



In the Matter of:

MACK STRICKLAND

ARB No. 13-088

Dispute concerning the payment of prevailing wage rates:

DATE: June 30, 2015

With Respect to requests for conformance of employee classification of insulator (for HVAC and plumbing to include piping and duct work) employed on Contract No. W912HN-07-D-0058, Task Order 0007, under Wage Determination No. GA20080002, Modification 0 (GA2); on Contract No. W912HN-07-D-0031, Task Order 20, under Wage Determination No. GA20080291, Modification 4 (GA291); and on Contract No. W912HN-07-D-0023.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Petitioner:

Mack Strickland, *pro se*, Waynesboro, Georgia,

For the Respondent, Administrator, Wage and Hour Division:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Jonathan T. Rees, Esq.; and Andrea Lindemann Gilliam, Esq.; *United States Department of Labor, Washington, District of Columbia*

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*. Judge Brown, concurring.

DECISION AND ORDER OF REMAND

Mack Strickland filed a petition for review of a final determination that the Administrator of the Wage and Hour Division issued on June 24, 2013, under the Davis-Bacon Act (DBA or the Act). 40 U.S.C.A. §§ 3141-3148 (Thomson Reuters Supp. 2014). The Act's implementing regulations are found at 29 C.F.R. Parts 1, 5, 7 (2014). The Administrator's final determination affirmed the Wage and Hour Division's (WHD) decision approving conformance requests from the United States Army Corps of Engineers (USACE) to add an insulator job classification at a wage rate of \$13.00 per hour to two general wage determinations, which were incorporated in two building construction contracts the USACE issued for the renovation of barracks at Fort

Gordon located in Richmond County, Georgia. Strickland requested review and reconsideration of the conformance decisions, contending that his job duties as an insulator should have been considered as duties performed by either the plumber or sheet metal worker job classifications already listed in the relevant general wage determination.

For the following reasons, the Administrator's decision is affirmed, in part, and vacated, in part, and remanded. The Administrator's decision adding the insulator job classification at a wage rate of \$13.00 per hour to General Wage Determination No. GA20080002, Modification 0, is affirmed in its entirety. But the Administrator's decision to add an insulator job classification at the same wage rate of \$13.00 per hour to the second general wage determination at issue (General Wage Determination No. GA20080291, Modification 4) is inconsistent with the guidelines in the Administrator's All Agency Memorandum 213 and unreasonable. Thus, we remand this case to the Administrator to modify the wage rate for the insulator job classification added to the second general wage determination and further action consistent with this Decision and Order of Remand.

BACKGROUND

1. Relevant Statutory and Regulatory Framework

The DBA applies to every contract of the United States in excess of \$2,000 for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States. 40 U.S.C.A. § 3142(a). It requires that the advertised specifications for construction contracts to which the United States is a party contain a provision stating the minimum wages to be paid to the various classifications of mechanics or laborers to be employed under the contract. *Id.* The minimum wage rates contained in the determinations derive from rates prevailing in the geographic locality where the work is to be performed or from rates applicable under collective bargaining agreements. 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

When wage patterns for a particular type of construction in a locality are established and when a large volume of procurement is anticipated in the area for the construction, the Administrator may furnish notice in the Federal Register of a "general" wage determination. 29 C.F.R. § 1.5(a). The Government Printing Office publishes general wage determinations. Contracting agencies may use general wage determinations without notifying the Administrator. *Id.* Alternatively, contracting agencies may ask the Administrator to issue a wage determination for particular contracts to cover specified employment classifications on an individual construction project. 29 C.F.R. § 1.5(b). This case involves the Administrator's general wage determinations.

A wage determination dictates the minimum wage rates paid to classifications of employees. It is incorporated into bid packages and ultimately into the contract. "Thus all bidders . . . are provided with the same information concerning the minimum wage rates that must be paid on a federal . . . procurement." *Mistick Constr.*, ARB No. 02-004, slip op. at 7 (June 24, 2003) (quoting *Pizzagalli Constr. Co.*, ARB No. 98-090, slip op. at 5 (May 29, 1999)).

Interested parties must challenge wage determinations prior to submission of bids on procurement. This requirement ensures an equitable procurement process so that “competing contractors know in advance of bidding what rates must be paid so that they bid on an equal basis.” *Id.* (quoting *Kapetan, Inc.*, WAB No. 97-33, slip op. at 8 (Sept. 2, 1988)).

On occasion, contract performance may require the addition of trade classifications after the period permitted for modification of the wage determination. After a contracting agency awards a contract, the Administrator may add job classifications to the wage determination through a “conformance action,” in which the contracting agency, through its contracting officer, “shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.” 29 C.F.R. § 5.5(a)(1)(ii)(A).

Conformance occurs after the conclusion of bidding on the contract and assumes “that the wage determination that was included in the bid specifications essentially is correct [with] the limited deficiency . . . that a needed job classification and wage rate are missing.” *Mistick*, ARB No. 02-004, slip op. at 7 (quoting *COBRO Corp.*, ARB No. 97-104 (July 30, 1999), *corrected*, slip op. at 10 (Sept. 13, 1999)). “The conformance mechanism is designed to facilitate expedited addition of a missing classification and wage rate while simultaneously maintaining the integrity of the bidding procedure.” *Mistick*, ARB No. 02-004, slip op. at 7. “The Administrator is not required to conduct a wage survey or to issue a de novo wage determination in order to effect a conformance.” *Id.*

The Davis-Bacon Act regulations regarding wage determination conformance actions assign the Administrator the responsibility to approve, modify, or disapprove proposed classifications and wage rates and to issue a ruling after considering the interested parties’ views. By design, the Davis-Bacon conformance process is an expedited proceeding created to “fill in the gaps” in the Administrator’s wage determinations. This narrow goal serves to establish an appropriate wage rate for a trade classification needed to perform a federal construction contract when the Administrator’s published wage determination does not already include a classification that performs the work. The limitations built into the conformance procedures are essential to maintaining fairness for all contractors competing for federal construction projects. *Tasker Homes*, ARB No. 07-102, slip op. at 5 (Oct. 29, 2009); *see also* 29 C.F.R. § 5.5; 48 C.F.R. Subpart 22.4 (2014). Simultaneously, the conformance process serves to safeguard wage rates by protecting existing classifications from dilution by creation of artificial, lower-paid classifications. *See Fry Bros. Corp.*, WAB No. 76-06, slip op. at 6 (June 14, 1977)(“If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left of the Davis-Bacon Act.”).

If a class of laborers or mechanics working on a DBA-covered project is not listed in the applicable wage determination, an additional classification and accompanying wage and fringe

benefits rates may be added to the wage determination pursuant to a conformance request under 29 C.F.R. § 5.5(a)(1)(ii)(A), *provided* the following criteria are satisfied:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (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).¹

In *Tesco Builders, Inc.*, ARB No. 05-102, slip op. at 5-6 (Oct. 31, 2007), the Board held that the holding in *Fry Bros. Corp.*, WAB No. 76-06, on which the Administrator relied in this case, supports the conclusion that where the relevant “wage determination rates are derived from a CBA,” “local area union practices . . . determine the proper classification . . . applicable to the work in question,” but not what wage rates are applicable. Previously, in *Mistick Constr.*, ARB No. 02-004, slip op. at 5-6, the Board noted that the Administrator in that case “premised her decision” of whether the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination “on (i) a distinction articulated in *Tower Constr.*, WAB No. 94-17, slip op. at 3-5 (Feb. 28, 1995), between skilled and non-skilled classifications and . . . (ii) agency policy “requir[ing] the proposed rate for a skilled classification [to] be equal to or exceed the lowest rate of the skilled classifications already contained in the contract wage determination.” *Tower Constr.*, WAB No. 94-17, slip op. at 3; *see also Millwright Local 1755*, ARB No. 98-015, slip op. at 11 (May 11, 2000).

On March 22, 2013, however, the Administrator issued All Agency Memorandum (AAM) 213, in which the Administrator noted that while previously the WHD “automatically us[ed] as a benchmark the lowest [wage] rate for a skilled classification . . . in the applicable

¹ A conformance action is effected in one of two ways, depending upon whether the contractor, the employees being classified in conformance with the wage determination, and the contracting officer agree or disagree as to the classification and wage rate. If the contractor and the employees, or their representatives, and the contracting officer agree on the additional classification and wage rate, the contracting officer submits a report of the action to the Administrator who then will approve, modify, or disapprove the conformance. 29 C.F.R. § 5.5(a)(1)(ii)(B). If the principals disagree, “the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination.” 29 C.F.R. § 5.5(a)(1)(ii)(C). Any party who disagrees with the Administrator’s determination may appeal the decision to this Board. 29 C.F.R. § 7.1.

wage determination,” the WHD “no longer” uses “the lowest wage rate as a benchmark” but now “consider[s] the entirety of the rates within the relevant category on the wage determination” as 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. AAM 213 at 1-3 (emphasis added).

AAM 213 notes that the WHD compares the requested additional classification to classifications on the applicable wage determination within the same category, which in this case is the skilled crafts category. “Thus, when considering a conformance request for a skilled classification on the applicable wage determination, WHD generally considers the entirety of the *rates* for the skilled classifications on the applicable wage determination and looks to where the proposed wage rate falls within the *rates listed* on the wage determination.” AAM 213 at 3 (emphasis added). Additionally, the WHD considers whether the wage rates in the applicable category, such as the skilled crafts in this case, are “predominantly” union prevailing “wage rates” or non-union “weighted average” prevailing “wage rates” and looks to that sector’s classifications in the wage determination and the “rates” for those classifications when proposing a wage rate for an additional classification. *Id.* If the wage rates in the applicable category are “roughly half” union and half non-union, “it would typically be appropriate to look to the lowest union rate and highest [non-union] rate” when proposing a wage rate. *Id.* Ultimately, in AAM 213, the Administrator notes that “[e]ach conformance request and corresponding wage determination involves particular circumstances and therefore should be evaluated as such,” so that even the use of the lowest skilled wage rate “may” be appropriate. AAM 213 at 4.

2. Relevant Contracts, Wage Determinations, and Conformance Requests

The USACE issued construction contracts for the renovation of barracks at Fort Gordon located in Richmond County, Georgia. *See* Administrative Record (AR) Tabs D, E; *see also* Petition for Review Exhibits (PR) Tabs 4-6. The Copper Construction Company, Inc., was a subcontractor on the construction project, *see* AR Tabs D-E, and Strickland worked as an insulator for Copper Construction on the project from August 2008 through January 2011, *see* AR Tab I. Strickland’s paycheck records indicate that Copper Construction paid him \$13.50 per hour in 2008 and \$14.50 per hour from 2009 through January 2011. *Id.*² According to Strickland, because he inquired about a disproportionate discrepancy between his pay and that of other contractors’ workers doing the same job duties on the project, the USACE filed conformance requests, under 29 C.F.R. § 5.5(a)(1)(ii)(A), with the WHD Administrator, requesting that the job classification of “Insulator, HVAC and Plumbing” be added to the General Wage Determination attached to the project contracts. Petition for Review (PR) at 2, 4.

² Strickland submitted subsequent paychecks from other employers indicating he was paid a wage rate of \$30.00 and \$33.25 per hour to do insulation work later in 2011, *see* AR Tab I, but the paychecks do not indicate on what type of work projects he worked or where he was working at that time.

Contract # 1 -

On September 30, 2008, the first contract at issue, Contract No. W912HN-07-D-0058, Task Order 0007 (Contract # 1), was awarded to the prime contractor, Tetra Tech EC-Tesero Joint Venture, and work began on the contract on November 24, 2008. *See* AR Tab D. This contract incorporated General Wage Determination No. GA20080002, Modification 0, for Richmond County in Georgia (WD GA2), which was published on February 8, 2008, and withdrawn on November 7, 2008. *See* AR Tabs A-B. The prevailing wage rates listed in WD GA2 were all non-union (weighted average) wage rates and indicated, for the relevant classifications, a \$13.20 per hour wage rate for a “Plumber,” with no fringe benefits, and a \$10.04 per hour wage rate for a “Sheet Metal Worker (HVAC DUCT WORK ONLY),” with no fringe benefits, *see* AR Tab A.

On November 11, 2011, the USACE filed a conformance request, SF 1444, with the WHD Administrator, requesting that the job classification of Insulator (for HVAC and Plumbing to include piping and duct work) at a wage rate of \$13.00 per hour be added to General Wage Determination No. GA2, as it did not provide rates for such a classification, which was needed to complete work on the project. *See* AR Tab D. On December 1, 2011, the WHD approved the conformed classification and wage rate in accordance with 29 C.F.R. § 5.5(a)(1)(ii). *See* AR Tab F.

Contract # 2 -

On September 20, 2009, the second contract at issue, Contract No. W912HN-07-D-0031, Task Order 20 (Contract # 2), was awarded to the prime contractor, The Clement Group, LLC, and work began on the contract on October 19, 2009. *See* AR Tab E. This contract incorporated General Wage Determination No. GA20080291, Modification 4, for Richmond County in Georgia (WD GA291), which was published on July 24, 2009. *See* AR Tab C. The prevailing wage rates listed in WD GA291 for five skilled job classifications were based on union bargained wage rates, including a \$20.14 per hour wage rate, plus \$10.93 in fringe benefits, for “Plumbers and Pipefitters” and a wage rate of \$22.40 per hour, plus \$10.95 in fringe benefits, for a “SHEET METAL WORKER, Including Hvac Duct Installation and Metal Roofing,” for “Buildings up to 100,000 square feet,” *see* AR Tab C. Another eight skilled job classifications were based on non-union wage rates, which ranged between \$10 and \$16 per hour, with only three receiving fringe benefits, the highest of which was \$1.71. *Id.*

On December 5, 2011, the USACE filed a conformance request, SF 1444, with the WHD Administrator, requesting that the job classification of Insulator (for HVAC and Plumbing to include piping and duct work) at a wage rate of \$13.00 per hour be added to General Wage Determination No. GA291, as it did not provide rates for such a classification, which was needed to complete work on the project. *See* AR Tab E. On December 13, 2011, the WHD approved the conformed classification and wage rate in accordance with 29 C.F.R. § 5.5(a)(1)(ii). *See* AR Tab G.

Contract # 3 -

Strickland submitted documents he obtained regarding a third contract. On July 18, 2007, the third contract, Contract No. W912HN-07-D-0023 (Contract # 3), was awarded to the prime contractor, The Clement Group, LLC, for work that initially was for construction projects in South Carolina. *See* AR Tab I. Subsequent Task Orders on the contract dating from August 23, 2007, through September 15, 2009, were for projects at Fort Gordon in Georgia which incorporated either WD GA2 or WD GA291. The USACE did not file a conformance request in regard to this contract, but, as already noted, had received approval in December 2011 adding the job classification of Insulator (for HVAC and Plumbing to include piping and duct work) at a wage rate of \$13.00 per hour to both WD GA2 and WD GA 291, *see* AR Tabs D-G.

3. Request for Review and Reconsideration of Conformance Decisions

By correspondence dated July 17, 2012, received by WHD on July 25, 2012, Strickland requested review and reconsideration pursuant to 29 C.F.R. § 5.13³ of the conformance decisions. Strickland requested the Administrator to reverse the conformance decisions, contending that his job duties as an insulator should have been considered as duties performed by either the plumber or sheet metal worker job classifications already listed in the general wage determinations. Strickland also contended that Contract # 1 should have incorporated WD GA291, instead of WD GA2, and that he was not paid the prevailing wage under a third contract involving renovation of the barracks at Fort Gordon. *See* AR Tabs H-I-J.

5. Administrator's Final Determination

On July 24, 2013, the Administrator issued a final determination. AR Tab J. The Administrator's review of WHD's conformance decisions included conducting "area practice surveys" that included interviewing employees at Fort Gordon, including Strickland, regarding their job duties as insulators, to determine which classification—plumber, sheet metal worker, or the conformed insulator—performed the insulator duties. Administrator's Final Determination (FD) at 2-3 (AR Tab J). *See* AR Tabs I, L. Initially, the Administrator rejected Strickland's contention that Contract # 1 should have incorporated WD GA291, instead of WD GA2, noting that because WD GA2 was in effect at the time Contract # 1 was awarded on September 30, 2008 (as opposed to when work actually began on the contract), WD GA2 was appropriately incorporated into Contract # 1. FD at 2, 5. The Administrator also affirmed the WHD's approval of the conformance requests from the USACE to add an insulator job classification at a wage rate of \$13.00 per hour to WD GA2 incorporated into Contract # 1, and to WD GA291

³ 29 C.F.R. § 5.13 provides in pertinent part: "All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to part 1 of this subtitle, of the rules contained in this part and in parts 1 and 3, and of the labor standards provisions of any of the statutes listed in §5.1 shall be referred to the Administrator for appropriate ruling or interpretation."

incorporated into Contract # 2. FD at 2-5. The Administrator did not review Contract # 3, on the grounds that USACE had not requested conformance of an insulator classification for this contract. *Id.* at 5.

Strickland timely appealed the Administrator's decision to the Administrative Review Board.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations. 29 C.F.R. § 7.1(b); *see also* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). DBA proceedings before the ARB are appellate in nature, and the Board will not hear matters de novo except upon a showing of extraordinary circumstances. 29 C.F.R. § 7.1(e). This general prohibition against de novo review means that the Board will rely on the record and arguments presented by the parties. *See Y-12 Nat'l Sec. Complex*, ARB No. 11-083, slip op. at 5 (Aug. 8, 2013); *Framlau Corp. v. Dembling*, 360 F. Supp. 806, 813 (E.D. Pa. 1973). We 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 Administrator to implement and enforce the Act. *See Y-12 Nat'l Sec. Complex*, ARB No. 11-083, slip op. at 5. In matters requiring the Administrator's discretion and expertise, the Board generally defers to the Administrator as being "in the best position to interpret [the DBA'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." *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (Sec'y May 10, 1991); *see also, Road Sprinkler Fitters Local Union No. 669*, ARB No. 10-123, slip op. at 6 (June 20, 2012) (citing *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (Sec'y May 10, 1991)).

DISCUSSION

The primary issue on appeal is whether pursuant to a conformance request, the addition of a new classification to existing wage determinations, including determination of the appropriate wage rate, satisfies the conformance criteria established under 29 C.F.R. § 5.5(a)(1)(ii)(A). A secondary issue is whether a wage determination, published and effective after a contract has been issued, is applicable to that contract. Strickland contends on appeal that his job duties as an insulator should have been considered as duties performed by either the "Plumber" or "Sheet Metal Worker" job classifications listed in the applicable wage determinations, thereby entitling him to a higher wage rate under existing wage determination job classifications than the wage rate at which he was paid, and that the second wage determination, WD GA291, applies to both Contract # 1 and # 2 under which his work was performed. A third issue raised on appeal is whether, and to what extent, Strickland may be entitled to a wage adjustment for work performed under a third contract (Contract # 3).

Contract # 1

In regard to Contract # 1, Strickland initially contends on appeal that Contract # 1 should have incorporated WD GA291 instead of WD GA2, as WD GA2 was withdrawn on November 7, 2008, AR Tab B, before work began on Contract # 1 on November 24, 2008, AR Tab D. We note, however, that a wage determination is incorporated initially into a bid package, so competing contractors know in advance of bidding what rates must be paid, and ultimately is incorporated into a contract, *Mistick*, ARB No. 02-004, slip op. at 7; *see* 29 C.F.R. § 1.6(b). Moreover, as the Administrator notes on appeal, the regulations state that a modification of a general wage determination is effective only if it is published “before contract award,” *see* 29 C.F.R. § 1.6(c)(3). So because a wage determination is incorporated into a contract when it is initially bid before the contract award, we affirm the Administrator’s determination that because WD GA2 was in effect at the time Contract # 1 was awarded on September 30, 2008 (as opposed to when work actually began on the contract), WD GA2 was appropriately incorporated into Contract # 1. FD at 2, 5.

Next, because the prevailing wage rates listed in WD GA2 incorporated into Contract # 1 were all non-union wage rates, the Administrator noted that the WHD looked to the non-union sector to determine the area practice as to which workers performed insulator duties, citing the standard established in *Fry Bros.*, WAB No. 76-06. FD at 3. The Administrator noted that the WHD obtained a list of non-union insulation, sheet metal, and plumbing contractors working in Richmond County, Georgia from the Associated Builders & Contractors of Georgia (ABCGA) and interviewed a “random sample” to see which performed the proposed insulator duties. *Id.*

Because the insulator and sheet metal contractors stated that insulators perform such duties and the plumbing contractors advised that insulators perform the large amount of insulation work as referenced in Contracts # 1 and # 2, the Administrator determined that this information confirmed that no existing classification in WD GA2 performed the work of the proposed insulator classification and, additionally, that the insulator classification is utilized in the area by the construction industry and, therefore, satisfied both the first and second criterion at 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(2). *Id.*

Furthermore, because the \$13.00 per hour proposed wage rate for the insulator classification is greater than eight other skilled classification wage rates in WD GA2, the Administrator determined that the proposed wage rate for the insulator classification bears a reasonable relationship to the wage rates contained in WD GA2 and, therefore, satisfies the third criterion at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) in accordance with the guidelines in AAM 213. *Id.*

Finally, the Administrator noted that because the \$13.50 to \$14.50 per hour wage rate Strickland was paid for his insulator’s work was greater than both the \$13.20 per hour wage rate for plumber’s and the \$10.04 wage rate for a sheet metal worker as listed in WD GA2, or even the \$13.00 wage rate approved for the new insulator classification, he still would not have been owed back wages if plumbers or sheet metal workers had performed his insulator duties. *Id.*

A review of the administrative record reveals that in a sworn declaration, WHD investigator Ray R. Gaut stated that the WHD interviewed a “random sample” of non-union insulation, sheet metal, and plumbing contractors working in Richmond County, Georgia from a list obtained from the ABCGA and interviewed a “random sample,” which confirmed that insulators perform the insulation work duties described in Contracts # 1 and # 2. *See* AR Tab L at 3-4.⁴ In a subsequent Notice, the Administrator provided Strickland and the Board with additional documents underlying Gaut’s sworn declaration, including WHD e-mail correspondence with the ABCGA; the lists the ABCGA provided of insulator, plumber, and sheet metal worker contractors; and the WHD investigator’s notes of contacts with insulator, plumber, and sheet metal worker contractors. *See* Administrator’s Notice. Thus, the Administrator’s final determination with regard to Contract # 1 that no classification in WD GA2 performed the work of the proposed insulator classification, that the insulator classification is utilized in the area and the proposed \$13 per hour wage rate for the insulator classification bears a reasonable relationship to the wage rates contained in WD GA2, thereby satisfying the criterion at 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3), is supported by WHD Investigator Gaut’s sworn declaration.

In addition, the WHD conducted the investigation or “area practice survey” in accordance with the WHD Field Operations Handbook (FOH) 15f05. *See* AR Tab K. FOH 15f05(d)(2)(a) states that if the applicable wage determination reflects non-union rates for the classification involved, to complete an area practice survey the WHD should contact non-union contractors such as “members of the Associated Builders & Contractors of America (ABC) and ask whether they performed the work in question on similar projects under way in the county during the survey timeframe.” *Id.* Finally, FOH 15f05(d)(2)(a)(2) states that “[i]f all the non-union contractors agree, or if a clear majority of them agree, the area practice is established.” *Id.*

Finally, as the Administrator noted, because Strickland was paid a higher wage rate for his work as an insulator in regard to Contract # 1 than the wage rates for a plumber, sheet metal worker, or even the approved wage rate for an insulator in WD GA2, any error the Administrator may have made in the conformance request at least in regard to Contract # 1, and its incorporated WD GA2, would be harmless.

Thus, Strickland has not demonstrated that the Administrator’s conformance decision in regard to Contract # 1 and its incorporated WD GA2 was inconsistent with the regulations, unreasonable, or an unexplained departure from precedent. *See Environmental Chem. Corp.*, ARB No. 96-113, slip op. at 3 (Feb. 6, 1998). Consequently, because the Administrator acted in accordance with the applicable regulations at 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3) and settled agency policy and practice, the Administrator’s conformance decision in regard to Contract # 1 and its incorporated WD GA2 is affirmed.

⁴ Contrary to Strickland’s allegation that there are no sworn statements in the record, Gaut made his declaration under the penalty of perjury. AR Tab L at 1, 6.

Contract # 2

Next, in regard to Contract # 2, the Administrator noted that WD GA291 incorporated into Contract # 2 contained five union skilled job classifications with prevailing wage rates and eight non-union skilled job classifications with prevailing wage rates, but contained no insulator classification. FD at 4. The union wage rates included a wage rate of \$20.14 per hour wage rate, plus \$10.93 in fringe benefits, for “Plumbers and Pipefitters” and a wage rate of \$22.40 per hour, plus \$10.95 in fringe benefits, for a “sheet metal worker, including HVAC duct installation.” *Id.* Because union rates prevailed for the plumber and sheet metal worker classifications in WD GA291, the Administrator noted that the WHD looked to the union sector to determine the area practice as to whether either classification performed insulator duties, citing the standard established in *Fry Bros.*, WAB No. 76-06. FD at 3.

The Administrator noted that the Plumbers’ Union Local 150 confirmed that plumbers did not perform such work and the Sheet Metal Workers’ Union Local 85 in conjunction with the USCAE confirmed that insulators would perform the “majority” of the insulation work defined in Contract # 2, while sheet metal workers would perform only a “very small portion.” *Id.* While the WHD requested that the Sheet Metal Workers’ Union Local 85 provide written documentation to support its assertion that sheet metal workers performed a small portion of insulation work defined in Contract # 2 in Richmond County, Georgia in the year prior to the award of the contract, because the union did not do so, its assertion that sheet metal workers performed a small portion of insulation work defined in Contract # 2 was not established. FD at 4-5. Consequently, the Administrator determined that this information confirmed that no classification in WD GA291 performed the work of the proposed insulator classification and that the insulator classification is utilized in the area and, therefore, satisfied both the first and second criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(2). FD at 5.

The WHD investigation or “area practice survey” with regard to Contract # 2 also was conducted in accordance with the WHD Field Operations Handbook (FOH) 15f05. *See* AR Tab K. FOH 15f05(d)(1)(a) states that if the applicable wage determination reflects union rates for the classifications involved, to complete an area practice survey the WHD should “[c]ontact the unions whose members may have performed the work in question to determine whether the union workers performed the work on similar projects in the county in the year prior to the wage determination . . . contract award date . . . for the project at issue.” *Id.* The WHD did contact the relevant unions. But as the Administrator notes on appeal, as neither the plumbers union, nor the sheet metal workers union “were able to provide information that their members performed” the insulator’s work “in question, the Administrator properly determined that the first criterion of the conformance test was satisfied.” *See Volkman R. R. Builders*, WAB No. 94-10, slip op. at 2-3 (Aug. 22, 1994).

Moreover, a review of the administrative record reveals that in his declaration, WHD investigator Gaut stated that the WHD contacted the Sheet Metal Workers’ Union Local 85, which indicated that insulators would perform the majority of the insulation work defined in Contract # 2, while sheet metal workers would perform only a “small portion.” *See* AD Tab L at 2, 4. Again, the Administrator’s Notice includes the WHD investigator’s notes of contacts with

the Plumbers' Union Local 150 and the Sheet Metal Workers' Union Local 85, WHD e-mail correspondence with the ABCGA indicating that the ABCGA advised the WHD to determine if the contractors it contacted were union or non-union, and that the WHD requested that the ABCGA confirm that plumbers do not perform, insulation work. *See* Administrator's Notice. Thus, the Administrator's final determination with regard to Contract # 2 that no classification in WD GA291 performed the work of the proposed insulator classification, and that the insulator classification is utilized in the area by the construction industry, thereby satisfy the first two criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(2).

The Administrator's determination that the proposed wage rate of \$13.00 per hour for the insulator skilled classification bears a reasonable relationship to the skilled classification wage rates contained in WD GA291 is inconsistent with the guidelines in AAM 213.

Nevertheless, the Administrator's determination that the proposed wage rate of \$13.00 per hour for the insulator classification bears a reasonable relationship to the wage rates contained in WD GA291, thereby satisfying the third criterion at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3), is inconsistent with the guidelines set forth in AAM 213. The Administrator stated that "given that [the \$13.00 per hour proposed] wage rate was higher than that paid to several skilled classifications on [WD] GA291, the proposed rate bears a reasonable relationship to the wage rates listed for skilled classifications in [WD] GA291." FD at 5.

AAM 213, at p. 3, requires the WHD to consider the "entirety of the rates" for the skilled classifications on the applicable wage determination and that WHD is to "look[] to where the proposed wage rate falls within the rates listed on the wage determination." Moreover, under AAM 213 the WHD is to consider whether the wage rates in the applicable category, such as the skilled job classifications in this case, are "predominantly" union prevailing "wage rates" or non-union "weighted average" prevailing "wage rates." *Id.* If the wage rates in the applicable category are "roughly half" union and half non-union, "it would typically be appropriate to look to the lowest union *rate* and highest [non-union] *rate*" when proposing a wage rate. *Id.* (emphasis added).

The Administrator indicated that WD GA291 contained five union skilled job classifications (including plumber and sheet metal worker) with prevailing wage rates and eight non-union skilled job classifications with prevailing wage rates, FD at 4, and appears to have relied on that distinction to conclude that WD GA291 contained predominantly non-union wage rates. Thus, apparently because the proposed wage rate of \$13.00 per hour for the insulator classification falls within the range of the wage rates for the eight non-union skilled job classifications (from a high of \$16 for a drywall hangar to a low of \$10 for a roofer), the Administrator concluded that the proposed wage rate of \$13.00 per hour for the insulator classification bears a reasonable relationship to the wage rates contained in WD GA291, thereby satisfying the third criterion at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3).

By WHD's count (five union as opposed to eight non-union classifications), the wage rates in the skilled job classifications were "predominantly" non-union classifications, so WHD considered only non-union wage rates in approving the proposed rate of \$13.00 per hour.

However, we do not consider it reasonable in this case to completely ignore the union rates in WD GA291—especially in light of the fact that the union rates included classifications (plumber and sheet metal worker) closely related to the duties of the conformed classification (insulator) at issue. AAM 213 requires that WHD consider the “entirety of the rates” and where, as here, a large percentage of those rates are union (though not “predominantly” so), WHD should have taken those union rates into consideration to properly establish that the proposed rate “bears a reasonable relationship to the wage rates contained in the wage determination.” 29 C.F.R. § 5.5(a)(1)(ii)(A)(3); *see M.Z. Contractors Co., Inc.*, WAB No. 92-23, 1993 WL 331762, slip op. at 2 (Aug. 16, 1993) (mechanical adoption of WHD policy may not produce “reasonable” result; flexibility in application of policy may be warranted).

In any event, WHD appears to have erred in comparing the number of union job classifications to non-union job classifications in determining that the proposed \$13.00 wage rate for insulators bore a reasonable relationship to the rates in WD GA291. AAM 13 makes clear that it is not the number of union versus non-union job *classifications* that is determinative of whether the applicable wage determination contains predominantly union or non-union wage rates, but the actual number of union versus non-union “*wage rates*” listed or contained in the wage determination. This is consistent with express language of 29 C.F.R. § 5.5(a)(1)(ii)(A)(3), which provides that “the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the *wage rates* contained in the wage determination.” (emphasis added). A skilled job classification on a wage determination, such as for an electrician and a sheet metal worker on WD GA291, may provide more than one “wage rate” for that job classification depending on the type of work performed. *See* AR Tab C. For instance, we note that in one of the examples the WHD provides to determine whether a proposed wage rate for a requested added skilled job classification bears a reasonable relationship to the wage rates contained in the relevant wage determination in the “Frequently Asked Questions: Conformances,” that the WHD has posted on its website (*see* Skilled Classification Example 2), the WHD counts three separate wage rates for the skilled carpenter job classification when determining whether the applicable wage determination contains “predominantly” union or non-union wage rates. *See* <http://www.dol.gov/whd/programs/dbra/Survey/conformancefaq.htm>.

A review of WD GA291 indicates that it actually contains a total of eight union wage rates for six skilled job classifications (the lowest being \$27.47, including fringe benefits for a carpenter) and also contains eight non-union wage rates for eight skilled job classifications (the highest being of \$16 for a drywall hangar). *See* AR Tab C.⁵ Thus, in accordance with the guidelines contained in AAM 213, because the number of wage rates for the skilled job classifications contained in WD GA291 are half union (eight) and half non-union (eight), the Administrator should have looked to see if the proposed wage rate of \$13 for the insulator skilled job classification fell between the lowest union wage rate for a skilled job classification, in this

⁵ Thus, the Administrator also erred in indicating that WD GA291 contained only “five” union skilled job classifications, and eight non-union skilled job classifications, FD at 4. A review of WD GA291 shows that it actually contains six union skilled job classifications. *See* AR Tab C. Apparently, the Administrator failed to count the Millwright skilled job classification, which is found just under the Carpenter skilled job classification. *Id.*

case \$27.47 including fringe benefits for a carpenter, and the highest non-union wage rate for a skilled job classification, in this case \$16 for a drywall hangar. *See* AAM 213 at 3; AR Tab C.

Because the \$13.00 per hour proposed wage rate for the insulator classification does not fall within the range of the lowest union wage rate for a skilled job classification of \$27.47 including fringe benefits for a carpenter and the highest non-union wage rate for a skilled job classification of \$16.00 for a drywall hangar in WD GA291, the Administrator erred in concluding that the proposed wage rate for the insulator classification bears a reasonable relationship to the wage rates contained in WD GA291 pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) in accordance with the guidelines set forth in AAM 213.

Accordingly, we vacate the Administrator's determination that the \$13.00 proposed wage rate for the insulator classification bears a reasonable relationship to the wage rates contained in WD GA291 in satisfaction of the third criterion at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) as unreasonable, and remand this case to the Administrator to modify the wage rate for the insulator job classification added to WD GA291 and for further necessary action consistent with this opinion, so that Strickland receives any back wages he is owed as a result of the Administrator's erroneous determination.

Contract # 3

Although Strickland submitted documents regarding Contract # 3 in support of his argument that he should have been paid a higher wage thereunder, because the USACE purportedly did not file a conformance request with regard to this contract, the Administrator did not review Strickland's claims with regard to this contract. FR at 5. Strickland contends, however, that he asked the USACE to file a conformance request in regard to this contract as well, and that it was error for the Administrator to refuse to consider Contract # 3. Response Brief at 5.

Review by the Administrator, as required by 29 C.F.R. § 5.13, is not limited to conformance error. A review of the administrative record indicates that Contract # 3 incorporated either WD GA2 or WD GA291. AR Tabs D-G. However, the record does not clearly reveal whether Contract # 3 incorporated WD GA291, and, if so, whether the conformance request granted in conjunction with Contract # 2 applied as well to Contract # 3. It is also unclear whether USACE should have filed a conformance request pertaining to Contract # 3, as Strickland argues.

Consequently, given our ruling remanding this case to the Administrator for reconsideration of the wage rate for the insulator classification under WD GA291, we also instruct the Administrator to take further necessary action consistent with this opinion with regard to Strickland's request for review of Contract # 3, pursuant to 29 C.F.R. § 5.13, to assure that Strickland receive any back wages to which he may be entitled under that contract.

CONCLUSION

Regarding Contract # 1, because the Administrator acted in accordance with the applicable regulations at 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3) and settled agency policy and practice, the Administrator's approval of the conformance request from the USACE to add an insulator job classification at a wage rate of \$13.00 per hour to WD GA2 incorporated into Contract # 1 is **AFFIRMED**.

Regarding Contract # 2, the Administrator's addition of the Insulator classification to WD GA291 is **AFFIRMED**. The Administrator nevertheless erred in determining the proper prevailing wage rate for the Insulator classification. Accordingly, the Administrator's determination that the \$13.00 proposed wage rate for the insulator classification bears a reasonable relationship to the wage rates contained in WD GA291 incorporated into Contract # 2 in satisfaction of the third criterion at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) is **VACATED** as unreasonable, and this case is **REMANDED**, to the Administrator for reconsideration consistent with this decision of the wage rate for the insulator job classification added to WD GA291 and for further necessary action consistent with this opinion to assure that Strickland receives any back wages to which he is entitled under Contract # 2 and WD GA291 as modified to include the Insulator classification.

Finally, the Administrator is directed upon remand to take such further action as necessary consistent with this opinion with regard to Strickland's request for review of Contract # 3, pursuant to 29 C.F.R. § 5.13.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring:

I concur in the majority's decision affirming the Administrator, in part, and reversing, in part, and remanding. I write separately to address the manner by which the Wage and Hour Division addressed Mr. Strickland's petition challenging the conformance determinations, which I find troubling because it may ultimately result in no meaningful remedy for him notwithstanding our ruling in this case.

The record indicates that Contract #1 closed and final contract payment was made on August 7, 2012.⁶ There is no indication in the record as to when Contract #2 closed and final payment made, but I believe it safe to say that Contract #2 is by now also closed.⁷ Moreover, there is nothing in the record to suggest that funds were withheld from payment under either contract upon Strickland's filing of his challenge to the conformance determinations. To the contrary, the Deputy Administrator's assertion on appeal that "nothing in the regulations requires the suspension of payments simply because an interested party has sought review of a conformance decision"⁸ would indicate that no contract funds were withheld. Consequently, should the Administrator, on remand, revise the wage rate for the Insulator classification as the majority decision indicates is warranted, I fail to see how or by what means Strickland will recover that which he seeks, *i.e.*, the payment of back wages owed.

Arguably, Strickland could sue his employer for the lost wages. However, where is the due process to the employer should that occur? It does not appear from the record that Strickland's immediate employer (Copper Construction Co., Inc.) or, for that matter, the prime contractors under the two contracts (TIEC-Tesoro, Joint Venture, and The Clement Group, LLC) were parties to the proceedings before the Administrator. Nor does it appear from the record that they were notified of Strickland's petition upon its filing.

On behalf of the Deputy Administrator on appeal, the Solicitor interprets the DBA's implementing regulations as providing for the suspension of payments to a contractor only in the event "it fails or refuses to comply with the labor standards clauses contained in 29 C.F.R. § 5.5."⁹ "[N]othing in the regulations," the Solicitor argues, "requires the suspension of payments simply because an interested party has sought review of a conformance decision. See 29 C.F.R. § 5.9."¹⁰

I must respectively disagree with the Solicitor. 29 C.F.R. § 5.5(a)(2) provides for the withholding from the contractor by the federal contracting agency, either on its own volition or upon direction of the Department of Labor, "so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract." 29 C.F.R. § 5.5(a)(1)(ii)(C) clearly contemplates disputes arising between

⁶ See Administrator's Determination Letter (July 24, 2013), at pg. 3.

⁷ The Administrator's reference to Copper Construction Co., Inc., the subcontractor under both contracts, as Strickland's "former employer" suggests that Contract #2 had also closed by the time of the Administrator's determination letter—or at least that Strickland was no longer employed by then with Copper Construction.

⁸ Deputy Administrator's Response to Petition for Review, at p. 16-17.

⁹ *Id.*

¹⁰ *Id.*

employees subject to a new wage determination classification and the contractor, subcontractor, or contracting agency as the result of a conformance determination. Where such disputes arise, as in the instant case, minimum notions of due process warrant construing the withholding provisions of section 5.5(a)(2) to assure that should the adversely affected employee ultimately prevail, funds will be available to pay the full amount of the wages to which the employee is entitled. Due process similarly dictates providing the federal contracting agency, the contractor, and subcontractor (if the subcontractor is the employer of the contesting employee) with notice of the employee's challenge of a conformance, and affording those with a vested interest the opportunity to participate in the resulting administrative proceeding before the Administrator.

Unfortunately, it may be too late to invoke new procedural norms in the instant case. The "horse" may have already "left the barn." It is not too late, however, for the Administrator to reconsider Wage and Hour's current practice and seek to construe existing DBA regulations in a manner that better assures due process protections for both employees and employers where a conformance is challenged. Otherwise, complaints challenging a conformance may consign the complainant to little more than a *Pyrrhic* victory should the challenge prevail, while at the same time squandering both the Administrator's and this Board's limited resources in a similarly futile exercise.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge