

U.S. Department of Labor

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



IN THE MATTER OF:

**BALTIMORE
WATERPROOFING, INC.,**

ARB CASE NO. 2022-0053

DATE: June 27, 2023

PETITIONER,

v.

**ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,**

RESPONDENT.

Appearances:

For the Complainant:

Vicki Kraus; Baltimore Waterproofing, Inc.; Baltimore, Maryland

For the Respondent:

***Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq.,
Jonathan T. Rees, Esq., Shelley E. Trautman, Esq.; United States
Department of Labor, Washington, District of Columbia***

**Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL
Administrative Appeals Judge**

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the Davis-Bacon Act (DBA) and “Related Acts” (DBRA)¹ and the applicable implementing regulations.² The DBRA apply DBA labor standards to certain federally assisted construction projects, such as the project at issue in the present matter. Baltimore Waterproofing, Inc. (Petitioner) seeks review of a final determination by the U.S. Department of Labor’s Wage and Hour Division (WHD) denying its request to add a “Waterproofer” classification to a wage determination under a DBA contract at the wage rate of \$24.00 per hour plus \$6.52 in fringe benefits for \$30.52 total per hour. We affirm.

BACKGROUND

Petitioner is a subcontractor on the Maryland Department of the Environment heavy construction project contract Sanitary Contract No. 918H (SC 918H) for improvements to the Back River Waste Water Treatment Plant in Baltimore County, Maryland.³ The prime contractor on SC 918H is Clark/US-Back River, LLC (Clark).⁴

On February 3, 2021, Petitioner filed a conformance request with the WHD Branch of Construction Wage Determinations (BCWD).⁵ Petitioner sought the addition of a Waterproofer classification to Davis-Bacon Act (DBA) Wage Determination (WD) No. MD20170027 Modification Number 0, published January 6, 2017 (MD27).⁶ Petitioner proposed a wage rate of \$24.00 per hour plus \$6.52 in fringe benefits for \$30.52 total per hour.⁷

On April 16, 2021, BCWD denied the proposed wage rate because it did not bear a reasonable relationship to the rates contained in MD27.⁸ Instead, BCWD

¹ 40 U.S.C. § 3141. Reference to DBA in this decision shall include the DBRA unless otherwise noted.

² 29 C.F.R. Parts 1 and 5 (2022).

³ Administrative Record (AR) at 7.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 7, 32.

⁷ *Id.* at 7.

⁸ *Id.* at 8, 27. An initial conformance decision was issued on April 1, 2021 finding the above conclusion. On April 16, 2021, that decision was withdrawn due to a typographical error that listed the project location as Prince George’s County instead of Baltimore County. A new conformance decision was issued correcting the error. The conclusion remained the same.

approved a wage rate of \$28.03 per hour plus \$13.43 in fringe benefits for a combined rate of \$41.46 for the classification.⁹

On May 28, 2021, Petitioner requested reconsideration of BCWD's determination.¹⁰ On June 4, 2021, BCWD asked Petitioner to "[p]lease list and explain your reason(s) for the [reconsideration] along with any documents to support your claim for appeal, if applicable."¹¹ On September 16, 2021, BCWD returned the Petitioner's request for reconsideration due to a lack of response to BCWD's request for reasons why Petitioner appealed the conformance decision letter.¹²

On September 24, 2021, Petitioner responded to the request for a response.¹³ Petitioner contended that the proposed wage rate of \$30.52 was the minimum wage rate for Waterproofers in the city of Baltimore, which owned and managed the facility.¹⁴ Petitioner asserted that this proposed wage rate was incorporated in Petitioner's contract with Clark and was the rate Petitioner was told to use.¹⁵ Petitioner also noted that, while MD27 covered heavy construction projects, Petitioner did not perform heavy construction.¹⁶

On April 20, 2022, BCWD affirmed its decision denying conformance of the Waterproofed classification because the proposed wage rate did not bear a reasonable relationship to the wage rates in MD27.¹⁷ BCWD determined the proposed classification fell within the skilled classifications in MD27 and the reasonableness of the proposed rate must be determined in relationship to the rates paid to skilled classifications listed in MD27.¹⁸ Next, BCWD observed that eight of the eleven skilled classifications in MD27 reflected union prevailing wage rates.¹⁹ Since union rates predominated, BCWD determined it was appropriate to look to union rates for the conformance determination.²⁰ BCWD pointed out that

⁹ *Id.* at 27.

¹⁰ *Id.* at 30.

¹¹ *Id.* at 28-29.

¹² *Id.* at 32.

¹³ *Id.* at 33.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 47-50.

¹⁸ *Id.* at 49.

¹⁹ *Id.*

²⁰ *Id.*

Petitioner’s proposed wage rate was significantly lower than all of the union skilled wage rates on MD27 and lower than three-quarters of all skilled rates in the wage determination.²¹ Based on these considerations, BCWD determined the proposed wage rate did not bear a reasonable relationship to the skilled wage rates in MD27.²² Instead, BCWD determined that a conformed rate for a Waterproofer of \$28.03, plus \$13.43 in fringe benefits, for a total of \$41.46 per hour, bore a reasonable relationship to the rates in MD27 in accordance with the governing regulations.²³ BCWD observed that the conformed rate of \$41.46 per hour was third lowest, and near the median, among union rates in the skilled classification.

Petitioner had contended that the proposed rate was listed in the City of Baltimore Schedule of Minimum Wage Rates and was also the wage rate it was instructed to use.²⁴ BCWD found that Petitioner’s arguments were misplaced because the conformed wage rate must bear a reasonable relationship to the rates contained in the wage determination applicable to the contract under consideration, not to rates that a contractor may pay under a different state or local wage schedule where DBA conformance principles do not apply.²⁵

Petitioner had also contended that a heavy construction wage determination was inaccurate as it did not perform heavy construction work.²⁶ BCWD responded that wage determinations are chosen based on the nature of the construction project, not the work done or the business purpose of a subcontractor.²⁷ BCWD concluded the designation of “heavy construction” was appropriate because construction on sewage and water plants, such as the one at issue, is designated as “heavy construction.”²⁸

On May 20, 2022, Petitioner filed a request for a final determination by the Administrator (Administrator or WHD).²⁹ Petitioner’s May 20, 2022 request copied, word-for-word, its September 24, 2021 appeal, save for one addition: Petitioner asserted that it was “not a union organization.”³⁰ On July 1, 2022, WHD denied

²¹ *Id.* at 49-50.

²² *Id.* at 50.

²³ *Id.*

²⁴ *Id.* at 47. Petitioner did not specify who instructed it to use this rate.

²⁵ *Id.* at 49.

²⁶ *Id.* at 48.

²⁷ *Id.* at 49.

²⁸ *Id.* at 49-50.

²⁹ *Id.* at 53-66.

³⁰ *Id.* at 53.

Petitioner's request.³¹ WHD affirmed the BCWD's April 20, 2022 determination.³² WHD also determined that relying on union rates was appropriate even though Petitioner was "not a union organization" because union prevailing wage rates predominated for skilled classifications in MD27.³³

On August 1, 2022, Petitioner petitioned the Administrative Review Board (ARB or Board) for review of the WHD's July 1, 2022 final ruling.³⁴ Petitioner's Petition for Review was, once again, a word-for-word copy of its appeals and requests for reconsideration with WHD below.³⁵ The Administrator of the WHD filed a brief in response to the Petition for Review. Petitioner did not file a reply.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final determinations under the DBA.³⁶ 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."³⁷ 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

³¹ *Id.* at 67-72. The Administrator's final ruling was issued on July 1, 2022, by the Principal Deputy Administrator (Administrator) as the senior agency official in the Wage and Hour Division, in accordance with authority delegated by Secretary's Order No. 1-2017, Attachment, 82 Fed. Reg. 6653, 6657, 2017 WL 202391 (Jan. 19, 2017).

³² *Id.* at 69-71. There is a discrepancy between WHD's final ruling and the Administrator's brief regarding the number of skilled classifications in MD27. The final ruling indicates that there are thirteen skilled classifications in MD27, ten of which are union-negotiated wage rates. *Id.* at 69 n.1. The Administrator contends that there are only eleven skilled classifications, eight of which are union-negotiated wage rates. Administrator's Brief at 15. The Administrator is correct that there are eleven skilled classifications, eight of which are union-negotiated wage rates and three of which are non-union wage rates. AR at 2-6.

³³ *Id.* at 71.

³⁴ Petition for Review at 1 (Petitioner requested that its petition for review serve as its brief).

³⁵ *Id.*

³⁶ 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).

³⁷ 29 C.F.R. § 7.1 (e) (2022).

Administrator to implement and enforce the DBA.³⁸ “In considering the matters within the scope of its jurisdiction,” the Board acts “as fully and finally as might the Secretary of Labor.”³⁹

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”⁴⁰

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.”⁴¹ 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 standards governing a particular contract.⁴² 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.”⁴³

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”⁴⁴ “However, the conformance procedure is not intended to be a

³⁸ *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), *aff’d*, 520 F.Supp.2d 870 (E.D. Mich. 2007), *aff’d*, 285 F.App’x 277 (6th Cir. 2008).

³⁹ 29 C.F.R. § 7.1 (d) (2022).

⁴⁰ *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)).

⁴¹ *Terrebonne Par. Juv. Just. Complex*, ARB No. 2017-0056, slip op. at 3 (ARB Sept. 4, 2020) (quoting *Sumlin & Sons, Inc.*, WAB No. 95-08, 1995 WL 732673, at *2 (WAB Nov. 30, 1995); citing 29 C.F.R. § 1.6(c)(3)).

⁴² *Id.* at 3-4 (quoting *Sumlin & Sons, Inc.*, WAB No. 95-08, 1995 WL 732673, at *2).

⁴³ *Id.* at 4 (quoting *Sumlin & Sons, Inc.*, WAB No. 95-08, 1995 WL 732673, at *2).

⁴⁴ *Id.* at 4 (quoting *Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *2 (WAB Sept. 29, 1995)).

substitute process for challenging wage determinations in a timely manner.”⁴⁵ The Administrator has broad discretion to accept or reject any given conformance request.⁴⁶

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.⁴⁷

In the present matter, WHD properly considered these criteria. It is undisputed that the first and second criteria are met.⁴⁸ Regarding the third criterion, Petitioner’s proposed wage rate of \$24.00 per hour plus \$6.52 in fringe benefits for \$30.52 total did not bear a reasonable relationship to the wages contained in the wage determination. MD27 includes eleven wage rates for skilled classifications, eight of which are union wage rates ranging from a combined total rate of \$34.04 to \$56.54.⁴⁹ The remaining three wage rates for the skilled classifications reflect non-union wage rates, ranging from a combined \$18.70 to \$23.37.⁵⁰ The conformed rate of \$41.46 per hour is the third-lowest union wage rate for skilled classifications, and is in the middle for all skilled classifications.⁵¹

Thus, the proposed wage rate was significantly lower than all the union skilled wage rates on MD27 and lower than three-quarters of all skilled rates in the wage determination. Therefore, WHD acted within its discretion when it determined that a conformed rate for a Waterproofer of \$28.03 plus \$13.43 in fringe benefits, for a total of \$41.46 per hour, bore a reasonable relationship to the rates in MD27.

⁴⁵ *Id.* at 4 (quoting *Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *2).

⁴⁶ *Id.* (citing *Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *2).

⁴⁷ 29 C.F.R. § 5.5(a)(1)(ii)(A) (2022); All Agency Memorandum (AAM) No. 213 (March 22, 2013).

⁴⁸ AR at 48.

⁴⁹ *Id.* at 2-6.

⁵⁰ *Id.*

⁵¹ *Id.*

Petitioner contends that the proposed wage rate of \$24.00 per hour plus \$6.52 in fringe benefits for a total of \$30.52 should be applied for three reasons.⁵²

1. The Administrator Correctly Considered the Wage Rates in MD27

WHD determined that the DBA regulations do not provide WHD with the “authority to consider wage rates contained in the City of Baltimore Schedule of Minimum Wage Rates or any other wage determination.”⁵³ As MD27 was included in Petitioner’s contract, WHD concluded that “only the wage rates on MD27 may be considered in establishing a conformed rate for the Waterproofed classification under the DBA.”⁵⁴

Petitioner contends that WHD should have applied the wage rate issued by Baltimore City because that is the wage rate it was given for SC 918H.⁵⁵ Petitioner asserts that the Baltimore City wage rate for a Waterproofer is \$24.00 per hour plus \$6.52 in fringe benefits for a total of \$30.52, the rate it proposed in the conformance request.⁵⁶ Petitioner further asserts that this is the wage rate it was instructed to use.⁵⁷ Petitioner contends it is performing the same work regardless of whether it is working under the Baltimore City or DBA classification, and requests the Board apply the same wage rate issued by Baltimore City.⁵⁸

The conformed wage rate must bear a reasonable relationship to the DBA rates contained in the wage determination applicable to the contract at issue, not to rates that may apply under a different wage schedule when DBA conformance principles do not apply.⁵⁹

⁵² Petition for Review at 1.

⁵³ AR at 70.

⁵⁴ *Id.*

⁵⁵ Petition for Review at 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1-2.

⁵⁹ See 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) (2022); *Terrebonne Par. Juv. Just. Complex*, ARB No. 2017-0056, slip op. at 5-6 (WHD “is required to ‘determine whether a proposed wage rate for an additional classification bears a reasonable relationship only to the rates contained in the wage determination *applicable* to the contract under consideration,” not prevailing wage rates applicable to another contract) (quoting *Velocity Steel, Inc.*, ARB No. 2016-0060, slip op. at 12 (ARB May 29, 2018) (emphasis in original); citing 29 C.F.R. § 5.5(a)(ii)(3)); *Courtland Constr. Corp., Wash. Cnty., Vt.*, ARB No. 2017-0074, slip op. at 5 (ARB Sept. 30, 2019) (citing AAM No. 213) (“under longstanding agency policy and Board precedent, the reasonableness of a wage rate is determined with respect to wage rates in

In the present matter, Petitioner is a subcontractor on SC 918H for improvements to the Back River Waste Water Treatment Plant in Baltimore County, Maryland.⁶⁰ SC 918H incorporated Davis-Bacon Wage Determination MD27.⁶¹ Given that the contract incorporated the wage rates in MD27, WHD correctly compared the proposed wage rate for a Waterproofer to the wage rates contained in MD27.⁶²

In addition, Petitioner's contract with Clark put Petitioner on notice that Petitioner must be "in compliance with the Davis-Bacon Act and/or 'Minimum Wage Rates- City of Baltimore' (whichever is greater)."⁶³ Thus, although the Baltimore City wage rates may be lower than the conformed rates, Petitioner had notice that it would be required to pay the greater wage rate.

Lastly, nothing in the Administrative Record supports Petitioner's argument that it was instructed to use the Baltimore City wage rates aside from Petitioner's own assertion. Even if Petitioner was instructed to use the wage rate of \$30.52, the DBA's prevailing wage requirements cannot be waived by a private agreement or a contractor's misunderstanding of its obligations.⁶⁴

Thus, WHD acted within its broad discretion in conforming the wage rate to a rate that bears a reasonable relationship to the wage rates in MD27.

the wage determination incorporated into the contract at issue and not to any other contract.”).

⁶⁰ AR at 7.

⁶¹ *Id.* at 2-7.

⁶² *Id.* at 48-50.

⁶³ AR at 35, 55 (Exhibit D to Sanitary Contract 918H).

⁶⁴ *See Yates*, ARB No. 2002-0119, ALJ No. 2001-SCA-00021, slip op. at 6 (ARB Sept. 30, 2003) (stating that it is “well established that a service contractor’s prevailing wage obligations cannot be altered or avoided by entering private agreements purporting to waive the requirements of the Act”) (citing *Erbes*, No. 1984-SCA-00109, slip op. at 3 (Sec’y July 17, 1991); *Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 63 (1984) (“Those who deal with the Government are expected to know the law”) (citations omitted); *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1060 (D.C. Cir. 2007) (“Existing administrative and judicial decisions and the [DBA] itself put the Company on fair notice of what was required.”).

2. The Administrator Reasonably Compared the Proposed Wage Rate to Union Wage Rates

WHD determined that “union prevailing wage rates predominated [the] skilled classifications listed in MD27.”⁶⁵ Based on this, WHD concluded that it was reasonable to base the wage rate on its relationship to the skilled union rates listed in MD27.⁶⁶

Petitioner contends that WHD wrongly considered only union wage rates when setting the conformance rate for Waterproofers.⁶⁷ Petitioner asserts that union wage rates should not apply because it is not a union organization.⁶⁸ Contrary to Petitioner’s assertion, however, where the wage rates in the applicable classification contained in the wage determination are made up predominately of union wage rates, it is appropriate to consider the union-negotiated wage rates.⁶⁹

As discussed above, MD27 includes eleven wage rates for skilled classifications, eight of which are union wage rates ranging from a combined \$34.04 to \$46.54.⁷⁰ The remaining three wage rates for the skilled classifications reflect non-union wage rates, ranging from a combined \$18.70 to \$23.37.⁷¹ Because the skilled classifications in MD27 are predominately made up of union rates, the Administrator reasonably looked to the wage rates contained in the skilled union sector. The approved wage rate of \$41.46 per hour is the third-lowest union wage rate for skilled classifications.⁷² Thus, WHD properly considered union wage rates and the approved wage rate of \$41.45 per hour bears a reasonable relationship to the wage rates contained in MD27.

⁶⁵ AR at 71.

⁶⁶ *Id.*

⁶⁷ Petition for Review at 1.

⁶⁸ *Id.* at 1.

⁶⁹ AAM No. 213; *cf. Terrebonne Par. Juv. Just. Complex*, ARB No. 2017-0056, slip op. at 5 (where “union-negotiated wage rates make up a predominance of the wage rates contained in the wage determination, the Administrator reasonably considered only these rates . . .”); *Courtland Constr. Corp., Wash. Cnty., Vt.*, ARB No. 2017-0074, slip op. at 4-6 (the Administrator reasonably selected the wage rate that was both the median and lowest union rate even though the work performed under the contract was in the State of Vermont, which was not a union state).

⁷⁰ AR at 2-6.

⁷¹ *Id.*

⁷² *Id.*

3. Petitioner’s Challenge of “Heavy Construction” is Untimely

WHD determined that Petitioner’s challenge of the “heavy construction” classification was untimely because challenges to a wage determination must be brought pre-contract award.⁷³

Petitioner contends that MD27 was improperly classified as “heavy construction.”⁷⁴ Petitioner asserts that it does not perform heavy construction or any sewer or water construction, but rather the waterproofing tasks it performs are on building exteriors to ensure no water or vapors penetrate the building.⁷⁵ Petitioner does not argue in favor of another wage determination classification.

The applicable regulations state that “[c]ontracting agencies are responsible for . . . designating specifically the work to which such wage determinations will apply. Any question regarding application of wage rate schedules shall be referred to the Administrator.”⁷⁶ The time to challenge the accuracy of a DBA wage determination is “prior to the submission of bids.”⁷⁷ Given that Petitioner did not challenge the designation of “heavy construction” prior to the submission of bids, Petitioner’s argument is untimely.⁷⁸

Thus, the Administrator acted within the broad discretion it is afforded in rejecting Petitioner’s conformance request and by determining a wage rate for the Waterproofed classification that bears a reasonable relationship to the rates in MD27.

⁷³ *Id.* at 71 n.3.

⁷⁴ Petition for Review at 1.

⁷⁵ *Id.*

⁷⁶ 29 C.F.R. § 1.6(b) (2022).

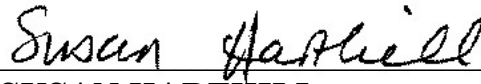
⁷⁷ *Strickland*, ARB No. 2013-0088, slip op. at 3 (ARB June 30, 2015).

⁷⁸ Even if Petitioner’s argument was timely, Petitioner has not provided any facts or legal arguments other than the bare assertion that waterproofing is not heavy construction.


CONCLUSION⁷⁹

Accordingly, we **AFFIRM** the WHD's July 1, 2022 ruling.

SO ORDERED.



SUSAN HARTHILL
Chief Administrative Appeals Judge



THOMAS H. BURRELL
Administrative Appeals Judge

⁷⁹ In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).