



In the Matter of:

**CONSTRUCTION OF THE
TERREBONNE PARISH
JUVENILE JUSTICE COMPLEX,
HOUMA, LOUISIANA,**

ARB CASE NO. 2017-0056

DATE: September 4, 2020

**With respect to Wage
Determination No. LA 140004, as
To Mechanical Insulators.**

Appearances:

For the Petitioner:

Thomas R. Peak, Esq.; *Taylor, Porter, Brooks & Phillips, LLP*; Baton Rouge, Louisiana

For the Respondent, Administrator, Wage and Hour Division:

Nicholas C. Geale, Esq; Jennifer S. Brand, Esq.; William C. Lesser, Esq; Jonathan T. Rees, Esq.; and Katelyn J. Poe, Esq.; *United States Department of Labor*; Washington, District of Columbia

**BEFORE: Thomas H. Burrell, James A. Haynes, and Heather C. Leslie,
*Administrative Appeals Judges***

DECISION AND ORDER

This matter is before the Administrative Review Board (the Board) pursuant to the provisions of the Davis-Bacon Act (DBA) and “Related Acts” (DBRA), 40 U.S.C. § 3141 et seq. (2006), and the applicable implementing regulations at 29 C.F.R. Parts 1, 5, and 7 (2020). The DBRA apply DBA labor standards to certain federally-assisted construction projects, such as the project at issue here. Insulation Sales & Service, Inc. seeks review of a determination by the Administrator of the U.S. Department of Labor’s Wage and Hour Division (Administrator) denying its request to add a “Mechanical Insulator” classification to a wage determination under a DBA contract. We affirm.

BACKGROUND

Insulation Sales & Services, Inc. (“Petitioner”), submitted a request for conformance on April 27, 2015 for a “Mechanical Insulator” at a wage rate of \$12.58 per hour and \$0.00 in fringe benefits.¹ On May 13, 2015, the Administrator denied the conformance request because the proposed wage rate did not bear a reasonable relationship to rates contained in Louisiana 140004, mod. 4 (“LA4”) as it was less than the lowest rate. The Administrator approved a rate of \$22.96 per hour plus \$7.75 in fringe benefits, for a combined total of \$30.71.²

Petitioner requested reconsideration on June 5, 2015, asserting the Administrator incorrectly compared mechanical insulators to skilled craft classifications, and requested the wage determination conform to classifications more similarly situated to mechanical insulator work.³ On July 1, 2015, the Administrator affirmed its decision that “Mechanical Insulator” fell within the “skilled” category of LA4 and the proposed wage rate did not bear a reasonable relationship to the wage rates in the wage determination.⁴

On July 30, 2015, Petitioner appealed and requested the Administrator consider prior conformance decisions with mechanical insulator wage rates closer to its proposed rate, or an alternative rate of \$14.64.⁵ However, on May 25, 2017, the Administrator affirmed the decision.⁶

Petitioner appealed to the Board for review on June 27, 2017. Both Petitioner and the Administrator filed briefs.

¹ Administrative Record (AR) Tab A.

² AR Tab C.

³ AR Tab D.

⁴ AR Tab E.

⁵ AR Tab F.

⁶ AR Tab H.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator’s final decisions under the DBA.⁷ The ARB’s review of the Administrator’s ruling is in the nature of an appellate proceeding and the Board “will not hear [factual] matters de novo except upon a showing of extraordinary circumstances.”⁸ The ARB will assess the Administrator’s rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA.⁹ “In considering the matters within the scope of its jurisdiction,” the Board acts “as fully and finally as might the Secretary of Labor.”¹⁰

In establishing a conformed rate for a wage classification, “the Administrator is given broad discretion and his or her decisions will be reversed only if inconsistent with the regulations, or if they are unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations”¹¹

DISCUSSION

The DBA provides a mechanism for contractors to challenge the accuracy or completeness of a wage determination prior to bidding or the award of a contract in order to provide the government the full benefits of the procurement process, assure fairness to potential bidders, and “provide a reasonable floor [] within the context of a local wage-determination for federal construction contract wages.”¹² By allowing for a challenge prior to the initiation of work, the regulations seek to avoid unfair surprise to an employer, its employees, or the government respecting the wage

⁷ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020). Reference to DBA in this decision shall include the DBRA unless otherwise noted.

⁸ 29 C.F.R. § 7.1 (e).

⁹ *William J. Lang Land Clearing, Inc.*, ARB Nos. 2001-0072 through -0079; ALJ Nos. 1998-DBA-00001 through -00006, slip op. at 5 (ARB Sept. 28, 2004).

¹⁰ 29 C.F.R. § 7.1 (d).

¹¹ *Millwright Local 1755*, ARB No. 1998-0015, slip op. at 7 (ARB May 11, 2000) (quoting *Envtl. Chem. Corp.*, ARB Case No. 1996-0113, slip op. at 3 (ARB Feb. 6, 1998)).

¹² *Sumlin & Sons, Inc.*, WAB No. 95-08, 1995 WL 732673, at *2 (WAB Nov. 30, 1995) (available on Westlaw); see 29 C.F.R. § 1.6(c)(3).

standards governing a particular contract.¹³ Thus, “[t]here is an attendant obligation on the part of would-be contractors to familiarize themselves with the governing wage determination and to take advantage of the challenge procedure should the wage determination be deficient.”¹⁴

Through the conformance process, the Administrator may grant a measure of relief to a contractor “(w)here due to unanticipated work or oversight, some job classifications necessary to complete the work are not included in the wage determination”¹⁵ “However, the conformance procedure is not intended to be a substitute process for challenging wage determinations in a timely manner.”¹⁶ The Administrator has broad discretion to accept or reject any given conformance request.¹⁷

In order for a proposed job classification to be added to an existing wage determination in conformance with a wage determination, the following criteria must be met: (1) the work to be performed by the classification requested is not performed by a classification already in the wage determination; (2) the classification is utilized in the area by the construction industry; and (3) the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.¹⁸

Here, Petitioner argues the Administrator’s interpretation of the wage determination is unreasonable. Specifically, Petitioner contends that the skill level of a “Mechanical Insulator” is more similar to the skill required of a common laborer and does not merit a combined wage rate of \$30.71. However, a “Mechanical Insulator” is indeed a skilled classification.¹⁹ Further, the Administrator is not

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *2 (WAB Sept. 29, 1995) (available on Westlaw).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 29 C.F.R. § 5.5(a)(1)(ii)(A); All Agency Memorandum (AAM) No. 213 (March 22, 2013).

¹⁹ *Miller Insulation Co. Inc.*, WAB No. 94-01, 1994 WL 173885, at *4 (WAB May 2, 1994) (available on Westlaw); *M.Z. Contractors Co. Inc.*, WAB No. 92-06, 1992 WL 515937 (WAB Aug. 25, 1992) (available on Westlaw).

required to engage in a detailed comparison of the skill level for the relevant classification.²⁰ Rather, the Administrator is to generally compare wage rates for additional skilled classifications to those wage rates for skilled classifications contained in the applicable wage determination.²¹ Thus, the Administrator correctly determined this conformance request is a skilled classification subject to the wage rates contained in LA4.

Petitioner also argues the Administrator should not have only considered the union-negotiated rates contained in the wage determination. Petitioner acknowledges the Administrator may consider whether the classification consists of predominantly union or non-union prevailing wage rates. However, Petitioner argues the Administrator should have looked to the lowest union rate and the highest non-union rate, relying on *Strickland*, ARB No. 2013-0088 (ARB June 30, 2015).

In *Strickland*, the Board held, “[i]f the wage rates in the applicable category are ‘roughly half’ union and half non-union, ‘it would typically be appropriate to look to the lowest union *rate* and highest [non-union] *rate*’ when proposing a wage rate.”²² Here, as the Administrator explained, six of the nine skilled classification wage rates in the wage determination are union-negotiated wage rates. AAM 213 instructs that if a wage determination contains predominantly union prevailing wage rates, it is appropriate to examine the union sector classifications in the wage determination.²³ As the union-negotiated wage rates make up a predominance of the wage rates contained in the wage determination, the Administrator reasonably considered only these rates in rejecting Petitioner’s proposed and alterative wage rates.

Petitioner further argues the Administrator failed to consider the prevailing wage rates within its locality. Petitioner cites prior wage determinations and contends they demonstrate a pattern in its locality and that the combined rate of

²⁰ *Tower Constr.*, WAB Case No. 94-17, 1995 WL 90010, at *5 (WAB Feb. 28, 1995) (available on Westlaw); *see also Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *3 (available on Westlaw) (the conformance process requires only that the Wage and Hour Division be “fair and reasonable, not precise”).

²¹ *Id.*

²² *Strickland*, ARB No. 2013-0088, slip op. at 12.

²³ AAM 213 at 4; *Courtland Constr. Corp.*, ARB No. 2017-0074, slip op. at 5 (ARB Sept. 30, 2019).

\$30.71 is more than double the highest previously approved wage rate. However, as the Administrator correctly argues, contractors “may not rely on wage rates previously approved” in other similar conformance requests.²⁴ Rather, the Wage & Hour Division is required to “determine whether a proposed rate for an additional classification bears a reasonable relationship ‘only to the rates contained in the wage determination *applicable* to the contract under consideration.’”²⁵ Here, as the Administrator explained, the conformed combined rate of \$30.71 is both the second-lowest union-negotiated rate and the median of all nine skilled classification wage rates contained in LA4 overall. Thus, the conformed rate bears a reasonable relationship to the wage rates in the wage determination.

The Administrator acted within the broad discretion she is afforded in both rejecting Petitioner’s conformance request and determining the appropriate wage rate for the conformed wage classification as added to the wage determination.

CONCLUSION

Because we conclude that the Administrator did not abuse her discretion in rejecting Insulation Sales & Service, Inc.’s conformance request and by determining a wage rate for the Mechanical Insulator classification that bears a reasonable relationship to the wage rates in the contract, we **AFFIRM**.

SO ORDERED.

²⁴ *Velocity Steel, Inc.* ARB No. 2016-0060, slip op. at 12 (ARB May 29, 2018).

²⁵ *Id.* (emphasis in original); 29 C.F.R. § 5.5(a)(ii)(3).