Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: **Contract Dispute of DCT Incorporated**
Pursuant to Contract No. DTFA-02-01-D-01850

Docket No.: 05-ODRA-00354

Appearances:

For the Protester: DCT Incorporated: David Tolman, Vice President

For the Agency: Linda Modestino, Esq.,
FAA Mike Monroney Aeronautical Center

I. INTRODUCTION

On August 17, 2005, DCT Incorporated ("DCT") filed the current contract dispute ("Current Contract Dispute") at the Office of Dispute Resolution for Acquisition ("ODRA") alleging that the Federal Aviation Administration's ("FAA") Mike Monroney Aeronautical Center ("Center") breached a September 10, 2004 Settlement Agreement that was executed by the parties pursuant to the ODRA's Alternative Dispute Resolution ("ADR") Process.[1] The Settlement Agreement "reserves" to DCT "the right to claim for payment based on Section 22.4" of a Collective Bargaining Agreement ("CBA") executed December 31, 2003 between DCT and the union representing its employees. The CBA provides that DCT will compensate its security officers for up to 15 minutes of

[1]The Current Contract Dispute is the third filed by DCT involving the same Contract. DCT's first contract dispute (*see* Docket No. 04-ODRA-00296, "First Contract Dispute") sought reimbursement of additional costs it had incurred as a result of a United States Department of Labor determination that required DCT employee travel time to be compensated. DCT's second contract dispute (*see* Docket No. 04-ODRA-00301, "Second Contract Dispute") had sought incorporation of the January 9, 2004 Wage Determination issued by the Department of Labor. The ODRA dismissed these two contract disputes on September 24, 2004, after the parties executed a Settlement Agreement reached pursuant to the ODRA ADR Process.

"travel time to and from posts." *See CBA* at page 28. DCT alleges a "Breach of Settlement Agreement" based on the Center's refusal to reimburse DCT for the "Travel Time" claim it submitted on September 15, 2005.[2] *See DCT filing dated August 17, 2005* at 1. The Center had advised DCT that the contract does not entitle DCT to compensation for the identified Travel Time.

Resolution of this Dispute requires a determination of what impact, if any, the CBA's Travel Time provision had on DCT's Contract with the Center. The ODRA held in its November 4, 2005 Decision in this case, that even though the Current Contract Dispute involves a DOL wage rate determination, the ODRA has subject matter jurisdiction because the Dispute because presents questions of contract interpretation that do not require particular DOL expertise.[3] *See Interlocutory Decision and Order on Motion to Dismiss Contract Dispute for Lack of Subject Matter Jurisdiction,* 05-ODRA-00354.

As discussed below, the ODRA finds that the DOL's New Wage Determination incorporated the CBA and its Travel Time provision. As a result, DCT was obligated under the terms of its Contract with the Center to compensate its employees for up to 15 minutes of the identified Travel Time and is entitled to reimbursement of such costs under the express terms of the Price Adjustment Clause of the Contract. Moreover, the Settlement Agreement executed by the Center and DCT expressly reserved DCT's right to claim for such costs. The ODRA therefore recommends that the Center be directed to reimburse DCT for the costs claimed here by the Contractor.

[2] Although DCT styled the Current Contract Dispute as a "breach" claim, after reviewing the Settlement Agreement and the submissions of the parties, the ODRA concludes that the Current Contract Dispute is actually a challenge of the Center's denial of DCT's claim for reimbursement of Travel Time costs.

[3] While the ODRA will consider challenges involving resolution of whether a contractor is contractually obligated to comply with a wage determination, the ODRA will not consider challenges to the propriety or substance of an actual wage rate determination. *See Interlocutory Decision and Order on Motion to Dismiss Contract Dispute For Lack of Subject Matter Jurisdiction, supra.* For example, the ODRA will not consider any argument that essentially disagrees with or otherwise challenges the DOL's classification of this Contract's identified guard activity as compensable work.

II. FINDINGS OF FACT

A. Chronology of Events

1. Following a competition, DCT was awarded a fixed-price base year contract ("Contract") to provide security guard services at the Center and two other FAA satellite facilities on November 6, 2000. DCT began performing the Contract on January 1, 2001. The Contract provided for up to four additional option years of performance. DCT performed the contract until its third option year ended on November 30, 2004. *See Contracting Officer's Chronological Statement of Pertinent Facts*, dated September 9, 2005.

2. During DCT's second year of Contract performance, the DOL received several complaints from DCT employees regarding their compensation, and subsequently conducted an on-site investigation of DCT's Contract performance. *See Agency Report Exhibit Number ("AR Exh. No.")* 1.

3. By letter dated August 11, 2003, the DOL subsequently advised DCT that the Contractor had "failed to properly compensate employees" as required under the SCA, in part because DCT had "not paid" its employees "for travel time . . . between worksites." *See AR Exh. No.* 1 at 3.

4. Shortly thereafter, DCT met with DOL and "agreed to comply with the [SCA], and pay the back wages to all affected" employees. *Id*.

5. By letter dated August 18, 2003, DCT advised the Center's contract specialist that pursuant to the SCA, the DOL had "determined that DCT had to pay fifteen minutes travel time" to its employees to compensate them "for travel from Headquarters to posts." *See AR Exh. No.* 1 at 1. At the DOL's instruction, DCT advised the Center that it had been directed to "compensate employees from the beginning of our Contract to present and through the remainder of the Contract" for back wages which incurred "from January 1, 2001 through August 8, 2003"

for "a total of $189,639.37." *Id*. Citing the Contract's Price Adjustment Clause, DCT requested reimbursement of this amount from the Center. *Id*.

6. In the August 18, 2003 letter to the Center Contract specialist, DCT also suggested that "to equalize the cost burden of the fifteen minutes mandated," the FAA could "reduce the required monthly training" from eight hours to "2.5 hours per month" so that "the money already allocated in the contract for the eight hours training" could "cover" and "compensate for the additional cost" of the identified daily fifteen minutes of Travel Time. *Id*.

7. By letter dated September 24, 2003, the Center contract specialist advised DCT that the Center "cannot give your request for reimbursement favorable consideration" since "there are no provisions in the contract to reimburse the contractor for any hours worked on an overtime basis." *AR Exh. No.* 5. The contract specialist advised DCT that by bidding on the original fixed price contract, DCT had assumed "full responsibility for scheduling their personnel in a manner that will fulfill all the requirements" of the Contract. *Id*. The contract specialist concluded the letter with instructions on how to "dispute this decision . . . by filing" a challenge at the ODRA. *Id.*

8. On December 16, 2003, DCT and the United Government Security Officers of America "UGSOA" Local # 243, which represented the security guard employees performing the DCT Contract, executed a CBA for this Contract which was scheduled to take effect during the third option year of DCT's performance, beginning December 31, 2003 and ending on December 31, 2004. *See AR Exh. No.* 11. As required by AMS § 3.6.2-30, DCT provided a copy of the CBA to the Center contract specialist. *Id*.

9. On December 17, 2003, pursuant to the FAA's AMS and federal law, *see AMS Procurement Guidance: Labor Laws, Labor-Related Laws; Procedures Related to Service Contracts* § T3.6.2, ¶ 8; 29 C.F.R. § 4.4(e), the contract specialist submitted an electronic standard form 98 "*Notice of Intention to Make A Service*

Contract And Response to Notice," ("SF 98") for DCT's third option year to the DOL, and asked DOL for a determination of whether the CBA would be the applicable wage determination for that year of DCT's Contract. *See AR Exh. No.* 13.

10. On January 9, 2004, the DOL provided the Center contract specialist with a new wage determination ("New Wage Determination") for the DCT Contract "which incorporate[d]" the CBA "effective December 31, 2003 through December 31, 2004," and provided:

> In accordance with . . . the [SCA]. . . employees employed by the contractor(s) in performing services covered by the [CBA] are to be paid wage rates and fringe benefits set forth in the [CBA] and modified extension agreement(s).

See AR Exh. No. 14 at 2. Included as a "compensation" term in the CBA was "up to 15 minutes" of daily "Travel Time" between posts.

11. On February 9, 2004, DCT filed its First Contract Dispute at the ODRA, seeking reimbursement for $219,270.52, which DCT alleged it had paid its employees for the daily 15 minutes of Travel Time "mandated" by the DOL. *See First Contract Dispute* at 2.

12. By letter dated April 12, 2004, DCT offered "to dismiss" its First Contract Dispute if the Center would agree to "reimburse DCT for the wages and benefits set forth in the CBA for the current Option Year," that had commenced on January 1, 2004. *See AR Exh.* No. 19.

13. On May 14, 2004, DCT filed its Second Contract Dispute at the ODRA which challenged the Center's refusal to incorporate and apply the CBA to DCT's third option year. *See Second Contract Dispute* at 1. The Center responded that it was not legally required to recognize or incorporate the CBA as the New Wage Determination for the DCT's third option year since the Center had not received DOL's New Wage Determination incorporating the CBA until after the Center

had issued the modification exercising the option year. *See id., and AR Exh. No.* 8.

14. The Director of the ODRA consolidated the First and Second DCT Contract Disputes ("Consolidated Disputes") and designated an ODRA Neutral to provide ADR services. On September 10, 2004, as a result of the ADR effort, the parties executed a Settlement Agreement for the Consolidated Disputes. Under the terms of the Settlement Agreement, the Center agreed to immediately incorporate the CBA as the applicable New Wage Determination for the third year of DCT's Contract performance, beginning January 1, 2004, *see AR Exh. No.* 22 at 2, ¶ 2(b), and DCT released Center from its claim for payment of travel time incurred prior to the effective date of the CBA. *Id.*, ¶ 2(a) and ¶ 2(b).

15. In the Settlement Agreement, the FAA also agreed to "pay DCT the wage rates and fringe benefits set forth" in the CBA for the third option year "provided that DCT submits to/files the following with the Contracting Officer, **on or before** close of business, **September 15, 2004:**

    (i) A statement of the total dollar value of [the] claim;

    (ii) Detailed supporting documentation of the claim amount, including a breakdown of the employees/positions/hours/rates, so as to reasonably allow the FAA to review and approve the amount claimed for payment.

    See Settlement Agreement, ¶ 2(b) at 2.

16. The Settlement Agreement provided that if DCT complied with the above-referenced documentation obligations, the FAA would "pay DCT the approved amount in accordance with this provision by close of business, October 15, 2004." *See Settlement Agreement*, ¶ 2(b)(iii) at 2.

17. The Settlement Agreement also stated that "simple interest on the approved claim amount" would "accrue beginning October 15, 2004, through the date payment is issued." *See Settlement Agreement*, ¶ 2(c) at 2.

18. That same day, September 10, 2004, based on the terms of the Settlement Agreement and pursuant to ODRA Procedural Regulation 14 C.F.R. § 17.29(c), the ODRA issued a Final Order that dismissed the Consolidated Disputes without prejudice.

19. By letter dated September 30, 2004, DCT submitted a "claim for adjustment for the period from January 1, 2004 through September 30, 2004" in the amount of a $150,084.26 to the Center contract specialist. DCT submitted a self-described "detail sheet of monies paid and monies due" and "supporting labor sheets" with its claim. *AR Exh. No.* 25.

20. By e-mail dated October 7, 2004, the Center contract specialist asked DCT to "advise" him "as soon as possible" of the following:

> How many employees are working a full 40 hour week?
> How many employees are working less than 40 hours per week—how many hours?
> On any given holiday, how many employees are working?
> Please specify the number of employees and the number of hours each would typically work.

AR Exh. No. 25.

21. On the afternoon of October 7, 2004, DCT responded to the contract specialist's questions with the following e-mail:

> Is there a specific reason for your need for this data? The hours that are required by contract are the hours that [are] covered either by full time or part time employees.

AR Exh. No. 25.

22. During a "telephone conversation" between the parties on October 8, 2004, the Center contract specialist advised DCT that its submitted "claim package was incomplete" and "lack[ed] the information needed to compute vacation and holiday benefits due." *AR Exh. No. 23* at 2. DCT was advised that without the

information requested in the contract specialist's earlier e-mail dated October 7, 2004, "no further action could be taken" on its claim. *AR Exh. No.* 23 at 2.

23. By letter dated October 18, 2004, the Center contract specialist provided DCT with a written chronology of the "events" which preceded its recently submitted "claim for adjustment," and advised DCT that in order "to resolve . . . differences of opinion" between the Center and DCT, and to ensure that DCT's claim was "expeditiously" processed, DCT needed to provide "the following information, in any format" to the Center:

> - Lists for the period Jan – Apr 2004 and May – Dec 2004 of all DCT employees with dates of service, employment status (whether full or part time), hourly rate of each employee, all positions identified, attachment 4 to the contract, Technical Exhibit Four, indicating whether the position is filled by full or part time employee.
>
> - [DCT's] calculations of the amount claimed for reimbursement with a breakdown showing how each sub-total was figured and [DCT's] rationale for including the sub-total in [its] overall total amount."

AR Exh. No. 23 at 1. The contract specialist's letter also advised that "[a]s soon as the requested information is received," the Center would "process [DCT's] claim for the adjusted amount." *Id.*, at 2.

24. In an e-mail sent October 28, 2004, the Center contract specialist advised DCT that the Center had "processed the necessary paperwork to have a check issued to DCT in the amount of $113,445.00" as a "partial payment against [DCT's] request for payment in accordance with the Settlement Agreement" that was "based on productive hours only, as stated in Technical Exhibit Four of the contract." *AR Exh. No.* 24. The contract specialist promised to "provide a complete breakdown of the calculations" for the $113,445.00 partial payment

after receiving "the additional information that was requested" in the earlier October 18, 2004 letter to DCT was received. *Id*.

25. On December 30, 2004, an Administrative Law Judge at the National Labor Relations Board ("NLRB") issued an "Order" which held that DCT had "engaged in certain unfair labor practices" because the Contractor had not paid several of its Lead Guards the $16.83 hourly wage rate required under the New Wage Determination, which incorporated the CBA into the Contract. *See AR Exh. No.* 26 at 2. Although DCT had earlier advised the Center that this wage rate was a clerical error, the Order directed DCT to "make any Lead Officers whole, with interest, for any loss of earnings since Jan. 1, 2004." *Id.*

26. On June 6, 2005, DCT submitted "documentation to the Center for the price adjustment due" DCT for the "costs associated with the applicable" CBA that took effect December 31, 2004. *AR Exh. No.* 27. DCT advised a newly assigned contracting officer who had replaced the prior contract specialist that the "total amount of DCT's claim is $161,614.49". *Id*. DCT's submitted claim package included a self-described "overall summary sheet detailing the amount invoiced and the amount due" as well as "supporting documentation sheets, cross-referenced to the overall sheet." *Id*.

27. On July 20, 2005, a newly assigned contracting officer—who had replaced the retiring contract specialist—sent an e-mail to DCT which requested a telephone conference to "get a better understanding of how" DCT had "arrived at [its] proposed costs." *AR at Exh. No.* 27. The contracting officer also advised DCT that "the FAA does not agree with the 15 minute before duty and after duty shift change request," and that without further submissions and details from DCT, the contracting officer would only authorize a unilateral equitable adjustment for $41,000—significantly less than the $161,614.49 DCT had requested in its claim. *Id.*

28. In a reply e-mail sent that afternoon, DCT asked the contracting officer to provide a facsimile or e-mail indicating how the Center calculated its proposed $41,000 payment. *Id*. DCT also reported that it would "get back . . . on the possibility of meeting" to discuss its submitted claim with her. *Id.*

29. On July 26, 2005, the contracting officer sent an e-mail to DCT advising that the Center was "making progress" on DCT's claim, and that after "further researching . . . the contract files," the Center had made "several adjustments to [its earlier] calculations which raise[d] significantly the total" amount due DCT. *Id.*

30. In a July 27, 2005 e-mail, the contracting officer advised DCT that the Center had determined DCT was entitled to a $53,916.14 price adjustment which reflected both a $1.00 per hour wage rate increase for Lead Guards resulting from the CBA, as well as a $.81 wage adjustment applicable to all guard employees. *AR Exh. No.* 29 at 1 and 2. The contracting officer's e-mail invited DCT to submit comments and questions. *Id.* at 2.

31. On August 17, 2005, DCT submitted the Current Contract Dispute to the ODRA which contends that the Center is in "Breach" of the September 10, 2004 Settlement Agreement which "reserves" to DCT the right to "claim payment" under "Section 22.4" of the CBA , which provides:

> Security Officer will be paid (not to exceed) fifteen (15) minutes regular hourly pay per day for travel time to and from posts. Time paid will be based on actual time worked as recorded by utilizing the Company provided time clock.

See AR Exhibit No. 11 at 28. DCT maintains that even though the Center "agreed to incorporate" the CBA, "they are now choosing which portions" of the CBA "they wish to reimburse DCT." *Id.* As relief, DCT's Current Contract Dispute "request[s]" that the ODRA "direct" the Center "to reimburse DCT the amount of $161,614.49 plus interest." *Id*.

32. By e-mail dated August 29, 2005, the Center contracting officer advised DCT that while the parties "had not resolved the issue regarding the 15 minute shift

change," funding for the remaining portion of the equitable price adjustment which the Agency determined it owed DCT—$ 53,916.14—would be available for release by Friday, September 2, 2005. *AR* at *Exhibit No.* 29. As a result, the amount DCT current seeks is $115,365.50 plus interest. *See DCT Filing* dated November 16, 2005 at 3.

B. The DCT Contract

33. The Contract at issue was awarded to DCT on a fixed-price basis for 97,606 annual man-hours of guard services to staff the 1,000 acre Center facility, and two warehouses located at the FAA Logistics Center ("FAALC") and the FAA's Thomas Road facility with the following guard coverage: a daytime Project Manager; round-the-clock Shift Managers, Dispatchers and Pass/ID Officers; round-the-clock security guards at five established facility posts; an 8-hour Guard at Gate 20 of the FAALC Warehouse; and non-stop Patrol Units. *See Technical Exhibit Four, "Man-Hour Resources," Contract,* at page 50.

34. When first awarded to DCT, the Contract made applicable DOL Wage Determination 1994-2431, Revision No. 15, dated June 14, 2000, which established a minimum wage rate that was based on the "prevailing" wage and benefit levels for comparable employees in the contract's "locality. *See* 29 C.F.R. § 4.51. *See AR Exh. No.* 4 at 52.

35. The Contract also incorporated AMS § 3.6.2-30, "*Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts),"* ("Price Adjustment Clause") which permits a contractor to claim a price adjustment from the contracting agency where it has experienced an actual increase in the applicable wages or fringe benefits "as a result of" either an increase in the applicable wage determination by DOL or by operation of law.[4] *See Contract* at 26; *see also* § 3.6.2-30(d)(1) and (2). Where such an increase

[4] The Price Adjustment Clause also provides that a contractor is entitled to a price adjustment increase where it arises from an amendment to the FLSA law. *See AMS* § 3.6.2-30(c).

occurs, the Price Adjustment Clause requires the contractor to notify the contracting agency within 30 days "after receiving" the new wage determination unless this notification period is extended in writing by the contracting officer. *See Pricing Adjustment Clause* at § 3.6.2-30(f).

36. The Contract's *Specifications/Statement of Work*, ("SOW") specified that "performance of this work shall be carried out in such a manner that causes minimal disruption to or interference with government business." *See SOW* at 1. The identified security guard services were to be "conducted in accordance with this contract and all applicable Federal, State, and local laws, regulations, codes or directives." *Id.* at ¶ C.2.4 at 3. Although the Contract required a cumulative "[t]otal amount" of required man-hours per guard post, the Contract did not specify how many employees were to be proposed to fulfill the hourly requirements, nor did the schedule identify how many hours could comprise one guard's shift. Instead, the Contract instead provided that:

> The Contractor shall furnish all labor, supervision, materials, equipment, transportation, and management necessary to provide guard services in accordance with the stated requirements . . . . The Contractor shall implement all necessary scheduling, personnel, and equipment control procedures to ensure timely accomplishment of all guard services requirements.

See SOW at ¶ C.3 at 9.

37. Of significance to the Current Contract Dispute, the Contract also contained the following "guardmount" clause ("Guardmount Clause") which required each Shift Supervisor to:

> include an informal guardmount at the start of each shift during which relief personnel shall be assembled for inspection, arming, announcements, and a general transfer of information from one shift's personnel to the next. This is in addition to the time required for posting and relief of personnel.

See SOW at ¶ C.2.9 at 6.

38. The Contract required each security guard employee to be qualified and trained to carry and use a firearm, in accordance with FAA Order 1600.69, *FAA Facility Security Management Program, Appendix 12: Safeguarding and Use of Firearms and Chemical Irritants.* *See Contract*, ¶ H.4 at 7, and required DCT to provide a list that identified the "firearms to be used or stored on the [Center] premises." *see SOW*, ¶ C.5.1.5 at 26. In this regard, the Contract provided that "[f]irearms owned by the Contractor can be stored on FAA owned/leased property . . . in an approved storage container." *See SOW*, ¶ C.6.2, "*Possession of Privately Owned Firearms in or on FAA-Owned or Leased Property,"* at 30.

39. Under the Contract, DCT also was required to "provide a daily work schedule, which indicates specific hours of the day that each post will be staffed, the guard's name and the number of personnel per post." *See SOW*, ¶ C.3.35 at 19.

III. DISCUSSION

A. The Parties' Positions

DCT argues that pursuant to the applicable federal laws cited above, this Contract's Price Adjustment Clause entitles the Protester to reimbursement for the increased Travel Time costs it was required to pay its employees as a result of the New Wage Rate Determination that was issued by the DOL on January 9, 2004. DCT also asserts that the documentation it has provided in support of its claim is unobjectionable since the format of its submitted worksheets are identical to those submitted with its original proposal.

The Center responds that DCT is not entitled to any price adjustment for the pertinent Travel Time because this particular employee compensation requirement stems not from the New Wage Determination, but rather from an earlier investigation and determination by the DOL which concluded that DCT had violated the SCA by failing to compensate its employees for this work. The Center also asserts that because this Contract was awarded as a fixed-price contract, and clearly identified Guardmount Time as a contract requirement, the fifteen minutes of Travel Time for which DCT seeks a price adjustment

here were not the result of the New Wage Determination, and therefore do not present a basis for claiming a price adjustment. *Center Brief dated December 7, 2005* at 3. In addition, because the Contract "never required" DCT to "utilize the storage container," the Center objects to the Travel Time claimed here because these costs arise solely from a voluntary "management decision" made by DCT which singularly serves only "DCT's convenience and that of its security guard employees." *Center Brief dated October 3, 2005* at 12; *Center Brief dated December 7, 2005, supra.* Finally, the Center also maintains that ordering employees "to arrive at work 15 minutes prior to their assigned schedule shift to pick up their weapons" demonstrates another voluntary "management decision" by DCT that is not identified in the Contract and therefore should not eligible for reimbursement here. *Center Brief dated October 3, 2005, supra.*.

B. The Legal Framework

The issue of whether DCT is entitled to a price adjustment for the Travel Time compensation it paid its employees is impacted by three federal labor laws—the FLSA, the Portal-to-Portal Act ("PPA"), and the SCA.

While both the FLSA and the SCA constitute sociological, economic legislation for the benefit and protection of employees, *see Transcontinental Cleaning Co.,* N.A.S.A.B.C.A. No. 1075-9, 78-1 BCA ¶ 13081, the FLSA is considered a broader "more generally applicable statute" than the other federal labor laws because it establishes the minimum wage and overtime pay standards, as well as recordkeeping requirements, for employees in the private sector and in federal, state, and local government. *Id.* The FLSA was enacted by Congress pursuant to the Commerce Clause of the United States Constitution, *Id.*, and was intended to correct and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *See* 41 U.S.C. § 202; *Koren v. Martin Marietta Services, Inc.*, 997 F. Supp. 196 (D. Puerto Rico 1988).

As originally enacted, the FLSA required compensation whenever it was necessary for the employee to be on the work premises—including "for some time prior and subsequent to the scheduled working hours." *See Mount Clemens Pottery Company v.*

United States, 328 U.S. 680 (1946). However, after the Supreme Court interpreted the FLSA to require compensating employees for the time they spent traveling from time clocks to their workstations, the Congress enacted the PPA which "represented an attempt by Congress to delineate certain activities which did not constitute" compensable work. *See Aiken v. Memphis*, 190 F.3d 753 (U.S.C.A. 6th 1999). The PPA excepts the following from FLSA's coverage:

> Walking on the employer's premises to and from the location of the employee's "principal activity or activities," and activities that are "preliminary or postliminary" to said principal activity or activities.

See IBP, Inc., v. Alvarez, 126 S.Ct. 514 (2005).

Even under the PPA, however, some of the activities performed by an employee "either before or after a regular work shift" can still continue to be "compensable" under the FLSA where the activities "are an integral and indispensable part of the principal activities for which covered workmen are employed." *See Steiner v. Mitchell*, 350 U.S. 247 (1956).

The SCA, as amended, was incorporated into the Contract by AMS § 3.6.2-28. *See Contract* at 26. The SCA extends the FLSA's minimum wage protections to federal service contracts in excess of $2,500 by requiring contractors to pay their "service employees" in various classes—including "Guards"—no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's CBA. Whichever determination is applicable is automatically incorporated into the contract. *See* 41 U.S.C. § 357(b).

The DOL has interpreted and implemented the SCA to be consistent with other federal wage and hour laws, most notably the FLSA. Of significance to the current Contract Dispute, the SCA Regulations provide for FLSA principles to be applied to determine the "hours worked" that an employee must be compensated for. *See* 29 C.F.R. § 4.178. In addition, the FLSA minimum wage provisions and standards are used by the DOL to determine employee wage and overtime pay under the SCA. *See* 41 U.S.C. § 351(b)(1);

29 C.F.R. § 4.181. The prohibitions and sanctions identified in the FLSA remain available to employees of those contracting with the government, even where the contract appears on its face to be subject only to the SCA. *See Berry v. Andrews*, 536 F. Supp. 1317 (D.Ala.1982) (court refused to find that the SCA constructively repealed the FLSA with respect to an alleged violation for which the SCA provided no remedy.) Finally, regardless of their classification or the kind of duties performed, employees who actually are paid according to an hourly rate rather than a guaranteed salary basis are covered by the FLSA's wage and hour laws. *See* 29 C.F.R. § 541.212 (incorporating § 541.118); *Donovan v. Kentwood Development Company*, 549 F.Supp. 480 (D.C. Md. 1982).

While the FLSA, PPA, and SCA are distinguishable statutes, the Supreme Court has emphasized "that the coverage of the [FLSA] overlaps that of other legislation affecting labor standards." *See Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950). Moreover, it is well established that the federal labor laws are "mutually supplemental," so that "the provisions of all may apply so far as they are not in conflict." *See Masters v. Maryland Management Company*, 493 F.2d 1329 (4th Cir. 1974). The SCA regulations similarly emphasize that "other federal, state or local" labor requirements will only be "applicable" to a contract where the legislation "does not contravene the requirements of the FLSA." *See* 29 C.F.R. § 778.5.

C. Analysis

Generally, the burden of proof lies with the party seeking a price adjustment. *See Strand Hunt Construction, Inc. 99-ODRA-00142, supra*; *Lafollette Coal, Inc.*, E.B.C.A. No. UCC-ND77Y74180V, 87-3 BCA ¶ 20,099. Where a party asserts entitlement to a price adjustment pursuant to that clause of the contract, the party bears the burden of proving the facts which, by a preponderance of evidence considered in the context of the clause, would entitle the party to the adjustment. *Id*.

While the Center correctly contends that firm-fixed price contracts generally place upon the contractor maximum risk and full responsibility for all costs, and resulting profit or loss, such contracts only require a contractor to bear ***all*** costs without additional

compensation if there is no Price Adjustment Clause. *See Tecom, Inc.*, ASBCA No. 51880, 00-2 BCA ¶ 30,944. As noted above, this Contract incorporated the standard Price Adjustment Clause set forth in the AMS; as a result, although the DCT Contract was a fixed price one, by operation of the Price Adjustment Clause, the contract expressly contemplated the possibility of price adjustments. *Id.; JWK International Corp.*, ASBCA No. 54,153, 04-2 BCA ¶ 32,783.

Wage and benefit increases that the government is obligated to reimburse under a Contract's Price Adjustment Clause must be prospective, and are implemented in accordance with the wage determination scheme in the SCA and regulations related thereto. *See Guardian Moving & Storage Company, Inc.* 421 F.3d 1268 (Fed. Cir. 2005). Under 29 C.F.R. § 4.3(b), any wage determination issued by the DOL will apply to a contract "entered into thereafter and before such determination has been rendered obsolete by a withdrawal, modification, or supersedure." Establishing a basis for claiming a price adjustment requires that there be a change (increase or decrease) in the contractor's cost of providing the wages and benefits as required by the Wage Determination. *See Lear Siegler Services, Inc.*, ASBCA No. 54,449, 05-1 BCA ¶ 32,937. Consequently, where the contract contains a Price Adjustment Clause, and so long as a contractor's increased costs result from the requirement to comply with the applicable wage determination, *i.e.*, a CBA, a supported price adjustment will generally be permitted. *Id.*

Federal law currently requires employees on federal service contracts to be compensated for all "hours worked," which is defined as "all time spent by an employee performing an activity for the benefit of an agency, and under the control or direction of the agency." *See* 29 C.F.R. § 551.401(a). It is also well established that "what constitutes work for which payment" is required "varies with customs and practices in different industries or businesses." *See Tennessee Coal, Iron & R. Co. v. Muscoda Local 123 et al.*, 322 U.S. 771 (1944). The Supreme Court has indicated that pre-shift and post-shift activities of employees are compensable if such activities are an integral part of the work which the employees were hired to perform. *Steiner v. Mitchell*, *supra*. Notably, for guard service contracts, "pre-shift and post-shift time spent by guards in obtaining and turning in their

weapons" as well as time spent by the guard employee "going between the place where the weapons are obtained and the various assigned places of duty" are considered "integral parts of the work which the guards are hired to perform" and therefore must be compensated as hours worked. *See International Business Investments, Inc.*, 11 Cl. Ct. 588 (Cl. Ct. 1987) *and cases cited therein.*

In determining whether pre-shift and post-shift guard activity is compensable, the amount of time spent by the guard employee engaging in these daily activities is determinative. As a general rule, "23 minutes per day" and "15 minutes per day" devoted by guards to perform "necessary pre-shift and post-shift activities" require compensation. *See International Business Investments, Inc.*, *supra*. In contrast, pre-shift and post-shift guard activities requiring only an extra 10 minutes per day have been determined "*de minimis*" and therefore ineligible for compensation. *Id; see also Lindow v. United States* 738 F.2d 1057, 1063 (9th Cir. 1984). It is only where employees are required to give up a substantial measure of their time and effort that compensable working time is involved. S*ee Leahy, Martinez and Moore v. City of Chicago*, September 11, 1996 (Fed. Cir. 1996). Consequently, when the activity at issue is "computed in light of the realities of the industrial world" but only comprises "a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded" in the calculation of compensable hours worked as they involve negligible "burdens" that "are insufficient to pass the *de minimis* threshold." *See Bobo v. United States*, 136 F.3d. 1465 (Fed. Cir. 1988) *relying on Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Significantly, the DOL's current "Fact Sheet # 4: Security Guard . . . Security Industry Under the [FLSA]" advises that "travel time between work sites must be treated as hours worked."[5]

A fundamental rule of contract interpretation requires that all parts of a contract must be read together and harmonized, where possible, so that no contractual provision will be rendered meaningless. *See Strand Hunt Construction, Inc., supra; Union Pacific Insurance Co. v. United States*, 497 F.2d 1402 (Ct. Cl. 1974). If a party's interpretation renders a portion of the contract language meaningless, useless, ineffective or

[5] *Available at*: *www.dol.gov/esa/regs/compliance/whd/whdcomp.htm.*

superfluous, that interpretation generally will be disregarded and rejected. See Restatement, Second, Contracts, Section 203(a); *Fortec Constructors v. United States*, 760 F.2d 1288 (Fed. Cir. 1985). In this case, while the Center argues that the CBA's Travel Time provision simply continued the requirement set forth in the Guardmount Clause, the ODRA concludes that these two Contract provisions are distinguishable. The Guardmount Clause of the Contract tasks only the Shift Manager with undertaking an "informal" gathering of guards, requiring the group to simultaneously self-arm while absorbing information about the assigned post from the previous shift of guards who are returning their weapons to the storage container and presumably going off-duty. Read in the context of the Contract, the Guardmount Clause suggests an "informal" and unscripted encounter between guard shifts that is brief and so *de minimis* as to be negligible activity by the guard employees. On its face, it is not clear that this activity would be compensable work.

The Travel Time provision that was incorporated into this Contract as a result of its inclusion in the New Wage Determination issued by the DOL classifies specific travel activity by all guard employees as compensable work. The Travel Time provision establishes that a specific activity—the actual time spent by each guard employee walking to and from the assigned posts—will be "paid" for "up to 15 minutes . . . per day." The plain language of the incorporated Travel Time provision expressly requires compensating guard employees for up to 15 minutes of daily travel between posts, and DCT is entitled to claim such costs under the Contract's Price Adjustment Clause. *See Phoenix Management, Inc.*, ASBCA No. 53409, 02-1 BCA ¶ 31,704 (where DOL's wage determination incorporated into the contract a CBA requiring two additional airfield management positions, pursuant to standard Price Adjustment Clause, contractor was entitled to all cost increases resulting from its compliance with the DOL wage determination, including the wages for those positions.)

The DOL wage determinations are generally issued on a contract-by-contract basis in response to specific requests from contracting agencies which are initiated by the submission of a Standard Form 98, "Notice of Intention to Make a Service Contract Award" ("SF 98") to the DOL for a determination of the employee and wage

classifications required under the contract.[1] *See AMS Procurement Guidance: Labor Laws, Labor-Related Laws; Procedures Related to Service Contracts* § T3.6.1, ¶ 8; 29 C.F.R. § 4.4(e). If a contractor or contracting agency disagrees with a DOL wage determination, the applicable regulations provide that within established timeframes, the aggrieved party may request "review and reconsideration" of the wage determination. While the Center provided the CBA and the required SF 98 to the DOL, it never questioned or challenged the DOL's subsequent New Wage Determination or its incorporation of the CBA.[6]

Wage determinations issued by the DOL are not retrospective, regardless of the effective date of the underlying CBA, *see Guardian*, 29 C.F.R. 4.3(b), and the SCA Regulations provide that any wage determination included in a CBA that is part of a Wage Determination issued by the DOL will apply to a contract's option year "entered into thereafter". *Id.; United States v. Service Ventures,* 899 F.2d (Fed. Cir. 1990). In this case, the DOL issued the New Wage Determination on January 9, 2004, and consistent with federal law, required it to be applied to the corresponding option year of DCT's Contract. As a result, DCT was obligated to compensate its employees for the identified "Travel Time". *Id.* Under these circumstances, DCT is legally entitled to request a price adjustment for the cost increases which resulted from the Travel Time provision.[7] *Id.*

D. Quantum

The ODRA requested and DCT provided evidence to support the $115,365.50 amount it currently claims as Travel Time costs owed by the Center. DCT submitted a worksheet

[6]The Price Adjustment Clause quoted above governs price adjustments for wage revisions occurring: (1) at the beginning of the renewal option period; (2) when an increased or decreased wage determination "is otherwise applied to this contract"; or (3) if the FLSA is amended after contract award. *See* 29 C.F.R. § 4.4(a)(1). Claims based upon wage revisions which occurred outside these three "predetermined instances" are permitted, but can only be considered pursuant to a contract's Changes clause, such as AMS § 3.10.1-12, which was incorporated into the DCT Contract. *See Lockheed Support Systems, Inc. v. U.S.*, 36 Fed. Cl. 424 (1996).

[7] On every SF 98, the contracting agency must identify: (1) the number and class of service employees expected to be employed under the contract; and (2) the wage rates and fringe benefits that would be paid by the Government to each employee class. *See AMS Procurement Guidance* §T3.6.2(d), *supra*.

for each required guard position which indicates the number of 8-hour shifts that were performed while each guard post was staffed (*i.e.*, 8,784 "*Dispatcher*" hours divided by "8 hours per shift" = 1,098 shifts per year) and the resulting number of shifts for which DCT claims it is entitled to 15 Minutes (".25 Hours") of Travel Time compensation. A final Travel Time number, reflecting the total number of the identified shifts multiplied by the 15 Minutes (".25 Hours") is provided on each sheet as a "Total" (*i.e.* 1,098 Dispatcher shifts x .25 Hours [15 Mins.) = 274.5 Dispatcher Travel Time hours.)

In an affidavit, DCT's Administrative Assistant reports that "[b]i-weekly," she "accumulated the hours worked by security guard employees from the on-site company clock and time cards." She then "summarized these" collected "hours on an Excel spreadsheet," and provided the figures to DCT's "Corporate Office" so that "[p]ayroll checks" could be "calculated from those figures" and disbursed to employees. *Affidavit of Kimberlee A. Impson*, dated November 16, 2005. The Administrative Assistant further advised that:

> [e]ach day calculated for each employee included a maximum 15 minutes additional shift time for each employee to retrieve their weapon and travel to and from their assigned post (as outlined in the CBA).

Id.

The Executive Assistant for DCT's Corporate Office also has submitted an affidavit confirming that "[d]uring the period of January 1, 2004 through December 31, 2004," she relied on the "accumulated time sheets" prepared by the Administrative Assistant to pay the guard employees "15 minutes per day per employee for the purpose of obtaining their weapon and travel time to and from their respective posts." *See Affidavit of Jeanene Davis*, dated November 10, 2005. DCT also points out that the 15 minutes Travel Time could not properly be included or performed simultaneously as part of the identified guard shift hours since subtracting 15 minutes of time for Travel Time would render a post unoccupied for 15 minutes of the core shift. *See DCT Comments* dated November 16, 2005 at 2.

The Center does not challenge DCT's calculations or specific amounts claimed. Rather, in its final Comments on the DCT submissions, the Center asserts only that DCT has not "provided evidence to support the contention that they are due money . . . based upon" the Travel Time provision. *See Center Comments* dated December 6, 2005. The Center also continues to argue that the Contract's Guardmount time is identical to Travel Time—an argument that, for the reasons identified above, the ODRA rejects.

A contractor's claim must be proven by a preponderance of the evidence, and must demonstrate liability, causation, and injury. *See Strand Hunt Construction, Inc., supra*. The contractor must also establish that its claimed costs are reasonable. Here, the ODRA concludes that the documentary evidence submitted by DCT substantiates and demonstrates its claim for $115,365.50 in Travel Time compensation. First, as indicated above, the time clock evidence required to measure the Travel Time was gathered by the DCT Administrative Assistant. This data was then summarized and reduced to an excel spreadsheet analysis. These calculations were then used by the Executive Assistant to pay each employee—and the worksheets presented to the ODRA clearly identify exactly how the amount of claimed Time Travel compensation was earned by and subsequently paid to each employee.[8] Finally, there is no evidence in the record to suggest this data is erroneous or otherwise unreliable.

[8] The FLSA requires that employers subject to its provisions make and keep records of wages, hours and other conditions and practices of employment prescribed by the DOL. *See 29 U.S.C. § 211(c).* The DOL recordkeeping regulations provide that no particular form is necessary, so long as the pertinent information is kept. *See* 29 C.F.R. § 516.1. The employer must maintain records on employees to whom the minimum wage and overtime provisions apply, and these records must include at a minimum: the regular rate of pay for any week when overtime is due; the basis on which the wages are paid; hours worked per day and week; total daily or weekly straight-time earned; total overtime; deductions; and total wages paid. *See* 29 C.F.R. § 516.2. The purpose of these records is to demonstrate that all of the "hours worked" by each employee have been properly paid.

IV. CONCLUSION

The ODRA concludes that DCT has established entitlement and the requested quantum by a preponderance of the evidence. Accordingly, it is recommended that the Center be directed to pay DCT for $115,365.60 in Travel Time costs, along with applicable interest.

_-S-_
Behn M. Kelly
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_-S-_
Anthony N. Palladino
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December 23, 2005