

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



In the Matter of:

SYSTEM TECH, INC.,

ARB CASE NO. 2020-0029

PETITIONER,

DATE: May 25, 2021

v.

**UNITED STATES DEPARTMENT
OF LABOR, ADMINISTRATOR,
WAGE AND HOUR DIVISION,**

RESPONDENT.

Appearances:

For the Petitioner:

James F. Jacobson, Esq.; *Sasser & Jacobson, PLLC*; Boise, Idaho

For the Respondent:

Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Jonathan T. Rees, Esq.; Sarah Caudrelier, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This matter is before the Administrative Review Board (Board or ARB) 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 DBA applies to federal

construction projects and the DBRA apply DBA labor standards to certain federally assisted construction projects. System Tech, Inc. (Petitioner) seeks review of a determination by the Administrator of the U.S. Department of Labor's Wage and Hour Division (WHD) denying its request to add a "Telecommunications Installer" classification at a proposed wage rate of \$19.75. As discussed below, we affirm the Administrator's determination.

BACKGROUND

On August 25, 2017, WHD approved the eighth modification of a wage determination (ID27) involving Department of Energy's (DOE) contract numbers 179446 (Cybercore Integration Center) and 179447 (Collaborative Computer Center) relating to DOE's plan to lease-build two facilities at the Idaho National Laboratory campus in Bonneville, Idaho. Petitioner was awarded a subcontract to perform telecommunications work on the project.

On November 15, 2018, DOE submitted a request for conformance on behalf of System Tech for a "Telecommunications Installer" at a proposed rate of \$15.00 per hour plus \$4.75 in fringe benefits, for a combined total of \$19.75. On November 29, 2018, WHD's Branch of Construction Wage Determination (BCWD) denied the conformance request, finding that the proposed rate did not bear a reasonable relationship to the other wage rates contained in ID27. BCWD instead approved a rate of \$27.77 per hour plus \$14.08 in fringe benefits, for a combined total of \$41.85.

Petitioner requested review and on April 5, 2019, BCWD affirmed its original conformance determination. BCWD explained that a proposed classification conformed to a wage determination should take into consideration wage rates within the same general classification category, and whether those wage rates are predominantly union prevailing wage rates or predominantly weighted average prevailing wage rates. BCWD found that the proposed Telecommunications Installer position is a skilled crafts classification and that ID27 contained 12 skilled crafts classifications, 8 of which reflected union rates and 4 of which reflected weighted-average rates. BCWD found that the proposed rate of \$19.75 did not bear a reasonable relationship to the union skilled classification rates found in ID27.

Petitioner requested reconsideration of BCWD's decision by the Administrator. On December 20, 2019, the Administrator issued a Final Ruling affirming the BCWD's decision, finding that the proposed rate was more than 50% lower than nearly every union skilled classification rate in ID27, and was also lower

than a majority of the non-union skilled classification rates. On February 4, 2020, Petitioner filed a petition for review before the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator’s final decisions under the DBA.¹ 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.”² The ARB will assess the Administrator’s rulings to determine whether they are consistent with the DBA and its implementing regulations, and whether the rulings are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA.³ “In considering the matters within the scope of its jurisdiction,” the Board acts “as fully and finally as might the Secretary of Labor.”⁴

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”⁵

DISCUSSION

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

¹ 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. 13186 (Mar. 6, 2020). References to the DBA in this decision also include the DBRA unless otherwise noted.

² 29 C.F.R. § 7.1(e).

³ *William J. Lang Land Clearing, Inc.*, ARB Nos. 2001-0072, -0079; ALJ Nos. 1998-DBA-00001 through -00006, slip op. at 5 (ARB Sept. 28, 2004).

⁴ 29 C.F.R. § 7.1(d).

⁵ *Millwright Local 1755*, ARB No. 1998-0015, slip op. at 7 (ARB May 11, 2000) (quoting *Envtl. Chem. Corp.*, ARB No. 1996-0113, slip op. at 3 (ARB Feb. 6, 1998)).

determination”⁶ However, the conformance procedure is not intended to be a substitute process for challenging wage determinations in a timely manner.”⁷ The Administrator has broad discretion to accept or reject any given conformance request.⁸

In order for a proposed classification to be added to or conformed with an existing 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.⁹

The issue before us on appeal is whether the Administrator reasonably concluded that the proposed rate did not bear a reasonable relationship to the other wage rates in the applicable wage determination. Petitioner argues that the Administrator’s interpretation of the wage determination is unreasonable. Specifically, Petitioner argues that the Administrator should have looked to job duties and considered the similarities of the Telecommunications Installer and Painter positions (the lowest union skilled classification rate in ID27), relying on *Strickland*, ARB No. 2013-0088 (ARB June 30, 2015). In other words, Petitioner argues that the job duties and other factors of a Telecommunications Installer do not merit a combined wage rate of \$41.85.

However, the Administrator was not required to engage in detailed comparisons of job duties or skill levels of the different classifications found in the applicable wage determination in establishing a conformed rate for the requested wage classification.¹⁰ AAM 213 instructs that if the applicable wage determination contains predominantly union prevailing wage rates for skilled crafts classifications, then it is appropriate to examine the entirety of the union skilled

⁶ *Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *2 (WAB Sept. 29, 1995) (available on Westlaw).

⁷ *Id.*

⁸ *Id.*

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

¹⁰ AAM No. 213.

classifications in establishing a conformed rate.¹¹ The Board's *Strickland* decision does not require the Administrator to look at job duties or consider other factors concerning different classifications in a wage determination to establish a conformed rate. As the union-negotiated wage rates make up the majority of skilled crafts classifications in ID27, the Administrator reasonably considered these rates in rejecting the proposed wage rate and proposing a wage rate reflecting the median rate of the union skilled classification rates.¹²

CONCLUSION

We hold that the Administrator's ruling that System Tech's proposed wage rate of \$19.75 did not bear a reasonable relationship to the wage rates in the applicable wage determination was a reasonable exercise of her discretion. Accordingly, because the Administrator did not abuse her discretion in rejecting the proposed conformance request and substituting in its place a wage rate for the Telecommunications Installer classification that bears a reasonable relationship to the wage rates in the wage determination, we **AFFIRM**.

SO ORDERED.

¹¹ *Id.*

¹² *Id.*; 29 C.F.R § 5.5(a)(1)(ii)(A).