

**ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.**

In the Matter of: *
*
SYSTEM TECH, INCORPORATED *
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*
Petitioner, *
*
v. * ARB Case No. 2020-0029
*
WAGE AND HOUR DIVISION, UNITED *
*
STATES DEPARTMENT OF LABOR, *
*
*
Respondent. *

**STATEMENT OF THE ADMINISTRATOR IN RESPONSE
TO PETITION FOR REVIEW**

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**STATEMENT OF THE ADMINISTRATOR IN RESPONSE
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The Administrator of the Department of Labor's Wage and Hour Division (Administrator) denied System Tech, Inc.'s (System Tech) request to add, or "conform," a Telecommunications Installer classification to the applicable wage determination for a construction project in Bonneville County, Idaho. The Administrator ruled that the conformance request did not satisfy the regulatory criteria required for approval of such requests because System Tech's proposed wage rate did not bear a reasonable relationship to the wage rates contained in the applicable wage determination. The Administrator instead approved the addition of the Telecommunications Installer classification at a higher wage rate.

On February 3, 2020, System Tech petitioned the Administrative Review Board (Board) for review, asking the Board to overturn the Administrator's denial of System Tech's conformance request. The Board accepted the Petition for Review and subsequently granted the Administrator's motion to amend the briefing schedule and ordered System Tech to file its opening brief on or before March 24, 2020. The Administrator now files this response to System Tech's Petition for Review. For the reasons that follow, System Tech's Petition for Review should be denied and the Administrator's denial of System Tech's conformance request should be affirmed.

ISSUE PRESENTED

Whether the Administrator's denial of System Tech's conformance request was a reasonable exercise of discretion, where System Tech's proposed wage rate for the Telecommunications Installer classification was dramatically lower than all but one of the skilled union wage rates in the applicable wage determination and hence did not bear a reasonable relationship to the wage rates listed in that wage determination.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

System Tech was engaged as a subcontractor on contracts for

the lease-build of a research and education facility and data center subject to the labor standards of the Davis-Bacon Act (DBA), 40 U.S.C. 3141 *et seq.*, and its implementing regulations, 29 C.F.R. pts. 1 and 5. The DBA applies to "every contract in excess of \$2,000, to which the Federal Government . . . is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government" 40 U.S.C. 3142(a). The DBA requires that laborers and mechanics employed on the site of the work of covered federal construction projects be paid wages and fringe benefits at no less than the locally prevailing rates for similar work in the area where the work is to be performed. See 40 U.S.C. 3142. Congress has included DBA prevailing wage requirements in numerous statutes - referred to collectively as Davis-Bacon "Related Acts" - under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other methods. The DBA and the Related Acts are referred to collectively as "the DBRA." See 29 C.F.R. 5.1(a).

The Department of Labor's (Department) Wage and Hour Division (Wage and Hour) determines the locally prevailing rates for job classifications used on DBRA-covered construction projects and issues wage determinations that reflect those rates. See 40 U.S.C. 3142; 29 C.F.R. pt. 1. The rates in each

wage determination reflect rates that Wage and Hour has determined "to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" in the relevant locality. 40 U.S.C. 3142(b); see also 29 C.F.R. 1.2. If a construction project is covered by the DBRA, the applicable wage determination is incorporated into the governing contract and provides the minimum wage and fringe benefit rates for workers in the listed job classifications used on the project. See 40 U.S.C. 3142(c); 29 C.F.R. 5.5(a).

After the contract has been awarded, if contract performance requires the use of a job classification which is not listed in the wage determination, the missing job classification "shall be classified in conformance with the wage determination." 29 C.F.R. 5.5(a)(1)(ii)(A). "By design, the Davis-Bacon conformance process is an expedited proceeding created to 'fill in the gaps'" in an existing wage determination, with the "narrow goal" of establishing an appropriate wage rate for a classification needed for performance of the contract. Am. Bldg. Automation, Inc., ARB No. 00-067, 2001 WL 328123, at *3 (ARB Mar. 30, 2001). The conformance process thus is not a *de novo* proceeding to retroactively determine the prevailing wage for the missing

classification. See Mack Strickland, ARB No. 13-088, 2015 WL 4071577, at *3 (ARB June 30, 2015) (citing Mistick Constr., ARB No. 02-004, 2003 WL 21488362, at *5 (ARB June 24, 2003)); Childress Painting & Assoc., Inc., ARB No. 96-121, 1996 WL 874458, at *2 (ARB Aug. 23, 1996). Rather, the conformance process is “`designed to facilitate expedited addition of a missing classification and wage rate while simultaneously maintaining the integrity of the bidding procedure.’” Strickland, 2015 WL 4071577, at *3 (quoting Mistick, 2003 WL 21488362, at *5).

In order for a missing classification to be added, or “conformed,” to the applicable wage determination, the following criteria must be met:

- (1) The work to be performed by the classification requested is not performed by a classification 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.

29 C.F.R. 5.5(a)(1)(ii)(A) (emphasis added); see also Strickland, 2015 WL 4071577, at *3-4. Wage and Hour may approve conformance requests only when all of the regulatory criteria are satisfied. 29 C.F.R. 5.5(a)(1)(ii)(A).

With respect to the third criterion, Wage and Hour's All Agency Memorandum 213 (AAM 213) explains the proper application of the DBRA's requirements for additional classifications and wage rates that are conformed to an existing wage determination. See U.S. Dep't of Labor, Wage and Hour Div., AAM 213 (Mar. 22, 2013), available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/AAM213.pdf>. AAM 213 focuses on the "reasonable relationship" requirement, explaining that classifications in wage determinations fall into four general categories: skilled crafts, laborers, power equipment operators (PEOs), and truck drivers. Id. at 3.

To determine a "reasonable relationship," the requested additional classification is compared to the classifications on the applicable wage determination within the same general category. Id. For example, a requested skilled classification is compared to skilled classifications in the wage determination; a proposed PEO classification is compared to existing PEOs; and a proposed truck driver classification is compared to existing truck driver classifications. Id. Wage and Hour also takes into account whether the wage rates in the applicable category are predominantly union prevailing wage rates or predominantly weighted average prevailing wage rates. Id. If a wage

determination contains predominantly union prevailing wage rates for skilled classifications, it typically would be appropriate to look to the union sector skilled classifications and rates in the wage determination. Id. The Board has repeatedly affirmed Wage and Hour's application of AAM 213. See Courtland Constr. Corp., ARB No. 17-074, 2019 WL 5089598 (ARB Sept. 30, 2019); Velocity Steel, Inc., ARB No. 16-060 (ARB May 29, 2018); see also Strickland, 2015 WL 4071577.

B. Statement of Facts

System Tech was engaged as a subcontractor to perform telecommunications work on Department of Energy (DOE) Contract Nos. 179446 and 179447 for the lease-build of the Collaborative Computing Center and Cybercore Integration Center at DOE's Idaho National Laboratory campus in Bonneville County, Idaho. See Admin. R., Tab A. The contracts incorporated Davis-Bacon wage determination ID170027, Modification 8, dated August 25, 2017 (ID27). See id.

On November 15, 2018, System Tech submitted a conformance request to Wage and Hour's Branch of Construction Wage Determinations (BCWD) through the contracting agency, DOE, seeking conformance of a Telecommunications Installer classification to ID27 at an hourly rate of \$15.00 plus \$4.75 in fringe benefits. See id. On November 29, 2018, BCWD denied the

conformance request because the proposed wage rate did not satisfy the third prong of the applicable conformance criteria, i.e., the proposed rate did not bear a reasonable relationship to the relevant wage rates contained in ID27. See Tab C. BCWD instead approved a minimum rate of \$27.77 per hour plus \$14.08 in fringe benefits for the Telecommunications Installer classification. Id.

On January 31, 2019, System Tech requested review of BCWD's conformance decision. See Tab D. In its request for review, System Tech requested that BCWD consider the wage rates reflected in several wage determinations applicable in "other states where the wages are similar to Idaho," including wage determinations applicable in Arizona, Ohio, and Texas. See Tab D. In addition, System Tech requested that BCWD consider two prior approvals of conformance requests on other projects in Idaho. See id. On April 5, 2019, BCWD affirmed its original conformance decision denying the proposed rate for Telecommunications Installers, again finding that the proposed rate did not bear a reasonable relationship to the relevant wage rates contained in ID27. See Tab E. BCWD's April 5, 2019 letter reaffirmed the conformed rate of \$27.77 plus \$14.08 in fringe benefits for the Telecommunications Installer classification. See id.

1. System Tech's Request for Review and Reconsideration

On May 6, 2019, System Tech requested review and reconsideration of BCWD's April 5, 2019 decision and requested a final ruling by the Wage and Hour Administrator. See Tab F. In its request for review and reconsideration, System Tech again asserted that its proposed wage rate of \$15.00 per hour plus \$4.75 per hour in fringe benefits is more in line with the wage rates listed for similar classifications in wage determinations applicable in other states. Id. System Tech also again referenced the two prior BCWD conformance decisions concerning other projects in Idaho. Id. System Tech supplemented its request for review and reconsideration in a July 2, 2019 email in which it contended that its proposed rate satisfied the reasonable relationship test. System Tech specifically argued in its supplemental submission that conformance based on the lowest skilled wage rate in ID27 was warranted based on two Board decisions from the 1990s that predated the analytical framework set forth in AAM 213 and discussed in subsequent Board precedent such as Strickland, 2015 WL 4071577. See Tab H. System Tech further supplemented its request for review in a July 17, 2019 submission in which it argued that the conformed wage rate for the Telecommunications Installer classification should be similar to the wage rates for the Painter classification (the

lowest union rate on ID27) and the Roofer and Carpenter classifications (two of the weighted average rates on ID27) because those classifications assertedly have similar characteristics, such as primarily on-the-job training, similar components of unskilled work, and work that has been traditionally performed by non-union workers. See Tabs I, J.

2. The Administrator's Final Ruling

The Administrator issued a final ruling in response to System Tech's request for review and reconsideration on December 20, 2019. See Tab K. In her final ruling, the Administrator affirmed BCWD's denial of System Tech's conformance request because the proposed wage rate did not bear a reasonable relationship to the wage rate listed in the relevant wage determination. Id. Instead, the Administrator found BCWD's approved wage rate of \$27.77 plus \$14.08 in fringe benefits (\$41.85 total) to be reasonable. Id.

The Administrator explained that under the governing legal standards, the reasonableness of the proposed wage rate for the Telecommunications Installer classification must be assessed based on the wage rates contained in the applicable wage determination. Id. The Administrator stated that ID27 listed twelve skilled classifications, eight of which reflected union

rates and four of which reflected weighted average rates.¹ The Administrator then reasoned that because two-thirds of the skilled classifications reflected union sector prevailing wage rates, it was appropriate pursuant to AAM 213 to consider only the union rates in setting a conformed wage rate for the Telecommunications Installer classification. Id. The Administrator explained that the proposed wage rate did not bear a reasonable relationship to the union wage rates because it was dramatically lower than seven out of eight of the union skilled wage rates contained in ID27. Id. Additionally, the proposed rate was lower than a majority of the non-union skilled wage rates. Id.

The Administrator also addressed System Tech's argument that AAM 213 permits conformance based on the lowest skilled

¹ The Administrator also observed that the Painter (Brush, Roller, Spray) and Plumber/Pipefitter classifications listed in ID 27 actually reflect a total of five separate classifications: Painter: Brush; Painter: Roller; Painter: Spray; Plumber; and Pipefitter. As the Administrator explained, each of these classifications independently satisfied the survey sufficiency criteria for inclusion in ID27 and were combined in the wage determination solely as a matter of convenience because the prevailing wage rates for the separate classifications were identical. Thus, ID27 actually contains 15 skilled classifications, 11 of which reflect union rates. Since BCWD's decision had referred to 12 skilled classifications, 8 of which reflect union rates, and because accounting for the additional union rates would not have altered the Administrator's determination in this matter, the Administrator followed BCWD's approach in her ruling letter. Id. at 3 n.1.

wage rate on a wage determination in some cases. Id. She noted that AAM 213 states that conformance to the lowest skilled rate is reserved for the “atypical” case where the lowest skilled rate in fact bears a reasonable relationship to the wage rates contained in the wage determination for the relevant category. Id. The Administrator concluded that conformance to the lowest skilled rate was not appropriate in this case because union skilled wage rates predominate in ID27 and the proposed rate is more than 50% lower than nearly every union skilled wage rate on ID27. Id.

The Administrator further explained that Wage and Hour does not attempt to evaluate or rank the relevant classifications in the wage determination by level of skill in order to determine which one most closely matches the skill level of a proposed skilled classification. Id. Such an in-depth parsing of skill levels associated with each classification is inconsistent with long-standing ARB precedent recognizing that conformance under the DBRA is a streamlined process. Id. Instead, Wage and Hour compares the proposed wage rate to all of the wage rates in the relevant category of skilled classification. Id.

The Administrator also rejected System Tech’s contention that consideration should be given to the rates contained in wage determinations applicable in other states, and to the rates

approved by BCWD in prior conformance decisions for different projects in Idaho. Id. The Administrator noted that 29 C.F.R. 5.5(a)(1)(ii)(A)(3) requires conformed wage rates to bear a reasonable relationship only to the rates contained in the wage determination applicable to the contract under consideration, not to wage rates in effect in other states or wage rates previously approved for projects in the same area. Id. The Administrator consequently affirmed BCWD's decision and instructed System Tech to pay the approved wage rate to all workers performing work in the Telecommunications Installer classification, retroactive to the first day work was performed under the contract. Id.

3. System Tech's Petition for Review

On February 3, 2020, System Tech filed a petition with the Board, which the Board accepted. See Pet. for Review (Pet. Rev.); Notice of Appeal and Order Establishing Briefing Schedule (ARB Feb. 7, 2020). On February 21, 2020, the Administrator filed a motion to amend the briefing schedule and to require System Tech to file an opening brief to which the Administrator could respond. On February 25, 2020, the Board issued an Order Granting Extension of Time and Amending Briefing Schedule. In accordance with that schedule, on March 24, 2020, System Tech filed an opening brief with the Board. See Pet'r's Brief

(Pet'r's Br.).

JURISDICTION AND STANDARD OF REVIEW

The Board's review of the Administrator's conformance ruling is in the nature of an appellate proceeding and, except upon a showing of extraordinary circumstances, the Board will not review matters *de novo*. See Strickland, 2015 WL 4071577, at *7. The Board instead assesses the Administrator's conformance rulings to determine if 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 [DBRA]." Strickland, 2015 WL 4071577, at *7. The Board "generally defers to the Administrator as being 'in the best position to interpret [the DBRA's implementing regulations] in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside.'" Id. (quoting Titan IV Mobile Serv. Tower, WAB No. 89-14, 1991 WL 494710, at *4 (WAB May 10, 1991)). The Board recently reaffirmed the Administrator's "broad discretion" in determining appropriate conformed wage rates. Courtland, 2019 WL 5089598, at *4.

ARGUMENT

THE ADMINISTRATOR REASONABLY EXERCISED HER DISCRETION WHEN SHE DENIED SYSTEM TECH'S CONFORMANCE REQUEST BECAUSE THE PROPOSED WAGE RATE DID NOT BEAR A REASONABLE RELATIONSHIP TO THE WAGE RATES IN ID27.

The regulations governing the conformance of a classification to a wage determination are found at 29 C.F.R. 5.5(a)(1)(ii)(A). In order for a proposed job classification to be conformed to 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 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.

29 C.F.R. 5.5(a)(1)(ii)(A).

As noted above, in considering the third criterion, the regulations require that Wage and Hour evaluate the proposed rate in relationship to the wage rates set forth in the wage determination applicable to the contract. Id.; see also Tower Constr., WAB No. 94-17, 1995 WL 90010, at *3 (WAB Feb. 28, 1995). Under longstanding agency policy and Board precedent, the reasonableness of a proposed wage rate for a skilled classification must be determined in relationship to the wage

rates for skilled classifications listed in the wage determination incorporated into the contract at issue. See AAM 213 at 3 (wage rates for additional classifications are compared to the wage rates for other classifications included on the wage determination in the same category, i.e., skilled trades, operators, truck drivers, and laborers); Tower, 1995 WL 90010, at *4 (same). In addition, if a wage determination contains predominantly union prevailing wage rates for skilled classifications, it is typically appropriate to establish a conformed skilled classification wage rate based on the union sector skilled classifications and their corresponding wage rates in the wage determination. AAM 213 at 3.

AAM 213 also states that Wage and Hour "no longer" uses "the lowest wage rate as a benchmark" in establishing conformed wage rates because "[t]he regulation at 29 C.F.R. 5.5(a)(1)(ii)(A)(3) requires that the proposed rate bear a reasonable relationship to the 'wage rates' on the wage determination and not to a particular rate or the lowest rate." See AAM 213 at 2-3; see also Velocity Steel, slip op. at 5 (discussing this aspect of AAM 213); Strickland, 2015 WL 4071577, at *4 (same). The AAM further provides that although conformance to the lowest skilled wage rate thus is "atypical," conformance to the lowest skilled rate may be "appropriate when

that rate in fact bears a reasonable relationship to the wage rates contained in the wage determination for the appropriate category." AAM 213 at 4.

In this case, it is not disputed that System Tech's proposed Telecommunications Installer classification falls within the skilled category of classifications and that the reasonableness of System Tech's proposed rate for that classification therefore must be determined in relationship to the wage rates for skilled classifications listed in the wage determination incorporated into the contract. See AAM 213; Tower, 1995 WL 90010, at *4. The applicable wage determination here (ID27) listed twelve skilled classifications, eight of which reflect union rates and four of which reflect weighted average rates. Because a clear predominance of the skilled classifications on ID27 reflect union rates, the Administrator properly considered only union skilled classifications and wage rates (including fringe benefits) in her analysis. AAM 213 at 3. The relevant skilled union rates on ID27 are: Sprinkler Fitter, with a combined wage rate of \$53.16 per hour; Plumber/Pipefitter at a combined \$46.13 per hour; Ironworker, Structural at a combined \$44.31 per hour; Sheet Metal Worker at a combined \$43.71 per hour; Electrician at a combined \$42.51 per hour; Carpenter (Metal Stud Installation and Drywall Hanger) at

a combined \$41.85 per hour; Bricklayer at a combined \$41.33 per hour; and Painter at a combined \$17.42 per hour. See Tab B. Seven of these rates exceed \$40 per hour; the only rate below that amount (the Painter rate) is more than 50% lower than every other union skilled wage rate on ID27.

System Tech proposed a wage rate of \$15.00 per hour plus \$4.75 per hour in fringe benefits, for a combined \$19.75 per hour. See Tab A. As the Administrator explained in her final ruling letter, this proposed rate was vastly lower than every union skilled wage rate other than the Painter rate and therefore did not bear a reasonable relationship to the skilled wage rates. See AAM 213 (in determining whether a proposed wage rate bears a reasonable relationship to the wage rates contained in the wage determination, Wage and Hour considers where the proposed wage rate falls within the relevant rates listed on the wage determination). Moreover, the proposed wage rate was substantially lower than 75% of the non-union skilled wage rates and, accordingly, was lower than both the non-union median and mean wage rates on ID27. The proposed rate thus could not be approved under the governing legal standards because it does not bear a reasonable relationship to the relevant wage rates contained in ID27. See Velocity Steel, slip op. at 11 (affirming Wage and Hour's rejection of a proposed rate in part because it

was "substantially lower" than all but one of the relevant skilled classification rates contained in the applicable wage determinations); Tower, 1995 WL 90010, at *4. Accordingly, the Administrator correctly affirmed BCWD's conformance decisions denying the use of System Tech's proposed wage rate for the Telecommunications Installer classification.

Instead, as the Administrator concluded, the approved wage rate of \$27.77 per hour plus \$14.08 per hour in fringe benefits (a total of \$41.85 per hour) bears a reasonable relationship to the skilled classification wage rates in ID27. See Tab K. This rate is far better aligned with the relevant wage rates in ID27, as it is the third-lowest skilled union classification wage rate on the applicable wage determination, is lower than a majority of the non-union skilled rates on ID27, and is lower than the median rate for all negotiated skilled rates. Id. Thus, the approved wage rate of \$41.85 per hour is not an unduly high rate, and is a reasonable reflection of the skilled classification wage rates on ID27. The Administrator therefore properly exercised her discretion by approving this wage rate in accordance with the applicable policies, regulations, and Board precedent.

In its opening brief, System Tech acknowledges that AAM 213 does not permit Wage and Hour to automatically conform a

classification to the lowest skilled wage rate on the applicable wage determination, and that its proposed rate only slightly exceeds the lowest skilled union rate. See Pet'r's Br. at 8. System Tech nonetheless contends that conformance based on the lowest union skilled wage rate is warranted and that the Administrator somehow did not adequately explain her conclusion that "it is not appropriate to conform to the lowest skilled rate where, as here, union rates predominated and the proposed rate is more than 50% lower than nearly every union skilled wage rate on ID 27." Id.

However, as the Administrator explained, conformance to the lowest rate in the relevant category may be appropriate only in the "atypical" situation where the lowest rate "in fact bears a reasonable relationship to the wage rates contained in the wage determination for the relevant category." AAM 213 at 4; see also Strickland, 2015 WL 4071577, at *4 (emphasizing that 29 C.F.R. 5.5(a)(1)(ii)(A)(3) "requires that the proposed wage rate bear a reasonable relationship to the 'wage rates' (plural) contained in the wage determination"). In other words, conformance to the lowest skilled rate should only be utilized in the rare case in which such conformance is reasonable in light of all the rates in the appropriate category. See Strickland, 2015 WL 4071577, at *11 (the Administrator looks to the "'entirety of the rates' for

the skilled classifications on the applicable wage determination and ... 'to where the proposed wage rate falls within the rates listed on the wage determination.'" (quoting AAM 213 at 3)). In this case, as the Administrator explained, the lowest skilled union wage rate is dramatically lower than every other skilled union rate, and a proposed rate approximating only the lowest skilled union rate cannot be said to bear a reasonable relationship to the relevant wage rates in the wage determination. See Tab K. This reasoning is not "arbitrary" or "circular," Pet'r's Br. at 9, but rather is firmly grounded in the requirement under the governing regulations and AAM 213 that the conformed rate bear a reasonable relationship to the wage rates in the wage determination. See Strickland, 2015 WL 4071577, at *4.

System Tech also contends that AAM 213 requires the "reasonable relationship" analysis to be based on a close comparison of the job duties, licensure requirements, and other similar factors associated with the proposed classification and the classifications in the relevant category. See Pet'r's Br. at 9. Relying on a series of unsupported, extra-record assertions, System Tech argues that, under this framework, its proposed wage rate should have been approved because the Telecommunications Installer classification assertedly is more closely related in

terms of "job duties, requirements, licensure, training, and oversight" to the Painter classification than it is to the seven skilled union classifications on ID27 with higher wage rates. Id. at 10-12.

This argument is unavailing because it is based on a misunderstanding of the conformance process under the DBRA. As explained supra, the conformance process is an "expedited proceeding" to "'fill in the gaps'" in an existing wage determination, with the "narrow goal" of establishing an appropriate wage rate for a classification needed for performance of the contract. Am. Bldg. Automation, 2001 WL 328123, at *3; see also Strickland, 2015 WL 4071577, at *3. Under the conformance process, "comparison of skills is only an approximation, left, generally, to the discretion of the Administrator." Tower, 1995 WL 90010, at *4. The conformance process thus does not entail a detailed parsing of the skill levels and other factors associated with each classification.

Instead, the Administrator appropriately considered the duties and other characteristics of the proposed Telecommunications Installer classification when she established a conformed wage rate based solely on the wage rates for the skilled classifications on ID27, without regard to the rates for truck drivers, laborers, and power equipment operators. To

require an in-depth qualitative comparison of job duties and other classification-specific factors within the category of skilled classifications would conflict with the streamlined nature of the conformance process established by the relevant regulations, ARB precedent, and AAM 213.² Indeed, such a cumbersome process does not align with the regulatory requirement, discussed above, that the conformed rate must bear a reasonable relationship to the wage rates contained in the wage determination, not to one classification and rate in particular. See 29 C.F.R. 5.5(a)(1)(ii)(A)(3).

² Tellingly, System Tech's argument rests substantially on three conformance decisions under the Service Contract Act (SCA). See Pet'r's Br. at 9 (citing Raytheon Sys. Co., ARB No. 98-157, 2000 WL 562697 (ARB Apr. 26, 2000); Dyncorp, LBSCA No. 87-SCA-OM-5, 1991 WL 733661 (LBSCA Jan. 22, 1991); and ERC/Teledyne Brown Eng'g, ARB No. 5-133, 2007 WL 352461, at *6 (ARB Jan. 31, 2007)). Unlike the DBRA's regulations, the SCA's implementing regulations expressly provide that, in establishing conformed wage rates, "pay relationship[s] should be maintained between job classifications based on the skill required and the duties performed." 29 C.F.R. 4.6(b)(2)(iv)(A). See also, e.g., Raytheon, 2000 WL 562697, at *11, cited in Pet'r's Br. at 9. The DBRA's conformance procedures contain no such requirement. See 29 C.F.R. 5.5(a)(1)(ii)(A). System Tech's reliance on Strickland, 2015 WL 4071577, at *12, is similarly misplaced. In Strickland, the Board did not endorse the parsing of job duties, but rather merely concluded that, under the facts of that particular case, the Administrator should not have "completely ignored" skilled union rates that "included classifications (plumber and sheet metal worker) closely related to the duties of the conformed classification" where at minimum "a large percentage" of the skilled rates on the wage determination were union rates. Strickland, 2015 WL 4071577, at *12.

System Tech also argues that the proposed wage rate for the Telecommunications Installer classification bears a closer "reasonable relationship" to the lowest union rate and the two lowest weighted average rates on ID27 because telecommunications installation on building construction projects in Idaho is typically performed by non-union workers. See Pet'r's Br. at 12. As the ARB has consistently held, however, the conformance process is not meant to serve as a "de novo proceeding to retroactively determine the prevailing wage for a particular classification." Childress Painting, 1996 WL 874458, at *2 (citation omitted); see also Strickland, 2015 WL 4071577, at *3 (citing Mistick, 2003 WL 21488362, at *5). Rather, as discussed above, conformed wage rates are based upon the relevant wage rates in the wage determination, without regard to assertedly typical contractor pay practices and whether they happen to reflect union or non-union rates. See 29 C.F.R. 5.5(A) (1) (ii) (A) (3); AAM 213; Strickland, 2015 WL 4071577, at *12.

Accordingly, the conformance process under the DBRA does not depend on a determination of which classification in the wage determination has the most similar pay practices to the proposed classification. As AAM 213 explains, if union rates predominate among the skilled classifications in the applicable

wage determination, it is typically appropriate to set a conformed skilled rate based on those union rates. See AAM 213 at 3. Notably, AAM 213 does not limit application of this principle to cases in which the work associated with the proposed classification has been traditionally performed by union workers in the county or state where the project is located. Id. See also Courtland, 2019 WL 5089598, at *2, *4 (rejecting contractor's argument that proposed classification should not be conformed to a union rate on the wage determination because "Vermont is not a union state").

Lastly, System Tech contends that the approved conformance rate in this case is not commensurate with the rates in two prior conformance approvals issued by BCWD for Telecommunications Installers in Idaho. See Pet'r's Br. at 12. However, as the Board explained in Velocity Steel:

contractors "may not rely on wage rates previously approved" in other similar conformance requests. *Childress Painting*, ARB No. 96-121, slip op. at 3. In addition, 29 C.F.R. 5.5(a)(ii)(3) requires Wage and Hour 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." *Tower Constr.*, WAB No. 94-17, slip op. at 3 (emphasis added). Thus, any approved wage rates . . . in other conformance requests involving other wage determinations are not relevant to whether the proposed wage rates in this case bear a reasonable relationship to the rates contained in the applicable wage determinations in this case.

Slip op. at 12. See also, e.g., Courtland, 2019 WL 5089598, at *2, *4 (rejecting contractor's reliance on "a wage rate from another wage determination and contract"); Bryan Elec. Constr., Inc., WAB Case No. 94-16, 1994 WL 764109, at *4 (WAB Dec. 30, 1994) ("There is no authority for reference to wage rates contained in another, unrelated wage determination, even one where ... the nature of construction and place of performance are the same."); E & M Sales, Inc., WAB Case No. 91-17, 1991 WL 523855, at *3 (WAB Oct. 4, 1991) (contractor "may not rely on a wage determination granted to another party regardless of the similarity of the work in question").

Moreover, the wage determinations at issue in those other conformance matters, see Tab F, are different wage determinations with substantially different wage rates than are contained in ID27. See ID10; ID22; ID27. Thus, it was inappropriate for System Tech to rely on those conformance decisions when preparing its conformance request in this case. See Velocity Steel, slip op. at 11 (rejecting contractor's equitable arguments for its reliance on prior conformance approvals; "[c]ontractors who seek to perform work on a federal construction project subject to the [DBRA] have an obligation to familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract

solicitation documents.”) (citations and quotation omitted).

Finally, as the Administrator thoroughly explained in her final ruling letter, the two prior conformance approvals referenced by System Tech were not decided pursuant to AAM 213, and are therefore irrelevant for that additional reason.³

CONCLUSION

The Administrator reasonably considered the entirety of the wage rates for skilled classifications contained in ID27 when evaluating System Tech’s conformance request for the Telecommunications Installer classification. The Administrator’s determination that System Tech’s proposed wage rate of \$15.00 plus \$4.75 in fringe benefits did not bear a reasonable relationship to the wage rates for skilled classifications in ID27 was a reasonable exercise of discretion and was consistent with the applicable regulations, agency policy, and Board precedent. In contrast, the Administrator’s conformed rate of \$27.77 plus \$14.08 in fringe benefits for the Telecommunications

³ Indeed, one of the conformance decisions (issued June 12, 2013) involved a wage determination that ceased to be in effect almost five years before Wage and Hour issued AAM 213. The other conformance decision (issued March 12, 2014) was also based on pre-AAM 213 policy (presumably because the contract at issue was likely awarded before AAM 213 was issued), as evidenced by the fact that the wage determination in the contract contained six union and six non-union rates and BCWD conformed to the lowest of those 12 rates.

Installer classification bears a reasonable relationship to the wage rates in ID27 and is consistent with the governing legal standards. Accordingly, the Administrator's December 20, 2019 ruling should be affirmed.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April 2020, I served the foregoing Administrator's Response Brief on Respondent solely via electronic mail as follows, with agreement of opposing counsel and in light of the shift in operations resulting from the COVID-19 pandemic:

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