

CONTRACTORS HAVE A DUTY TO INQUIRE ABOUT WAGE AND FRINGE BENEFITS WHEN THE INFORMATION IS INCOMPLETE

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Any contractor with experience in providing contracts for services (i.e. service contracts) understands that the Service Contract Act (“SCA”) provides for the payment of minimum wages and benefits as set forth in a wage determination. In addition, most collective bargaining agreements (“CBA”) with unions are incorporated into the relevant wage determinations. A recent Armed Services Board of Contract Appeals decision states that a contractor has a duty to inquire of the government when they know that a CBA given to them is incomplete. *CAE USA, Inc.*, ASBCA no. 58006, Jan. 27, 2014.

The FAR states that “successor contractors performing on contracts in excess of \$2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract. This requirement is self-executing and is not contingent upon incorporating a wage determination or the wage and fringe benefit terms of the predecessor contractor's collective bargaining agreement in the successor contract.” FAR 22.1002-3.

So a CBA is very important when pricing a contractor’s proposal. In CAE, the government provided a copy of the relevant CBA, but all the details about the fringe benefits were not contained in the CBA. CAE, which bid on a contract for support services for the KC-135 aircraft, was aware that the CBA was missing these details, but did not inquire of the government. Instead, CAE made its own assumptions in its bid. After contract award, CAE discovered the actual, higher fringe benefits, and paid them, but filed a claim to recover the costs.

The Board asked two questions, discussed below:

(1) Does the SCA/FAR impose a duty on the government to provide a complete CBA to bidders?

The Board found that there was no reasonable doubt that pursuant to the FAR, the government is responsible to provide a complete CBA, and the CBA provided to CAE was not complete.

(2) Does CAE’s failure to advise the government of the CBA’s incompleteness and decision to bid on its undisclosed assumptions preclude it from recovery?

The Board answered “yes”, CAE cannot recover. Having chosen to submit an offer on the basis of its own assumptions, without notice to the government of the incompleteness of its CBA or what CAE’s assumptions were, it cannot now be heard to complain that its assumptions were not correct. The ASBCA stated that “CAE knew of [the CBA’s] incompleteness and failed to notify the government.” Therefore the Government is not the guarantor of the correctness of CAE’s assumptions when it failed to inquire.

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This article does not provide legal advice as to any particular transaction.

TIP: If you are aware that anything is missing from a wage determination or a collective bargaining agreement that the Government provides in a solicitation for the purpose of preparing your bid, write the government, point out the defects and request both correction and completeness before the offer is due.