CONSTRUCTION CONTRACTS MAY EXCLUDE WAGE ADJUSTMENTS EVEN IF THERE IS A NEW WAGE DETERMINATION.

In a January 26, 2022 blog, "Construction Contracts (But Not Service Contracts) May Exclude Wage Adjustment Clauses" this author explained that contracting officers may include a "no wage adjustment clause for a new wage determination" as follows:

> Construction contracts that are subject to the Davis-Bacon Act (40 USC §§ 3131-3148), are required to include one of three possible wage adjustment clauses where there is a wage determination increase, one of which is a "no-adjustment" clause. Contracts for services that are subject to the Service Contract Act, 41 USC Chapter 67 are required to include two possible wage adjustment clauses where there is a wage determination increase, but in those contracts, the Federal Acquisition Regulation ("FAR") does not permit a "no-adjustment" clause. *Gulf Pacific Contracting, LLC,* ASBCA No. 61434, Sept. 26, 2021.

Recently, in *Pacific Dredge & Const., LLC,* ASBCA No. 63234, August 17, 2022, the Board showed the consequences of a "no-adjustment" clause in a construction contract. Pacific Dredge had a contract awarded by the Army Corps of Engineers for dredging federal navigation channels at the Santa Barbra Harbor. The contract included Federal Acquisition Regulation ("FAR") 52.222-30, Construction Wage Rate Requirements-Price Adjustment (None or Separately Specified Message). The clause states:

> (a) The wage determination [issued by Dept. of Labor] that is effective for an option to extend the term of the contract will apply to that option period
> (b) The Contracting officer **will make no adjustment in contract price, other than provided for elsewhere in this contract,** to cover any increases or dereases in wages and benefits as a result of-
> (1) Incorporation of the Department of Labor's ("DOL") wage determination at the exercise of the option to extend the term of the contract**.** (Emphasis added)

The agency issued a unilateral modification which exercised an option for the second contract year. This modification stated that a new DOL construction wage determination issued three months before the option began applied and superseded the prior wage determination. Pacific Dredge filed a claim for $42,700, asserting that this modification constituted a change pursuant to FAR 52.243-4, Changes. When the claim was denied, Pacific Dredge appealed to the Board.

The Board held that there could be no change in price unless a specific method of adjustment was provided for elsewhere in the contract. The Board said that neither the solicitation nor the contract contained "elsewhere" a separately specified pricing *method.* Rather, the contractor was allowed to propose separate prices for option periods. The Changes clause cannot be read to create an independent basis for the agency to pay the contractor the claimed wage increase. The changes clause is a mandatory change, and if the Board agreed that this clause required an equitable adjustment it this case, it would render FAR 52.222-30 meaningless because there

never would be a situation where NO adjustment would be made. The Board concluded that either the contract contains no method to adjust prices after award, or there is a separately specified method, such as the application of a coefficient to pricing obtained from pricing data. However, the Changes clause is not a separately specified pricing *method.*

Takeaway. Contractors must use caution when pricing construction contracts. Check FAR 52.222-30 in the solicitation, and if the "no adjustment" in price language is included, be sure to carefully price all options for any expected increase in construction wage costs that might occur prior to each option. Your price should not be "fixed" throughout the contract.

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