

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



In the Matter of:

**AMERICAN SECURITY
PROGRAMS, INC.,**

ARB CASE NO. 2019-0084

DATE: March 25, 2021

PETITIONER,

v.

**UNITED STATES DEPARTMENT
OF LABOR, ADMINISTRATOR,
WAGE AND HOUR DIVISION,**

RESPONDENT.

Appearances:

For the Petitioner:

Eric S. Crusius, Esq. and Vijaya S. Surampudi, Esq.; *Holland & Knight LLP; Tysons, Virginia*

For the Respondent:

Bradley G. Silverman, Esq.; Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Jonathan T. Rees, Esq.; *Office of the Solicitor, U.S. Department of Labor; Washington, District of Columbia*

**Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek,
*Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA).¹ On December 20, 2019, the Administrative Review

¹ 41 U.S.C. § 6701 *et seq.* (2011) and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2020).

Board (ARB) accepted a Petition for Review from American Security Programs, Inc. (ASP) of the August 23, 2019, Final Determination of the Administrator, Wage and Hour Division (the Administrator). ASP challenged the Administrator's ruling that Section 4(c) of the SCA applies to the base year (September 1, 2017 through August 31, 2018) of Contract No. NAMA-17-F-0085 for security guard services between ASP and the National Archives and Records Administration (NARA). For the following reasons, the Board affirms the Administrator's Final Determination.

BACKGROUND

The material facts pertinent to the Administrator's ruling in this matter are not in dispute. NARA contracts with private entities to provide security guard services at its headquarters in Washington, District of Columbia, and in College Park, Maryland.

From September 1, 2014, through August 31, 2016, SecTek, Inc. provided security guard services to NARA (SecTek/NARA contract). The base year was from September 1, 2014, through August 31, 2015. The security guards covered under the SecTek/NARA contract received wages and fringe benefits under a collective bargaining unit (CBA) between the International Guards Union of America, Local 153 (IGUA) and SecTek (the SecTek CBA). The SecTek/NARA contract included two year-long option years that NARA could choose to exercise. NARA chose to exercise the first option year.

In July of 2016, SecTek informed NARA that it would be unable to provide services unless it received a price adjustment. NARA denied the price adjustment. In August of 2016, NARA learned of an internal SecTek memo and questioned whether SecTek intended to pay the required wages and fringe benefits if NARA chose to exercise the second option year. On August 24, 2016, NARA determined it would not exercise the second option year with SecTek.

Subsequently, NARA awarded ASP a sole-source contract to perform security guard services from September 1, 2016, through August 31, 2017 (the sole-source contract). NARA did not conduct an open procurement process in selecting ASP for this contract. As generally required by regulation, NARA created a "Limited Sources Justification" document explaining the reasons why it offered ASP a sole-source contract. The Limited Sources document explained that NARA had only one week to transition to a new contractor to avoid an interruption of safety services and that the sole-source contract would allow NARA the necessary amount of administrative lead time to conduct a competitive procurement of a new contractor.

During the period of the sole-source contract, NARA conducted an open procurement process, and ASP was the successful bidder of Contract No. NAMA-17-F-0085 (ASP/NARA contract). The base year of the ASP/NARA contract was from

September 1, 2017, through August 31, 2018, and included four one-year option periods. ASP entered a fully executed CBA with IGUA and submitted it to NARA on August 17, 2017, which listed its effective date as September 1, 2017.² The ASP/NARA contract did not incorporate the ASP CBA.³

On September 29, 2017, ASP requested NARA to increase the price for the base year of the ASP/NARA contract and incorporate the wage and fringe benefits provided for in the new CBA into the wage determination of the contract.⁴

On November 28, 2017, NARA subsequently requested a determination from the Administrator whether NARA should modify the base year of the ASP/NARA contract in order to incorporate the new ASP CBA.⁵ NARA also sought a determination whether Section 4(c) applied to the ASP CBA.⁶ On April 5, 2018, ASP submitted documentation that it had paid its workers the wages and fringe benefits under the SecTek/NARA CBA during the course of the sole-source contract, and “had followed all required statutory procedures and obligations under Section 4(c)[.]”⁷

On September 4, 2018, the Administrator issued a ruling that Section 4(c) of the SCA required a wage determination for the ASP/NARA full-term contract based upon the SecTek CBA, not ASP’s own CBA.⁸ ASP submitted a request for reconsideration. On August 23, 2019, the Administrator affirmed its prior determination.⁹ This appeal followed.

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 determination under the SCA.¹⁰ The

² Administrative Record (AR) at 326, 329. All references to the AR in this decision are based upon the PDF version of the file in the record.

³ *Id.* at 325.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 326-27.

⁸ *Id.* at 13–18.

⁹ *Id.* at 6–9.

¹⁰ The Secretary of Labor has delegated to the Board authority to issue agency decisions under the SCA. Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020). *See* 29 C.F.R. §§ 8.1(b)(1), (6).

ARB's review is in the nature of an appellate proceeding.¹¹

LEGAL BACKGROUND

The SCA requires that employees working on covered Government service contracts be paid prevailing hourly wages and fringe benefits as determined by the Secretary of Labor.¹² Section 4(c) of the SCA requires successor contractor to ensure that service employees are paid wage and fringe benefits that are not diminished from those offered by a predecessor contract for substantially the same services when such employees were under a CBA during the predecessor contract period. Specifically, Section 4(c) provides that:

Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a [CBA] as a result of arm's-length negotiations.”¹³

Section 4(c) thus operates as a “floor” to ensure that a successor full term contract may not pay less than the wage and fringe benefits its employees would have received under the CBA of the predecessor full term contract.

There is no requirement that the successor contract commence immediately after the completion or the termination of the predecessor contract for the application of Section 4(c) to the successor contract.¹⁴ Section 4.163(h) outlines three examples of circumstances that may result in the interruption of contract services but which will not undermine the predecessor/successor contract relationship. This regulation provides that contract services under the predecessor contract “may be interrupted because the Government facility is temporarily closed for renovation, or because a predecessor defaulted on the contract or because a bid protest has halted a contract award requiring the Government to perform the services with its own employees.” The regulation further provides that “in all such cases, the requirements of Section 4(c) would apply to any successor contract that may be awarded after the temporary interruption of a full term contract.” Section 4.163(h) further states that the “basic principle in all of the preceding examples is that

¹¹ 29 C.F.R. §§ 8.1(b)(1), (6).

¹² 41 U.S.C. § 6703(1)-(2); 29 C.F.R. § 4.6(b)(1).

¹³ 29 C.F.R. § 4.163(c)(1).

¹⁴ 29 C.F.R. § 4.163(h).

successorship provisions of Section 4(c) apply to the full term successor contract.”¹⁵ Consistent with this basic principle, the scope of Section 4.163(h) is not limited to these three examples and independently provides that “temporary interim contracts, which allow a contracting agency sufficient time to solicit bids for a full term contract, also do not negate the application of Section 4(c) to a full term successor contract.”

DISCUSSION

The Administrator determined that Section 4(c) of the SCA required a wage determination for ASP’s full term contract based on SecTek’s CBA, rather than ASP’s subsequent CBA. The Administrator explained that under the applicable regulations, ASP’s sole-source contract was a temporary interim contract that did not break the predecessor/successor contract relationship under Section 4(c) between the SecTek/NARA full term contract and that ASP/NARA full term contract.¹⁶ The Administrator concluded that Section 4(c) required ASP to pay its workers during the base year of the ASP/NARA contract no less than the wages and fringe benefits that the workers would have received under the SecTek CBA.

On appeal, in support of its request to NARA for a price adjustment to the base year of the ASP/NARA contract, ASP’s overarching argument is that it should be allowed to pay its workers higher wages and fringe benefits pursuant to its own CBA negotiated with the union, rather than the lower wages of the SecTek CBA. The primary thrust of ASP’s challenge to the Administrator’s decision is that the Administrator erred in determining that the sole-source contract was a temporary interim contract and that the SecTek/NARA contract was the full term predecessor contract to the ASP/NARA contract. ASP specifically argues that the Administrator should have determined the sole-source contract between NARA and ASP was a full term successor contract. Consequently, ASP submits that the sole-source contract is the Section 4(c) successor contract to the SecTek/NARA contract and that the ASP CBA governs the wage determination for the base year of the APS/NARA successor contract.

Upon our review of the record, the parties’ arguments, and the applicable law, we conclude that the Administrator reached a well-reasoned decision based on undisputed facts. For the reasons set forth below, we affirm the Administrator’s decision the sole-source contract is a temporary interim contract, the SecTek/NARA full term contract is a predecessor to the ASP/NARA contract, and the SecTek CBA governs the wage determination for the base year of ASP/NARA Contract. Therefore, the Administrator determined Section 4(c) requires ASP to provide wages and fringe benefits that are no less than those provided in the SecTek CBA.

¹⁵ *Id.*

¹⁶ AR at 20 (citing 29 C.F.R. § 4.163(h)).

The phrase “temporary interim contracts,” as used in Section 4.163(h), refers to contract(s) “which allow a contracting agency sufficient time to solicit bids for a full term contract.” The regulation also explicitly provides that such temporary interim contracts “do not negate the application of Section 4(c) to a full term successor contract.” A temporary interim contract merely acts as a “bridge” from one full term contract to another full term contract and does not break the chain of Section 4(c) successorship. Thus, when an agency uses a temporary interim contract to procure services, the Section 4(c) predecessor contract is the prior full term contract (e.g., the SecTek/NARA contract), and not the temporary interim contract (e.g., the sole-source contract), and does not break the successor chain. The successor contract under Section 4(c) is the next full term contract awarded by an agency through the more traditional full and open competitive procurement process (e.g., the ASP/NARA contract).¹⁷

In this matter, NARA originally awarded SecTek a contract to provide security guard services from September 1, 2014 to August 31, 2015, plus two option years. NARA exercised its first-year option, which ended on August 31, 2016. But when it came time for NARA to decide whether to exercise the option for the second year, NARA learned that SecTek may not pay the required wages and fringe benefits under its CBA if NARA exercised its second-year option, especially in the aftermath of rejecting SecTek’s request for a price adjustment for the option year. NARA decided not to exercise its second-year contract option with SecTek on August 24, 2016. Faced with SecTek’s unexpected and last-minute unavailability, NARA had only a week to find a temporary replacement vendor to prevent a disruption of those security services until a full term successor contract could be awarded. NARA subsequently entered into a one-year sole-source contract with ASP, effective September 1, 2016, to provide essentially the same security services as SecTek. As a result of the exigent circumstances, NARA intended the sole-source contract to be a short-term agreement that was necessary for NARA to keep its essential security forces up and running until it could solicit bids for the next full term successor contract.

During the period of the sole-source contract, NARA solicited bids for the next full term contract, which it awarded to ASP as the successful bidder. The final sole-source contract stated that it was a “[b]ridge” between two full term contractual agreements and that it had specifically incorporated the SecTek CBA.¹⁸ The sole-

¹⁷ We note that Section 2(a) of the SCA, in conjunction with 4(c), requires the Administrator to calculate wage determinations using the predecessor contractor’s CBA. *See* 41 U.S.C. §§ 6703(1)-(2). The regulations provide that Sections 2(a) and 4(c) of the SCA “must be read in harmony” to reflect the statutory scheme of the SCA. 29 C.F.R. §§ 4.163(d) and (e).

¹⁸ AR at 31-32 (Item 11(b)).

source contract facilitated the transition from the full term NARA/SecTek contract to the full term NARA/ASP agreement without the interruption of security guard services to NARA. Under these circumstances, we agree with the Administrator that the sole-source contract in this case constitutes a temporary interim contract within the meaning of Section 4.163(h).

Temporary interim contracts that provide a contracting agency “sufficient time to solicit bids for a full term contract[] do not negate the application of Section 4(c) to a full term successor contract.”¹⁹ Thus, we agree with the Administrator that the SecTek/NARA contract was the predecessor full term contract, and, therefore, the SecTek CBA constitutes the applicable Section 4(c) WD for the base year of the successor contract between ASP and NARA.

NARA’s Limited Sources Justification document further supports the Administrator’s determination that the sole-source contract is a temporary interim contract and its purpose was necessitated by emergency circumstances that do not interrupt Section 4(c)’s predecessor-successor obligations. NARA explained in the Limited Sources Justification document that it was essential to have uninterrupted security guard services and that it chose to contact only ASP in order to meet the quick transition deadline based upon its prior experience with the agency.²⁰ The Limited Sources Justification document also explained that the sole-source contract was for one year because “[b]ased on NARA’s experience, the administrative lead time to conduct the procurement and transition a new contractor require the year period of performance.”²¹ Finally, NARA’s Limited Sources Justification document expressly stated that “[d]uring the one year task order, NARA will conduct a full and open competitive procurement for these services that will have a service period of performance start date of September 1, 2017.”²²

We turn next to ASP’s contention that the sole-source contract was a full term successor contract, and not a temporary interim contract. In support of its contention, ASP advances two arguments. First, ASP submits that the sole-source contract is a full term contract because it lasted for a year, which is the same length of time as the base year in the ASP/NARA contract. Second, ASP submits there was no interruption of contract services between the SecTek/NARA contract and the sole-source contract that required a “temporary [contract] vehicle.” These arguments are without merit.

¹⁹ 29 C.F.R. § 4.163(h).

²⁰ AR at 23.

²¹ *Id.* at 24.

²² *Id.* at 28.

The SCA does not impose the requirement of an interruption of services for a contract to be considered a temporary interim contract; nor does it provide a fixed limit for the length of what is to be considered a temporary interim contract. Neither do the SCA's implementing regulations. Section 4.163(h) plainly does not require an agency to experience an interruption of contract services before it may enter into a temporary interim contract. This regulation also does not place any fixed limit on how long a temporary interim contract can last.²³

In addition, ASP argues that its CBA should set the wage determination because it provides higher wages and fringe benefits than the SecTek CBA. However, the "Administrator specifies *the minimum* monetary wages and fringe benefits to paid as required under the Act" by either a prevailing locality rate or by wages rates and fringe benefits contained in a CBA through the successorship doctrine."²⁴ Thus, the SCA's successorship doctrine does not prohibit ASP from paying wages and fringe benefits that are higher than the SecTek CBA.²⁵

In summary, we agree with the Administrator's determination that ASP's sole-source contract was a "temporary interim" contract that allowed NARA sufficient time to solicit bids for a full term successor contract and, therefore, did not break the chain of Section 4(c) successorship between SecTek's full term predecessor contract) and ASP's successor full term contract. Therefore, the Administrator properly concluded that the SecTek CBA constitutes the Section 4(c) wage determination for the base year of the ASP/NARA contract.

²³ ASP argues that the Administrator erred by relying on *In re GSA* because in that case the government agency entered into a series of temporary interim contracts only after the initial contractor defaulted and the temporary interim contracts were under a year in length. *See In re Gen. Servs. Admin. (In re GSA)*, ARB No. 1997-0052, 1997 WL 733631 (ARB Nov. 21, 1997). We disagree. The situation in the present matter is akin to a default because SecTek made itself unavailable by forcing NARA's hand to decide whether to exercise a second option year with SecTek despite the risk it would not pay its employees the stated wages and fringe benefits, to agree to a price adjustment it had previously denied, or to find a new contractor to perform security services. *See* 20 C.F.R. § 4.163(h). Further, the Board in *In re GSA* did not set a specific length limitation for what is to be considered a temporary interim contract.

²⁴ 20 C.F.R. § 4.50 (emphasis added). Although a successor contract may have its own CBA, it does not negate the clear mandate of Section 4(c) that the wages and fringe benefits called for by the predecessor contract's CBA shall be the minimum payable under a successor contract. *See* 29 C.F.R. § 4.163(d).

²⁵ Furthermore, Section 2(c) of the SCA does not provide the Administrator with the discretion to calculate a wage determination based upon the CBA to a successor full time contract, rather than the CBA of a predecessor full time contract, simply because it pays higher wages and benefits than the predecessor CBA.

CONCLUSION

We find the Administrator properly concluded that the wage rates and fringe benefits in the SecTek CBA constitutes the Section 4(c) wage determination for the base year of Contract No. NAMA-17-F-0085 between NARA and ASP. Accordingly, we affirm the Administrator's Final Determination.

SO ORDERED.