UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 22, 2016

CBCA 5084

SECTEK, INC.,

Appellant,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

Respondent.

Jeffrey Weinstein of The Weinstein Law Group, PLLC, Washington, DC, counsel for Appellant.

Jennifer Klein and Stephani Abramson, Office of General Counsel, National Archives and Records Administration, College Park, MD, counsel for Respondent.

Before Board Judges **SHERIDAN**, **WALTERS**, and **CHADWICK**.

CHADWICK, Board Judge.

SecTek, Inc. (SecTek or appellant) has a fixed-price contract with the National Archives and Records Administration (NARA or respondent) that is subject to the Service Contract Act, 41 U.S.C. §§ 6701-6707 (2012). SecTek employs unionized security guards. During the base year of the contract, SecTek and the union signed a new collective bargaining agreement (CBA), the economic terms of which took effect on the first day of the first option period. When SecTek requested an increase in the contract price for the first option period to reflect the higher wages and fringe benefits under the new CBA, NARA

denied the request. NARA asserts that, on these facts, the base year of the contract was not the "predecessor contract" to the first option period for purposes of a price adjustment under the Service Contract Act and its implementing regulations. We agree and accordingly deny the appellant's motion for summary relief, grant the respondent's cross-motion for summary relief, and deny the appeal.

Statement of Facts

The parties agreed on the following facts, among others.

1. NARA awarded firm fixed price, task-order contract NAMA-14F-0127, for security guard support services, to SecTek in August 2014. The initial performance period was from September 1, 2014, through August 31, 2015. Appeal File, Exhibit 4; Joint Statement of Undisputed Facts ¶¶ 1-2.

2. The contract included Federal Acquisition Regulations (FAR) Clause 52.222-41, Service Contract Act of 1965 (Nov 2007). Pursuant to that clause, the contract incorporated Department of Labor Wage Determination 2005-2103, Revision 13, dated June 19, 2013, and CBA 2010-3553, Revisions 0 through 2, between SecTek and the International Guards Union of America and its Local 153 (the union), members of which worked for SecTek on the contract. Appeal File, Exhibits 1-2; Joint Statement of Undisputed Facts ¶¶ 1-2.

3. On April 3, 2015, NARA notified SecTek of its intent to exercise the first option period under the contract, from September 1, 2015, through August 31, 2016. Appeal File, Exhibit 1; Joint Statement of Undisputed Facts ¶ 3.

4. On June 29, 2015, SecTek signed a new CBA with the union. This new CBA stated that it was "effective upon signing except where stated otherwise." Wages and fringe benefits were addressed in appendix A of the new CBA, which took effect on September 1, 2015. Thus, this CBA did not govern wages or fringe benefits until September 1, 2015. Appeal File, Exhibit 2 at 2, 37; Joint Statement of Undisputed Facts ¶ 5.

5. SecTek sent the new CBA to NARA on June 30, 2015. At the same time, SecTek requested a price adjustment under the contract, pursuant to FAR clause 52.222-43(d), Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts). Appeal File, Exhibit 3; Joint Statement of Undisputed Facts ¶ 6.

6. On August 15, 2015, the NARA contracting officer unilaterally issued a task order modification exercising the first option and incorporating in the contract, effective as of September 1, 2015, Revision 16 of Wage Determination 2005-2103, dated July 8, 2015. This

revised wage determination did not incorporate the wages or fringe benefits in the June 2015 CBA between SecTek and the union. Appeal File, Exhibit 4; Joint Statement of Undisputed Facts ¶¶ 7-8.

7. On August 28, 2015, after consulting with NARA about why the contracting officer had not incorporated the June 2015 CBA in the contract, SecTek sent NARA a revised version of the CBA, in which the effective date of Appendix A was changed from September 1, 2015, to August 31, 2015. Appeal File, Exhibit 5; Joint Statement of Undisputed Facts ¶¶ 10-11.

8. Despite this change, SecTek did not make any payments to its employees at the rates in the June 2015 CBA during the base year of the contract. Joint Statement of Undisputed Facts ¶ 11; Appellant's Rejoinder to Respondent's Response to Appellant's Motion for Summary Relief at 1 ("SecTek was required to pay its guards in accordance with the prior CBA for at least the contract base year, which it did.").

9. On September 22, 2015, SecTek submitted a certified claim for a price adjustment of $708,436.34 to account for the wage and fringe benefit increases under the June 2015 CBA. Appeal File, Exhibit 9.

10. On November 20, 2015, the contracting officer emailed SecTek a letter dated November 17, 2015, which she described as "NARA's Determination in response to your request to incorporate Sec Tek's [sic] CBA for Option Year One." In the letter, the contracting officer wrote that "NARA concluded that the wages and fringe benefits specified under" the June 2015 CBA, as amended in August 2015, "are not effective for purposes of [Service Contract Act] section 4(c) [41 U.S.C. § 6707(c)], as it pertains to Option Year 1 . . . which commenced on September 1, 2015." Appeal File, Exhibit 10; Joint Statement of Undisputed Facts ¶ 16. The parties disagreed as to whether this letter constituted a contracting officer's decision on SecTek's claim.

11. On December 1, 2015, SecTek filed this appeal from a deemed denial of its claim.

12. On January 15, 2016, SecTek filed a complaint alleging that NARA breached the contract and the duty of good faith by denying the price adjustment.

13. On April 1, 2016, following a suspension of the appeal, the contracting officer issued a decision (or a revised decision) denying the claim. Respondent's Status Report (Apr. 14, 2016), Attachment 1; Joint Statement of Undisputed Facts ¶ 18.

14. On April 29, 2016, the parties filed simultaneous cross-motions for summary relief, with a joint statement of undisputed facts. By permission of the Board, NARA filed a response to SecTek's motion and SecTek filed a rejoinder to NARA's response.

Discussion

As a threshold matter, we have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 7103-7104, because SecTek's December 1, 2015, appeal was either a timely appeal from a contracting officer's decision issued on November 20, 2015, or a timely appeal from a deemed denial, filed more than sixty days after the certified claim was submitted. We need not decide which was the case, and the parties have not asked us to do so. Our review is de novo. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc).

"Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on the undisputed material facts." *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,623. "A material fact is one that will affect the outcome of the case." *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,394.

We address each cross-motion on its own merits, drawing all reasonable inferences in favor of the non-movant, should inferences be required. *See Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,991. "The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue." *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066, at 176,123 (citing *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999)).

NARA argues that the undisputed fact that SecTek did not pay its guards according to the terms of the June 2015 CBA during the base year precluded NARA from incorporating the economic terms of that CBA in SecTek's contract for the first option year. We agree.

The Service Contract Act bars a successor to a covered contract from paying a service employee "less than the wages and fringe benefits the service employee would have received under the predecessor contract, including . . . any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement," with an exception not relevant here. 41 U.S.C. § 6707(c). This law "guarantee[s] a wage base" for the successor contractor's employees. *Service Employees' International Union v. General Services Administration*, 443 F. Supp. 575, 579 (E.D. Pa. 1977). The FAR contains a parallel provision, which adds that the requirement that the successor contractor pay at least the same wages and fringe benefits as the predecessor contractor "is self-executing and is not

contingent on incorporating a wage determination or the wage and fringe benefits of the predecessor contractor's collective bargaining agreement in the successor contract." 48 CFR 22.1002-3(a) (2013) (FAR 22.1002-3(a)).

The regulations implementing the Service Contract Act provide that "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 the application of the Act's provisions." 29 CFR 4.143(b) (emphasis added). This means that "a contractor may become its own successor . . . [when] the contracting agency exercises an option." *Id*. 4.163(e). However, the contractor will be considered the successor to its own contract

> only if the employees who worked on the predecessor contract *were actually paid* in accordance with the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement. Thus, for example, [41 U.S.C. § 6707(c)] would not apply if the predecessor contractor entered into a collective bargaining agreement for the first time, which did not become effective until after the expiration of the predecessor contract.

Id. 4.163(f) (emphasis added).

FAR clause 52.222-43(d), under which SecTek sought the price adjustment for the first option year, provides, as relevant here, that the price of a covered contract "will be adjusted to reflect the Contractor's actual increase . . . in applicable wages and fringe benefits to the extent that the increase is made to comply with" the wage determination applicable "at the beginning of the renewal option period," or a wage determination "applied to the contract by operation of law."

We apply the plain language of the statute and regulations. *See United States v. James*, 478 U.S. 597, 604 (1986) ("[We] assume that the legislative purpose is expressed by the ordinary meaning of the words used."); *Rumsfeld v. United Technologies Corp*., 315 F.3d 1361, 1370-71 (Fed. Cir. 2003). The base year and the first option year must be considered different "contracts." SecTek negotiated a new CBA with the union during the base year, but it did not succeed to the base year of the contract, because it did not pay the union members under the new CBA until the start of the first option year. Although we may assume that the June 2015 CBA itself obligated SecTek to pay the guards the higher wages and fringe benefits during the first option year, the successor contractor provision of the Act did not require such compensation "by operation of law." *See* FAR clause 52.222-43(d). The wage determination applicable at the start of the first option year was number 2005-2103, Revision 16, dated July 8, 2015, which did not include the higher rates under the new

CBA. For these reasons, NARA properly found that SecTek was not entitled to an adjustment in the price of its fixed-price contract.

SecTek argues that NARA's reading of the successor/predecessor language in 29 CFR 4.163 is "narrow and incorrect," citing *Penn Enterprises, Inc*., ASBCA 52234, 01-1 BCA ¶ 31,244, and *COSTAR III, LLC*, ASBCA 56479, 11-2 BCA ¶ 34,830. But neither of those decisions (which in any event would not bind us) materially construed 29 CFR 4.163. In *Penn Enterprises*, the Armed Services Board of Contract Appeals (ASBCA) had to decide whether payments to union members during the first option year, for sick leave that the employees did not use during the base year, were payments made under the CBA for the base year or under the CBA for the option year. In resolving that issue, the Board presumed that the exercise of the option created "a 'new' contract for purposes of the Service Contract Act," but held that this was not dispositive of the issue presented. 01-1 BCA at 154,198. The language on which SecTek relies in *COSTAR* was dictum. The ASBCA said there, "[E]ssentially, . . . if a contractor negotiates a change to its CBA during any period of its contract," it will be entitled to a price adjustment under FAR 52.222-43 "when the next contract option is exercised," but that was not the ASBCA's holding. 11-2 BCA at 171,368-69. The Board's conclusion was simply that a price adjustment "is not available during the period when the change to the CBA is agreed upon." *Id*. at 171,369.

SecTek argues that

> [i]f NARA's interpretation were correct, a hypothetical Company B, succeeding to a predecessor Company A, would not be entitled to recover increased wages and fringe benefits included in a new CBA negotiated during Company B's contract base period until at least the beginning of the *second* option period of Company B's contract, since only Company B is the "successor contractor." This flies in the face of how contractors have routinely negotiated CBAs for decades.

Appellant's Motion for Summary Relief at 4. A contractor can readily qualify as its own successor, however, by actually paying its employees under a CBA that will be applicable in the next contract year. 29 CFR 4.163(f). SecTek argues that it "was required to pay its guards in accordance with the prior [contractor's] CBA for at least the contract base year." Appellant's Rejoinder to Respondent's Response at 1. But the Act only forbade SecTek from paying the union members "less than" they made under the predecessor contract. 41 U.S.C. § 6707(c). It did not preclude SecTek from agreeing to increase their wages or fringe benefits during the base year.

Finally, SecTek argues that it has received price adjustments in these same circumstances under "numerous other contracts with federal agencies going back many years." Appellant's Rejoinder at 1. We have no evidence of that, and would not consider it relevant to interpreting the statute or regulations if we did.

Because NARA properly denied the price adjustment, there was no breach.

Decision

The appeal is **DENIED**.

KYLE CHADWICK
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

RICHARD C. WALTERS
Board Judge