

# ***Parking Systems Plus, Inc. v. Dep't of Transportation***

OATH Index No. 2350/11, mem. dec. (Oct. 28, 2011)

On appeal, CDRB determined that contractor is obligated to pay the cost of increases to prevailing wages for its employees.

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**NEW YORK CITY OFFICE OF  
ADMINISTRATIVE TRIALS AND HEARINGS  
CONTRACT DISPUTE RESOLUTION BOARD**

*In the Matter of*  
**PARKING SYSTEMS PLUS, INC.**  
*Petitioner*  
*- against -*  
**DEPARTMENT OF TRANSPORTATION**  
*Respondent*

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## **MEMORANDUM DECISION**

**ALESSANDRA F. ZORNIOTTI**, *Administrative Law Judge/Chair*

**KEVIN HANRATTY, ESQ.**, *Deputy General Counsel, Mayor's Office of Contracts*

**BRUCE FEFFER, ESQ.**, *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board (“CDRB” or “Board”) is a petition filed by Parking Systems Plus, Inc. (“PSP” or “petitioner”) seeking relief from paying increases to the prevailing wage for cleaner-floor persons (“cleaners”) and unarmed security guards (“guards”) employed in PSP’s parking garages. This dispute arises out of a series of contracts awarded by respondent, the Department of Transportation (“DOT”), to PSP to provide parking services at various locations around New York City. PSP seeks to recover monies for or to be excused from paying wage increases valued at over \$119,358 for the cleaners and over \$596,010 for the guards.

The Board finds that petitioner is not entitled to additional compensation from respondent and that it is petitioner’s obligation to pay its cleaners and guards increases to the prevailing wage. Moreover, the Board lacks jurisdiction to provide the equitable relief requested.

Accordingly, the appeal is denied.

## **BACKGROUND**

In 2004, 2005, and 2006, PSP entered into a series of contracts with DOT to manage and

operate various municipal parking garages in New York City. Each contract was for an initial term of three years with an option for DOT to renew for two years under the same terms (*See*, Contract No. 20060021652-0000660325, Detailed Specifications at § 2). At issue are eight contracts. While the contracts are for different locations and dates they contain the same operative provision relevant to this decision.

Article 31 of the contracts requires that PSP pay the “prevailing wage” to its employees. Prevailing wages for designated workers employed on public works projects in New York City are determined by the New York City Comptroller’s Bureau of Labor Law (“Comptroller”) in accordance with New York State Labor Law (“Labor Law”) Article 8 section 220 and Article 9 section 230, and are published annually in accordance with New York City Administrative Code section 6-109 and Labor Law 220.

The disputed prevailing wage rates are governed by Labor Law 230 because cleaners and guards are building service employees. As required by Labor Law 231(4), attached to each of the contracts is the Comptroller’s prevailing wage schedule for the “effective period” July 1 through June 30 (*see*, Contract No. 20050037115-0000584087, Section 230 Prevailing Wage Index: July 1, 2004 – June 30, 2005 at 2).

This petition involves two claims – an increase to the prevailing wage rate for cleaners and for guards. Both increases occurred after the contracts were signed. On July 1, 2007, the Comptroller increased the prevailing wage schedule for cleaners from a range of \$7.00 to \$9.31 per hour in wages and \$1.28 to \$2.17 per hour in supplemental benefits, to \$10.00 per hour in wages plus \$1.50 per hour in supplemental benefits (Ans. at 4-6; Pet., Ex. A). On July 1, 2009, the Comptroller increased the prevailing wage schedule for guards from \$11.35 per hour in wages plus \$0.78 per hour for supplemental benefits, to a range of \$11.25 to \$13.25 per hour in wages plus \$4.46 per hour for supplemental benefits (Ans. at 4-6; Pet., Ex. A).

Pursuant to Article 19 of the contracts, PSP requested that DOT grant change orders to compensate for each increase. Requests related to the cleaners were made on August 6, 2007, March 31, 2008, and August 27, 2009 (Ans. at 6). It is unclear when the change order(s) for the guards was requested, but DOT acknowledged that a request was made (Ans. at 4). DOT denied the requests for the guards and the cleaners by letters dated September 29, and October 15, 2009, respectively (Ans. at 6; Pet. Ex. B).

On October 6, and November 3, 2009, PSP filed notices of dispute with DOT for the guards and the cleaners (Ans. at 5, 6).

By letters dated January 14, and February 9, 2010, DOT's Agency Chief Contracting Officer ("ACCO") issued final determinations denying compensation for the increase in the prevailing wages, stating "a change in the prevailing wage rate for a particular job title is not considered extra work." The ACCO further stated that the requirement for a contractor to pay the prevailing wages has been part of the Labor Law for approximately 30 years and that a contractor's bid should take such increases into account when submitting a bid (Pet. Exs. B, C).

PSP submitted timely disputes to the Comptroller and argued that it should be given an adjustment in the contracts' prices because the increase to the prevailing wages presented a hardship, could not have been anticipated, and was unfair (Pet. Ex. D).

The Comptroller denied the claims on June 3, 2010, finding that in the absence of an escalation clause in the contracts there was no basis to award additional money, and that under section 20(5) of the General City Law, the City lacked the authority to pay more for work specified in the contracts (Pet. Ex. A).

This action was commenced timely with the filing of two petitions that were consolidated. Oral argument was scheduled for October 20, 2010. The case was adjourned and ultimately taken off calendar on consent to permit PSP, who had proceeded without representation, to retain counsel.

Upon timely notice that PSP had retained counsel, the matter was restored to the calendar. Petitioner filed an amended petition under the above-referenced index number and argued that the wage increases were unforeseen, that they caused extreme economic hardship, and that they rendered the contracts unconscionable. Petitioner also argued that respondent should be considered a joint-employer and responsible for the increases in the prevailing wages.

Respondent timely answered and argued that the petition should be denied because it is the contractor's obligation to pay increases to the prevailing wages. It points to the fact that there is no escalator clause in the contracts to allow for these increases and such payments are prohibited by section 20(5) of the General City Law. Moreover, the Board lacks jurisdiction to provide equitable relief.

Oral argument was held on August 10, 2011. At the argument petitioner raised a new argument that under Labor Law 230, the prevailing wages should have remained constant for the

life of the contracts and that it was the parties' mutual mistake to increase them. Respondent argued that the City has never treated prevailing wages under the Labor Law as static and that it has always been the contractor's responsibility to cover the cost of increased prevailing wages. Petitioner's request to brief these issues was granted over respondents' objection. The record closed on October 7, 2011.

In its brief, petitioner argued that DOT and the Comptroller misapplied Labor Law 230 by increasing the prevailing wages and that the rate schedules attached to the contracts should have remained in effect for the life of the contracts. Petitioner claimed this theory is supported by differences in the language of Labor Law 220 and 230 and because there was a notice recently posted on the New York State Department of Labor's website advising that all 230 prevailing wage schedules must be determined annually but that rates in contracts entered into before August 1, 2010, remain in effect. Similar language can be found in the meeting minutes from the New York Procurement Council on June 15, 2011 (Pet. Post-Hearing Brief, Ex. B). Petitioner further argued that the CDRB has power to grant equitable relief under Administrative Code section 7-206.

Respondent argued that the City's Comptroller, not the State Labor Commissioner, has authority over implementation of prevailing wages determinations within New York City. In any event the recent change to the State's policy defeats petitioner's argument by demonstrating that the State is now conforming to the long-standing policy of the City Comptroller of enforcing increases to Labor Law 230 prevailing wages. Respondent also argued that there is no support that the drafters of Labor Law 230 intended to treat 230 employees differently from workers covered by Labor Law 220.

### **ANALYSIS**

Under the Procurement Policy Board Rules ("PPB Rules"), which were specifically incorporated into section 3 of the contracts, certain disputes between the City and a vendor "that arise under, or by virtue of, a contract between them" are subject to alternative dispute resolution, a process which begins with the presentation of the dispute to the agency commissioner and ends with a presentation to the CDRB. 9 RCNY § 4-09(a) (Lexis 2011). The rules require that the Board's "decision . . . be consistent with the terms of the contract." 9 RCNY § 4-09(g)(4).

In this case, the dispute is over the interpretation of the contracts, specifically the prevailing wage provisions. There is no question that Article 31 of the contracts required PSP to pay its cleaners and guards prevailing wages in accordance with the Labor Law and the Administrative Code. The issue raised is whether PSP is obligated to cover the cost of paying increases to the prevailing wage rates that occur over the life of the contracts. We find this question falls within the CDRB's jurisdiction to decide. 9 RCNY § 4-09(a)(2). *See also Pile Foundation Construction Co., Inc. v. Dep't of Environmental Protection*, OATH Index No. 1785/09, mem. dec. at 7 (Apr. 15, 2009) (issue of contract interpretation is for Board to decide).

Initially, petitioner acknowledged that increases to the prevailing wages should be paid and are expected, but argued that because the increases were larger than anticipated and caused economic hardship, it is entitled to additional compensation (Pet. at 7-8). Subsequently, petitioner argued that under Labor Law 230, the prevailing wage schedules attached to the contracts should have remained in effect for the life of the contracts regardless of any changes to the prevailing wage rates. Neither argument is persuasive.

In *L & L Painting Co., Inc. v. Department of Transportation*, OATH Index No. 1045/06, mem. dec. (May 4, 2006), the CDRB denied a claim for additional compensation due to increased fuel costs. The contractor had executed a five-year contract to remove lead-based paint from the Queensboro Bridge using diesel-fueled compressors. During the course of the contract, the price of diesel fuel rose from \$1.38 to \$2.35 per gallon for an estimated cost increase exceeding two million dollars over the life of the contract. The Board found no basis in the contract to award additional money to the contractor. OATH 1045/06 at 4. *See also Dart Mechanical Corp. v. Dep't of Sanitation*, OATH Index No. 1815/06, mem. dec. (Nov. 9, 2006), *aff'd*, Index No. 101494/07 (Sup. Ct. N.Y. Co. Oct. 10, 2007), *aff'd*, 57 A.D.3d 263 (1st Dep't 2008) (Board denied contractor's claim for additional compensation for increased costs of gas absorption chillers); *SNF Holding Co. v. Dep't of Citywide Administrative Services*, OATH Index No. 1612/06, mem. dec. (Sept. 14, 2006) (Board denied contractor's claim for increased compensation because there was no basis in the contract to change the price index used to set the cost of water treatment chemicals). Similarly, here, there is no escalation clause in the applicable contracts that allows for additional compensation to be paid to PSP for increases to prevailing wage rates.

When courts have considered whether increases in the prevailing wage required by contract entitle a contractor to additional compensation, they have found that it does not. *See Brang Co. v. State University Construction Fund*, 47 A.D.2d 178, 179 (3d Dep't 1975) (contractor "may not obtain reimbursement from a public entity for increased labor costs due to subsequent increases in the prevailing wage rate schedule."); *D.M.W. Contracting Co. v. Bd. of Education*, 259 A.D. 1081, 1081 (2d Dep't 1940), *aff'd*, 285 N.Y. 591 (1941) (contractor not entitled to additional compensation when contract was clear that the prevailing wage must be paid); *see also General Building Contractors of NY, Inc., v. Roberts*, 118 A.D.2d 173, 176 (3d Dep't 1986) (finding it permissible for Comptroller to enforce increases in the prevailing wage after the contract is let).

Petitioner claims that the above-referenced court cases are inapplicable because they involve prevailing wages under Labor Law 220. According to petitioner, there is a distinction between Labor Law 220 and 230 in that prevailing wages paid under 220 contracts change every year but they remain constant for the duration of the contract under 230. We find nothing in Labor Law 220 or 230 to support petitioner's conclusion that "section 230 does not permit the City to obligate contractors to pay increased prevailing wages" (Pet. Mem. at 2).

Article 8, section 220 of the Labor Law governs laborers and mechanics. Article 9, section 230 of the Labor Law was enacted in 1971 to extend the prevailing wage requirements and protections of section 220 to include "building service employees" who perform "care or maintenance" work for public buildings. Labor Law §§ 230(1), 231 (Lexis 2011); *see also* Comm. on Labor Law Approval Mem., Bill Jacket, L. 1971, ch 777; *Feher Rubbish Removal, Inc. v. NYS Dep't of Labor*, 28 A.D.3d 1, 5-6 (4th Dep't 2005). When reviewing the proposed amendment, the Industrial Commissioner noted that the new Article 9 would implement procedures to determine prevailing wages "similar to those . . . existing for public work." Mem. of Office of Indus. Comm'r at 2, June 15, 1971, Bill Jacket, L. 1971, ch 777. In approving the proposed amendment, the Labor Committee wrote, "[t]he fundamental public policy embodied in the bill is that service employees employed by a contractor or subcontractor in the performance of a service contract with a public agency should not be paid sub-standard wages." Comm. on Labor Law Approval Mem. at 1, Bill Jacket, L. 1971, ch 777.

Under Labor Law 230, "prevailing wage" means "the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality."

Labor Law § 230(6)(Lexis 2011). The fact that the 230 legislators omitted language from the definition in Labor Law § 220(5)(a) providing, “The prevailing rate of wage shall be annually determined . . . no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth” does not lead to the inevitable conclusion that 230 wage schedules remain in effect for the term of the contract. Such a finding would result in different procedures for determining and providing prevailing wages to laborers and service workers in contravention of legislative intent. *See Raritan Development Corp. v. Silva*, 91 N.Y.2d 98, 106-07 (1997) (“it is fundamental that a court, in interpreting a statute should attempt to effectuate the intent of the Legislature.”) More importantly, it would be contrary to public policy because service employees working on public projects would be deprived of statutory wage increases, in some cases for many years. *Brian Hoxie’s Painting Co. v. Cato-Meridian Central School Dist.*, 76 N.Y.2d 207, 212 n.2 (1990) (“overriding purpose of the prevailing wage requirements is to ensure that workers on public projects receive adequate pay . . . and to eliminate unfair competitive bidding by nonunion employers who might otherwise submit offers that are artificially low . . . based upon worker compensation below the prevailing rates.”); *see also General Building Contractors of NYS, Inc. v. Roberts*, 118 A.D.2d 173, 176 (3d Dep’t 1986) (long-standing public policy of New York State is to enforce current prevailing wage rates even if they increase after a contract is formed).

The fact that the New York State Labor Commissioner may have frozen prevailing wage rates for Labor Law 230 contracts entered into prior to 2010 does not, as alleged by petitioner, require that New York City also do so.<sup>1</sup> The Labor Law vests the City’s Comptroller, as the “fiscal officer,” with the power to set prevailing wages for workers employed on public works projects in this locality, Labor Law §§ 230(6),(8), 231(4), and the Administrative Code requires the Comptroller to set the prevailing wage annually. Admin. Code § 6-109. Notably, Labor Law 230 states that “In no event . . . in a city with a local law requiring a higher minimum wage on city contract work [shall the basic hourly cash rate of pay] be less than the minimum wage specified in such local law.”

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<sup>1</sup> Currently pending in the State Legislature is a bill to “clarify” that the prevailing wage requirements under Labor Law 230 “cannot be evaded” by an agreement with a public agency. The bill also provides for criminal penalties for such violations in future contracts. The stated justification for the legislation is that Labor Law 230 lacks many of the safeguards incorporated into 220 and that “ambiguities or outdated definitions” in the law have “left the door open for efforts to avoid paying prevailing wages for service work performed for public agencies.” Sponsor’s Mem., 2011 NY Senate Bill 1110.

In any event the schedules attached to the contracts specify that the wages set forth therein will be in effect through June 30, of either the year the contract was entered into or the following year. The addendum specifically provides:

This schedule is applicable to work performed from July 1, 2004, through June 30, 2005, unless otherwise noted. Changes to this schedule are published on our web site @ [www.comptroller.nyc.gov](http://www.comptroller.nyc.gov) Contractors must pay the wages and supplements in effect when the building service employee performs the work.

(Contract No. 20050037115-0000584087, Section 230 Prevailing Wage Index: July 1, 2004 – June 30, 2005 at 1). Thus, petitioner was on notice that the prevailing wages would be frozen only for the effective period stated and that they would increase if the Comptroller issued new rates during the life of the contracts. Indeed, petitioner acknowledged that such increases would occur and that they were the contractor’s responsibility.

To the extent contract documents contain any ambiguities, section 8 of the Information for Bidders, entitled “Examination of Proposed Contract,” states:

Request For Interpretation Or Correction Prospective Bidders must examine the Contract Documents carefully and before bidding must request the Commissioner in writing for an interpretation or correction of every patent ambiguity, inconsistency or error therein which should have been discovered by a reasonably prudent bidder  
.....

(Contract No. 20050037115-0000584087, Invitation for Bids/Bid Documents at A6). Thus, petitioner was obligated to carefully review the documents and inquire about its obligation to pay increases to the prevailing wage rates before submitting its bid. *Acme Builders, Inc. v. Facilities Development Corp.*, 51 N.Y.2d 833, 834 (1980); *Tully Construction Co., Inc. v. Dep’t of Sanitation*, OATH Index No. 3524/09, mem. dec. at 6 (Dec. 10, 2009). Having failed to do so, petitioner is bound by DOT’s interpretation of the contracts. *Thalle Construction. Co. v. City of New York*, 256 A.D.2d 157, 158 (1st Dep’t 1998); *Arnell Construction Corp. v. Board of Ed.*, 193 A.D.2d 640, 641 (2d Dept. 1993); *James H. Merritt Plumbing, Inc. v. City of New York*, 55 A.D. 2d 552, 554 (1st Dep’t 1976).

Petitioner’s arguments that it is entitled to equitable relief because the increases were more than anticipated must also fail. PPB rule 4-09(g)(4) requires that the Board render decisions consistent with the contract which precludes it from awarding equitable remedies.

*Weeks Marine, Inc. v. Dep't of Sanitation*, OATH Index No. 1296/00, mem. dec. at 9 (June 23, 2000), *aff'd*, 291 A.D.2d 277 (1st Dep't 2002). Petitioner's reliance on Administrative Code section 7-206 is also misplaced. That section does not vest any equitable power in the CDRB, but grants it to the Board of Estimates.<sup>2</sup>

We have reviewed petitioner's remaining contentions and find them to be without merit.

Accordingly, the appeal is denied. The Board's ruling should not be construed as limiting PSP's right to seek redress in any other forum.

This constitutes the final decision of the Board. All panel members concur in this decision.

Alessandra F. Zorgniotti  
Administrative Law Judge/Chair

October 28, 2011

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<sup>2</sup> The Board of Estimate was dissolved by decision of the U.S. Supreme Court. *Bd of Estimate v. Morris*, 489 U.S. 688 (1989) (finding the structure of the Board of Estimate violates the Equal Protection Clause of the 14th Amendment). However, section 7-206 of the Administrative Code was never repealed or amended. Petitioner has pointed to nothing that provides the CDRB with the same power.