



MLB TRANSPORTATION, INC.
AND OWL, INC.,

ARB CASE NO. 2016-0078

DATE: July 23, 2019

PETITIONERS,

v.

ADMINISTRATOR, WAGE AND
HOUR DIVISION,

RESPONDENT.

Appearances:

For the Petitioners:

Les A. Schneider, Esq.; J. Larry Stine, Esq.; and Jonathan D. Gaul, Esq.; *Wimberley, Lawson, Steckel, Schneider & Stine, P.C.*; Atlanta Georgia

For the Administrator, Wage and Hour Division:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Jonathan T. Rees, Esq.; and Ann Capps Webb, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

Before: William T. Barto, *Chief Administrative Appeals Judge*; Daniel T. Gresh, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA).¹ On July 7, 2016, the Petitioners filed a Petition for

¹ 41 U.S.C. § 6701 *et seq.* (2011) and implementing regulations at 29 C.F.R. Parts 4, 6, 8, and 18 (2015).

Review of the June 7, 2016, final determination of the Administrator, Wage and Hour Division (the Administrator) in this wage determination and classification matter. Administrator's Final Determination (June 7, 2016). The Administrative Review Board (ARB or Board) docketed the appeal for review and set a briefing schedule. Notice Of Appeal And Order Establishing Briefing Schedule (July 14, 2016). The Administrator filed a response brief, and urges the Board to deny the Petition for Review and affirm the Administrator's determination.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide in its discretion questions of law and fact arising from the Administrator's final determinations under the SCA.² The ARB's review is in the nature of an appellate proceeding.³ The Board is authorized to modify or set aside the Administrator's findings of fact only where they are not supported by a preponderance of the evidence.⁴

DISCUSSION

Where the petitioners seek review of a wage determination as in this case, disposition by the Board is discretionary and limited. The regulation at 29 C.F.R. § 8.6(a) provides the following:

The Board may decline review of any case whenever in its judgment review would be inappropriate because of lack of timeliness, the nature of the relief sought, the case involves only settled issues of law, the appeal is frivolous on its face, or other reasons. A case will be reviewed upon the affirmative vote of one member.

² 29 C.F.R. § 8.1(b)(1), (6). The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the SCA. Secretary's Order 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019).

³ 29 C.F.R. § 8.1(b)(1), (6).

⁴ 29 C.F.R. § 8.9(b).

See Palmetto GBA, ARB No. 10-056 (ARB Feb. 28, 2012)(declining review when review would be inappropriate for lack of timeliness and futility of relief sought). The rule imposed by regulation is that the Board will not review a wage determination after award unless an exception applies. Specifically, the regulation at 29 C.F.R. § 8.6(b) provides as follows:

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.

In this case, there is no evidence that the Petitioners entered into any service contract with the U.S. Department of Veterans Affairs without the corresponding wage determination. Accordingly, this condition precedent to ARB review after award, exercise of option, or extension of a contract is not met. Further, the exception provided at subsection (c) to the rule that the Board will not review a wage determination after award, applies only to “substantial variance” or lack of “arm’s length negotiations” cases.

We turn now to 29 C.F.R. § 8.6(d), which provides the following exception:

Where a petition for review of a wage determination is filed prior to award, exercise of option, or extension of a contract, the Board may review the wage determination after such award, exercise of option, or extension of a contract if the issue is a significant issue of general applicability. The Board’s decision shall not affect the contract after such award, exercise of option, or extension.

The record shows that the Petitioners, MLB Transportation, Inc. (MLB) and Owl, Inc. (Owl), filed the Petition for Review with the Board on July 7, 2016. As to MLB, its contract VA247-P-0957 was awarded in 2009, with a six-month extension running from October 2014 to March 30, 2015, and a new contract VA247-15-D-0272 “began April 1, 2015.” Administrative Record Tab 26; *see also* Administrator’s Final Determination at 3 n.1, at 7, at 7 n.3; Administrator’s Response Brief at 7, at 7 n.7, at 9, at 11 n.5. Therefore, the Petition for Review was not filed prior to the award of any of MLB’s contracts. As to Owl, Solicitation VA247-09-RP-0257/Contract VA247-P-1044

was awarded in 2009, Administrative Record Tab 30, and Solicitation VA247-12-R-0316 was awarded in 2012, Administrative Record Tab 29. *See* Administrator’s Response Brief at 7 nn. 3-4, at 11 n.5. An apparent third Owl contract “VA247-13-Q-1826,” *see* Petition for Review at 5, is not found in the record and Petitioners assert no date of award.⁵ Therefore, on this record, the Petition for Review was not filed prior to the award of any of Owl’s contracts.

Based on a review of the record before us, we conclude that the Petitioners did not file their Petition for Review *prior to any* “award, exercise of option, or extension of a contract” on any of these service contracts as they must in order for the Board to review the wage determination they seek to challenge here.⁶ 29 C.F.R. § 8.6(d).⁷ In sum, the record demonstrates no exception to the regulatory rule that the ARB will not review a wage determination after award. It follows that this case should not have been docketed for review.⁸

⁵ The record demonstrates that the Petitioners did not submit copies of the pertinent contracts to the Administrator. Rather, the Administrator obtained some of them either at the administrative level or during the pendency of this appeal. Administrator’s Final Determination at 3 n.1; Administrator’s Response Brief at 7 nn. 3-4. In his final determination, the Administrator determined that to the extent additional factual information regarding “Owl’s contract might warrant further discussion or analysis of the relevant issues, any right to such further consideration has been waived due to [Owl’s] failure to submit supporting documentation.” Administrator’s Final Determination at 3 n.1

⁶ The Administrator notes that “Petitioners have proffered no facts suggesting that they filed their Petition for Review ‘prior to award, exercise of option, or extension of a contract.’ 29 C.F.R. [§] 8.6(d).” Administrator’s Response Brief at 21 n.9.

⁷ We do not reach the issue of whether this appeal includes a “significant issue of general applicability” as the Board is without jurisdiction to proceed. 20 C.F.R. § 8.6(d).

⁸ Petitioners seek a ruling akin to a declaratory judgment that the Administrator’s action and determinations were legally incorrect. Yet 28 U.S.C. § 2201 grants authority to issue declaratory judgments to “any court of the United States,” which does not include the ARB. *See* 28 U.S.C. § 451. The Secretary’s Order delegating to the Board authority to issue final agency decisions grants the Board jurisdiction only over enumerated statutes, none of which authorize the ARB to issue such a judgment. *See* Secretary’s Order 01-2019, 84 Fed. Reg. 13072.

Accordingly, we set aside our Notice of Appeal and Order Establishing Briefing Schedule (July 14, 2016), and we **DENY** the Petition for Review.

SO ORDERED.