



**In the Matter of:**

**V-TECH SERVICES, INCORPORATED**

**ARB CASE NO. 05-100**

**Contract for Custodial Services  
William J. Hughes Technical Center  
Atlantic City International Airport  
DTFACT-04-C-00020**

**DATE: September 28, 2007**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For Petitioner:***

**Brian F. Jackson, Esq., Richard L. Etter, Esq., *McNees Wallace & Nurick LLC*,  
Harrisburg, Pennsylvania**

***For Respondent Administrator, Wage and Hour Division:***

**Mary J. Reiser, Esq., Ford F. Newman, Esq., William C. Lesser, Esq., Steven J.  
Mandel, Esq., Howard M. Radzely, Esq., *U.S. Department of Labor*, Washington,  
D.C.**

### **FINAL DECISION AND ORDER**

V-Tech Services, Inc., requested that the Deputy Administrator, Wage and Hour Division (Administrator), convene a hearing to determine whether a collective bargaining agreement (CBA) between Hiasun, Inc. (V-Tech's predecessor on a Federal Aviation Administration service contract) and the Teamsters Local 331, International Brotherhood of Teamsters, AFL-CIO (Local 331) contained negotiated wage rates "substantially at variance" with the locally prevailing wage rates for similar work within the meaning of the McNamara-O'Hara Service Contract of 1965, as amended (SCA or Act), 41 U.S.C.A. § 351 *et seq.* (West 1987); *see* 41 U.S.C.A. § 353(c). In a final ruling, the Administrator denied the request for a hearing as it was filed after V-Tech began to perform work on its service contract and, therefore, was untimely under the regulations implementing the SCA at 29 C.F.R. §§ 4.10(b)(3)(ii)(2005). Moreover, the Administrator determined that V-Tech failed to demonstrate that "extraordinary circumstances" existed that would justify waiving the timeliness requirement under section 4.10(b)(3)(ii). V-Tech petitioned for review by the Administrative Review Board. We find that the

Administrator's final ruling, denying V-Tech's untimely request for a substantial variance hearing, is in accordance with SCA regulations and is reasonable.

### **JURISDICTION AND STANDARD OF REVIEW**

Pursuant to 29 C.F.R. § 8.1(b) (2006), 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. *See also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Board's review of the Administrator's final SCA rulings is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). The Board is authorized to modify or set aside the Administrator's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b). The Board reviews questions of law de novo. *United Gov't Sec. Officers of America, Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (Sept. 29, 2003); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 99-SCA-018, slip op. at 5 (ARB Jan. 25, 2002). The Board nonetheless defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with law. *See Dep't of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 15-16 (Dec. 22, 1999).

### **ISSUE**

Whether the Administrator reasonably determined that "extraordinary circumstances" did not exist that would justify waiving the timeliness requirement for V-Tech to request a substantial variance hearing under 29 C.F.R. § 4.10(b)(3)(ii).

### **BACKGROUND**

#### **I. Overview of the SCA's wage determination procedures and substantial variance hearing procedures**

The SCA generally requires that every contract in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of service employees in the United States, must contain a provision that specifies the minimum hourly wage and fringe benefit rates that are payable to the various classifications of service employees working on such a contract. *See* 41 U.S.C.A. § 351(a)(1)-(2). These wage and fringe benefit rates are predetermined by the Wage and Hour Division acting under the authority of the Administrator, who has been designated by the Secretary of Labor to administer the Act.

Under the Act, there are two types of SCA wage schedules, also known as wage determinations that are prepared for inclusion in service contracts. The first type is a general wage determination, and the wages and fringe benefits contained in such a

schedule are based on the rates that the Wage and Hour Division determines prevail in the particular locality for the various classifications of service employees to be employed on the contract. 41 U.S.C.A. § 351(a)(1)-(2). These wage determinations sometimes are referred to as “prevailing in the locality” wage determinations.

A second type of wage determination is issued at locations where there is a CBA between the service employees and an employer working on a Federal service contract. Under these circumstances, the SCA mandates that the Wage and Hour Division specify the wage and fringe benefit rates from the CBA (including prospective increases) as the required minimum rates payable to the service employee classifications to be employed on the procurement contract. *Id.* In addition, Section 4(c) of the Act requires generally that the negotiated wage rates (and prospective increases) must be incorporated into a successor contract’s wage determination in those instances where a labor agreement has been negotiated between the service employees and a contractor’s predecessor. 41 U.S.C.A. § 353(c).

Section 4(c), however, contains provisions that restrict the applicability of CBA-based wage and fringe benefit rates in wage determinations:

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm’s length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are *substantially at variance with those which prevail for services of a character similar in the locality.*

41 U.S.C.A. § 353(c) (emphasis added). As interpreted by the Secretary under the SCA regulations, the successor provisions of Section 4(c) are subject to two limitations, both of which involve hearings before Department of Labor Administrative Law Judges.

First, collectively-bargained wage rates may only be incorporated into a covered service contract if such rates were reached “as a result of arm’s-length negotiations ....” *Id.* A challenge to the bona fides of a collective bargaining agreement can be brought by

requesting a so-called “arm’s length hearing.” *See* 29 C.F.R. § 4.11.<sup>1</sup> Second, the SCA’s Section 4(c) proviso states that wages and fringe benefits contained in a CBA shall not apply to a service contract “if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.” 41 U.S.C.A. § 353(c). Therefore, the collectively-bargained wage or fringe benefit rates negotiated between a Federal service contractor and the union representing its employees may not be applied to a successor procurement period if, following a challenge and hearing, it is determined that the negotiated wages are substantially different from locally-prevailing rates for similar work. *See* 29 C.F.R. § 4.10.

But the regulation governing a request for a substantial variance hearing includes explicit procedural time limitations for filing a hearing request. The substantial variance hearing provision states in pertinent part:

(3) . . . [R]equests for a hearing shall not be considered unless received as specified below, *except in those situations where the Administrator determines that extraordinary circumstances exist:*

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the initial term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

29 C.F.R. § 4.10(b)(3) (emphasis added).

## **II. Factual and procedural background**

The Federal Aviation Administration (FAA) awarded a service contract to V-Tech on August 23, 2004, to provide custodial services for the William J. Hughes Technical Center at the Atlantic City International Airport. *See* Tab J. Hiasun, Inc., V-Tech’s predecessor on the service contract, and Local 331 had previously negotiated a CBA that established wage rates and fringe benefits for service employees at the Center from October 2002 through September 2005. *See* Tab C. Before commencing work on its service contract, V-Tech officials met with Local 331 representatives “to discuss a collective bargaining agreement” and were informed that “the Hiasun CBA would govern with no modifications, other than increases in wage and benefits rates.” *See* Tab D, Jan. 4, 2005 letter at 5.

---

<sup>1</sup> In its Brief in Support of Petition for Review, V-Tech withdrew its request for an arm’s length hearing in this case. *See* Brief in Support of Petition for Review at 1, n. 1.

V-Tech commenced full performance on its service contract on August 25, 2004, providing an hourly wage rate of \$9.43 for its janitors, whereas the Hiasun CBA established an hourly wage rate of \$14.80 for janitors. See Tab C; Tab D, Jan. 4, 2005 letter at 2, 4-5. Subsequently, on January 4, 2005, V-Tech requested that the Administrator convene a hearing to determine whether the negotiated wage rates in the Hiasun CBA were “substantially at variance” with the locally prevailing wage rates for janitors pursuant to SCA Section 4(c), 41 U.S.C.A. § 353(c). Tab D. V-Tech does not dispute that its request for a substantial variance hearing was untimely pursuant to 29 C.F.R. § 4.10(b)(3)(i)-(ii).

In its request, however, V-Tech argued that “extraordinary circumstances” existed that would justify waiving the timeliness requirement. Specifically, V-Tech contended that the substantial “disparity” between the Hiasun CBA wage rates, which it did not negotiate, and the locally prevailing wage rates was sufficient, “in and of itself,” to allow a substantial variance hearing to further the purpose of SCA Section 4(c). In addition, V-Tech contended that “extraordinary circumstances” existed due to the urgency of the FAA’s request that V-Tech begin full performance on the service contract and the difficulty V-Tech had in processing its employees for required security clearances in time to begin performing the contract. Moreover, V-Tech argued that “extraordinary circumstances” arose in light of its interpretation of Executive Order 13204, i.e., that because the Executive Order relieved it of any obligation to offer a right of first refusal of employment to its predecessor Hiasun’s employees, it also relieved it of any obligation to pay its own employees in accordance with the Hiasun CBA.<sup>2</sup> See Tab D, Jan. 4, 2005 letter at 5-6.

On April 27, 2005, the Administrator issued a final ruling denying V-Tech’s request for a substantial variance hearing. Tab A. Specifically, the Administrator determined that, although “V-Tech correctly concluded that [pursuant to Executive Order 13204] it was not obligated to hire the employees who had performed . . . services for Hiasun,” Executive Order 13204 “does not undermine any of the SCA requirements nor does it in any way relieve a successor contractor of its obligations under Section 4(c) of the SCA.” Tab A at 2. Since V-Tech acknowledged that it “was aware of the predecessor contractor’s CBA and wage rates and fringe benefits required under that CBA,” the Administrator held that he “cannot conclude that the existence of Executive Order 13204 or any other factors” V-Tech cited “constitute extraordinary circumstances

---

<sup>2</sup> Executive Order 13204 revoked Executive Order 12933, *Nondisplacement of Qualified Workers Under Certain Contracts*, 59 Fed. Reg. 53,559 (Oct. 24, 1994), and its implementing regulations, which required that, with respect to contracts for public buildings, that successive contractors offer a right of first refusal of employment to employees of the prior contractor. See Executive Order 13204, *Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts*, 66 Fed. Reg. 11,228 (Feb. 17, 2001). The Secretary of Labor subsequently rescinded Executive Order 12933’s implementing regulations at 29 C.F.R. Part 9 (2000), effective as of March 23, 2001. 66 Fed. Reg. 16,126 (Mar. 23, 2001).

that would have reasonably prevented V-Tech from filing a timely request for a substantial variance hearing.” *Id.* V-Tech asks that we review the Administrator’s final ruling. The Administrator has responded, urging us to affirm his decision.

### III. V-Tech’s Arguments

In its Petition for Review, V-Tech argues that the Administrator erred in concluding that just because V-Tech was aware of the predecessor contractor’s CBA, V-Tech knew that the CBA applied to V-Tech’s current service contract.<sup>3</sup> V-Tech notes that its service contract with the FAA represents its first government contract and that it did not become aware of any requirement to pay the wage rates contained in the Hiasun CBA until the FAA informed them of the requirement in December 2004.<sup>4</sup>

V-Tech contends that when it previously met with Local 331 representatives before commencing work on its service contract and was informed of the union’s position that the Hiasun CBA would govern V-Tech’s current service contract, it believed it was “presumably” because Local 331 asserted, contrary to Executive Order 13204, that V-Tech was required to offer a right of first refusal of employment to its predecessor Hiasun’s employees.<sup>5</sup> Thus, because Local 331 was apparently misguided about any obligation V-Tech had to offer a right of first refusal of employment to the Hiasun employees, V-Tech states that it believed it had no obligation to pay its own employees in accordance with the Hiasun CBA.<sup>6</sup> V-Tech argues that its conclusion “was a reasonable, albeit incorrect, interpretation of the law.”<sup>7</sup> Similarly, V-Tech contends that as neither the FAA’s bid solicitation (or “Notice of Intention to Make a Service Contract”) nor the service contract contain a wage determination or indicate that V-Tech must pay the wage rates set forth in the Hiasun CBA, V-Tech’s erroneous interpretation was reasonable.<sup>8</sup>

---

<sup>3</sup> Petition for Review at 2.

<sup>4</sup> Petition for Review at 2; Brief in Support of Petition for Review at 4.

<sup>5</sup> Brief in Support of Petition for Review at 3.

<sup>6</sup> Petition for Review at 2; Tab D, Jan. 4, 2005 letter at 5; Brief in Support of Petition for Review at 3, 6.

<sup>7</sup> Brief in Support of Petition for Review at 6; *see also Summit Investigative Serv., Inc. v. Wigfall*, ARB No. 96-111, ALJ No. 94-SCA-031, slip op. at 5 (ARB Nov. 15, 1996), *citing J & J Merrick Enter., Inc.*, BSCA No. 94-09 (Oct. 27, 1994)([w]hile ignorance of the law or contract is not an excuse for an SCA violation, ... a reasonable misunderstanding regarding the terms of the contract may make the contractor less culpable for a violation).

<sup>8</sup> Brief in Support of Petition for Review at 4, 7-8; Tab D, Jan. 4, 2005 letter at 3.

**IV. The Administrator reasonably determined that “extraordinary circumstances” did not exist that would justify waiving the timeliness requirement for V-Tech to request a substantial variance hearing under 29 C.F.R. § 4.10(b)(3)(ii).**

The term “extraordinary circumstances” under 29 C.F.R. § 4.10(b)(3) relates specifically to whether or not a complainant literally had adequate information within sufficient time to file a timely request for a substantial variance hearing. *U.S. Dep’t of State*, ARB No. 98-114, slip op. at 11 (Feb. 16, 2000). But because “[i]t is well established that the privilege of contracting with the government carries with it the responsibility to be aware of and follow the applicable contractual and legal provisions governing contractual performance,” “[c]laims of ignorance by governmental contractors are ... not generally regarded with favor.” *U.S. Dep’t of Labor v. Dantran, Inc.*, ARB No. 93-SCA-26, slip op. at 5 (June 10, 1997). “[T]he obligation to comply with contractual requirements as well as the burden of obtaining the knowledge of how to comply rests, at all times, with the government contractor.” *Dantran*, slip op. at 6.

As a government contractor, V-Tech has a legal obligation to comply with the SCA and the Act’s implementing regulations governing its contractual performance which it “cannot shirk by complaining that the violation should have been brought to [its] attention at an earlier date.” *Dantran, supra*. *Cf. Heckler v. Cmty. Health Serv.*, 467 U.S. 51, 63-64 (1984)(“those who deal with the Government are expected to know the law” and have “a duty to familiarize [themselves] with the legal requirements”); *Gen. Eng’g & Mach. Works v. O’Keefe*, 991 F.2d 775, 780 (Fed. Cir. 1993)(“government contractors are presumed to have constructive knowledge of federal procurement regulations”); *Am. Gen. Leasing, Inc. v. United States*, 587 F.2d 54, 59 (Ct. Cl. 1978)(“parties contracting with the Government are charged with having knowledge of the law governing the formation of such contracts”).

Although V-Tech contends that the FAA’s bid solicitation or “Notice of Intention to Make a Service Contract” does not indicate that V-Tech must pay the wage rates set forth in the Hiasun CBA, the Notice does indicate that services provided under the contract are to be performed under a CBA, as it names Local 331 as the relevant union. *See* Tab G at 1. In addition, V-Tech was informed of its predecessor Hiasun’s CBA, which was effective until September 30, 2005, before commencing work on its service contract. Tabs C, D, F. The SCA was also specifically incorporated by reference into V-Tech’s service contract. *See* Tab J, section 3.6.2-28, p. 59.

SCA Section 4(c) expressly requires that a successor contractor, such as V-Tech, pay the wage rates contained in a predecessor’s CBA, “irrespective of whether the successor’s employees were or were not employed by the predecessor contractor.” 29 C.F.R. § 4.163(a); *see also* 41 U.S.C.A. § 353(c).<sup>9</sup> Thus, we reject V-Tech’s contention

---

<sup>9</sup> V-Tech contends that under traditional principles of labor law arising under the National Labor Relations Act, V-Tech’s decision not to hire any of its predecessor Hiasun’s employees would have severed any obligation it had to pay its own employees in accordance

that it reasonably believed that because it did not employ any of its predecessor Hiasun's employees, it had no obligation to pay its own employees in accordance with the Hiasun CBA. Moreover, the requirement that a successor contractor pay the wage rates contained in a predecessor's CBA under Section 4(c) "is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's [CBA]." 29 C.F.R. § 4.163(b). Consequently, we also reject V-Tech's contention that it reasonably miscalculated the required wage rate because its service contract did not contain a wage determination or specifically indicate that V-Tech must pay the wage rates set forth in the Hiasun CBA.

For the reasons stated above, we find that the Administrator's final ruling, declining to order a substantial variance hearing in response to V-Tech's untimely request, is in accordance with the SCA and its implementing regulations and is reasonable. *Dep't of the Army*, slip op. at 15-16.

### CONCLUSION

The Administrator determined that "extraordinary circumstances" did not exist that would justify waiving the timeliness requirement for V-Tech to request a substantial variance hearing under the SCA and its implementing regulations. Since the Administrator's determination was reasonable and in accordance with the SCA and its implementing regulations, V-Tech's Petition for Review is **DENIED** and the Administrator's final ruling letter of April 27, 2005, is **AFFIRMED**.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**DAVID G. DYE**  
**Administrative Appeals Judge**

---

with the Hiasun CBA. V-Tech's contention is misplaced, as the National Labor Relations Act governs labor-management relations that apply to private sector employers, not service contracts entered into by the United States, which are governed by the SCA. *See* 41 U.S.C.A. § 351; 29 U.S.C.A. § 152(2) (exempting "the United States or any wholly owned Government corporation . . . ." from the National Labor Relations Act).