U.S. Department of Labor

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

In the Matter of:

DEFENSE THREAT REDUCTION AGENCY

ARB CASE NO. 99-108

***In re*: Application of Wage Determination No. 94-2531, rev. 12, to DTRA Contract Number OSIA01-96-C-0004 for security guard services at West Jordan Russian Housing Complex, Salt Lake County, West Jordan, Utah.**

DATE: Nov. 30, 1999

Appearances:

For the Complainant:

Thomas M. Pike, *pro se, Contracting Officer, Defense Threat Reduction Agency, Dulles, Virginia*

For the Respondent:

Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, DC*

REMAND ORDER

The Defense Threat Reduction Agency ("DTRA") has petitioned the Administrative Review Board ("ARB") for review of U.S. Department of Labor Wage Determination Number 94–2531, revision 12 (Sept. 18, 1998), pursuant to the McNamara–O'Hara Service Contract Act of 1965 ("SCA"), as amended, 41 U.S.C. §351 *et seq.* (1994) and 29 C.F.R. §4.56(b). The contract to which the wage determination applies provides Security Guard (Police Officer) Service in support of treaty inspection activities at the West Jordan Russian Housing Project in West Jordan, Utah.

On October 13, 1999, we ordered DTRA to show cause why its petition for review should not be dismissed on the grounds that its original request for review by the Administrator was untimely, or in the alternative, dismissed and remanded to the Administrator for further consideration on the grounds that the Administrator has issued no final order. We issued the Order to Show Cause in response to a motion to dismiss DTRA's petition for review and to suspend the briefing schedule filed by the Deputy Administrator of the U. S. Department of Labor's Wage and Hour Division.

The regulation at issue governing the review and reconsideration of wage determinations by the Administrator provides in relevant part:

> Any [request for review and reconsideration of a wage determination] must be <u>accompanied by supporting evidence</u>. In no event shall the Administrator review a wage determination or its applicability after the opening of bids in the case of a competitively advertised procurement, or later than 10 days before commencement of a contract option or extension. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

29 C.F.R. §4.56(a) (emphasis supplied). The Deputy Administrator acknowledges that DTRA originally sought review of the wage determination on May 27, 1999, more than ten days before the date of the commencement of the option period on July 1, 1999. However, the Deputy Administrator asserts that DTRA submitted no evidence in conjunction with its request for review and reconsideration. Accordingly, the Deputy Administrator contends that because DTRA did not make a request <u>accompanied by supporting evidence</u> more than ten days before the commencement of the contract (and in fact, did not submit such supporting evidence until it filed its petition for review with the ARB, subsequent to the commencement of the option period), the original request for review was untimely.

In the alternative, the Deputy Administrator argues that if the Board disagrees with his contention that DTRA's request for review was untimely, the petition for review must nevertheless be dismissed and the case remanded to the Wage and Hour Division for further consideration because the Deputy Administrator has not yet issued a final decision in response to DTRA's request for review of the wage determination. In support of this argument, the Deputy Administrator cites 29 C.F.R. §8.1(b) which states that the ARB has jurisdiction to decide questions arising from the final decisions of the Administrator (or his authorized representative). DTRA has petitioned for review of a June 15, 1999 letter from Sandra Wilson Hamlett, Supervisory Salary and Wage Specialist ("Hamlett"). The Deputy Administrator contends that this letter was not the final ruling on the request for review.

Resolution of these two issues – whether the original request was untimely because it was not accompanied by supporting evidence, and whether the Wage and Hour Division's response was a "final decision" of the Administrator – requires examination of the exchange of correspondence between DTRA and the Division. DTRA, in its May 27, 1999 letter requesting review and reconsideration, stated:

> Follow-up consultation with the West Jordan, Utah Police Department indicates that, when taking into account area cost of living raises, the $20.67 hourly rate is considerably higher than the local state, county, and city government Police Officer wage rates.
>
> Based upon the aforementioned circumstances, the DTRA requests that a review of the attached DoL Wage Determination be conducted to confirm the $20.67 hourly rate.

> A copy of the original request, to include the Standard Forms 98 and 98a, are also attached for your review.

In response, the Hamlett letter explained the methodology the Wage and Hour Division used in determining the applicable wage rate and stated that if DTRA "require[d] further consideration, such requests must be submitted with[in] the time frames prescribed in Section 4.56 of Title 29, Part 4 of the Code of Federal Regulations and must be accompanied by supporting evidence." (Emphasis supplied). Attached to the letter was a document entitled "Criteria for Data Submitted For R&R." An introductory paragraph of this document states:

> Section 4.56 of 29 C.F.R., Part 4 provides that any interested party affected by a WD [wage determination] issued under the McNamara–O'Hara Service Contract Act may request review and reconsideration by the Administrator. We have reviewed your request and found that the data submitted in support of your request are insufficient to support a review and reconsideration.

This introduction is followed by seven enumerated criteria and five additional items provided as guidance, "[i]f you choose to submit data for review and reconsideration within the appropriate time frames as provided in 4.56."

The term "supporting evidence" found in 29 C.F.R. §4.56(a) is neither defined by the SCA, nor by regulation. In this case DTRA cited as supporting evidence the results of "consultation" with the West Jordan, Utah Police Department, which DTRA alleged confirmed that the $20.67 hourly rate in the wage determination is considerably higher than the local state, county, and city government Police Officer wage rates. We would have agreed with the Deputy Administrator that this "supporting evidence" is not sufficient to require the Deputy Administrator to amend his initial wage determination, if the Deputy Administrator had so found. However, the Deputy Administrator did not deny DTRA's request for review and reconsideration on this basis, but instead invited DTRA to submit additional evidence. On appeal, the Deputy Administrator now contends for the first time, that DTRA failed to file a timely request because its original request was "accompanied by no information that could reasonably be construed as "'supporting evidence.'" Deputy Administrator's Motion to Dismiss Petition for Review and to Suspend the Briefing Schedule at 5.

The only suggestion the Deputy Administrator offers as to the type of data it would consider sufficient to constitute "supporting evidence" is the document entitled "Criteria for Data Submitted for R&R" attached to the Hamlett letter. However, we do not agree that DTRA's request for review and reconsideration may be dismissed as untimely because it fails to comply with this "guidance," provided to DTRA only after it had filed its request for review and reconsideration. The detailed and extensive data described in the "guidance" is not necessarily inherent in the term "supporting evidence." If the Deputy Administrator intends to require such data before it will even consider whether a request for reconsideration is timely filed, it is incumbent upon the Deputy Administrator, in the interest of fundamental fairness, to

publicize the criteria by which it intends to judge the timeliness of a request for reconsideration so that it is available to the public in advance of filing, and not (as here) after the request has been filed and the time for filing has all but run. Accordingly, we **DENY** the Deputy Administrator's motion to dismiss DTRA's petition for review on the grounds that its original request for review and reconsideration pursuant to 29 C.F.R. §4.56(a) was untimely.

We also sympathize with DTRA's confusion regarding the proper procedure to follow once it received the Hamlett letter. This letter was in response to a letter from DTRA to the Administrator of the Wage and Hour Division requesting a review of the wage determination. While the Deputy Administrator now claims that DTRA submitted insufficient "supporting evidence" even to invoke the review and reconsideration procedure pursuant to 29 C.F.R. §4.56(a), this argument does not appear consistent with the Hamlett letter's review of the methodology under which the challenged wage determination was rendered and the statement that if the DTRA required "further consideration" such requests "must be submitted with[in] the time frames prescribed in Section 4.56 of Title 29, Part 4 of the Code of Federal Regulations and must be accompanied by supporting evidence." We note, however, that the Hamlett letter does not indicate whether it was addressing "further consideration" under subsection 4.56(a), or instead under subsection 4.56(b). The Deputy Administrator now contends that it was simply informing DTRA that to invoke review of the wage determination pursuant to 29 C.F.R. §4.56(a), it must submit "supporting evidence." However, Hamlett's reference to 29 C.F.R. §4.56 was not, in fact, specifically limited to subsection (a). Hamlett's reference could, as DTRA argues, just as reasonably be interpreted as applying to 29 C.F.R. §4.56(b) which provides, "Any decision of the Administrator under paragraph (a) of this section may be appealed to the Administrative Review Board within 20 days of issuance of the Administrator's decision."[1/]

If an interested party seeks review and reconsideration of a wage determination pursuant to 29 C.F.R. §4.56(a), the party's expectation that it will receive in response a final decision of the Administrator subject to review pursuant to 29 C.F.R. §4.56(b) is reasonable. Accordingly, if the Wage and Hour Division issues a response to a request for a review and reconsideration that does not constitute a final order of the Administrator subject to such review, it behooves the Wage and Hour Division to so state explicitly, in an effort to reduce the number of premature appeals which waste the time and resources of both the parties and the ARB. *Accord Swetman Security Service, Inc.*, ARB Case No. 98-105 (July 23, 1998); *Diversified Collection Services, Inc.,* ARB Case No. 98-062 (May 8, 1998).

[1/] The regulation further provides that any such appeal "shall be in accordance with the provisions of 29 C.F.R. Part 8." 29 C.F.R. §4.56(b). The Part 8 regulation describing the ARB's jurisdiction to hear appeals specifies that such jurisdiction extends to "questions of law and fact from **final** decisions of the Administrator of the Wage and Hour Division or authorized representative . . ." 29 C.F.R. §8.1(b) (emphasis supplied).

Accordingly, given the Deputy Administrator's contention that he has not yet rendered a final decision in response to DTRA's request for review and reconsideration, we **GRANT** the Deputy Administrator's motion to dismiss DTRA's appeal without prejudice and suspend the briefing schedule and **REMAND** the case to the Deputy Administrator for further consideration. Because of the confusion the Hamlett letter engendered regarding the proper procedure for submitting additional evidence and pursuant to 29 C.F.R. §8.1(d), DTRA shall have **25 days** from today's date to submit additional evidence to the Deputy Administrator, including but not necessarily limited to the evidence submitted to the ARB for the first time on appeal, and the Deputy Administrator shall have **45 days** from today's date to consider DTRA's request for review and reconsideration in light of the new evidence submitted and issue a final decision pursuant to 29 C.F.R. §4.56(a).

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member