

WHEN WILL BOARDS HAVE JURISDICTION TO ADJUDICATE MATTERS THAT RELATE TO SERVICE CONTRACT ACT ISSUES?

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There is an interesting question of whether or not the Boards of Contract Appeals (as opposed to the Department of Labor, or DOL) have jurisdiction over certain matters involving the Service Contract Act, 41 U.S.C. Chapter 67. A recent case, *Alcazar Trades, Inc.*, CBCA 5837, Feb. 27, 2018, is a case where the Civilian Board found that the dispute was solely within DOL's jurisdiction, and dismissed an appeal involving a wage determination. There are other cases which are distinguishable, as explained below, where the BCA's will accept jurisdiction under certain circumstances.

Alcazar negotiated a new collective bargaining agreement ("CBA") under a GSA schedule contract, and submitted the new CBA to the agency (Nuclear Regulatory Commission) contracting officer, requesting upward wage adjustments in the contract option years. The contracting officer denied the claim, and Alcazar appealed. The Civilian Board, however, dismissed the case for lack of jurisdiction because the Department of Labor never issued a new wage determination.

The Board noted that deciding whether a particular CBA should form the basis of a new wage determination for the option years is left to the DOL. The Board stated that the DOL regulations in 29 CFR Part 7 set forth the [exclusive] procedure for appellant to follow "...concerning correct wage determination to be used in its contract" and the "regulations leave it to DOL to decide whether the ...CBA should have formed the basis of a wage determination for the contracting officer to apply when considering a price adjustment." Alcazar asserted that the Board had jurisdiction because the CO failed to fulfill his duty to obtain a new wage determination based on the CBA, but the Board noted that it was only DOL that had the right to decide whether the new CBA should form the basis of a wage determination—and DOL had not done that. Therefore the case was dismissed for lack of jurisdiction.

There are numerous cases, however, where the Boards accept jurisdiction of a dispute—but only where that dispute centers on the contractual rights and obligations of the parties. "The Board maintains jurisdiction, even though matters related to, and decided exclusively by the Department of Labor are part of the factual predicate." *Central Paving, Inc.*, ASBCA No. 38658, 90-1 BCA ¶ 22305. Examples are:

- Where a contracting officer improperly refuses to comply with DOL's determination of specific wage classifications of employees. *IBI Security Servs., Inc.*, ASBCA No. 38960, 90-2 BCA ¶22687.
- Where a dispute concerns whether, when the contract was awarded, there was a mistake (mutual or unilateral) as to the applicability of the Davis-Bacon Act to appellant's employees. *Central Paving, Inc.*, ASBCA No. 38658, 90-1 BCA ¶ 22305.
- Where an appellant alleges that job descriptions and descriptions of labor classifications conflicted with local area practice and that there was no disclosure of a local area practice of classifying employees; where appellant alleges there was Government

misrepresentation in the laborer job descriptions in the solicitations and contracts; where appellant alleges that the contracting agency withheld superior knowledge in that it knew or should have known about local area practice, and where the appellant alleges that the contracting agency did not understand local practices and had made a mistake in the contract. *Emerald Maint, Inc.*, ASBCA No. 36628, 88-3 BCA ¶ 21103.

The Takeaway: Even where matters in a dispute are reserved to and decided by the Department of Labor, the Boards will take jurisdiction when the dispute centers on the contractual rights and obligations of the parties in a particular contract. Be careful in evaluating the particular category where your dispute lies, in order to determine if you should submit a contract claim, or a request to the DOL.

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