Docket No. 2118	Date of Decision: 9/21/99
Appeal Type: [ ] Bid Protest	[X] Contract Claim
Procurement Identification: Under MTA Contract No. MTA-0743	
Appellant/Respondent: Keystone Contracting Company, Inc. Mass Transit Administration	

Decision Summary:

Prevailing Wage Rates

Maryland's prevailing wage rates apply to this Contract, and Keystone must pay those rates to its workers. Contract General Provision §7.30A says those rates apply, Article 2 of Subtitle 17 of the State Finance and Procurement Article mandates those rates, and COMAR 21.11.11 implements the procedures for monitoring and enforcing those rates.

MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF	*
KEYSTONE CONTRACTING	*
COMPANY, INC.	*
	* Docket No. MSBCA 2118
UNDER MTA CONTRACT NO.	*
MTA-0743	*

APPEARANCE FOR APPELLANT:	William Anderson, Esq. Baltimore, MD
APPEARANCE FOR RESPONDENT:	Douglas G. Carrey-Beaver Assistant Attorney General Baltimore, MD

Opinion of Board Member Steel

This matter comes before the Board on the motion of Respondent Mass Transit Administration ("MTA") to summarily dispose of the appeal filed by Keystone Contracting Company, Inc. ("Keystone") in the above-referenced proceeding. The issue Keystone seeks to raise in this appeal concerns whether, under Contract No. MTA-0743 ("Contract"), Keystone is required to pay its workers state-mandated prevailing wage rates.

Findings of Fact

1. On or about May 30, 1997, Keystone was awarded the above-captioned Contract, in the original amount of $736,000, to provide weatherization improvements for the Upton Metro Station at the intersection of Pennsylvania Avenue and Laurens Street in Baltimore City. In that Contract appear the Maryland Department of Transportation ("MDOT") General Provisions for Construction Contracts, Special Provisions applicable to the

Contract, and Supplementary General Provisions for Construction Contracts for 100% State-funded contracts.

2. On the face of the Supplementary General Provisions, dated March 1995, appears the phrase, in underlined capital letters, “100% STATE-FUNDED CONTRACTS ONLY." Immediately following that title page is a page entitled "SPECIAL NOTICE FOR SUPPLEMENTARY GENERAL PROVISIONS FOR CONSTRUCTION CONTRACTS" below which again appears the phrase, in capital letters, "100% STATE-FUNDED CONTRACTS ONLY. On that page appears the following explanation of that phrase:

> This Contract is financed with 100% State of Maryland funds. Therefore, most references to the Federal Transit Administration (FTA) or Urban Mass Transit Administration (UMTA) are hereby deleted from the Supplementary General Provisions for Construction Contracts. The only exception is the "Buy America Requirement" which will remain in force.

3. Because the project is completely financed by the State of Maryland with no federal funding, that page identifies those deleted provisions that are not part of this State-funded-only Contract. Included in the deleted articles is SGP-7.09 - Prevailing Wage Contracts for Public Works. Because it is deleted, SGP-7.09 is blank in the Contract.

4. The MDOT General Provisions remain intact and undisturbed in the Contract. Among those General Provisions, and thus remaining as part of the Contract, is GP-7.30, entitled "Prevailing Wage Contracts for Public Works." GP-7.30, like the other MDOT General Provisions, is not deleted from this Contract. GP-7.30A states:

> [t]he Provisions of Subtitle 2 of Title 17 of the State Finance and Procurement Article of the Annotated Code of Maryland and COMAR 21.11.11 pertaining to Prevailing Wage for Public Works are incorporated in construction contracts of $500,000 or more by reference.

5. The Contract also contains Appendix A, entitled "State of Maryland, Department of Licensing and Regulation, Division of Labor and Industry, Prevailing Wage Section." Referencing the Annotated Code of Maryland, State Finance and Procurement Article, Sections 17-201 through 17-226, that four-page Contract appendix describes in detail the minimum hourly wage rates that the successful bidder and any subcontractor must pay "to all workers employed by them."

6. The MDOT General Provisions remain intact and fully applicable to the Contract. In those General Provisions is GP-7.30, entitled "Prevailing Wage Contracts for Public Works." GP-7.30, like the other MDOT General Provisions, is not deleted from this Contract. GP-7.30A states that

> It]he Provisions of Subtitle 2 of Title 17 of the State Finance and Procurement Article of the Annotated Code of Maryland and COMAR 21.11.11 pertaining to Prevailing Wage for Public Works are incorporated in construction contracts of $500,000 or more by reference.

7. Appellant notified the State that if it were required to pay the Maryland State prevailing wage rate, it would consider such a requirement to be a change in the contract. Pursuant to order by the State, it paid an additional $27,695.75 in wages. After receipt of Appellant's claim for that amount, the Procurement Officer denied the claim, and this appeal followed.

Decision

In its Complaint, Keystone suggests that, because SGP-7.09 (Prevailing Wage Contracts for Public Works [in federally funded cases]) was deleted from the Contract, GP-7.30 (to which GP-7.09 made reference) regarding State prevailing wage rates must also be

deleted. The Board disagrees for the reasons set forth below and grants Respondent's motion for summary disposition.

Although not specifically provided for under the Administrative Procedure Act, this Board, since it is charged with the informal expeditious and inexpensive resolution of appeals,[1] is willing to hear and decide motions to dismiss or for summary disposition. The moving party must demonstrate the absence of a genuine issue of material fact, Mercantile Club, Inc. v. Scheer, 102 Md. App. 757 (1995). Further, in making its determination, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party against whom the motion is directed (in this instance, the Appellant). Honaker v. W.C. & A.N. Miller Dev. Co., 285 Md. 216 (1977); Delia v. Berkey, 41 Md. App. 47 (1978), Affd. 287 Md. 302 (1980). There are no material facts in dispute here that would prevent the Board from granting this motion to summarily dismiss Keystone's appeal.

The subject Contract requires Keystone to pay its workers the prevailing wage rates mandated by Maryland. GP-7.30A is included in Keystone's Contract with MTA. That provision, quoted in full above in finding of fact number 4, provides that, for State construction contracts that are greater than $500,000, Subtitle 2 of Title 17 of the State Finance and Procurement Article ("SFP") and COMAR 21.11.11 "pertaining to Prevailing Wage for Public Works" are incorporated by reference. Where a document is incorporated by reference, that document becomes part of the referencing document. Thus, by being incorporated by reference in GP-7.30A, Subtitle 2 of Title 17 and COMAR 21.11.11 are part of this $736,000 Contract.

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[1]Section 15-210, Division II, State Finance and Procurement Article; See Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983).

Subtitle 2, entitled "Prevailing Wage Rates - Public Work Contract," is patterned after the federal Davis-Bacon Act (40 U.S.C. § 276a, et seq.), which originally was meant to "protect local contractors and workmen against what was deemed to be unfair and predatory competition from outsiders who, by importing cheap migratory labor, could obtain important public works contracts by underbidding contractors located in the community where the project was to be built." Barnes v. Comm'r of Labor and Industry, 45 Md. App. 396, 403,413 A.2d 259, 264 (1980), aff'd sub *nom. Baltimore Bldg. And Coast. Trades Council AFL-CIO v.* Barnes, *290 Md. 9,* 427 *A.2d 979* (1981). Similar to the Davis-Bacon Act, Maryland's prevailing wage statute is intended to

> assure that wage rates generally prevailing in the construction industry in particular areas are not adversely affected by major public works projects undertaken in those areas. By requiring contractors engaged in public construction to pay at least the same wage rates they would be expected to pay if engaged in non-public construction in the same community, the Legislature has endeavored to avoid unnecessary labor unrest that might especially affect public projects and delay their efficient completion. 45 Md. App. at 404, 413 A. 2d at 264.

Under Maryland's prevailing wage statute, a public work contract for a sum greater than $500,000, like Keystone's Contract, must include a clause for payment to workers of at least the prevailing wage rate and must include as part of the contract specifications a determination by Maryland's Commissioner of Labor and Industry of the prevailing wage rates in the locality for each classification of worker required to perform *that* Contract. SFP §§17-212 & 213. Thus, each contractor and subcontractor under the contract "shall pay not less than the prevailing wage rate. . . ." SFP §17-214.

Like Subtitle 2, COMAR 21.11.11 is also part of Keystone's Contract. Pursuant to COMAR 21.11.11.02, Keystone was required to

submit to the Commissioner of Labor and Industry its payroll records and those of its subcontractors, with a certification that the wage rates paid its workers "are not less than those established by the Commissioner as set forth" in Keystone's Contract. SFP § 17-220(c).

Appendix A to Keystone's Contract contains the wage rates established, as mandated by the prevailing wage statute, by the Commissioner for workers under this Contract. Those wage rates were taken from a July 29, 1996 determination for Baltimore City, the locality in which the Contract work was performed, that was issued by Maryland's Commissioner of Labor and Industry. In the instructions for the prevailing wage rate appendix, Keystone was notified that the wage rates in the payroll records submitted by Keystone "shall be accompanied by a statement signed by the contractor...indicating that the wage rates contained therein are not less than those established by the Commissioner as set forth in the contract . . . ."

There is no question that Maryland's prevailing wage rates apply to this Contract, and that Keystone must pay those rates to its workers. GP §7.30A says those rates apply here, Appendix A further explains that those rates apply, Article 2 of Subtitle 17 of the State Finance and Procurement Article mandates those rates, and COMAR 21.11.11 implements the procedures for monitoring and enforcing those rates. Accordingly, Respondent's motion for summary disposition is granted and the appeal is denied.

Wherefore, it is Ordered this day of September, 1999 that the appeal is denied.

Dated:

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Candida S. Steel
Board Member

I concur[2]:

Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

[2] Chairman Harrison is recused in this matter.

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2118, appeal of Keystone Contracting Company, Inc. under MTA Contract No. MTA-0743.

Dated:

Mary F. Priscilla
Recorder