

***A-1 First Class – Viking Moving & Storage, Inc. v. Human Resources Admin.***

OATH Index No. 2655/11, mem. dec. (Oct. 28, 2011)

Contractor petitioned CDRB seeking full amount of requested price adjustment. CDRB grants HRA’s motion to dismiss petition as time-barred.

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**CITY OF NEW YORK  
OFFICE OF ADMINISTRATIVE TRIALS  
AND HEARINGS**

**CONTRACT DISPUTE RESOLUTION BOARD**  
*In the Matter of*  
**A-1 FIRST CLASS – VIKING MOVING & STORAGE, INC.**  
*Petitioner*  
*- against -*  
**HUMAN RESOURCES ADMINISTRATION**  
*Respondent*

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**MEMORANDUM DECISION**

**INGRID M. ADDISON**, *Administrative Law Judge/Chair*

**KEVIN HANRATTY**, *General Counsel, Mayor’s Office of Contracts*

**RUTH GURSKY**, *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board (“CDRB” or “Board”) is the petition of A-1 First Class – Viking Moving & Storage, Inc. (“petitioner” or “A-1”) challenging a determination by the New York City Human Resources Administration (“respondent” or “HRA”) which, it contends, failed to adequately increase the billable labor rates in regard to Class “B” Furniture Mover Helpers. Respondent argues that petitioner failed to timely file its Notice of Dispute with the Agency Head and its Notice of Claim with the Comptroller and, therefore, the petition must be dismissed as time-barred.

For the reasons set forth below, the Board finds that petitioner’s claim is time-barred and is therefore dismissed.

**BACKGROUND**

On or about June 15, 2009, A-1 and HRA entered into a contract for moving services, contract number CT069 20100000728 (“the Contract”).

The Contract required A-1 to pay prevailing wages and benefits. When A-1 bid on the contract, there were four classifications of moving employees: Furniture Mover/Driver (“Mover/Driver”), Furniture Mover/Assistant (“Mover/Assistant”), “Casual Driver” and “Casual Mover”. The remuneration for the Mover/Driver and Mover/Assistant titles was \$37.34 and \$20.93, respectively, while Casual Drivers and Casual Movers were paid at \$12 and \$13, respectively

On July 1, 2010, the New York City Comptroller issued a new prevailing wage schedule which eliminated the “Casual Driver” and “Casual Mover” titles, and split the Mover/Driver and Mover/Assistant titles into “A” and “B” classifications (Mover/Driver A, Mover/Driver B, Mover/Helper A and Mover/Helper B), to be determined by the year that the worker entered the business. The new hourly rates for Mover/Driver A and Mover/Driver B were \$38.90 and \$33.03, respectively. For Mover/Helper A and Mover/Helper B, they were \$35.90 and \$30.60, respectively.

In a letter to HRA, dated July 7, 2010, A-1 requested new hourly billing rates as follows: For Mover/Driver A and Mover/Driver B, \$42.88 and \$37.89, respectively, and for Mover/Helper A and Mover/Helper B, \$47.86 and \$61.15, respectively. The request was based upon an escalator clause in the Contract (Pet. Notice of Dispute, Ex. D).

By letter dated August 11, 2010, Fern Vasile, Assistant Deputy Commissioner in HRA’s Office of Contracts and Budget Management, responded to A-1’s request. Ms. Vasile acknowledged A-1’s request for increased billable rates and noted that:

[T]his Office, the HRA/Office of Legal Affairs as well as the New York City Law Department have reviewed your request and determined that, in accordance with the most recent revisions to Section 230/Prevailing Wage Schedule, effective July 1, 2010 through June 30, 2011, the following adjustments [to] your billable rates will be made:

<u>Seniority</u>	<u>Effective July 1, 2010</u>
<u>Furniture Mover Driver</u>	
Industry A	\$42.88
Industry B	\$37.01

Furniture Mover Assistant

Industry A	\$47.86
Industry B	\$42.59

It is emphasized that based upon the above referenced revisions to the Prevailing Wage Schedule, the titles of Driver and Assistant have been Reclassified to Furniture Mover Driver (Industry A & B) and Furniture Mover Assistant (Industry A & Industry B) and therefore, can no longer be used under this contract.

If you have any questions or require additional information, please let me know.

(Resp. Mot. to Dismiss, Ex. 1).

On September 3, 2010, Mr. Laby met with Edward M. LeMelle, HRA Deputy General Counsel, who afterwards wrote to Mr. Laby on September 10, 2010, and reminded him of petitioner's obligations under the new prevailing rate schedule, as discussed during that meeting (Resp. Mot. to Dismiss, Ex. 2). The letter notified petitioner that the new rates for Drivers A and B would result in a price differential over the applicable prevailing wage rate of \$3.98, while those for Assistants A and B titles would result in a price difference of \$11.96. The letter further cautioned that failure to comply with the contract may result in termination (Resp. Mot. to Dismiss, Ex. 2).

A-1 submitted its Notice of Dispute to HRA Commissioner Doar on October 8, 2010 (Resp. Mot. to Dismiss, Ex. 3). On December 7, 2010, the Commissioner issued a decision that A-1's claim was time-barred, and rejected it on the merits (Resp. Mot. to Dismiss, Ex. 4).

A-1 filed a Notice of Claim with the Comptroller on January 7, 2011 (Resp. Mot. to Dismiss, Ex. 5). The Comptroller requested additional time to respond to the Notice of Claim beyond the 45-day period provided in the Contract. After the Comptroller failed to act upon the claim by the extended deadline of June 6, 2011, A-1 filed its petition with the CDRB on June 17, 2011.

HRA filed a motion to dismiss on August 16, 2011, on grounds that petitioner's Notice of Dispute to the agency head and Notice of Claim to the Comptroller were time-barred. A-1 filed its response to HRA's motion on September 12, 2011, and HRA filed its reply on September 13, 2011.

**ANALYSIS**

The Procurement Policy Board's ("PPB") rules provide a mechanism by which a petitioner/vendor may submit for resolution, disputes related to its contract with the City. A vendor

must present its dispute in writing to the agency head within 30 days of receiving written notice of the “determination or action that is the subject of the dispute.” 9 RCNY § 4-09(d)(1) (Lexis 2011).

Here, the parties disagree about when HRA made its determination. HRA asserts that its August 11, 2010 letter setting the billing rates that are subject of the dispute, was its determination. As such, the 30-day clock began to run when A-1 received that letter, making untimely, A-1’s Notice of Dispute on October 8, 2010. It therefore seeks dismissal of A-1’s petition as time-barred.

A-1 characterizes the August 11 letter as HRA’s counterproposal to A-1’s July 7 request for wage modification, and contends that the letter lacks the requisite finality to trigger the 30-day clock because it closed by asking if petitioner had any questions or required additional information. A-1 claims that this lack of finality is further demonstrated by HRA’s willingness to meet with it on September 3, 2010. In its opposition to respondent’s motion to dismiss, A-1 further argues that HRA’s August 11 letter does not comply with section 4-09(b) of the PPB rules in that it does not clearly state that it is a determination and is not supported by a “reasoned explanation.” Therefore, it could not constitute a determination. Finally, A-1 challenges the authority of Ms. Vasile, the assistant deputy commissioner who issued the August 11 letter, to render a determination.

A-1 claims that the September 10, 2010 letter is HRA’s determination which it disputed, and therefore counters that its October 8, 2010 Notice of Dispute is timely.

#### The August 11, 2010 Letter

A-1’s attempt to relegate it to a counterproposal is not a compelling argument for finding that HRA’s August 11 letter did not constitute a determination. Indeed, the letter indicated that it was a response to A-1’s request for an increase in billable rates. But nothing in its statement that “the following adjustments [to] your billable rates will be made” could be interpreted as a counter offer thereby making the letter open-ended and inviting an opportunity for haggling. That the letter was intended to convey finality is supported by the number of parties that were involved in HRA’s decision regarding the new billable rates. In her letter, the assistant deputy commissioner clearly articulated that a collective determination had been made by HRA’s Office of Contracts and Budget Management (“OCBM”), its Office of Legal Affairs (“OLA”), and the New York City Law Department (“Law Department”), after a review of A-1’s request. Specifically, Ms. Vasile stated

that “this Office, the HRA/Office of Legal Affairs as well as the New York City Law Department have reviewed your request and determined that . . . the following adjustments [to] your billable rates will be made.” (Resp. Mot. to Dismiss, Ex. 1) (emphasis added). It is therefore perplexing that A-1 did not perceive this as HRA’s determination, and an outright rejection of A-1’s request.<sup>1</sup>

Further, even if the meeting on September 3 with HRA’s deputy general counsel, Mr. LeMelle, was an attempt by A-1 to re-negotiate the billable rates that HRA had decided upon, that did not toll A-1’s time to file its Notice of Dispute with the agency head. *See Gertler v. Goodgold*, 66 N.Y.2d 946, 948 (1985) (finding statute of limitations period commenced with a letter stating that “reorganization plans are already firm” and was not extended by negotiations thereafter); *Manual Elkin Co. v. Dep’t of Design & Construction*, OATH Index No. 1010/07, mem. dec. at 4 (Feb. 22, 2007) (finding time period began to run when agency issued a letter denying petitioner’s claim and that “ongoing settlement discussions do not suspend a contractor’s obligation to file a notice of dispute”); *Nationwide Court Services, Inc. v. Dep’t of Health & Mental Hygiene*, OATH Index No. 2042/06, mem. dec. at 3-4 (Nov. 3, 2006) (finding that agency’s initial letter denying petitioner’s claim started the statutory period, not its subsequent letter reiterating its position); *Kreisler Borg Florman/L.A. Wenger Contracting Co., Inc., v. Dep’t of Design & Construction*, OATH Index No. 1088/03, mem. dec. at 7 (June 11, 2003) (“Whether there were settlement discussions . . . does not excuse the failure to file”). Moreover, it defies credulity that the discussions at that meeting, and the deputy general counsel’s subsequent letter could trump a unified determination made by the deputy commissioner of the OCBM, the OLA and the Law Department.

A-1’s argument that HRA did not clearly identify its August 11 letter as a determination, or provide a “reasoned explanation” as required by section 4-09(b) of the PPB rules is not compelling.

PPB rule 4-09(b) provides that:

All determinations required by this section shall be clearly stated, with a reasoned explanation for the determination based on the information and evidence presented to the party making the determination.

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<sup>1</sup>Notably petitioner recognized this as a denial of its claim in its Notice of Dispute (“ . . . HRA rejected the bulk of A-1’s requested rate adjustments by letter dated August 11, 2010.” (Pet. Notice of Dispute at 6)).

9 RCNY § 4-09(b) (Lexis 2011) (emphasis added). The only determinations required under section 4-09 are (i) the Agency head's decision, 9 RCNY § 4-09(d)(3) (“[w]ithin thirty days after receipt of all materials and information . . . the Agency Head shall make his or her determination”) and (ii) the CDRB's decision, 9 RCNY § 4-09(g)(4) (“[w]ithin forty-five days of the conclusion of all submissions and oral arguments, the CDRB shall render a decision resolving the dispute”). Section 4-09 also gives the Comptroller an opportunity to compromise or adjust the claim. 9 RCNY § 4-09(e)(4). Notably, in each case, the PPB rules establish timelines for submissions and responses and/or decisions. There is nothing in the PPB rules that carves out a timeframe for an agency's response to a vendor's application for any upward modification of financial remuneration under its contract with the agency. Moreover, the sole reference to the determination being challenged is contained in section 4-09(d)(1), which provides for such challenge “within thirty days of receiving written notice of the determination or action that is the subject of the dispute.” 9 RCNY § 4-09(d)(1).

Thus, it seems clear that the determinations required under section 4-09, are triggered only after the decision that gave rise to the dispute in the first place. This interpretation is supported by section 4-09(a), the applicability section of the rule, which states that, “Except as provided in (1) and (2) below, this section shall apply to all disputes between the City and a vendor that arise under, or by virtue of, a contract between them.” 9 RCNY § 4-09(a). The Board therefore finds the requirements of section 4-09(b) to be inapplicable to determinations rendered prior to the vendor's Notice of Dispute, and as such, inapplicable to HRA's August 11 letter.

In sum, the Board finds HRA's August 11, 2010 letter to be an unambiguous determination of the rates that it would pay in light of the new prevailing wage schedule, not an invitation to haggle. That determination triggered the dispute resolution process. *See Manuel Elkin Co.*, OATH 1010/07 at 4 (finding letter triggered the dispute resolution process where it unambiguously stated that petitioner's “request for payment of services provided . . . is disallowed.”); *Ajet Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1418/01, mem. dec. (June 28, 2001) (petitioner's claim was found to be time-barred where a letter from the project engineer to petitioner unambiguously denied the claim, despite petitioner's argument that the letter was ambiguous); *cf. H. Allen Construction, Ltd. v. Dep't of Housing Preservation & Development*, OATH Index No. 499/93, mem. dec. (Jan. 20, 1993) (citing *Mundy v. Nassau Co. Civil Service Comm'n*, 44 N.Y.2d 352, 358

(1978)) (finding issuance of determination did not commence the timeframe for petitioner to file an appeal where it created ambiguity by providing incorrect information regarding when the statutory period would begin to run). Accordingly, A-1's Notice of Dispute should have been filed within 30 days of receipt of that letter. Instead, it was filed on October 8, almost one month late. A-1's Notice of Dispute is therefore time-barred.

A-1's claim that Ms. Vasile did not have the actual authority to render a determination lacks merit. The HRA organizational chart that A-1 submitted to support its claim (Pet. Opp. to Resp. Mot. to Dismiss, Ex. D) is not authenticated by HRA. Thus, its accuracy is questionable. Besides, A-1 presented no evidence that an assistant deputy commissioner in HRA's Office of Contracts and Budget Management was not authorized to make decisions on requests for contract modifications. A-1's further claim that Ms. Vasile also lacked apparent authority is disingenuous. A-1's Director of Operations, Mr. Laby, clearly acknowledged Ms. Vasile as one authorized to decide on a change to the billable rate structure when he wrote her on July 7, 2010, requesting increases based on the new prevailing wages schedule (Pet. Opp. to Resp. Mot. to Dismiss, Ex. A).

Because the Board finds petitioner's Notice of Dispute to be time-barred, it is unnecessary to address respondent's argument as to the timeliness or tardiness of the Notice of Claim. Where a contractor has missed the deadline for filing its claim with the agency head, it is appropriate to dismiss its petition. *See Manual Elkin Co.*, OATH 1010/07 at 5; *Kreisler Borg Florman v. Dep't of Design & Construction*, OATH Index Nos. 338/07, 339/07 & 340/07, mem. dec. at 6 (Jan. 26, 2007); *Dell Tech Enterprises, Inc. v. Dep't of Environmental Protection*, OATH Index No. 427/07, mem. dec. at 6 (Nov. 22, 2006).

Accordingly, respondent's motion to dismiss is granted.

Ingrid M. Addison,  
Administrative Law Judge/Chair

Dated: October 28, 2011

A P P E A R A N C E S:

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