U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

SUMMITT INVESTIGATIVE SERVICE, INC.	**ARB CASE NO. 96-111**
and	**(BSCA CASE NO. 95-10)**
HAROLD WIGFALL and MICHAEL B. HOLIDAY,	**(ALJ Case No. 94-SCA-031)**
Individually and Jointly	
RESPONDENTS.	**DATE: March 27, 1997**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL ORDER DENYING MOTION FOR RECONSIDERATION

On November 15, 1996, the Administrative Review Board issued a Final Decision and Order (F. D. and O.) in this case arising under the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq*. and the implementing regulations at 29 C.F.R. Part 8. On January 16, 1997, the Respondents, Summitt Investigative Services, Inc., and Harold Wigfall and Michael B. Holiday (individually and jointly)(collectively Summitt) moved for reconsideration of our decision and submitted a brief in support thereof. On January 28, 1997, the Administrator, Wage and Hour Division, resisted Summitt's motion and noted that the "Administrator's earlier submission and the administrative record support the decision of the Board in this case." On February 14, 1997, Summitt supplemented the request for reconsideration. We have reviewed the matter and reaffirm our earlier decision, for all the reasons set out below.

Summitt's primary argument is that a "glaring deficiency," Summitt brief at 2, in the wage determination "sidetracked the contract from the start." *Id*. We agree that the wage determination contained a "glaring deficiency," when compared to the statement in the bid solicitation regarding job classifications. That is exactly why Summitt had an obligation to seek correction of the wage determination prior to bidding on the contract. The case cited by Summitt in its supplement to the request for reconsideration clearly supports this position. The United States Court of Federal Claims held that "a patent or *glaring* ambiguity would impose 'an affirmative duty on plaintiff to seek clarification [from the agency] prior to submitting its bid. *Enrico Roman, Inc., v. United States*, 2 Cl.Ct. 104, 107 (1983).'" (Emphasis supplied). *United Internal Investigative Services v. U.S.*, 33 Fed.Cl. 363, 370 (1995).

After arguing that the problem with the wage determination in this case constituted a "glaring deficiency," Summitt attempts to avoid the obligation to seek correction of that "glaring deficiency"

by arguing that it was actually just a clerical error. Summitt argues that a wage determination that allegedly is missing certain job classifications can have those missing job classifications added to the wage determination without resort to the conformance process.

Summitt cites 29 C.F.R. §§ 4.5 and 4.54 in support of this argument. But, 29 C.F.R. §4.5(c)(2) only applies where "the Department of Labor discovers and determines . . . that a contracting agency made an erroneous determination that the SCA did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract." No such determination was made by the Department of Labor in this case. 29 C.F.R. § 4.54 deals with the revision of wage determinations to reflect more recent wage information, rather than the correction of an allegedly deficient wage determination.

The SCA regulations clearly state that the appropriate way to add allegedly missing job classifications to a contract wage determination is through the conformance process. *See* 29 C.F.R. § 4.6 (b)(2)(i)-(iv). Thus, we reject Summitt's argument that the allegedly missing job classifications could be added to the wage determination without resort to the conformance process. We also reject Summitt's argument that it should not be debarred because the Administrator wrongly failed to grant a conformance request in this case. Summitt never submitted all the information necessary to rule on a conformance request and any denial by the Administrator was not appealed to the Board pursuant to 29 C.F.R. Part 8.

Summitt's remaining arguments that are worthy of review are, in large part, based upon evidence that does not exist in the record of this case. Summitt's new counsel is attempting to make the proverbial 'silk purse' (a reversal of our initial decision) out of a 'sow's ear' (the record evidence presented by Summitt upon which our prior decision rests). To the extent that the new arguments are based upon evidence that is not contained in the record, we refuse to consider those arguments. We have noted below those areas where Summitt's arguments merit some attention, but upon scrutiny are not supported by record evidence.

The Vacation Issue

Summitt correctly points out that an employee need not be given a vacation on the date upon which the right to a vacation vests. "The vacation may be scheduled according to a reasonable plan mutually agreed to and communicated to the employees." 29 C.F.R. § 4.173(c)(2). Summitt now asserts that the Board committed reversible error "by requiring that Summitt allow employees to take a vacation at the time those benefits vest." Summitt Brief at 19. But, that is not an accurate description of the Board's holding.

Summitt's argument regarding this issue, up until the motion for reconsideration, was that "under the SCA, [Summitt] had until one year from the date of vesting to either make vacation payments to their employees or allow them to take vacation time off." Respondent's Post-Hearing Brief, Aug. 14, 1995, at 11. We rejected this argument because the SCA requires a paid vacation "*i.e.*, payment at the time the vacation is taken, not up to a year later." F. D. and O. at 12.

We reject Summitt's modification of this argument now because there is no record evidence of a reasonable vacation plan, as contemplated by 29 C.F.R. § 4.173(c)(2). In fact, Summitt has never even argued that the Federal Aviation Authority (FAA) forced it to allow employees to take a vacation in contravention of a reasonable vacation plan. The only vacation "plan" that can be gleaned from this record is that Summitt was either not going to pay employees at the time of their vacation, or was not going to allow any employee to take a vacation until the end of the year. Neither of these vacation "plans" meet the requirements of 29 C.F.R. § 4.173(c)(2).

The Uniform Issue

The contract clearly and unequivocally required FAA approval prior to the purchase of uniforms. The FAA rejected Summitt's existing uniforms, according to Summitt Vice President Michael B. Holiday, because the "'FAA had done some study and this was the [FAA's] style of uniform that they were only going to accept.'" R. D. and O. at 6. The FAA contracting officer who made the decision not to accept Summitt's uniforms did not testify in this case. His reasons for rejecting the uniforms are only contained in the record as related above and by the statement of another FAA employee that "I think the striping was incorrect on the pants or the jacket." *Id*.

On the record presented in this case we cannot accept the argument that the FAA's decision to reject Summitt's existing uniforms was arbitrary. Uniforms are supposed to be identical. In a military/law enforcement setting the color of the striping on a uniform could be quite meaningful, *e.g.*, it could distinguish between branches of the organization that the uniform represents. Therefore, FAA's decision to require that all its uniforms be the same, even to the extent of requiring the same color striping, is not on its face arbitrary.

Selective Enforcement

For the first time in its motion to reconsider Summitt argues that debarment under the SCA is selectively enforced against only small businesses and not against "Fortune 500-type large businesses." Summitt Brief at 7. There is absolutely no support for this allegation in the record. Thus, we reject Summitt's argument.

For all the reasons set out above, and for all the reasons set out in our F. D. and O. in this case, we reject Summitt's motion for reconsideration and reaffirm our initial decision.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member