



In the Matter of:

**DIVERSIFIED COLLECTION
SERVICES, INC.**

ARB CASE NO. 98-062

DATE: September 25, 1998

***In re* request for review and
reconsideration of Wage Determination
No. 97-0364**

DECISION AND ORDER OF REMAND

This case is before the Board on the petition of Diversified Collection Services, Inc., (Diversified) seeking review of the March 13, 1998 final ruling of the designee of the Acting Administrator, Wage and Hour Division (Administrator) issued pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (1994) (SCA). *See* 29 C.F.R. §§8.1(b)(6), 8.7(b) (1998). Diversified challenges the Administrator's ruling that its request for review and reconsideration of Wage Determination (WD) 97-0364 was filed untimely. Diversified is joined in its challenge to the Administrator's ruling by the contracting agency, the Financial Management Service of the Department of the Treasury (FMS).

For the reasons set forth below, we grant Diversified's petition with regard to the Administrator's timeliness ruling and remand the case for the Administrator to address the merits of the parties' challenges to wage determination WD 97-0364, as applied to FMS Contract No. T-fms-97-19.

BACKGROUND

The Treasury Department's Financial Management Service awarded a negotiated contract for collections services to Diversified on September 30, 1997. The contract did not include a wage determination, as required by the SCA. AR Tab D.^{1/} On October 7, 1997, Diversified received from FMS a notice of a unilateral modification of the procurement contract incorporating SCA wage determination WD 97-0364, which had been issued by the Wage and Hour Division on September 24, 1997. The wage determination established prevailing wage

^{1/} The abbreviation "AR" refers to documents found in the Administrative Record, which are further identified by AR tab.

rates for collection agents in 14 locations throughout the United States, including a \$12.86 per hour rate for San Leandro, California, where Diversified conducts business. AR Tab J.

Following inquiries to the FMS contracting officer and the Wage and Hour Division, Diversified filed a formal request for review and reconsideration of the wage determination with the Administrator on December 9, 1997. AR Tab I. By letter of December 18, 1997, issued by Nila Stovall, Chief, Branch of Service Contract Wage Determinations, the Wage and Hour Division denied the request as untimely. AR Tab H. On January 7, 1998, Diversified filed an appeal of the December 18, 1997 ruling with this Board. AR Tab G. By motion of February 13, 1998, the Administrator objected to the Board's consideration of Diversified's petition, arguing that the December 18 letter was not a final decision of the Administrator for purposes of 29 C.F.R. §8.1(b) (1998). AR Tab D. By letter of March 13, 1998, signed by the National Office Program Administrator, Corlis Sellers, the Administrator reaffirmed the December 18, 1997 denial of Diversified's request for review and reconsideration of WD 97-0364. AR Tab A. On May 8, 1998, the Board issued an order clarifying the status of the appeal, directing the Administrator to file the administrative record, and providing a schedule for the filing of further briefs in this matter.^{2/} The Department of the Treasury Financial Management Service intervened as an interested party on June 25, 1998.

DISCUSSION

In order to maintain a fair and efficient procurement operation, it is essential that questions about SCA wage determinations be raised in a timely fashion. The Administrator's initial December 18, 1997 ruling on the timeliness of Diversified's request relied on a provision in the SCA regulations (29 C.F.R. §4.56(a)) that precludes review of a wage determination by the Administrator "later than 10 days before commencement of a contract in the case of a negotiated procurement" AR Tab H. Section 4.56(a) explains that the time limitation "is necessary in order to ensure competitive equality and an orderly procurement process." *Id.*

This reasoning was abandoned in the Administrator's March 13, 1998 final decision, in which the Administrator acknowledged that it would have been impossible for the contractor to request review of the wage determination within the time provided by Section 4.56(a) because the contractor was not aware of the wage determination until it received the contract modification from FMS on October 7, 1997, a week *after* the award of the contract. AR Tab A. As suggested by the Administrator's March 13 ruling (and as explicitly conceded by the Administrator on appeal), the circumstances in this case vary from the ordinary procurement process in which a wage determination typically is issued and incorporated into a procurement

^{2/} The Board's May 8, 1998 Order set June 25 as the deadline for the filing of briefs in reply to the Administrator's response brief. Order at 3. FMS filed its initial brief in this matter on June 25, 1998. The Administrator filed a response to the FMS brief on July 16, 1998. On August 3, 1998, FMS filed a reply brief. The July 16, 1998 response of the Administrator is hereby accepted and FMS' August 3 motion for filing of its reply brief is hereby granted.

contract prior to its award. *Id.*; Statement of the Acting Administrator in Opposition to Petition for Review at 4; *see* 29 C.F.R. §4.5(a) (1998).

This Board's predecessor, the Board of Service Contract Appeals (BSCA), similarly considered a challenge to a wage determination that was issued after a procurement contract was awarded, under the mechanism outlined in 29 C.F.R. §4.5(c)(2). *In re Wage Determination No. 90-1029 (Rev. 6) as Applied to Service Contracts in Jasper Co., Missouri*, BSCA Case No. 94-10, Dec. 30, 1994. Recognizing the need for some administrative mechanism for evaluating a wage determination issued under such circumstances, in *Jasper Co.* the BSCA concluded that any request for review of a wage determination incorporated post-award must be filed before the Wage and Hour Division within a reasonable period of time. *Jasper Co.*, slip op. at 3. Under the facts before the BSCA in *Jasper Co.*, the Board concluded that a challenge to the wage determination submitted two months after the wage determination was received was unreasonable. As the Administrator now concedes, the dispositive issue before us is whether Diversified acted within a reasonable period of time in requesting review and reconsideration of the wage rates for collection agents, WD 97-0364.

In concluding that Diversified's December 9, 1997 request for review and reconsideration would not be considered, the Administrator relied on two factors: (a) the conclusion that the period of time between Diversified's receipt of the October 7 wage determination and its December 9 request for review was excessive, citing *Jasper Co.*; and (b) the assertion that Diversified's December 9, 1997 request "did not include any data" from which the Wage and Hour Division could review and reconsider the wage determination. AR Tab A. Based on the record before us, we respectfully disagree.

The allowable length of time between a party's receipt of a wage determination and the filing of a request for review and reconsideration depends on the particular circumstances of each case. It is undisputed in this case that Diversified had no knowledge of the wage determination prior to the negotiated bid award on September 30, that Diversified first learned of the wage determination rates when it received FMS's contract modification on October 7, 1997, and that Diversified did not file its request for review and reconsideration until approximately two months later on December 9, 1997. In *Jasper Co.*, the Board concluded that a two month delay was unreasonable, and in this case Diversified's request similarly was filed two months after it became aware of the wage determination. However, we find the two cases distinguishable.

In *Jasper Co.*, the U.S. Department of Housing and Urban Development (HUD) awarded a contract for property management and maintenance services that included a wage determination that did not apply to the county where the work was to be performed. Only *after* the award of the contract did HUD recognize its error and ask the Labor Department's Wage and Hour Division for a correct wage determination. The Division provided the new wage determination to HUD approximately two months following HUD's request. Two months after HUD received the new wage determination, it filed a request for review and reconsideration. *Jasper Co.*, slip op. at 2.

Several factors distinguish the present case from the matter before the BSCA in *Jasper Co.* For example, the petitioning party in *Jasper Co.* was a federal contracting agency familiar with the review and reconsideration process, and which already had been in communication with the Wage and Hour Division in connection with the issuance of the wage determination. Thus, the petitioning party already was thoroughly engaged in the process *before* the disputed wage determination was issued. Further, the wage determination issued for HUD involved semi-skilled employee classifications that are routinely issued by the Department, and thus did not raise any unusual issues. In this context, the BSCA appropriately concluded that HUD's two-month delay in requesting review and reconsideration of the post-award wage determination was excessive and therefore untimely. In contrast, Diversified's first awareness of the wage determination came when it received the FMS notice modifying the collections services contract. Further, the arguments raised by Diversified suggest that there are some novel problems associated with the collection agent classifications wage schedule, because the industry's compensation policy is not based simply on an hourly wage rate system.

As Diversified correctly notes, the pertinent regulatory provisions at 29 C.F.R. Part 4, Subpart B do not specifically address the circumstances in which Diversified was placed when FMS modified the procurement contract post-award. Faced with a lack of clarity in the regulations, Diversified represents that it contacted the Wage and Hour Division by telephone but experienced delays attempting to reach a Wage and Hour official who could provide guidance regarding those regulatory provisions. Diversified Reply Brief at 5-6; *see* AR Tab G. In addition, the record indicates that FMS was barraged by inquiries from other debt collection contractors who, like Diversified, were unfamiliar with the procedures for objecting to a wage determination issued by the Wage and Hour Division. AR Tab G. On the record before us, the Board is satisfied that Diversified acted promptly to raise its concerns about the wage determination, and did not delay in attending to the matter.

We note also that, unlike the circumstances considered in *Jasper Co.*, the wage determination incorporated post-award into the Diversified contract (WD 97-0364) did not supersede a previously issued wage determination, but instead was the first wage determination that had been issued by the Wage and Hour Division for incorporation into the debt collection contract awarded to Diversified by FMS. *See* AR Tab D, Attachment A; Tab G. Without question, interested parties seeking to protest a wage determination that has been issued after the award of a contract must be diligent in pursuing their remedy before the Administrator and the Board; in the full context of this case, however, we conclude that Diversified's two-month delay in submitting a formal request for review and reconsideration was not excessive.

With regard to the Administrator's March 13, 1998 assertion that Diversified failed to submit appropriate data when it filed the request for review and reconsideration, Diversified contends that its request was delayed by its efforts to obtain data in support of its challenge to the wage determination, and the company further states that it submitted such data to the Administrator as part of its review request. We find that the record supports this claim. Contrary to the Administrator's final decision, Diversified's December 9, 1997 request was accompanied by supporting wage data. Specifically, Diversified submitted a 1996

Compensation Survey, compiled by the American Collectors Association, Inc. AR Tab D, Attachment A. In addition, Diversified's December 9 request stated that Diversified was in the process of compiling wage data specific to Alameda County, California, pursuant to the statements of one Wage and Hour official regarding the need for such data. *Id.* The record indicates that data regarding wages paid to collectors in Alameda County was submitted by Diversified to the Administrator on January 29, 1998. AR Tab E. Diversified's efforts to develop and provide wage data relevant to its challenge to WD 97-0364 provide further support for the conclusion that Diversified made a diligent effort to perfect its request for review and reconsideration, and that the time period required was reasonable under the circumstances of this case.

ORDER

For the foregoing reasons, we conclude that Diversified Collection Service's December 9, 1997 request for review and reconsideration of WD 97-0364 was timely. We therefore **GRANT** Diversified's petition with regard to the timeliness issue and **REMAND** the case to the Administrator for a decision on the merits of Diversified's request.

The Administrator is directed to issue a final ruling pursuant to Section 4.56(a)(2) within 45 days of the date of this decision and order.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member