



In the Matter of:

**CITY OF ELLSWORTH, MAINE, BAYSIDE
ROAD WASTEWATER TREATMENT FACILITY,
Wage Determination No. ME20100005**

ARB CASE NO. 14-042

DATE: JUN - 6 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Frank T. McGuire, Esq.; Matthew M. Cobb, Esq.; Rudman Winchell, Bangor, Maine

For Respondent Administrator, Wage and Hour Division:

Andrea Lindemann Gilliam, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; U.S. Department of Labor, Washington, District of Columbia

For Intervenor, Maine Department of Environmental Protection:

Scott W. Boak, Esq.; Assistant Attorney General, Office of the Attorney General, State of Maine; Augusta, Maine

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge

DECISION AND ORDER OF REMAND

This case arises under the Davis-Bacon Act, as amended, 40 U.S.C.A. § 3141-3148 (Thomson Reuters 2015), and the Davis-Bacon Related Acts (see 29 C.F.R. § 5.1(a)); 29 C.F.R. Parts 1, 3, 5, 6 (2015). The Davis-Bacon Act (DBA) applies to construction contracts entered into directly between the Federal government and a contractor. The Davis-Bacon and Related Acts (collectively “the DBRA”) incorporate the Davis-Bacon Act’s various prevailing wage requirements into contracts between a non-Federal entity, such as a State or local government,

and a contractor where the Federal government provides funding.¹ City of Ellsworth (Ellsworth or City) contracted to build the Bayside Road Wastewater Treatment Facility and Pump Station (Bayside Project) in Ellsworth, Maine, and because the project received partial federal funding under one of the DBRA statutes, the DBA labor standards applied to the project. Receiving a complaint of improper wages, the United States Department of Labor's Wage and Hour Division (WHD) investigated and determined that the contract for the facility should have included a wage determination for building construction in addition to the DBA Heavy construction wage determination that had been included.² Ellsworth filed a petition for review with the Administrative Review Board (ARB or Board) challenging the Wage and Hour Administrator's decision. For the following reasons, we affirm the Administrator's determination that the Bayside Project contract should have included a Building wage determination. The Board nevertheless remands this case to the Administrator for further consideration of whether it is appropriate under 29 C.F.R. § 1.6(f) to retroactively apply the Building wage determination to construction of the Bayside Project.

BACKGROUND

City of Ellsworth solicited bids in 2010 for the construction of the Bayside Project to upgrade its wastewater treatment system. The construction covered a wastewater treatment plant and associated infrastructure, which included approximately six buildings.³ The City undertook the project after receiving grants and loans from several different federal and state agencies, the funds of which the Maine Department of Environmental Protection (DEP) administered.⁴ One of the funding sources, loans through the Clean Water State Revolving Fund (CWSRF), was

¹ See *Miami Elevator Co.*, ARB Nos. 97-145, 98-086; slip op. at 3 (Apr. 25, 2000), for a more detailed explanation of the Davis-Bacon Related Acts.

² Laura A Fortman, Principal Deputy Administrator, issued WHD's final determination on February 20, 2014. For purposes of this opinion, we refer to the Deputy Administrator as "Administrator."

³ The project included a main pump station, headworks building, pump building and maintenance shop, an operations building, a process and chemical handling building, and a blower building.

⁴ In 2007, Ellsworth received a \$2 million grant from the Maine DEP Wastewater Construction Program, a \$1.1 million loan/grant from the U.S. Department of Agriculture/Rural Development (USDA/RD), and a \$500,000 grant from the U.S. Department of Housing and Urban Development's Community Development and Block Grant Program (CDBG). In 2008, the City received a federal appropriation of \$286,000, an additional \$9.5 million loan/grant from USDA/RD, and an additional \$500,000 CDBG grant. In 2010, Ellsworth received two loans from the Clean Water State Revolving Fund Program, partly funded through the U.S. Environmental Protection Agency and state matching funds administered by Maine's DEP, including a partial principal forgiveness package and \$2 million loan/grant through the American Recovery and Reinvestment Act of 2009. Administrator's Determination Letter, n.1.

partially funded by the U.S. Environmental Protection Agency and required application of Davis-Bacon labor standards to construction of the Bayside Project. Ellsworth was consequently required to incorporate a DBA prevailing wage determination into the contract for construction of the Bayside Project.

For DBA wage determination purposes, most covered construction projects require only one of four basic categories of wage determinations based on the type of construction: building, residential, highway, or heavy construction.⁵ However, some projects include more than one type of construction and may require multiple wage determinations.

The City of Ellsworth initially put the Bayside Project out to bid in the summer of 2010. Because the City received few bids and because the few that it received were higher than its available funding, the City cancelled the bidding and sought additional CWSRF funding. The City rebid the project in the fall, with the new bids opened in October 2010. The total cost of the Bayside Project bid that was accepted, which did not contain DBA wage rates, was approximately \$13.683M.⁶ Initially, the Project's cost breakdown was estimated to be \$7.435M in heavy construction costs and \$6.248M in building construction costs, with the building construction representing approximately 46% of the total cost.⁷

Also in October 2010, after rebidding the Bayside Project, the City was notified that due to a recent policy change involving CWSRF funds, DBA prevailing wage rates should be included in the project construction contract.⁸ Upon being advised of the DBA coverage, Ellsworth sought to determine whether to include a Heavy wage determination, a Building wage determination, or both, in its contract with the prospective principal contractor.⁹ The City promptly consulted with Woodward & Curran (the City's engineering firm), who in turn requested from Penta Corporation (the prospective contractor) a cost breakdown for the project.¹⁰

Simultaneously, Maine DEP, which was involved in the administration of the CWSRF funds, including identification of the appropriate DBA wage determination, offered its advice.

⁵ Department of Labor All Agency Memorandum (AAM) No. 130.

⁶ Administrative Record (AR) Tab 3, Exhibits (Ex) A and E.

⁷ However, in April 2013, following notification of a Wage and Hour Division (WHD) investigation into whether a Building wage determination was required for the Bayside Project, Ellsworth's engineering firm (Woodard & Curran) reevaluated the cost of the buildings to be approximately 21% of the total project cost. AR Tab 3, Ex. P, at 4. See discussion, *infra*.

⁸ The CWSRF funding involved two loans partly funded by the U.S. Environmental Protection Agency under the Clean Water Act, with matching funds from Maine DEP.

⁹ Administrator's Brief (Admin. Br.) at 3.

¹⁰ City of Ellsworth Petition for Review (Pet. for Rev.) at 5.

On October 22, 2010, DEP Assistant Environmental Engineer, Brandy Piers, sent an e-mail to Brent Bridges, a Woodard & Curran employee, that stated “[i]t looks like you are going to need both Heavy and Building rates.”¹¹ A few days later, on October 28, DEP Senior Environmental Engineer and Bayside Project manager, David Breau, provided different guidance to Paul Rodriguez, Vice President of Woodard & Curran. Breau forwarded a February 22, 2010 e-mail pertaining to an unrelated waste water treatment rehabilitation project in which a former DEP staff member recounted to DEP colleagues general guidance she had received from the Wage and Hour Division concerning when multiple DBA wage determinations are appropriate for projects involving both sewer and pump station work. In the forwarded e-mail, the former staff member explained: “For those of you with sewer and pump station work on one project if each aspects [sic] account for at least 20% of the project cost (building = 30% of the budget, and heavy 70%) then the project is eligible for, but not required to use, dual determinations. If each piece does not account for at least 20% (building 5% and heavy 95%) then only the dominating determination can be used.”¹²

On October 29, 2010, Penta Corporation provided the City’s engineering firm with the initial cost breakdown for the project that had been contained in its winning bid for the construction contract, showing 54% allocated for heavy construction and 46% for building construction.¹³ Based on this information, Woodard & Curran notified the Ellsworth City Manager that, since the majority of the total cost for the Bayside Project consisted of heavy construction costs, Maine DEP would likely approve a Heavy wage rate determination, with a resulting additional contract cost of approximately \$100,000, as opposed to an additional estimated contract cost of \$900,000 if a Building wage determination was used. Woodward and Curran advised: “The wage rate determination for the project should be based on which classification makes up the majority of the project cost. . . . Since Heavy Construction makes up a majority of the total cost, we would expect the State to approve [a] wage rate determination based on that classification.”¹⁴

Based on the foregoing, Ellsworth incorporated only a Heavy wage determination into the construction contract for the Bayside Project. In November the City identified General Wage Determination No. ME20100005 (dated 10-22-2010) for Heavy Construction as the appropriate prevailing wage schedule.¹⁵ Ellsworth awarded the contract to Penta Corporation on January 4,

¹¹ Maine Department of Environmental Protection’s Petition to Intervene in Support of the City of Ellsworth (DEP Petition), Exhibit C.

¹² AR Tab 6; DEP Petition, Exhibit D.

¹³ AR Tab 3, Ex. E.

¹⁴ *Id.*

¹⁵ Ellsworth’s Pet. for Rev. at 6. Immediately thereafter, the Wage Determination was supplemented for specific job classifications not listed in the Determination through a conformance request pursuant to 29 C.F.R. § 5.5(a)(1)(ii) that the Wage and Hour Division approved on December 2, 2010. Tab 3, Ex. H.

2011, with a Contract Change Order applying the “Heavy” wage determination to the contract executed on February 4, 2011, approved by DEP.¹⁶ The Change Order increased the contract price by \$188,821.37.¹⁷ Following execution by Penta and Elco Electrical of a Change Order on February 10, 2011, incorporating the Heavy wage determination into Elco Electrical’s subcontract for electrical services, construction on the project began. Approximately twenty subcontractors were ultimately involved in the Bayside Project.¹⁸ By November 2012, the project was “substantial[y] complet[e]” and by March 2013 “final completion” of the project’s construction phase was achieved, subject to final touch-ups that were completed on or about August 27, 2013.¹⁹

Toward the end of the project, there was a dispute between Elco employees and Penta, which resulted in another subcontractor completing the final electrical work. Sometime in or around April 2013, Elco employees filed a complaint with the Wage and Hour Division alleging that proper DBA wages were not paid.²⁰ On April 16, 2013, a WHD investigator contacted Ellsworth and informed the City that WHD was investigating the complaint. The investigator indicated that building wages should have been added to the wage determination, stating in an e-mail his “concern[] that a building wage determination was not included in the change order dated Feb. 4, 2011,” and that based on the information he had reviewed to date, “I think a building wage determination should have been included in the contract” with Penta Corporation, but that he was waiting on a final decision from WHD’s national office.²¹

On April 24th, Maine DEP responded to WHD’s April 16th communique, and explained that in deciding the appropriate DBA wage schedule, DEP and the City considered AAM 130, AAM 131, the February 22, 2010 guidance from DOL, and the value of the heavy and building components of the project contract. DEP advised the investigator that based on this, it had been determined that dual wage determinations were not required and that the use of a Heavy wage determination was appropriate.²²

¹⁶ Ellsworth Pet. for Rev. at 4, 5, 7; Main DEP at 4; Branch Chief letter, Aug. 8, 2013.

¹⁷ AR Tab 1.

¹⁸ Ellsworth Pet. for Rev. at 7.

¹⁹ AR Tab 3, at 4 (Sept. 9, 2013 request for reconsideration); Admin. Br. at 4.

²⁰ AR Tab 7, at 2; Admin. Brief at 4; Ellsworth Pet. for Rev. at 8.

²¹ AR Tab 3, Ex. M; AR Tab 7 (Determination Letter); Admin. Br. at 4; Ellsworth Pet. Rev. at 8.

²² AR Tab 3, Ex. N. See also AR Tab 6, Maine DEP Oct. 2, 2013 correspondence to WHD Branch Chief Helm, at 3, additionally asserting that the City and DEP were unaware at the time of their decision of WHD Prevailing Wage Resource Book 2009’s identification of project components costing in excess of \$1 million as “substantial” within the meaning of AAM 130 and 131. See also AR Tab 3, Ellsworth’s Sept. 9, 2013 request for reconsideration of Branch Chief’s initial ruling, in

At about the same time, in response to the City's request for a reevaluation of the prime contractor's pre-construction breakdown of building versus heavy construction work on the project, Ellsworth's engineering firm (Woodard and Curran) reported in an April 26, 2013 memorandum to Ellsworth's City Manager that based on its assessment, "the Heavy construction classification work represents approximately 79% of the overall project work and the Building construction work represents approximately 21% of the overall work." Given this breakdown, the engineering firm advised "that the use of a Heavy wage rate classification was appropriate and accurately reflects the work associated with the project as a whole."²³

On May 7, 2013, the City submitted a challenge to the retroactive incorporation of a Building wage determination into the construction contract, addressed to Maine DEP.²⁴

In May, the WHD investigator forwarded the information from his investigation, together with DEP's response and the Woodard and Curran reassessment, to the WHD regional office.²⁵ Subsequently, on July 18th, the investigator advised the City and Maine DEP (via e-mail) that the WHD Regional Office Assistant Director had informed him that the WHD National Office "would not ask the City of Ellsworth to include the building wage determination in the contract because the project is almost concluded." The investigator further advised that he had been instructed to close his file, and that "Wage and Hour will take no further action on this matter."²⁶ On July 19th, the City and DEP received a follow-up e-mail from the investigator in which he indicated that the information that he had provided the day before "was premature"—that he had been advised since sending his previous e-mail that WHD's National Office was still reviewing the matter.²⁷

On August 8, 2013, the WHD Branch Chief for Government Contracts Enforcement issued an initial ruling directing the City of Ellsworth to modify the construction contract for the Bayside Project to retroactively include a Building construction wage determination. WHD determined that a Building wage determination should have been added because even the revised building component cost of \$2.874M constituted at least 20% of the overall project cost (the conservative estimate). WHD determined that the building construction was "substantial" and not "incidental" within the meaning of All Agency Memorandum (AAM) 131 (July 4, 1978)

which Ellsworth also asserts that it reasonably relied upon WHD's approval in November/December, 2010 of additional job classifications to the Heavy wage determination.

²³ AR Tab 3, Ex. P; Adm. Brief at 6-7.

²⁴ AR Tab 1.

²⁵ Ellsworth Pet. for Rev. at 8; Admin. Br. at 7. From the Administrative Record, it also appears that the City's challenge to the incorporation of a Building construction wage determination of May 7, 2013, was forwarded to the WHD regional office.

²⁶ AR Tab 3, Ex. Q; Ellsworth Pet. for Rev. at 8-9.

²⁷ *Id.*

(requiring multiple wage determinations for projects with multiple types of substantial construction).²⁸

On August 27, 2013, all work on the Bayside Project was fully completed.²⁹

On September 9, 2013, Ellsworth sought reconsideration of WHD's August 8, 2013 determination. On February 20, 2014, the Administrator issued her final determination denying reconsideration and affirming the Branch Chief.³⁰ The Administrator cited WHD's authority under 29 C.F.R. § 1.6(f) to retroactively issue wage determinations, and on the grounds that a Building wage determination "clearly should have been included in the contract at the outset," asserted that requiring the City and Maine DEP to retroactively incorporate the second wage determination into the project contract was an appropriate exercise of the discretion invested in WHD under section 1.6(f). Relieving the parties of this requirement, the Administrator opined, was neither "necessary and proper in the public interest" or needed "to prevent injustice and undue hardship" within the meaning of 29 C.F.R. § 5.14.³¹

On March 24, 2014, Ellsworth filed a petition for review of the Administrator's final decision with the ARB.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012), the ARB is delegated the Secretary's authority to review cases arising under the Davis-Bacon Act and the DBRA statutes. See also 29 C.F.R. § 7.1(2015). Consistent with that authority, the ARB has jurisdiction and authority to decide, in its discretion, appeals from final decisions arising under 29 C.F.R. Parts 1, 3, and 5, including decisions involving controversies concerning the payment of prevailing wage rates. 29 C.F.R. § 7.1(b).

In reviewing an ALJ's decision in a Davis-Bacon or Related Acts case, the Board acts "as the authorized representative of the Secretary of Labor" and "shall act as fully and finally as might the Secretary of Labor concerning such matters."³² Pursuant to the Administrative Procedure Act, the Secretary, acting on behalf of the Department of Labor, "has all the powers which [the agency] would have in making the initial decision except as [the agency] may limit

²⁸ AR Tab 3, Ex. A; Admin. Br. at 7; Ellsworth Pet. for Rev. at 9.

²⁹ AR Tab 4; Ellsworth Pet. for Rev. at 7.

³⁰ AR Tab 7; Admin. Br. p. 7; Ellsworth Pet. for Rev. at 9.

³¹ *Id.*

³² 29 C.F.R. § 7.1(d).

the issues on notice or by rule.”³³ One rule limiting the Board’s power in Davis-Bacon or Related Acts cases is section 7.1 of Title 29 of the Code of Federal Regulations. It provides that this “Board is an essentially appellate agency.”³⁴ Though the Board “will not hear matters de novo except upon a showing of extraordinary circumstances,”³⁵ the Board does decide questions of law de novo. It also “may remand under appropriate instructions any case for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence.”³⁶

DISCUSSION

The DBA and DBRA require that contractors pay no less than the prevailing wage to the various classifications of mechanics or laborers they employ.³⁷ The Department of Labor’s Wage and Hour Division (WHD) determines the prevailing wages and publishes them as “wage determinations.”³⁸ For DBA wage determination purposes, covered construction projects are classified based on four general types of construction, as either “heavy,” “building,” “residential,” or “highway” construction. If the project consists of more than one type of substantial construction component, multiple wage determinations must be used provided that certain threshold criteria are met.³⁹

³³ 5 U.S.C. § 557(b) (1994).

³⁴ 29 C.F.R. § 7.1(e)); *see also* *Pythagoras Gen. Contracting Corp. v. Administrator, Wage & Hour Div.*, ARB Nos. 08-107, 09-007; slip op. at 5 (Feb. 10, 2011) (as reissued Mar. 1, 2011).

³⁵ 29 C.F.R. § 7.1(e).

³⁶ 29 C.F.R. § 7.1(e). *See also* *In re Lakeshore Plaza Holding*, ARB No. 14-072, ALJ No. 2013-DBA-006, 2016 WL 866114, at *4 (ARB, Feb. 5, 2016); *In re Weeks Marine*, ARB No. 12-093, ALJ No. 2009-DBA-006, 2015 WL 2172482, at *7 (ARB Apr. 29, 2015); *In re Cody Ziegler*, ARB No. 01-014, ALJ 1997-DBA-017, 2003 WL 23114278, at *14 (ARB Dec. 19, 2003).

³⁷ The DBA, at 40 U.S.C.A. § 3142(a) and (b), provides in pertinent part:

The advertised specifications for every [covered] contract . . . shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics . . . [which] minimum wages shall be based upon the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil division of the State in which the work is to be performed. . . .

³⁸ *Pythagoras Gen. Contracting Corp. v. Admin. Wage & Hour Div.*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-014 (ARB Feb. 10, 2011).

³⁹ AAM No. 131. *See* AAM No. 130 at n.1 (citing, for example, projects such as a water and sewage treatment plants, which include “construction items that in themselves would be otherwise

The Bayside Project contract contained a wage determination only for heavy construction. In WHD's February 20, 2014 final ruling, the Administrator determined that even with the revised calculations the City's engineering firm provided indicating that approximately 21% of the project cost involved building construction, the project clearly falls within the guidance of AAM 131 and the Prevailing Wage Resource Book requiring multiple wage determinations. AAM 131 requires multiple wage determinations for DBA and DBRA covered projects that have more than one "substantial" construction component. Under the AAM guidance, construction components are considered "substantial" if they comprise "more than approximately 20%" of the total project cost.⁴⁰ The AAM guidance recognizes the 20% as but a "rough guide," and that for very large projects a construction component may be "sufficiently substantial" to warrant a separate wage determination even if it does not amount to 20% of the total project cost.⁴¹ In such instances, as the Administrator noted, the WHD Prevailing Wage Resource Book clarifies that if separate project components cost \$1 million or more, such components are considered "substantial" and not "incidental," and require the use of multiple wage determinations.⁴² Accordingly, the Administrator held that the applicable building wage determination should have been included in the construction contract for the building work performed on the project.

The central issue in this case is whether the Administrator appropriately exercised her authority under 29 C.F.R. § 1.6(f) in requiring the City of Ellsworth to include a wage determination for building construction in addition to the wage determination for heavy construction that was already included in the Bayside Project construction contract. Ellsworth raises three general objections to the Administrator's decision in its petition for review. First, Ellsworth argues that it acted correctly and in good faith reliance upon general guidance from WHD by including only a wage determination for heavy construction. Second, Ellsworth challenges WHD's authority under 29 C.F.R. § 1.6(f) to impose a second wage determination post-bid and after contract commencement because that section is only applicable if no wage determination was initially included in the construction contract for the Bayside Project. Finally, Ellsworth argues that even if a second wage determination could be required under section 1.6(f), its retroactive application was inappropriate under the circumstances of this case.

As justification for its incorporation of only the Heavy wage determination in the Bayside Project contract, Ellsworth asserts that it relied in good faith on guidance contained in the February 22, 2010 e-mail written by a former DEP staff member recounting her conversation

classified," but for which "a multiple classification may be justified if such construction items are a substantial part of the project.").

⁴⁰ AAM 131.

⁴¹ *Id.*

⁴² AR Tab 7 (Administrator's Feb. 20, 2014 Determination Letter). See AR Tab 12, at 11 (excerpt from WHD's Prevailing Wage Handbook).

with a DOL representative involving a completely different project.⁴³ Ellsworth also argues that the 20% threshold set forth in AAM 131 and other criteria cited by the Administrator for requiring the Building wage determination⁴⁴ do not have the force or effect of law; that they are merely flexible, nonbinding guidelines not that dissimilar from the general guidance DEP received from WHD in February of 2010.⁴⁵

Whether or not the City and Maine DEP were justified in their reliance on the guidance DEP previously received concerning another wastewater project,⁴⁶ they indicated that they also considered AAM 130 and AAM 131 in making the initial decision to include only the Heavy wage determination.⁴⁷ AAM 130 and AAM 131 are admittedly intended only as “flexible and illustrative” guidelines “rather than a set of hard and fast rules,”⁴⁸ nevertheless the 20% and \$1M thresholds have been a part of WHD guidance and controlling precedent requiring multiple wage determinations for many years.⁴⁹ Moreover, consistent with AAM 130’s commentary regarding the general applicability of multiple wage determinations for water and sewage treatment

⁴³ The e-mail reads in part: “For those of you with sewer and pump station work on one project if each aspects account for at least 20% of the project cost (building = 30% of the budget, and heavy 70%) then the project is eligible for, but not required to use, dual determinations. If each piece does not account for at least 20% (building 5% and heavy 95%) then only the dominating determination can be used.” AR Tab 7. In essence, the e-mail states that use of a multiple wage determination is voluntary, never mandatory.

⁴⁴ The City asserts, for example, that it was unaware, when it made its decision to incorporate only the Heavy wage determination, of WHD’s Prevailing Wage Resource Book 2009 and its identification of the \$1 million threshold for requiring a separate wage determination for a project component notwithstanding that the component itself did not comprise at least 20% of the total project cost.

⁴⁵ As previously noted, the City and Maine DEP also assert that they reasonably relied upon WHD’s approval in December of 2010 of additional job classifications to the Heavy wage determination pursuant to a “conformance” proceeding under 29 C.F.R. § 5.5(a)(1)(ii) whereby WHD approved the addition of several job classifications to the Heavy wage determination. The addition of job classifications to a wage determination applicable to a covered project does not, in and of itself, rule out the possibility that other wage determinations may also be applicable to the same project.

⁴⁶ Both AAM 130 and 131 advise contracting agencies to refer questions regarding the applicability of the guidelines and questions regarding appropriate classifications in specific cases to the Wage and Hour Division.

⁴⁷ AR Tab 3, Ex. N.

⁴⁸ *In re Dutch Hotel Kitchen Project*, WAB No. 90-29 (Mar. 22, 1991).

⁴⁹ *See, In re Central Energy Plant*, ARB No. 01-057, 2003 WL 22312694 (Sept. 30, 2003); *In re Dick Enters.*, ARB No. 95-046A, 1996 WL 704227 (ARB Dec. 4, 1996).

plants,⁵⁰ the Wage and Appeals Board (ARB's predecessor agency for DBA appeals) has repeatedly recognized that wastewater treatment plants, such as the one in this case, generally contain substantial amounts of both heavy construction and building construction, thereby requiring the inclusion of wage determinations for both in contracts for construction of such facilities.⁵¹

In this case, the applicability of both Heavy and Building wage determinations based on the initial bid estimates was not even a close call. The cost of the building construction proportion was determined to be \$6.248 million, 46% of the total amount of the project's construction cost—far in excess of both the 20% and \$1 million thresholds. On April 26, 2013, following notification of the WHD investigation, Ellsworth sought to justify its action by presenting a revised building component cost of \$2.874 million, 21% of the total project cost, based on changes in the assumptions generating the 46% figure.⁵² However, even accepting the revised, more conservative estimates of the building costs, we agree with the Administrator that the building component was substantial, thus requiring a separate wage determination, because it not only met 20% of the total project cost threshold, it exceeded by far the \$1 million independent threshold.

We next turn to Ellsworth's argument that WHD lacked authority to impose the Building wage post-bid and after contract commencement because 29 C.F.R. § 1.6(f) is only applicable if no wage determination had initially been included in the construction contract for the Bayside Project. Ellsworth contends that 29 C.F.R. § 1.6(f) allows retrospective addition of wage determinations only for limited reasons not present in this case, and that it is not a general opportunity to modify wage determinations after bidding and performance.⁵³ The Administrator

⁵⁰ "Where a project, such as a water and sewage treatment plant, includes construction items that in themselves would be otherwise classified, a multiple classification may be justified if such construction items are a substantial part of the project." AAM 130, n.1.

⁵¹ See, e.g., *In re Yuma Desalting Plant*, No. 84-23, 1985 WL 167230, at *1 (WAB Jan. 23, 1985); *In re Waco Metro Area Reg'l Sewerage Sys. Improvement Project*, No. 83-04, 1983 WL 144680, at *2 (WAB Apr. 22, 1983); *In re 69th Street Wastewater Treatment Plant*, No. 77-29, 1978 WL 22704, at *2 (WAB Mar. 3, 1978); *In re Lower Potomac Pollution Control Plant*, No. 77-20, 1977 WL 24840, at *1 (WAB Sept. 30, 1977); *In re S. Cobb Waste Water Treatment Plant*, No. 76-19, 1976 WL 23200, at *2 (WAB Nov. 19, 1976).

⁵² AR Tab 3, Ex. P.

⁵³ 29 C.F.R. § 1.6(f) states:

The Administrator may issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may issue a wage determination which shall be

counters that section 1.6(f) allows for the retroactive addition of any wage determination that should have been included initially, even if the existing wage determination was also correct.

The Board agrees with the Administrator that WHD has the authority to require the retroactive incorporation of a second, Building, wage determination into the Bayside Project contract under section 1.6(f) notwithstanding the fact that the contract already includes a valid wage determination. The ARB addressed the retroactive applicability of multiple wage rates in *Central Energy Plant*, ARB No. 01-057, supra. In *Central Energy Plant*, a Heavy wage determination was added retroactively to an existing contract that already contained a Building wage determination. The total dollar figure for the project was \$61,471,734. Notwithstanding that the piping portion, involving heavy construction, was \$11,809,821, constituting 19.2% of the total project cost, the Army Corps of Engineers, the contracting agency, applied a Building wage determination for the entire project, on the grounds that the piping component was incidental to the overall project. Upon review by WHD, the Administrator ruled that a Heavy wage determination should be added, citing the requirement of multiple wage determinations if the cost of more than one component approximates 20% of the overall project cost or by itself costs more than \$1M. The ARB affirmed the Administrator's decision that the piping portion of the work was substantial and thus required the additional Building wage determination. In doing so, the ARB affirmed the Administrator's authority under 29 C.F.R. § 1.6(f) to order retroactive incorporation of the second wage determination, reasoning that it met the criterion that "if the [contracting] agency has failed to incorporate a wage determination in a contract required to contain [DBA] prevailing wage rates."⁵⁴

In reaching its conclusion, the majority in *Central Energy Plant* rejected the views of the dissenting judge who argued, as the City of Ellsworth now argues, that the cited criterion could

applicable to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination. Under any of the above circumstances, the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, Provided That the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.

⁵⁴ The ARB held, "[s]ection 1.6(f) grants the Administrator the discretion to issue a wage determination after a contract award or after the beginning of construction under the circumstances delineated therein, such as when the contracting agency has failed to incorporate a required wage determination in a contract, used a wage determination which does not apply to the contract, or incorporated the wrong wage determination in the contract because of an inaccurate description of the project." *Central Energy Plant*, ARB No. 01-057, slip op. at 14 (citations omitted).

not apply because the contract already contained one wage determination. We find nothing in the arguments presented by Ellsworth, nor in the regulatory history and case authority cited by the City, that persuade us to depart from the majority's view in *Central Energy Plant*. Indeed, to acquiesce in the City's interpretation of section 1.6(f) would undermine, if not totally defeat, the very purpose of this provision for providing a "mechanism for the incorporation of proper wage determinations in covered contracts after contract award."⁵⁵ As the Administrator argues on appeal before the ARB, the City's position would effectively allow a contracting agency unfettered discretion to incorporate a wage determination containing lower wage rates into a covered contract without regard to whether it is properly applicable to all substantial components of the construction project, thereby permitting the intentional omission of a clearly applicable wage determination reflecting higher rates and, as a result, depriving covered workers of the prevailing wages to which they otherwise would be entitled. Accordingly, the Board affirms the Administrator's authority under 29 C.F.R. § 1.6(f) to require the retroactive inclusion of the Building wage determination in the Bayside Project's contract.

Nevertheless, a remand of this case to the Administrator for further consideration is necessary. As previously noted, proceedings before the ARB in the review of a final decision of the Administrator under the DBA are appellate in nature. Absent an interpretation that is found to be unreasonable or that exhibits an unexplained departure from past determinations, the Board will generally defer to the discretion delegated to the Administrator in assessing whether the Administrator's rulings are consistent with the DBA and its implementing regulations. At the same time, where the evidentiary record or the Administrator's findings are found lacking, absent a showing of extraordinary circumstances warranting a *de novo* hearing, the Board will remand the case for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence.

Ellsworth argues that even if the Administrator had the authority to order the retroactive addition of a Building wage determination, the Administrator should be barred from exercising that authority in this case due to the undue hardship that it would impose on Ellsworth. Cited in particular is the fact that by the time WHD notified Ellsworth and Maine DEP in April of 2013 of its investigation and advised them that a Building wage determination should have been included, project construction had been substantially complete for almost five months (since November 2012), with final completion of the project's construction phase achieved in March 2013 subject to final touch-ups that were completed in August 2013, about the same time that the Wage and Hour Branch Chief issued his initial ruling.⁵⁶

Given these circumstances, Ellsworth argues, implementation of the remedies authorized under 29 C.F.R. § 1.6(f) is not feasible, and any attempt to enforce any of the prescribed

⁵⁵ 47 Fed. Reg. 23,644-23,646 (May 28, 1982); see also 46 Fed. Reg. 4306, 4309 (Jan. 16, 1981).

⁵⁶ The parties do not dispute that by the time of WHD's investigation, the project wastewater treatment center was mostly complete except for a few finishing touches. AR Tab 1 (May 7, 2013 letter to Maine DEP from Rudman & Winchell). Moreover, the Administrator does not challenge Ellsworth's characterizations of the project's completion.

remedies would impose significant undue hardship.⁵⁷ Because the Bayside Project was effectively concluded when WHD took action in 2013, Ellsworth argues before the ARB (as it did before the Administrator) that any order requiring it now to either terminate and resolicit the contract with the additional wage determination, or incorporate the wage determination retroactively to the beginning of construction through a supplemental agreement or through a change order would be unworkable. Moreover, the City argues, it would be difficult if not impossible to assess and allocate the additional cost for the building construction because of the lapse of time and the lack of records. Finally, City avers, the remedies prescribed under section 1.6(f) would be impossible to implement without wreaking unwarranted hardship on Ellsworth where section 1.6(f) not only requires that the prime contractor and its twenty subcontractors be compensated for any increased wages but that the method of incorporation of the additional wage determination and resulting adjustments in contract prices be effected in accordance with applicable procurement law.

As the City points out, WHD has, in circumstances similar to those presented by this case, declined to retroactively impose a wage determination pursuant to 29 C.F.R. § 1.6(f) to a project that was already completed. Noting that “[t]he Administrator may consider a number of factors that vary on a case-by-case basis in determining the application of section 1.6(f) to a particular case,” in deciding whether or not to exercise his discretion in the matter before him, the Administrator considered the following four factors: “[1] the reasonableness or good faith of the contracting agency’s coverage decision, [2] the status of the procurement (i.e. to what extent the construction work has been completed), [3] the understanding of the contractual parties as to the possible retroactive application of the DBA provisions and [4] the possible disruptions to procurement in deciding on remedies.”⁵⁸

In rendering the final decision, the Administrator did not address or take into consideration any of the foregoing equitable factors.⁵⁹ Instead, the Administrator merely cited

⁵⁷ 29 C.F.R. § 1.6(f) provides in relevant part that where any of the specified criteria authorizing retroactive application of a wage determination are met, “the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, provided that the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.”

⁵⁸ DBA Ruling Letter 2004-01 (June 3, 2004). While the ARB does not consider the Administrator’s rulings interpreting the Davis-Bacon and Related Acts as binding precedent, they nevertheless provide rationale and factors to guide WHD’s discretion for retrospective addition of wage determinations. Such DBA Ruling Letters constitute official rulings or interpretations of the WHD entitling a party to relief pursuant to 29 U.S.C. § 259 in specified instances. See <https://www.dol.gov/whd/opinion/opinion.htm>.

⁵⁹ The factors the Administrator took into consideration in DBA Ruling Letter 2004-01 are not necessarily exclusive of other equitable considerations. See, e.g., *In re Muskogee Shopping Mall*, WAB No. 85-26, 1986 WL 193112 (Jan. 21, 1986) (recognizing the Deputy Administrator’s decision

WHD's discretionary authority under 29 C.F.R. § 1.6(f) to retroactively require the additional wage determination "[p]articularly given that the applicable building wage determination clearly should have been included in the contract at the outset," and "because the amount of building construction on the Bayside Road Project plainly called for use of a building wage determination."⁶⁰ From this the Administrator concluded that relieving the City of its obligation to include a Building wage determination in the contract would not be "necessary and proper in the public interest" or needed "to prevent injustice and undue hardship."⁶¹

The generalized conclusions, upon which the Administrator relied in requiring the retroactive application of the second wage determination, raised several concerns. To begin with, the conclusions merely recite the basis for finding that the second wage determination was warranted. They do not address whether or to what extent the Administrator's authority under 29 C.F.R. § 1.6(f) can or should be invoked, particularly in light of the remedial provisions of section 1.6(f). Secondly, upon reviewing the Administrator's determination letter in its entirety, it is difficult to discern what, if any, factual basis the Administrator relied upon in ruling that the City of Ellsworth must retroactively incorporate the Building wage determination into the Bayside Project contract. There is no indication, for example, that the equitable concerns the City raised or the potential difficulties in implementing the remedial provisions of 29 C.F.R. § 1.6(f) were taken into consideration. Where the Administrator has failed to articulate the factual basis, equitable or otherwise, upon which the decision requiring retroactive application of the Building wage determination was reached, the Board cannot conclusively determine whether the Administrator's determination in this case is reasonable or, instead, an unexplained departure from past determinations. Finding the Administrator's decision lacking in necessary findings upon which the decision was reached, the Board has no choice but to remand this case to the Administrator for reconsideration of whether the Building wage determination should, under the circumstances presented in this case, be retroactively applied to the Bayside Project contract.

CONCLUSION

The Board affirms the Administrator's basis for including a Building wage determination in the Bayside Project's contract because the cost of the building construction was more than 20% of the total project cost and independently more than \$1M. The Administrator's authority under 29 C.F.R. § 1.6(f) to order the retroactive inclusion of the second wage determination is also affirmed. However, for the reasons stated, this case is remanded to the Administrator for reconsideration of whether, under the circumstances of this case, the City of Ellsworth should be

to not include a wage determination in a DBA-covered contract because the contractor had relied on the contracting agency's determination that the Davis Bacon Act did not apply to the contract, and application of the DBA provisions requiring the DBA wage determination under the circumstances of that case would have rendered the project financially unfeasible.

⁶⁰ AR Tab 7, p.4.

⁶¹ *Id.* (citing 29 C.F.R. § 5.14).

required to incorporate the Building wage determination or ordered to take other remedial action prescribed under 29 C.F.R. § 1.6(f).

SO ORDERED.

[REDACTED]

JOANNE ROYCE
Administrative Appeals Judge

[REDACTED]

PAUL M. IGASAKI
Chief Administrative Appeals Judge

[REDACTED]

[REDACTED]

E. COOPER BROWN
Administrative Appeals Judge