The purpose of this memorandum is to clarify the application of All Agency Memorandum (AAM) No. 213, dated March 22, 2013, to conformance decisions where the relevant wage determination (WD) contains very few classifications within the same category—i.e., skilled crafts, power equipment operators (PEOs), laborers, or truck drivers—to which the additional classification may be compared to determine whether its wage rate bears a “reasonable relationship” to other wage rates on the WD pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(A)(3). When the WD contains fewer than three skilled classifications, agency contracting officers should compare a proposed skilled classification to existing classifications within the skilled craft and PEO categories. Likewise, when the WD contains fewer than three PEO classifications, agency contracting officers should compare a proposed PEO classification to existing classifications within both categories.

AAM 213 addresses the proper application of Davis-Bacon and Related Acts (DBRA) requirements for wage rates for additional classifications that are “conformed” to an existing WD by agency contracting officers, focusing on the requirement that the conformed wage rate for an unlisted classification must “bear a reasonable relationship to the wage rates contained in the wage determination.” AAM 213; see 29 C.F.R. § 5.5(a)(1)(ii)(A)(3). Under AAM 213, to determine a “reasonable relationship,” the wage rate for the requested additional classification is compared to the wage rates for classifications on the WD within the same category—i.e., skilled crafts, PEOs, laborers, and truck drivers. AAM 213 at 3. For instance, the wage rate for a proposed skilled classification is compared to the wage rates for skilled classifications in the WD. Id. (citing Mistick Constr., ARB No. 02-004, 2003 WL 21488362 (June 24, 2003), and Tower Constr., WAB No. 94-17, 1995 WL 90010 (Feb. 28, 1995)). Similarly, the wage rate for a proposed PEO, laborer, or truck driver classification is compared to those of existing classifications within the PEO, laborer, or truck driver categories, respectively. Id.

At issue is how to apply the “reasonable relationship” principle in the narrow circumstances in which the WD contains very few classifications within the relevant category. In such instances, the Wage and Hour Division (WHD) has determined that it is appropriate for agency contracting officers to combine the skilled craft and PEO categories for the purposes of the “reasonable relationship” analysis. Therefore, when the WD contains fewer than three skilled classifications against which to compare a proposed skilled classification, or when the WD contains fewer than three PEO classifications against which to compare a proposed PEO classification, agency
contracting officers should determine whether the proposed classification bears a “reasonable relationship” to other wage rates on the WD by comparing the proposed classification to the existing skilled and PEO classifications on the WD. Considering skilled and PEO classifications together in these limited circumstances is consistent with WHD’s long-held view that PEOs, while forming a “separate and distinct subgroup of construction worker classifications,” Tower Constr., 1995 WL 90010, at *4, are nonetheless a type of skilled classification. However, when the WD contains three or more classifications within the skilled craft or PEO categories, proposed skilled or PEO classifications should be compared only to the classifications within the relevant category. This approach is consistent with the broad discretion afforded to the Administrator in making conformance decisions, see, e.g., Constr. Terrebonne Par. Juvenile Justice Complex, ARB No. 2017-0056, 2020 WL 5902440, at *2 (Sept. 4, 2020), as well as Administrative Review Board precedent, Courtland Constr. Corp., ARB No. 2017-0074, 2019 WL 5089598 (Sept. 30, 2019) (upholding a conformed skilled wage rate based on three skilled classifications); Tower Constr., 1995 WL 90010 (affirming WHD’s policy of distinguishing PEOs from skilled classifications where the WD at issue contained four skilled classifications).

Thus, for the purposes of applying AAM 213’s “reasonable relationship” analysis, WHD hereby clarifies that in the narrow circumstances in which the WD contains fewer than three classifications in the relevant skilled craft or PEO category, agency contracting officers should evaluate whether the proposed classification bears a “reasonable relationship” to the existing skilled and PEO classifications on the WD. Agency contracting officers should otherwise continue to follow the guidance set forth in AAM 213, including the steps required when proposing a wage rate for an unlisted classification. AAM 213 at 3-4. By following the guidance in this AAM and AAM 213, contracting agencies and contractors will benefit by receiving approvals from WHD that ensure consistency in conformed wage rates and increase efficiencies in government.

Questions should be directed to the Branch of Construction Wage Determinations, Division of Wage Determinations, Office of Enterprise Data and Analytics, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210; telephone number (202) 693-0087.

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1 Unlike the skilled craft and PEO categories, WHD considers the remaining two categories, laborers and truck drivers, sufficiently distinct such that it would not be appropriate to look beyond the classifications within these categories even in instances when the WD contains only one or two classifications in these categories.