



In the Matter of:

SELCO AIR CONDITIONING, INC.,

ARB CASE NO. 14-078

**HUD PROJECT NO. 121-35945
PACIFIC BAY VISTA APARTMENTS**

DATE: JUL 27 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner Sheet Metal Workers' International Association Local Union No. 104:

Eileen B. Goldsmith, Esq.; Altshuler Berzon LLP, San Francisco, California

For Selco Air Conditioning, Inc.:

Roger M. Mason, Esq.; Sweeney, Mason, Wilson & Bosomworth; Los Gatos, California

For the Administrator, Wage and Hour Division:

Katelyn Wendell, 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

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 West 2015)(DBA), and its implementing regulations, 29 C.F.R. Parts 1 and 5 (2015). Petitioner Sheet Metal Workers' International Association Local Union No. 104 (Local 104) seeks review of a conformance decision of the Administrator of the Department of Labor's Wage and Hour Division, issued pursuant to 29 C.F.R. § 5.5(a)(1), approving the addition of three job classifications to a Davis-Bacon wage determination incorporated into the construction contract for a residential project covered by the DBA. For the following reasons, the Administrative Review Board (ARB or Board) vacates the Administrator's decision and remands this matter for reconsideration consistent with this Decision and Order of Remand.

BACKGROUND¹

On an unspecified date prior to February of 2012,² Selco Air Conditioning, Inc. (Selco) entered into a subcontract to perform renovation work on the air conditioning systems on Housing and Urban Development (HUD) Project No. 121-35945, a HUD mortgage insured project involving the rehabilitation of the Pacific Bay Vista Apartments in San Bruno, California. Because the project was a DBA-covered residential construction project in San Mateo County, California, DBA Wage Determination No. CA100030 Modification 35 (December 16, 2011) (W.D. CA 30) applied.

By correspondence dated February 21, 2012,³ addressed to the Department of Housing and Urban Development (HUD), Michael Roberts Construction, Inc., the contracting agency and prime contractor on the project, requested on Selco's behalf that three additional job classifications for the work Selco was performing on the project be added to the Wage Determination.⁴ The three additional classifications Selco sought were: Residential A/C Journey Person, Residential A/C Specialist, and Residential Service Technician.

HUD forwarded the request to the Wage and Hour Division for decision on February 24, 2012, together with a completed HUD Form 4230A (Report of Additional Classification) indicating that the request failed to meet all necessary criteria for granting a conformance request under 29 C.F.R. § 5.5(a)(1)(ii)(A). Specifically, the HUD referral letter to Wage and Hour explained that the request did not meet the first criteria necessary for granting a conformance.⁵

¹ Unless otherwise noted, the Background Statement is based on the Administrative Record the Administrator filed with the ARB pursuant to 29 C.F.R. § 7.6(a). The ARB is generally limited in reaching its decision to reviewing the record that was before the Administrator. 29 C.F.R. §§ 7.1(e) and 7.8(b). Nevertheless, in certain instances, the ARB may consider extra-record evidence for purposes of determining whether remand to the Administrator is warranted "for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence." *Id.* at § 7.1(e). Here, evidence presented for the first time on appeal warrants the Administrator's consideration upon remand.

² The Administrative Record does not indicate when the subcontract was signed.

³ So far as can be determined, Selco initially made its conformance request after it was awarded the subcontract. Neither the prime construction contract nor Selco's subcontract are in the Administrative Record. Nor is there any evidence in the record regarding when the prime contract or subcontract were put out to bid.

⁴ The Roberts Construction correspondence contained in the Administrative Record includes, among other items, a copy of Selco's request letter to Roberts Construction, dated February 3, 2012. Selco's letter references a Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate, but no SF 1444 is in the Administrative Record that the Administrator transmitted to the ARB.

⁵ 29 C.F.R. § 5.5(a)(1)(ii)(A) identifies three criteria that must be met before a classification of laborers or mechanics to be employed under a covered contract, who are not listed in the applicable wage determination, may be approved and added to the wage determination:

stating that HUD “believe[d] the work can be performed by a classification listed on the wage decision, Sheet Metal Worker.”⁶ Consequently, HUD recommended that Wage and Hour disapprove the conformance request.⁷

Notwithstanding HUD’s recommendation of disapproval, on May 10, 2012, the Wage and Hour Section Chief for Construction, Wage Determinations, approved addition of the three new job classifications to W.D. CA 30, making them applicable to Selco’s subcontract.⁸

By letter dated June 4, 2012, addressed to the Wage and Hour Section Chief, Local 104’s Labor Compliance Officer challenged the conformance approval for the Pacific Bay Vista project. Citing the conformance regulations’ prohibition against approving the addition of new classifications after a project is bid, unless the work to be performed by the requested classification “is not performed by a classification in the wage determination,” 29 C.F.R. § 5.5(a)(1)(ii)(A)(1), Local 104 argued that, “because the work at issue here can be performed by employees in an existing classification, the conformance regulations cannot be used.”⁹

In response to Local 104’s request for reconsideration, Wage and Hour asked the union to submit its bargaining agreements “for the remaining classifications on the SF-1444 and a detail[ed] description of the work being performed on the project for the supervisor’s review.”¹⁰ Local 104 provided Wage and Hour with current wage rates for the project and the following description of the work performed by sheet metal workers, which the union contended did the work proposed to be done by the additional classifications:

Architectural flashing Z-bar, base metal, 4X5 deck/walkway metal, nosing, rake metal, post metal, capping, gutter, down spouts, band flashing, washer/dryer pans, window and door heads & pans, mansard metal, post capping. *HVAC* (Central HVAC) Heater

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- (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.

⁶ W. D. CA 30 included a Sheet Metal Worker classification at a wage rate of \$37.67 per hour and \$23.93 per hour in fringe benefits. Administrative Record (AR) Tab A at 31-32.

⁷ AR Tab C.

⁸ AR Tab E.

⁹ AR Tab G.

¹⁰ AR Tab H.

coils, bath exhaust fans, 4 furnace ducting “flex,” venting pipe 4”, O’hagin’s vents, A/C ext.^[11]

In follow-up, Local 104 again requested a response from Wage and Hour to the union’s June 4th request for reconsideration of its initial approval of the conformance. Noting that “[w]e have not received the information needed in order to reconsider our approval,” Wage and Hour asked HUD to obtain information about the work being performed on the project from the prime contractor.¹² HUD responded by providing Wage and Hour with a document detailing the scope of work for the project, but which did not contain the information Wage and Hour sought.¹³

Subsequently, on October 17, 2012, Wage and Hour’s Director of the Division of Wage Determinations responded to Local 104. The Director explained that “there is additional data that is needed to fully respond to your request [including] “a complete description of the work being performed on the HUD project in question by employees of Selco Conditioning . . . and we need to know if this work (residential AC journey person, residential AC specialist, and residential service technician) is being performed on the project.”¹⁴ Local 104 responded by again providing a description of the work performed by sheet metal workers on the Pacific Bay Vista project and arguing that the additional job classifications should be retracted because the Sheet Metal Workers classification in the applicable wage determination covered the work in question.¹⁵

On October 18, 2012, Wage and Hour informed Michael Roberts Construction that it had “received a request to reconsider the SF-1444 that we approved for your project,” and asked the company to provide “a detailed description of the work that you are performing on the project.”¹⁶ Michael Roberts Construction responded on Selco’s behalf by providing Wage and Hour with what appears to have been the same project scope of work that HUD had provided Wage and Hour, followed by an e-mail on October 23, 2012, in which it is stated: “Per our phone conversation: there are both Sheet metal workers and A/C specialists on this project; the A/C specialists are only doing a/c work. In both the subcontractor’s union agreement and Calif. prevailing wage a/c specialist is a separate classification under Sheet metal worker.”¹⁷

¹¹ *Id.*

¹² AR Tab I.

¹³ *Id.*

¹⁴ AR Tab J.

¹⁵ *Id.*

¹⁶ AR Tab I.

¹⁷ *Id.*

On October 26, 2012, Local 104 submitted a formal request to the Administrator seeking review and reconsideration of Wage and Hour's May 10, 2012 conformance decision. The union again asserted that "the conformance regulations . . . prohibit DOL from approving new add-on classifications after a project is bid unless the work to be performed is not performed by any classification in the wage determination," and that "because the work at issue here can be performed by employees in an existing classification, the conformance regulations cannot be used."¹⁸

On November 1, 2012, Wage and Hour again contacted Local 104 and requested payroll records demonstrating that sheet metal workers employed in their area had performed air conditioning tasks similar to the Pacific Bay Vista work in the year prior to the contract award. Local 104 asked for clarification of the request. In response, Wage and Hour advised, by e-mail dated November 13, 2012, that the agency did not have "a copy of the residential agreement whose rate is reflected in the contract wage determination CA20080030" and that it needed "to see the portion of the agreement that defines the scope of work."¹⁹ Wage and Hour clarified that it was requesting documentation "showing that work has been performed in San Mateo County on HVAC or AC at the residential rate within the year prior to the contract award."²⁰

On November 14, 2012, Local 104 provided Wage and Hour with the union's Building Trades collective bargaining agreement (rather than the residential CBA), the constitution of the Sheet Metal Workers International Association, and a previous version of the wage determination at issue.²¹ The union also advised that because Selco had performed work on another residential project in South San Francisco and paid the posted Sheet Metal rate, it was in the process of obtaining certified payroll records for the project, which it would provide to Wage and Hour.²² On November 15, 2012, Bob Hansen, Local 104's Contract Compliance Director, submitted wage data for another project in San Mateo County, the Trestle Glen Apartments Project in Colma, California; consisting of the bid advertisement for the project and certified payroll showing payment of journeyman wages.²³

¹⁸ AR Tab K.

¹⁹ AR Tab L.

²⁰ *Id.*

²¹ AR Tab M.

²² *Id.* Local 104 did not provide certified payroll records from the El Camino Project to Wage and Hour prior to June 2014, but has now submitted the information in conjunction with its petition for review, asserting on appeal that "Selco used the Davis-Bacon residential sheet-metal worker classification to perform the contract at work." Petition for Review, p. 5.

²³ AR Tab N. Local 104 contends that the Trestle Glen Apartments Project is a residential project. The Administrator argues, however, that because the project had five floors, rather than four, it is, instead, a building project and thus not probative of the scope of work of residential sheet metal workers. Administrator's Response to Petition for Review, p. 10. *See also* AR Tab O (Administrator's June 19, 2014 Final Ruling).

The Administrator subsequently issued a final ruling on June 19, 2014, affirming Wage and Hour's May 10, 2012 decision, after considering the information Selco, Local 104, HUD, and Michael Roberts Construction submitted. The Administrator cited Local 104's failure to provide requested collective bargaining agreements for residential sheet metal work and residential air conditioning work, which the Administrator had requested to clarify the scope of work performed under both agreements, and noted that the information Local 104 did provide "failed to reveal whether the sheet-metal worker classification on the WD at issue performed air-conditioning work on residential projects."²⁴ Accordingly, the Administrator affirmed Wage and Hour's initial ruling because "no evidence was presented that demonstrated that the subject work was performed by a classification listed in the wage determination in the year prior to contract award."²⁵

On July 18, 2014, Local 104 filed a Petition for Review of the Administrator's ruling with the Administrative Review Board.²⁶

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to hear and decide, in its discretion, appeals from final decisions under 29 C.F.R. Parts 1, 3, and 5.²⁷ As essentially an appellate agency, the Board will not hear matters de novo except upon a showing of extraordinary circumstances, and may remand any case for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence.²⁸

In considering matters arising under the Davis-Bacon Act, within the scope of its jurisdiction, the Board acts as fully and finally as might the Secretary of Labor concerning such matters.²⁹ Where a ruling of the Administrator of the Wage and Hour Division is appealed, the Board will assess the ruling to determine whether it is consistent with the applicable statute and regulations, and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act.³⁰

²⁴ AR Tab O.

²⁵ *Id.*

²⁶ The Petition for Review included documents that Local 104 had not presented to the Administrator when this matter was pending before Wage and Hour.

²⁷ Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 7.1(b).

²⁸ 29 C.F.R. § 7.1(e).

²⁹ 29 C.F.R. § 7.1(d).

³⁰ *In re Spencer Tile Co.*, ARB No. 01-052 (Sept. 28, 2001).

DISCUSSION

A. Governing Law

The Davis Bacon Act requires that laborers employed on covered federal construction projects be paid wages and fringe benefits at rates at least equal to the locally prevailing rates for similar work.³¹ Under the DBA, Wage and Hour issues wage determinations that reflect locally prevailing rates for job classifications used on construction projects.³² The minimum rates in wage determinations are based on the rates determined by Wage and Hour “to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the [applicable locality].”³³ If the DBA covers a construction project, the applicable wage determination is incorporated into the governing contract and provides the minimum rates for workers in the job classifications who work on the project.

Occasionally a class of laborers or mechanics is required on a construction project that is not found in the wage determination. In such instances, Wage and Hour is authorized to add an additional job classification and wage rate after the award of the construction contract through a process known as a *conformance*. The conformance procedure is designed to be a simple, expedited process for adding wage rates needed for job classifications not found in the wage determination. To protect the integrity of the competitive bidding system, the requirements for the addition of a conformed classification and wage rate are narrowly limited, and a conformed classification will be recognized only if it meets the following three-part test: (1) The work to be performed by the classification is not performed by a classification in the wage determination; (2) The classification is used 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.³⁴

Wage and Hour will initially decide a conformance request under 29 C.F.R. § 5.5(a)(1)(ii)(B) or (ii)(C), depending upon whether or not the contractor, the laborers to be employed in the classification (if known) or their representatives, and the contracting officer agree or disagree with the proposed classification.³⁵ The Administrator may be requested to

³¹ See 40 U.S.C.A. § 3142.

³² *Id.*; see also 29 C.F.R. Part 1.

³³ 49 U.S.C.A. § 3142(b).

³⁴ *In re Pizzagalli Constr. Co.*, ARB No. 98-090, slip op. at 5 (May 28, 1999) (citing 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3)).

³⁵ 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 of the conformance. 29 C.F.R. § 5.5(a)(1)(ii)(B). If the principals disagree,

reconsider Wage and Hour's decision as provided in 29 C.F.R. § 1.8. Disputes in connection with conformances are to be resolved in accordance with the procedures set forth under 29 C.F.R. § 5.11.³⁶ Appeal from a final decision by the Administrator is provided at 29 C.F.R. §§ 1.9 and 7.1.

B. The Record Does Not Support the Administrator's Conclusion that Selco Was Entitled to the Addition of Job Classifications on the Pacific Bay Vista Project.

Local 104 raises two issues on appeal that the Board presently cannot address and resolve because the evidentiary record on appeal is inadequate. First, there is nothing in the administrative record evidencing what work the three additional classifications were to perform. ARB precedent establishes that where the addition of a new classification to a wage determination is sought pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(A), the conformance request will be denied under the first criterion of the three-part test *if the work to be performed by the requested classification* is performed in the area by workers within an existing classification in the applicable wage determination.³⁷ This information might be in the SF 1444 that should have accompanied the conformance request, assuming it was properly filled out. But again, the SF 1444 is not in the Administrative Record.

The Administrator asserts, in his June 19, 2014 final ruling, that a Local 104 Wage and Fringe Schedule dated July 1, 2011 (AR Tab D), filed with the conformance request, "reflected that Local 104 recognized residential a/c work is done by the classifications requested for conformance." However, that document is merely a rate schedule for residential service technicians. It does not provide any information about the work to be performed by the requested classifications. The Administrator's determination letter concludes that the

"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). Even if parties agree to the proposed conformance, the Administrator must approve the additional classification.

³⁶ See 29 C.F.R. § 5.5(a)(9); 29 C.F.R. § 5.11(a).

³⁷ It is unnecessary to establish that an existing classification of workers listed in the wage determination predominantly performs the work in question; only that the work in question is performed in the area by an existing classification of workers already included in the wage determination. *In re Pizzagalli*, ARB No. 98-090, slip op. at 8; *In re Iron Workers II*, WAB No. 90-26, 1992 WL 465692 at *3 (Mar. 20, 1992) (citing *TRL Sys.*, WAB No. 86-08 (Aug. 7, 1986) and *Warren Oliver Co.*, WAB No. 84-08 (Nov. 20, 1984)); *In re More Drywall, Inc.*, WAB No. 90-20 (Apr. 21, 1991). *Accord In re U.S. Fire Prot.*, ARB No. 99-008, 1999 WL 702413, at *4 (Aug. 30, 1999); *In re Audio-Video Corp.*, ARB No. 95-047, slip op. at 4 (July 17, 1997) ("for purposes of the conformance process the use of a classification need not be the prevailing classification doing a specific job"); *In re J.A. Languet Constr.*, WAB No. 94-18, 1995 WL 256780, at *5 (Apr. 27, 1995) ("our precedent does not require conformed classifications or denials to be based on prevailing practice").

information Local 104 provided “failed to reveal whether the sheet metal classification on the WD at issue performed air conditioning work on residential projects,” and that “no evidence was presented that demonstrated that the subject work was performed by a classification listed in the wage determination,” implying that the requested classifications do air conditioning work. However, there is no evidence that the Board can find in the Administrative Record that supports this implication. Absent that evidence, it is impossible for the Board, on appeal, to address the first, and most fundamental question in determining the appropriateness of a conformance, i.e., *the work to be performed by the new classifications*.

The second issue preventing the Board from ruling, and requiring remand instead, relates to the nature of the conformance process itself. Local 104 argues on appeal that granting the conformance Selco requested violates the deeply rooted policy and long-recognized legal principal barring use of the conformance process to circumvent the competitive contract bidding process—the integrity of that competitive process, which is intended to assure both fairness to those bidding on government contracts and that the government obtains the full benefit resulting from fair competition between bidders. Local 104 asserts that Selco knew, or should have known, prior to the opening of bids and the award of contracts that the applicable wage determination was inadequate because it did not include the three contested job classifications, and thus Selco was obligated to challenge the wage determination and not entitled to subsequently seek addition of the classifications through the conformance process.

The conformance process is narrow in scope, with the limited purpose of establishing a new classification when it is necessary to do so because work needed to perform the contract is not performed by an existing classification in the applicable wage determination.³⁸ The process affords the Administrator the authority “to relieve a contractor of the undue hardship that would result from application of a classification in the wage determination that could not be reasonably anticipated at the time of bidding.”³⁹ However, the conformance process cannot be used as a substitute for the obligation to timely challenge the correctness of a wage determination.⁴⁰ The DBA regulations

place on those seeking government contracts an obligation to familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents. Should those wage standards appear to be incomplete or incorrect the would-be contractor or subcontractor is obligated to challenge their accuracy prior to the opening of bids or the award of a contract. This procedure guarantees fairness to all bidders and assures the full benefits to the government of the

³⁸ *In re Am. Bldg. Automation, Inc.*, ARB No. 00-067, slip op. at 3 (Mar. 30, 2001). *See In re Cambridge Plaza*, ARB No. 07-102 (Oct. 29, 2009).

³⁹ *In re J.A. Languet*, WAB No. 94-18, 1995 WL 256780 at *7.

⁴⁰ *Pizzagalli*, ARB No. 98-090 at 6; *Languet*, WAB No. 94-18, 1995 WL 256780 at *7.

procurement process.^[41]

Only where, “due to unanticipated work or oversight, some job classifications necessary to complete the work are not included in the wage determination,” may a contractor seek additional classifications through the conformance process.⁴²

Reviewing the administrative record in this case, the Board finds nothing that indicates what Selco knew or should have known about the work and the job classifications that were required prior to bidding on and entering into the subcontract that it secured. Nor is there anything in the record to suggest that the requested classifications were due to unanticipated work on the project or the result of an oversight in the applicable wage determination. For that matter, there is nothing in the record to indicate when the bids were submitted or contracts awarded for either the prime contract or the Selco subcontract. Presumably some of this information would be contained in the SF 1444 that accompanied the conformance request. But again, even the SF 1444 is not in the administrative record before the Board.

Consequently, there is a gaping evidentiary hole in the record concerning whether Selco knew or should have known in advance of the bid process, and before entering into its subcontract, that the work to be performed by the three additional classifications was not covered by the applicable wage determination, or whether the additional job classifications involved work that was not anticipated at the time of bidding or that were not included in the wage determination due to an oversight. If the former was the case, Selco would be barred from seeking to add the classifications through the conformance process. If the latter, Selco would be entitled to add the classifications through the conformance process, assuming the criteria under 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3) were met.

CONCLUSION

Accordingly, this case is **REMANDED** to the Administrator, Wage and Hour Division, for further consideration consistent with this Decision and Order of Remand, including the making of new or modified findings based upon a fully developed evidentiary record. In remanding this matter, it is also noted that Local 104 has submitted evidence on appeal that it did not present to the Wage and Hour Division. We agree with the Administrator’s observation that under most circumstances the Board “will not hear new issues on appeal nor accept evidence not provided to the Administrator, absent an indication the party lacked the opportunity to present the evidence to Wage and Hour.” Administrator’s Brief at 13 (citing *In re Spencer Tile Co, Inc.*, ARB No. 01-052 (ARB Sept. 28, 2001)). However, pursuant to 29 C.F.R. § 7.1(e), we refer to the

⁴¹ *In re Clark Mech. Contractors*, WAB No. 95-03, 1995 WL 646572 at *2 (Sept. 29, 1995).

⁴² *Id.*

Administrator for consideration upon remand the evidence Local 104 presented to the Board for the first time on appeal

SO ORDERED.

[REDACTED]

E. COOPER BROWN
Administrative Appeals Judge

[REDACTED]

[REDACTED]

PAUL M. IGASAKI
Chief Administrative Appeals Judge

[REDACTED]

JOANNE ROYCE
Administrative Appeals Judge

[REDACTED]