



**In the Matter of:**

**EG&G TECHNICAL SERVICES, INC.**

**ARB CASE NO. 02-006**

**In re: Application of Wage Determination  
No. 1996-0460 to pilots contracted to work  
at Randolph AFB, TX., on Contract No.  
F14691-00-D-0002 with the United States  
Department of the Air Force.**

**DATE: June 28, 2002**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD <sup>1</sup>**

**Appearances:**

*For the Petitioner:*

Steven J. Mandel, Esq., Douglas J. Davidson, Esq., Eugene Scalia, Esq., *U. S. Department of Labor, Washington, D.C.*

*For the Respondent:*

Daniel D. Abrahams, Esq., Shlomo D. Katz, Esq., *Epstein, Becker & Green, P.C., Washington, D.C.*

**ORDER DISMISSING APPEAL**

**BACKGROUND**

EG&G Technical Services (“EG&G”) has petitioned the Administrative Review Board (“Board”) for review of U.S. Department of Labor Wage Determination No. 1996-0460 pursuant to the McNamara-O’Hara Service Contract Act (SCA), as amended, 41 U.S.C. § 351 *et seq.* (1994), and 29 C.F.R. § 4.56 (2001). The contract to which the wage determination is applicable, Air Force Contract No. F14691-00-D-002 (“A. F. Contract”), provides for qualified 737-type rated (FAA) pilots to fly the Air Force’s T43-A aircraft in support of the Joint Undergraduate Navigator Training and Marine Aerial Navigation School at Randolph Air Force Base, Texas.

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<sup>1</sup> This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19, 978 §5 (May 3, 1996).

By Standard Form SF-98, dated July 13, 2001, the Department of the Air Force requested a wage determination for the option period of the A. F. Contract beginning October 1, 2001. The SF-98 indicated that EG&G was the incumbent contractor, that WD 96-0460 currently applied to the contract, and described the nature of the services to be provided under the contract. On August 2, 2001, the Wage and Hour Division of the Department of Labor (“Wage and Hour”) responded to this SF-98 by issuing WD 1996-0460 (Rev. 2).

As provided in 29 C.F.R. § 4.56(a), by letter dated September 6, 2001, and received by Wage and Hour on September 10, 2001, a group of EG&G employees requested Wage and Hour to reconsider WD 1996-0460 as applied to the contract option period beginning October 1, 2001. The employees requested that the wage rates be increased to reflect cost of living adjustments and stated that if Wage and Hour made such adjustment, the new rates, “would compare very favorably with wage rates for regional and national carriers.”<sup>2</sup>

Clarence Strain, Supervisory Salary and Wage Specialist, Wage and Hour Division, responded by letter dated October 4, 2001, and stated:

The wage rates in WD 96-0460 (Rev. 2) were based upon a March 1995 Bureau of Labor Statistics (BLS) Occupational Compensation Survey for Certificated Air Carriers. Since the 1995 data, we have not received any survey data for the classifications listed in the WD. WD 96-0460 (Rev.3), copy enclosed for your information, has been revised to reflect the December 1999 - 3.5% and June 2001 - 3.7% E[mployment] C[ost] I[n]dex percentage increases.

Strain did not explain why the adjustment had been based on only two years, rather than on six years as requested by the employees, but stated, “We hope that this is responsive to your concerns. If you have any questions concerning this matter, you may contact me . . .” According to the Acting Administrator of the Wage and Hour Division, the Air Force did not incorporate Revision 3 in the A. F. Contract because Wage and Hour had issued the wage determination modification subsequent to the date on which the Air Force exercised the option beginning October 1, 2001. Acting Administrator’s Motion to Dismiss and to Suspend the Briefing Schedule (“Adm. Mot.”) at 3. *See also* 29 C.F.R. § 4.5(a)(2).<sup>3</sup>

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<sup>2</sup> As calculated by the employees, the wage inflation rates had averaged approximately 3% per year; and applying that rate cumulatively over six years would result in an overall wage increase of 19.4%.

<sup>3</sup> This regulation provides in pertinent part:

In the case of procurements entered into pursuant to negotiations (or in the case of the execution of an option or an extension of the initial

(continued...)

By letter dated September 20, 2001, and received by Wage and Hour on the same date, EG&G also requested reconsideration of the wage determination. EG&G's request raised the same inflation-adjustment argument raised previously by the employees as well as a more general argument that EG&G's contract should have the same wage rates that Wage and Hour issued for WD No. 1996-0458, a wage determination for Captains (First Pilots), First Officers (Co-Pilots), and Second Officers/Flight Engineers employed on contracts for aircraft services operating large multi-engine aircraft to deliver mail for the U.S. Postal Service under ANET and WNET contracts. *See generally U.S. Postal Service ANET and WNET Contracts*, ARB No. 98-131 (Aug. 4, 2000).

Strain responded to EG&G's request for modification by letter dated October 12, 2001, stating:

Wage Determination 96-0460 (Rev.3), copy enclosed for your information, has been updated to reflect the Bureau of Labor Statistics' December 1999 - 3.5 and June 2001 - 3.7 Economic [sic] Cost Index percentage increases.

We hope that this is responsive to your concerns. If you have any questions concerning this matter, you may contact me . . .

In the letter, Strain did not address EG&G's argument that the A. F. Contract should incorporate the wage rates that Wage and Hour issued for WD No. 1996-0458 (applicable to the ANET and WNET contracts).

Although Strain invited EG&G to contact him if it had any further questions regarding the matter, it does not appear that EG&G accepted Strain's offer. Instead, EG&G filed a Petition for Review dated October 23, 2001, with the Board requesting us to review Strain's October 12, 2001 letter pursuant to 29 C.F.R. § 8.2(a).

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(...continued)

contract term), revisions received by the agency after award (or execution of an option or extension of term, as the case may be) of the contract shall not be effective provided that the contract start of performance is within 30 days of such award (or execution of an option or extension of term). If the contract does not specify a start of performance date which is within 30 days from the award, and/or if performance of such procurement does not commence within this 30-day period, the Department of Labor shall be notified and any notice of a revision received by the agency not less than 10 days before commencement of the contract shall be effective.

29 C.F.R. § 4.5(a)(2).

In response to EG&G's Petition for Review, we issued a Notice of Appeal and Order Establishing Briefing Schedule. Shortly thereafter, the Acting Administrator filed a Motion to Dismiss and to Suspend the Briefing Schedule arguing that the ARB should dismiss the petition for review because it is untimely under the Secretary of Labor's regulations governing requests for review and reconsideration of wage determinations under the SCA, 29 C.F.R. § 8.6 (b).

Accordingly, we ordered EG&G to show cause why we should not dismiss the Petition for Review on the grounds that it is untimely, and we granted the Acting Administrator's motion to suspend the briefing schedule pending disposition of her Motion to Dismiss. EG&G filed Petitioner's Opposition to the Acting Administrator's<sup>4</sup> Motion to Dismiss as directed.

## DISCUSSION

As demonstrated below, EG&G's argument that the Board may review WD No. 1996-0460 as requested in EG&G's Petition for Review is irreconcilable with the regulations governing the Board's authority to review the Administrator's decision in response to a request for review and reconsideration of a wage determination, 29 C.F.R. § 8.6.<sup>5</sup> Accordingly, we deny EG&G's Petition for Review and dismiss this appeal.

EG&G first argues that its Petition for Review was timely because it requested the Administrator to reconsider WD No. 1996-0460 eleven days prior to the date on which the Air Force exercised the contract option, as provided in 29 C.F.R. § 4.56(a) and requested the Board to review the Administrator's response within twenty days of the response, as provided in 29 C.F.R. § 8.3(a). However, the fact that EG&G filed a petition for review within twenty days of a Wage and Hour decision on review and reconsideration with which it disagrees, does not resolve the question whether the Board may entertain the petition. The regulation relevant to the Board's disposition of petitions for review in cases such as this one provides:

Except as provided in paragraphs (c) and (d) of this section, the Board will not review a wage determination after award, exercise of option, or extension of a contract, unless such procurement action was taken without the wage determination required pursuant to §§ 4.4 and 4.5 of part 4 of this title.

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<sup>4</sup> On December 7, 2002, the U.S. Senate confirmed Tammy Dee McCutcheon as Administrator of the Wage and Hour Division. Consequently, subsequent references will be made to the "Administrator," rather than the "Acting Administrator."

<sup>5</sup> The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions in cases arising under the SCA. Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 also provides, "the Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations which has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions." *Id.* at 19979.

29 C.F.R. § 8.6. Thus, because the option had been exercised before EG&G filed its Petition for Review and the A. F. Contract contained a wage determination as required, the Board will not review the wage determination unless the exceptions found in paragraphs (c) and (d) of the regulation are applicable. As provided in paragraph (c), the Board may review the wage determination under specified circumstances in cases in which collective bargaining agreements are implicated. 29 C.F.R. § 8.6(c). However, no collective bargaining agreement is applicable to the determination of the wage determination in this case.

The second exception to the general rule applies “[w]here a petition for review of a wage determination is filed **prior to award, exercise of option, or extension of a contract.**” 29 C.F.R. § 8.4(d) (emphasis added). In such cases, the Board may review the wage determination “if the issue is a significant issue of general applicability,” however [t]he Board’s decision shall not affect the contract after such award, exercise of option or extension.” *Id.* In this case, EG&G filed its Petition for Review with the Board after the Air Force exercised the option. Accordingly, even if this case involves an issue of general applicability, as EG&G contends (and the Administrator disputes), this exception also is inapplicable to the facts of this case.

Finally, EG&G argues that the Board should review the wage determination under “a general exception to the doctrine that bars courts from hearing moot cases . . . where the issue presented is ‘capable of repetition, yet evading review.’” Petitioner’s Opposition to the Acting Administrator’s Motion to Dismiss (“Pet. Opp.”) at 5-6 (citations omitted). To the extent that the issue EG&G raises is “moot,” such “mootness” is mandated by the necessity to “ensure competitive equality and an orderly procurement process,” 29 C.F.R. § 4.56(a), and by the fact that the applicable regulations specifically limit the circumstances under which the Board may review a wage determination and the effect of any such review upon the wage determination, once a contract option has been exercised. 29 C.F.R. § 8.6 (b), (c), (d). Moreover, the regulations specifically provide that “[e]xcept as provided in paragraphs (c) and (d) of this section, the Board **will not review** a wage determination after . . . exercise of [an] option . . .” 29 C.F.R. § 8.6(b) (emphasis supplied). Accordingly, we would be most reluctant to disturb the balance the regulations have struck between competitive equality and an orderly procurement process on one side and the procedural rights of parties who may wish to challenge a wage determination on the other, in the absence of the most compelling circumstances. This case does not present such circumstances for the reasons discussed below.

First, EG&G does not appear to have been as diligent as it might have been in requesting the Administrator to review the wage determination in the first instance. EG&G filed its request for review and reconsideration on September 20, 2001, eleven days before the commencement of the option. EG&G argues that its request for review and reconsideration was timely because, “[t]he regulations clearly provide that the deadline for such a request is ‘10 days before commencement of a contract option or extension.’ 29 C.F.R. § 4.56(a)(1).” Pet. Opp. at 2. EG&G’s interpretation of 29 C.F.R. § 4.56(a)(1) is incorrect. The regulation provides in pertinent part:

**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 in the case of a negotiated procurement, exercise 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)(1) (emphasis added). The “10 days before commencement” language unambiguously establishes a deadline precluding the Administrator from reviewing a wage determination later than 10 days “before commencement of a contract in the case of a negotiated procurement, exercise of a contract option or extension,” regardless of when the request for review was filed.<sup>6</sup> Thus, as provided in 29 C.F.R. § 4.56(a)(1), given the option commencement date as the end of the 10-day cut-off, the Administrator would have been required to act upon the request for review and reconsideration on the same day that Wage and Hour received it. Given this abbreviated length of response time, the Administrator’s inability to fully consider and respond to EG&G’s request for reconsideration was quite reasonable, especially in light of 29 C.F.R. § 4.56(a)(2), which provides that the Administrator shall respond to such requests within thirty days.

EG&G avers that it requested the reconsideration and review as expeditiously as possible. Although EG&G concedes that it knew in July that the agency might exercise the contract’s option, EG&G states that it “did not know until September 19th that there would not be a revised wage determination as part of the option exercise.” Pet. Opp. at 2. However, the EG&G employees who initially petitioned for review had sufficient information, no later than September 6, 2001, to request review and reconsideration of the wage determination. EG&G does not explain why its employees were sufficiently informed almost two weeks before the date upon which EG&G contends it was so informed. Furthermore, the Air Force requested a wage determination for the option period of the A. F. Contract beginning October 1, 2001 on July 13, 2001; and on August 2, 2001, 59 days prior to the option commencement, Wage and Hour responded to this request by issuing WD 1996-0460 (Rev. 2). There is no indication in the record that EG&G made any effort to ascertain whether Wage and Hour had revised the wage

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<sup>6</sup> We note that both EG&G and the Administrator apparently have construed the relevant 10-day period as the 10-day period before the performance on the option period begins rather than the 10-day period before the date on which the contracting agency exercises the option on the contract. See Adm. Mot. at 6; Pet. Opp. at 3. In *Delta Associates, LTD*, 89-SCA-WD-1 (Dep. Sec’y Aug. 9, 1989), the Administrator took the position that the relevant period was the 10-day period prior to the exercise of the option (in that case October 28, 1988), rather than, as argued by the contractor, the 10-day period before performance on the option began (in that case, December 1, 1988). Slip op. at 3-4. In *Delta Associates*, the contractor’s request, filed on November 22, 1988, was untimely under either interpretation because under the Administrator’s interpretation, the Administrator was precluded from acting upon a request for review and reconsideration after October 18, 1988, and under the contractor’s interpretation, the Administrator was precluded from acting after November 21, 1998. Therefore, the Deputy Secretary found it unnecessary to determine the relevant triggering event for the 10-day cut-off. The Administrator, in this case, has not explained her rationale for apparently abandoning the previously held interpretation of 29 C.F.R. § 4.56(a)(1). In any event, given our decision in this case, it is unnecessary for us to resolve this issue of regulatory interpretation at this time.

determination prior to September 19th when EG&G states that it first received notification that Wage and Hour had not revised the wage determination. The fact that the Air Force had not officially exercised the option was not an impediment to obtaining review and reconsideration of the wage determination as demonstrated by the fact that the EG&G employees requested review and reconsideration on September 6th, nine days prior to the date on which the Air Force, by contract, was required to give notice of its intent to exercise the option.<sup>7</sup> Thus, had EG&G acted more expeditiously, it is possible that the Administrator would have had the opportunity to more fully consider EG&G's position within the prescribed time limitations, thus obviating the "mootness" concern.

Second, as the Administrator states:

The issue in this case involves the application of a specific wage determination to a single contract for flight training services. It is far too early to know what wage determination will be issued (including whether it will be some form of WD 1996-0460 or an entirely different wage schedule) by Wage and Hour for the next option period beginning October 1, 2002.

Thus, given the proscriptions against retroactive adjustment of wage determinations after the commencement of an option period in 29 C.F.R. § 4.56(a) and 29 C.F.R. § 8.6(d),<sup>8</sup> EG&G is, in effect, asking the Board for an advisory opinion concerning a wage determination that may never be applied to the A. F. contract. However as the Board recently wrote, "the Board disfavors engaging in speculative adjudication of challenges to wage determinations . . . ." *Teamsters Local 639*, ARB No. 99-010, slip op. at 4 (May 30, 2002).

Finally, the Administrator states, "The arguments and information presented by EG&G in its petition, and any it may wish to submit during the current contract period, will be considered by Wage and Hour in deciding what wage determination to issue for a subsequent contract period in the event the contracting agency elects to exercise the next option." Adm. Mot. at 6. EG&G responds that the Administrator's promise to consider EG&G's contentions is "hollow" and points out that it took six years for the Administrator to revise the wage determination at issue here and even then, the employees have not received the benefit of the revision. We, of course, note the fact that the pilots under the A.F. Contract are not receiving the wages to which Wage and Hour agrees they would be entitled if the wage determination had been revised prior to October 1, 2001. However, as demonstrated above, the Board may not retroactively modify the wage determination. Moreover, given the fact that under the very tight time constraints imposed by 29 C.F.R. § 4.56 (a), the Administrator has not yet had the opportunity to fully and fairly consider the arguments EG&G raises in support of a revised wage

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<sup>7</sup> EG&G states that its contract required the Air Force to provide written notice of its intent to exercise the option on September 15, 2001. Pet. Opp. at 4.

<sup>8</sup> Recognizing this limitation EG&G states, "[i]t may well be, given the limits of the ARB's authority, that any decision of the Board will have only prospective effect." Pet. Opp. at 7.

determination, we are unwilling to brand the Administrator's assertion that Wage and Hour will consider EG&G's arguments prior to issuing a wage determination for the next option year as "hollow."

### **CONCLUSION**

Accordingly, we hold that consistent with 29 C.F.R. § 8.6, we are precluded from granting the relief EG&G requests, and we **DISMISS** its Petition for Review.

**SO ORDERED.**

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

**WAYNE C. BEYER**  
Administrative Appeals Judge