In the Matter of:

SERVICESTAR LANDMARK PROPERTIES-FORT BLISS LLC AND SERVICESTAR DEVELOPMENT COMPANY LLC

ARB NO. 17-013

DATE: June 25, 2018

With Respect to the Applicability of the Service Contract Labor Standards Act to Contracts Related to the Freedom Crossing Project.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioners:
David R. Warner, Esq.; ***Centre Law & Consulting, LLC;*** **Tysons Corner, Virginia**

For the Respondent Administrator, Wage and Hour Division:
Jesse Z. Grauman, Esq.; Nicholas C. Geale, Esq.; Jonathan T. Rees, Esq.; and Jennifer S. Brand, Esq.; ***United States Department of Labor, Office of the Solicitor, Fair Labor Standards Division,*** **Washington, District of Columbia**

Before**: Joanne Royce, Administrative Appeals Judge and Leonard J. Howie III,** ***Administrative Appeals Judge***

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (the Board) pursuant to the Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C.A. §§ 6701-6707 (Thomson Reuters 2011), the regulations at 29 C.F.R. Parts 4 and 8, and Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377; 69,378 (Nov. 16, 2012).[1] ServiceStar Landmark Properties-Fort Bliss LLC (SLP) and ServiceStar Development Company LLC (SDC)

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[1] Under order 02-2012, the Secretary of Labor delegated to the Board jurisdiction to hear and decide administrative appeals arising under the SCA.

seek review of a ruling issued by the Administrator, Wage and Hour Division (the Administrator).

The Administrator found that the principal purpose of the contracts for construction and operation of "Freedom Crossing," a commercial shopping center on the military installation at Fort Bliss, Texas, is to furnish services through the use of service employees. In making this finding, the Administrator also concluded that the partial exemption for Davis-Bacon covered contracts does not apply and the retail subleases are subcontracts that are covered by the SCA. SDC/SLP appealed.

We conclude that the Administrator's determination was consistent with the Act and the regulations, was reasonable, and was not an abuse of discretion. We therefore affirm his final ruling for the reasons stated in this final decision and order.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 8.1(b), the Board has jurisdiction to hear and decide "appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative" rendered under the SCA.[2] Our review of the Administrator's final rulings issued pursuant to the Act is in the nature of an appellate proceeding.[3] We may affirm, modify, or set aside, in whole or in part, the decision under review.[4] We must modify or set aside the Administrator's findings of fact only when we determine that those findings are not supported by a preponderance of the evidence.[5] The Board reviews questions of law de novo.[6] We defer to the Administrator's interpretation of the SCA when it is reasonable and consistent with law.[7]

BACKGROUND

The Freedom Crossing shopping center at issue in this matter, is a commercial shopping center at Fort Bliss, Texas, and one of an intended twenty shopping centers planned for military installations across the United States. The two governing documents for the shopping center are a Public-Private Venture Agreement (PPV) and a Ground Lease Agreement (the Ground Lease).

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[2] *See also* SO 02-2012.

[3] 29 C.F.R. § 8.1 (d).

[4] 29 C.F.R. § 8.9 (b).

[5] *Id.*

[6] *United Gov't Sec. Officers of Am., Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 5 (ARB Sept. 29, 2003).

[7] *Alcatraz Cruises LLC*, ARB No. 07-024, slip op. at 5 (ARB Jan. 23, 2009).

The PPV is between the Army and Air Force Exchange Service (AAFES) and two companies, SLP and SDC. The Ground Lease is between the Army and SLP. Both agreements are for 40-year terms. The agreements anticipate that there will be retail tenant subleases entered into between SLP and third party retailers such as a Post Exchange, Commissary, movie theater, Starbucks, Denny's, Dollar Tree, and a Paul Mitchell Salon.

The PPV agreement provides for the project's construction and for ongoing operations with responsibilities divided between SLP and SDC. It states that the relationship between AAFES and SLP is as a grant by AAFES to SLP of a license and concession and the authority to grant sub-license and sub-concessions for the use of the buildings under the terms of the PPV agreement. Income from the leases under the PPV is income to AAFES, not to SLP.

The PPV agreement contains a clause expressly incorporating the Service Contract Act, requiring the SCA's provisions to be included in all third-party tenant leases, contracts, and subcontracts for covered work entered into by SLP or SDC pursuant to the PPV agreement or in connection with the Freedom Crossing project. In compliance with this clause, SLP incorporated SCA provisions into its subleases for retail tenants.[8]

The Ground Lease states that the leased area shall be used for "operation, maintenance, repair and rehabilitation of the improvements to be constructed on the Premises. . . ."[9] AAFES has a significant role—AAFES retained the title to the buildings, and through the Ground Lease, the Army granted AAFES the right to use and license the buildings. The Army or AAFES must approve all third-party tenant leases.

While SLP and SDC initially believed that the SCA applied to this project, they changed positions and came to believe that the SCA is not applicable to the PPV, the maintenance service contracts under it, or the subleases with the retail tenants. They wrote to the Administrator about their belief arguing that the SCA should not apply. They indicated to the Administrator that they were willing to voluntarily apply the SCA to contractors providing ancillary services such as janitorial and landscaping services, but intended to amend their subleases with retail tenants at Freedom Crossing to delete references to the SCA.

THE ADMINISTRATOR'S FINAL RULING

The Administrator ruled that the SCA applied to the contracts for the development and operation of Freedom Crossing and the related retail subleases. The Administrator noted that the contracts are not materially different from the type of concession contracts to which the SCA has applied for decades. Because the Freedom Crossing contracts are contracts in the form of leases, concessions, and licenses for the purpose of providing services primarily to military personnel and their families, the Administrator found SLP's arguments as to why the SCA did not apply unpersuasive.

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[8] Administrator's Determination Letter, at 2 (dated Oct. 17, 2016) (citing PPV at 8).

[9] *Id.* (citing Ground Lease at 3).

The Administrator prefaced his analysis by explaining that the SCA has long been applied to retail concessions on military installations.[10] The Administrator next analyzed applicability of the SCA to Freedom Crossing, and concluded that the purpose of the Freedom Crossing contracts is to furnish services through the use of service employees, such that the Act did apply to the contracts. The Administrator explained that the services that will be provided "include services provided by fast food outlets and other dining establishments, personal care salons, dry cleaning, and others," which have been found to be covered by the SCA.[11] The PPV agreement also provided for cleaning, mowing, landscaping, snow removal, and janitorial services, to which the Act has also been found to apply.[12]

The Administrator analyzed whether an exemption for Davis-Bacon-covered contracts applied and concluded that it did not. He explained that there is a three-part test to determine whether a contract is principally for services: 1) the stated purpose of the contract, 2) the amount and percentage of service labor hours performed under the contract, and 3) the percentage of contract costs attributable to services.[13] Applying the three-part test, the Administrator concluded that the contract is covered by the SCA because it was principally for services, the amount and percentage of service labor hours, including the hours and costs of the employees of the retail subtenants over 40 years as well as maintenance workers, would far exceed those for construction, and the percentage of contract costs attributable to services would also far exceed construction costs given the 40 year length of the Ground Lease and PPV agreements and the service costs associated with the operation, maintenance, and provision of retail services for that time period.

Finally, the Administrator analyzed whether the retail subleases may be considered subcontracts under the SCA. After discussing the definition of subcontract and indicating that it is not appropriate or reasonable to define it in a cramped manner, the Administrator ruled that even defining "subcontract" narrowly, he would still find the retail subleases to be subcontracts. The PPV agreement requires SLP to maintain retailer occupancy levels for the retail facilities and enter into, facilitate, and enforce retail subleases. Thus, the Administrator concluded, entering into the retail subleases is part of the primary contract and discharged an SLP obligation under the primary contract. The Administrator found that the combined language of the Ground Lease and the PPV supported his conclusion as well as the references to the retail tenant leases as "sub-leases," "sub-licenses and sub-concessions" of SLP's prime lease, license, and concession.

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[10] The Administrator discussed a 1967 letter from Secretary of Labor W. Willard Wirtz to Assistant Secretary of Defense stating that it was clear from legislative history that Congress intended for the SCA to cover concessionaire contracts the government entered into for the purpose of providing services to patrons of post exchanges on military installations and a 1986 ruling that the SCA applied to a fast food concession contract between the Navy Resale and Services Support Office and McDonald's for restaurants on military bases.

[11] Administrator's Determination Letter at 5.

[12] *Id.* (citing 29 C.F.R. 4.130(a)).

[13] *Id.* (citing *Raytheon Aerospace*, ARB Nos. 03-017, -019, slip op. at 4 (ARB May 21, 2004)).

DISCUSSION

In this case, the SLP and SDC argue that the SCA does not cover the PPV and the Ground Lease because the requirements of the agreements include substantial construction and property management activities and no retail operations; thus the principle purpose is not the furnishing of services through the use of service employees. SLP and SDC also argue that the subleases between SLP and third party retail tenants are not subcontracts under the SCA because the services the retail tenants provide are not covered by the Ground Lease or PPV. They assert that the Administrator improperly interpreted the agreements as requiring SLP to provide retail services, which is unsupported by the agreements themselves.

The SCA applies to all Federal service procurement contracts that have "as [their] principle purpose the furnishing of services in the United States through the use of service employees.[14] Certain categories of contracts, however, are exempt from SCA coverage. One such exemption is for "[a]ny contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting and decorating of public buildings or public works."[15] As previously discussed, SLP and SDC assert that the Freedom Crossing contracts are not subject to the SCA, because the principal purpose of the contracts is not to furnish services, but rather to develop, construct, and manage the Freedom Crossing project.

The Act's implementing regulations make clear that there is "no hard and fast rule" for determining the principal purpose of a contract.[16] Determining a contract's principal purpose within the meaning of the Act "is largely a question to be determined on the basis of all the facts in each particular case."[17]

Another SCA regulation is relevant to determining a contract's principal purpose where the contract involves a contract that requires both construction activity and service work to be performed by service employees. That regulation, 29 C.F.R. § 4.116(c)(1), specifically notes that "[i]n such a case, if the contract is principally for services, the exemption provided by section 7(1) will be deemed applicable only to that portion of the contract which calls for construction activity subject to the Davis-Bacon Act." Regarding this, the regulation under the heading "Service or maintenance contracts involving construction work," states further:

> The provisions of both the Davis-Bacon Act and the Service Contract Act would generally apply to contracts involving construction and service work where such contracts are principally for services. The Davis–Bacon Act, and thus the exemption provided by section 7(1) of the Act, would be applicable to

[14] 41 U.S.C.A. § 6702(a); 29 C.F.R. § 4.104.

[15] 29 C.F.R. § 4.115(b)(1).

[16] 29 C.F.R. § 4.111(a).

[17] *Id.*

> construction contract work in such hybrid contracts where: (i) The contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work (hereinafter referred to as construction) or it is ascertainable that a substantial amount of construction work will be necessary for the performance of the contract (the word "substantial" relates to the type and quantity of construction work to be performed and not merely to the total value of construction work (whether in absolute dollars or cost percentages) as compared to the total value of the contract); and (ii) The construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract.[18]

Thus, in rendering his decision, the Administrator noted that pursuant to the regulations, "factors for consideration which are clearly relevant in determining if the contract is subject to the SCA include the stated purpose(s) of the contract, the amount and percentage of service labor hours performed on the contract, and the amount and percentage of contract costs attributable to services."[19] Reviewing the Administrator's treatment of these factors, we conclude that he properly determined that the principal purpose of the Freedom Crossing contracts is to furnish services and that it is therefore subject to the SCA.

In the first place, the Administrator noted that operation of Freedom Crossing involves the provision of a substantial quantity and variety of services through the use of service employees including those provided by fast food outlets and other dining establishments, personal care salons, dry cleaning, and others. These services are covered by the SCA.[20] The PPV agreement provides for services including cleaning, mowing, landscaping, snow removal, and janitorial services, among others. The SCA covers these services.[21] The Administrator rejected SLP and SDC's arguments that the principle purpose of the contracts was not services because it did not provide these services directly (and that the purpose was "creation and long-term operation of Freedom Crossing."). The Administrator reasoned that the various services contemplated by the contracts could not be segregated as SLP and SDC asserted they should be. Because the purpose of Freedom Crossing is to provide retail services to military families, "creation and long-term operation" of Freedom Crossing, also has furnishing of services by service employees as the principal purpose. Further, the Ground Lease states that the premises "shall be used for purposes of operation, maintenance, repair and rehabilitation of the improvements to be constructed on the Premises," and the PPV states that its purpose is "to develop and manage construction and operation of the Project," which anticipates both construction and service-related work.

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[18] 29 C.F.R. § 4.116(c)(2).

[19] Administrator's Determination Letter, at 8.

[20] 29 C.F.R. 4.130(a).

[21] *Id.*

Secondly, the Administrator examined the amount and percentage of labor hours and contract costs performed under the contract. The Administrator considered the work performed by employees of the contractor and by subcontractors. While the record did not show the amount and percentage of service labor hour or contract costs, as compared to construction labor costs, the Administrator looked at the 40-year lease term and PPV agreement to determine that the service labor hours and costs associated with the operation, maintenance, and provision of retail services at Freedom Crossing will far exceed construction costs. We determine that the Administrator had a reasonable basis to conclude that the principal purpose of the Freedom Crossing contracts was to furnish services.

Finally, we conclude that the Administrator reasonably determined that the retail subleases are subcontracts under the SCA. That the retail subtenants will provide retail services is a part of the primary contracts. We agree with the Administrator that reference to the retail tenant leases as subleases of SLP's prime lease also supports the conclusion that the parties understood the retail tenants to be operating a part of SLP's contracts.

Therefore, we hold that the Administrator's determination that the principal purpose of the Freedom Crossing project contracts is to furnish services was a reasonable exercise of the Administrator's authority. We also hold that the retail tenants of Freedom Crossing are subcontracts under the SCA. Thus, we affirm the Administrator's ruling.

CONCLUSION

The Administrator's final determination that the Freedom Crossing contracts were subject to the SCA is consistent with the Act and applicable regulations and his conclusions are well-reasoned. The Administrator's October 17, 2016 final ruling is **AFFIRMED,** and the Petitions for Review are **DENIED.**

SO ORDERED.

LEONARD J. HOWIE III
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge