



In the Matter of:

**TOWN OF BERRYVILLE
WASTEWATER TREATMENT
PLANT**

ARB CASE NO: 11-081

DATE: May 7, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Douglas M. Nabhan, Esq., *Williams Mullen*, Richmond, Virginia

For the Administrator, Wage and Hour Division:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Jonathan T. Rees, Esq.; U.S. Department of Labor, Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

**FINAL DECISION AND ORDER DISMISSING
PETITION FOR REVIEW**

The Town of Berryville, Virginia (Berryville) entered into a contract with Caldwell and Santmyer, Inc. (Caldwell) to construct a wastewater treatment facility. The Berryville project is subject to the prevailing wage requirements of the Davis-Bacon Act, 40 U.S.C.A. §§ 3141-3148 (West 2010).¹ The contract contained wage determinations for both “building” construction and “heavy” construction.² See Administrative Record Tabs H & I. Caldwell entered into a

¹ The Davis-Bacon Act requires prime contractors and subcontractors to pay prevailing wage rates, as determined by the Secretary of Labor, to all laborers and mechanics that perform work on federal public construction contracts in excess of \$2,000. 40 U.S.C.A. § 3142.

² The Department of Labor has distinguished four types of construction for purposes of making prevailing wage determinations: building, residential, heavy, and highway construction. 29 C.F.R. §

subcontract with Miller and Anderson, Inc. (Miller) for mechanical and electrical services at the Berryville facility. Miller, the subcontractor, began working on the project and paid its employees the building wage rate. On July 13, 2010, Berryville contacted the Department of Labor's Wage and Hour Division (WHD) requesting guidance on which wage rates applied to various aspects of the project. On August 9, 2011, WHD issued a final ruling that portions of the work at the Berryville project performed by Miller's employees were heavy construction requiring the payment of wages consistent with the heavy wage rate. *See* WHD Determination (Aug. 9, 2011).

On August 25, 2011, Miller petitioned the Administrative Review Board (ARB) for review of the WHD's August 9, 2011, ruling. While Miller's petition stated that it was an "appeal" of WHD's decision and "incorporate[d] by reference all previous appeals that have been filed on its behalf," Miller did not attach any previous appeals on its behalf or otherwise explain in its petition the basis for any challenge to WHD's final ruling. Therefore, we find that Miller's petition has failed to raise a challenge to the final ruling. *See* 29 C.F.R. §§ 7.1(b) (describing the types of decisions the ARB may review); 7.5(a) (requiring that petitions contain "grounds for review" and be "accompanied by supporting data, views, or arguments"); and 7.9(b) (requiring that petitions "state concisely the points relied upon, and shall be accompanied by a statement setting forth supporting reasons") (2012). In addition, Miller's petition asks that the "Board simply focus on what was available to the bidders from the town of Berryville" but cites no legal authority for such a request. In this case, WHD did more than rely on the bid documents to determine which prevailing wage rate applied to the work performed under the Miller contract. WHD went to the project site to inspect the work being performed and then provided Miller with an explanation of its conclusion regarding the application of the heavy construction wage rate. WHD Determination at 2. Consequently, we reject Miller's request to review its petition solely on the bid documents.

Miller's petition expressly focuses on the issue of potential liability for any underpayment of wages. The petition states that "the Town of Berryville had the obligation to adequately and properly inform all prospective bidders of the wage determinations that would apply to different portions of the project." Petition at 2. The petition contends that WHD's determination that the heavy wage rate applies to its work "is not at all consistent 'with the contract solicitation documents'" and requests ARB to "simply focus on what was available to the bidders from the Town of Berryville." *Id.* Miller contends in its Petition that WHD's clarification of the wage requirements renders Berryville responsible for the increased wages:

Because this clarification was not clearly spelled out prior to the acceptance of the bid and because the Town of Berryville sought clarification to it's [sic] own bid solicitation documents Miller and Anderson should not be held responsible for paying for these construction items at the heavy construction wage rate. The Town of Berryville should treat this as a change order and reimburse

1.3(d) (2012); *see also* All Agency Memorandum No. 130, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division at pp. 2-5 (Mar. 17, 1978).

Miller and Anderson for the difference of the Building and heavy wage rate that the Department of Labor now claims is owed.

Petition at 1-2.

But WHD's determination on appeal finds only that the heavy construction wage rate applies to portions of the Town of Berryville project. There is no enforcement order before us or any order applying the wage rates to any particular Miller employees or any specific laborers or determining the issue of liability. Consequently, because there is no WHD order addressing the financial responsibility for any such increase in wages, the request in its Petition is not ripe for review. *See, e.g., In Re: Int'l Ass'n of Machinists*, ARB No. 11-073 (Jan. 25, 2012).

Accordingly, Miller's Petition for Review is **DISMISSED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge