached or constructively changed the contract in the following respects:

1. EPA refused to incorporate the CBA addendum in a timely fashion;
2. EPA breached its obligation under FAR clauses 22.1007 and 22.1008 to notify DOL of the CBA addendum and obtain the appropriate wage rate determination;
3. EPA breached its contractual obligation to reasonably administer the contract as implied by law and required by FAR clause 1.602-2; or
4. Alternatively, EPA's failure to comply with the labor requirements constituted a constructive change under the contract's Changes clause.

Myers, citing *Placeway Construction Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990), further reasons that the contracting officer's decision of November 12, 2004, assessing liquidated damages, asserted a monetary claim against Myers which is appealable under the Contract Disputes Act. *See also Midwest Properties, LLC v. General Services Administration*, GSBCA 15822, 03-2 BCA ¶ 32,344 (2002); *Cleveland Telecommunications Corp. v. General Services Administration*, GSBCA 12540, 94-1 BCA ¶ 26,588 (1993). Because this is a labor-related dispute that centers on the parties' mutual contract rights and obligations, Myers believes that the matters reserved to DOL are simply part of the factual predicate of a matter that properly belongs at the Board. *Burnside-Ott*.

Although the facts posed by this appeal are unusual, we conclude, based on applicable case law, that Myers has made an effective argument that its contentions indeed are not directed at the labor standards themselves, but rather are centered on its premise that EPA breached the contract's requirement that it incorporate the revised wage standards agreed to in the CBA addendum and thus negated the corollary contract provision providing for assessment of liquidated damages in these circumstances. Viewed from another perspective, Myers is saying that even if liquidated damages are technically required to be assessed under the DOL regulations and corresponding FAR clause, EPA, by breaching or constructively changing the contract, must somehow compensate Myers for this situation -- either through an abatement of the liquidated damages assessment or, if that is not possible, by equitably adjusting the contract price to reflect this cost.

Myers raised these contentions in its correspondence with EPA leading to the eventual decision that Myers has appealed to the Board. Whether Myers can prevail on these theories remains for later proceedings. Myers is entitled to pursue its contract-related arguments at the Board.

Decision

EPA's motion to dismiss for lack of subject matter jurisdiction is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge