

# LEGAL ADVISOR

*A PilieroMazza Update for Federal Contractors and Commercial Businesses*

## *Labor & Employment Law*

### **RECENT ASBCA DECISION OPENS DOOR TO NEW APPROACH FOR CONTRACTORS NEGOTIATING COLLECTIVE BARGAINING AGREEMENTS**

By Nichole D. Atallah

Many government contractors that perform service work on federal contracts subject to the Service Contract Act (SCA) find themselves bargaining with a unionized workforce at one point or another. In most cases, the collective bargaining agreement (CBA) negotiated between the union and the employer replaces the area-wide wage determination that would otherwise apply to the SCA contract and would then govern the terms and conditions of the unionized SCA employees.

Negotiating a CBA is not a simple task, especially because contractors are often restrained by their contractual obligations to the government. Although FAR 52.222-43, the SCA Price Adjustment Clause, provides a method for a contractor to pass on its increased wage and benefit costs, if any, to the government customer as reflected in a valid CBA, contractors have a legal obligation to negotiate a CBA at arms-length, within a range of rates common in the locality and without any clauses that are contingent upon the SCA or incorporation into the government contract. When negotiating the financial components of the CBA, contractors often take into consideration factors that include the morale of non-bargaining unit personnel and client satisfaction. As a result, contractors are often looking to negotiate CBA provisions that appeal to employee concerns but have the least immediate economic impact and that meet the needs of the government customer.

On March 12, 2015, in *Government Contracting Resources, Inc.*, ASBCA No. 59162, the Armed Services Board of Contract Appeals (ASBCA) provided contractors with CBA negotiations. In *Government Contracting Resources, Inc.* (GCR), the CBA negotiated between the union and GCR

contained a provision providing for severance payments to former employees laid off for 30 days or longer due to lack of work. There was no dispute that the CBA was properly incorporated into GCR's contract with its government customer, NASA. At the time the CBA was incorporated into the NASA contract, GCR did not request a price adjustment under the Price Adjustment Clause because there were no severance costs to claim. However, when several employees were laid off as a result of a transition to a new contractor, the CBA required the severance payments to be made. GCR then requested a price adjustment from NASA pursuant to the Price Adjustment Clause.

NASA rejected the request and argued that because the contract was firm-fixed-price and because the potential severance costs were known from the outset of the award, the severance costs were not recoverable under the Price Adjustment Clause. On appeal, the ASBCA disagreed and found that the Price Adjustment Clause can be applied when a contractor experiences an increased cost in providing benefits contained in a wage determination, including a CBA, especially when a contractor cannot possibly know with any certainty what those costs might be in advance.

This case could have a significant impact on the types of proposals that unions and contractors bargain over in an effort to reach agreement. In the past, contractors have been reluctant to design creative solutions to employee concerns revealed at the bargaining table because of uncertainty about whether the costs would be recoverable from the government customer. Although the Price Adjustment Clause clearly calls for reimbursement for the difference in costs to the contractor as a result of an increase in wages and benefits reflected in the CBA, contracting officers often deny requests for equitable adjustment for costs that are speculative. For example, CBA provisions that provide for call-back

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pay or compensation during an unscheduled closing at the government installation might have been considered too speculative because there is no way for the contractor to know how many times it would need to call back an employee or how many days a government installation might unexpectedly close. In light of the ASBCA's ruling in *Government Contracting Resources*, such provisions may no longer present a hurdle because costs such as these may be recouped in a later request for equitable adjustment should those costs in fact be incurred. This gives both employers and unions an opportunity to think more broadly and be more creative during the CBA negotiation process to address employee concerns while at the same time giving contractors greater confidence in the financial ramifications.

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