IN THE MATTER OF:

VELOCITY STEEL, INC. **ARB CASE NO. 16-060**

Re: Broadway Road, Contract No. 7838; Wage Decision ID130093, Modification 1; Ada County, Idaho; WHD # 7617

DATE: May 29, 2018

Meridian Road, Contract No. 7857; Wage Decision ID140090, Modification 1; Ada County, Idaho; WHD # N/A

Gowen Road, Contract No. 7840; Wage Decision ID130093, Modification 1; Ada County, Idaho; WHD # 7618

Nampa Precast, Project No. 7805; Wage Decision ID130097, Modification 1; Canyon County, Idaho; WHD # 499

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Petitioner:

Robert T. Christensen, *Velocity Steel, Inc.*, Wilder, Idaho

For the Respondent, Administrator, Wage and Hour Division:

M. Patricia Smith, Esq; Jennifer S. Brand, Esq.; William C. Lesser, Esq; Jonathan T. Rees, Esq.; and Katelyn J. Poe, Esq.; *United States Department of Labor*, Washington, District of Columbia

BEFORE: Joanne Royce, *Administrative Appeals Judge*, and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Velocity Steel, Inc., filed a petition for review of a final determination that the Administrator of the Wage and Hour Division issued on April 12, 2016, under the Davis-Bacon Act (DBA or the Act), 40 U.S.C.A. §§ 3141-3148 (Thomson/West 2005 Supp. Thomson Reuters 2017) and the Davis-Bacon Related Acts (collectively, "the DBRA").[1] The Acts' implementing regulations are found at 29 C.F.R. Parts 1, 3, 5, 6, 7 (2017). While the DBA applies to construction contracts entered into directly between the Federal government and a contractor, the DBRA incorporate the DBA's various prevailing wage requirements into contracts between a non-Federal entity, such as a State or local government as in this case, and a contractor where the Federal government provides funding.[2] The Idaho Transportation Department (ITD) issued four highway construction contracts for four highway construction projects located in Ada and Canyon Counties, Idaho.[3] Because the projects apparently received partial federal funding under one of the DBRA statutes, the DBA labor standards apply to the projects. Velocity Steel is a Rebar and Post-Tension installation subcontractor on the four highway construction projects.[4]

The Administrator's final determination affirmed the Wage and Hour Division's (WHD) decisions denying conformance requests from the contracting agency, the ITD on behalf of Velocity Steel, to add an Ironworker job classification at a wage rate of $16.00 per hour, plus $5.00 in fringe benefits, to three general wage determinations that were incorporated in the four highway construction contracts. After Velocity Steel requested review and reconsideration of the WHD conformance decisions, the Administrator held that the conformance requests do not satisfy the criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) because the proposed wage rate and fringe benefits do not bear a reasonable relationship to the wage rates contained in the relevant wage determinations in accordance with the guidelines in the Administrator's All Agency Memorandum (AAM) 213. Instead, the Administrator approved an Ironworker job classification at a wage rate of $23.92 per hour, plus $9.75 in fringe benefits, as it bears a reasonable relationship to the wage rates contained in the relevant wage determinations in accordance with the criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) and the guidelines in AAM 213. Because the Administrator acted in accordance with the applicable regulation at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) and settled agency policy and practice, the Administrator's denial of the conformance requests and, alternatively, approving an Ironworker job classification at a wage rate of $23.92 per hour, plus $9.75 in fringe benefits, is reasonable and, therefore, is affirmed.

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1 *See* 29 C.F.R. § 5.1(a).

2 29 C.F.R. § 5.1(a); *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.

3 Administrative Record (AR) Tab 1, a-d.

4 AR Tab 5d.

BACKGROUND

1. Relevant statutory and regulatory framework

The DBA 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. 40 U.S.C.A. § 3142(a). 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. The DBA and DBRA require that contractors pay no less than the prevailing wage to the various classifications of mechanics or laborers they employ.

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. *See* 40 U.S.C.A. § 3142(c); 29 C.F.R. § 5.5(a). "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 to 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); *see also Strickland*, ARB No. 13-088, slip op. at 3-4 (ARB June 30, 2015).[5]

Previously, in *Mistick Constr.*, ARB No. 02-004, slip op. at 5-6, the Administrative Review Board (ARB or 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 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

[5] 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.

in the wage determination and the "rates" for those classifications when proposing a wage rate for an additional classification. *Id*.

2. Relevant contracts and wage determinations

Velocity Steel was a subcontractor on four highway construction projects in Idaho. The projects all incorporated, in relevant part, identical general wage determinations that all included only non-union (weighted average) prevailing wage rates for the skilled classifications, at issue in this case, and the same highest non-union prevailing wage rate for the unskilled laborer classification. All of the three general wage determinations applicable in this case provided the identical non-union prevailing wage rates for five skilled classifications, indicating for the relevant classifications combined hourly wage rates and fringe benefits ranging from $39.07 for an electrician to $33.67 for a carpenter, plus a lower $21.41 for a Cement Mason/Concrete Finisher. *Id*. Two of the wage determinations included a non-union prevailing combined hourly wage rate and fringe benefits for an unskilled common laborer classification of $21.97 and all three included a non-union prevailing combined hourly wage rate and fringe benefits for a "laborer, asphalt" classification of $30.18.

Contract specifics

Nampa Precast contract

On October 23, 2013, the ITD awarded the Nampa Precast contract, Contract No. 7805, and work began on June 2, 2014. *See* AR Tab 1d. This contract incorporated General Wage Determination No. ID130097, Modification 1, for Canyon County in Idaho (WD ID97), which was published on September 6, 2013. *Id*. The prevailing wage rates for the five skilled classifications listed in WD ID97 are all non-union (weighted average) wage rates and indicated, for the relevant classifications, combined hourly wage rates and fringe benefits ranging from $39.07 for an electrician to $33.67 for a carpenter, plus a lower $21.41 for a Cement Mason/Concrete Finisher. *Id*. The non-union (weighted average) prevailing wage rate for an unskilled common laborer listed in WD ID97 is $18.68.

Broadway Road contract

On January 16, 2014, the ITD awarded the Broadway Road contract, Contract No. 7838, and work began on February 24, 2014. *See* AR Tab 1b. This contract incorporated General Wage Determination No. ID130093, Modification 1, for Ada County in Idaho (WD ID93), which was published on September 6, 2013. *Id*. The relevant non-union (weighted average) prevailing wage rates for the five skilled classifications listed in WD ID93 and the non-union prevailing wage rate for an unskilled common laborer classification is $21.97.

Gowen Road contract

On January 23, 2014, the ITD awarded the Gowen Road contract, Contract No. 7840. *See* AR Tab 1c. This contract also incorporated General Wage Determination No. ID130093, Modification 1, for Ada County in Idaho (WD ID93), as described for the Broadway Road Contract above.

Meridian Road contract

Finally, on March 14, 2014, the ITD awarded the Meridian Road contract, Contract No. 7857, and work began on April 13, 2014. *See* AR Tab 1a. This contract incorporated General Wage Determination No. ID140090, Modification 1, for Ada County in Idaho (WD ID90), which was published on January 24, 2014. *Id*. Again, the relevant non-union (weighted average) prevailing wage rates for the five skilled classifications listed in WD ID90 are identical to those as described for WD ID93 and WD ID 97 above and the non-union prevailing wage rate for an unskilled common laborer classification is $21.97.

3. Conformance requests and denials

On September 2, 2014, at the request of Velocity Steel, the ITD filed conformance requests (SF 1444) with the WHD Administrator, requesting that the job classification of Ironworker Journeyman at an hourly wage rate of $16.00 plus $5.00 in fringe benefits ($21.00 combined) be added to General Wage Determinations ID90 and ID 93 for the Meridian Road, Broadway Road, and Gowen Road projects, as they did not provide rates for such a classification that was needed to complete work on the project. *See* AR Tab 1a, b, c. ITD filed a similar conformance request on September 3, 2014, requesting the job classification of Ironworker Reinforcing with the same hourly wage rate and fringe benefits be added to General Wage Determinations ID97 for the Nampa Precast project. *See* AR Tab 1d.

Later in September 2014, the WHD denied the proposed wage rate, including fringe benefits, for the Ironworker Journeyman classification for the Meridian Road project because it "does not bear a reasonable relationship" to wage rates contained in the relevant general wage determination (ID90), but instead approved an hourly wage rate of $23.92 plus $9.75 in fringe benefits. *See* AR Tab 2a.

Similarly, on October 9, 2014, the WHD denied the proposed wage rate, including fringe benefits, for the Ironworker classification for the Broadway Road and Gowen Road projects because it "does not bear a reasonable relationship" to wage rates contained in the relevant general wage determination ID93, but instead WHD approved an hourly wage rate of $23.92 plus $9.75 in fringe benefits in accordance with the criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) and the guidelines in AAM 213. *See* AR Tab 2b, c.

Finally, on November 13, 2014, the WHD again denied the proposed wage rate, including fringe benefits, for the Ironworker Reinforcing classification for the Nampa Precast project because it "does not bear a reasonable relationship" to wage rates contained in the relevant general wage determination ID97, but instead approved an hourly wage rate of $23.92 plus $9.75 in fringe benefits in accordance with the criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3). *See* AR Tab 2d.

On September 24, 2014, Velocity Steel requested that the WHD reconsider its decision in regard to the Meridian Road project, including with its request two similar conformance requests in which the WHD had approved a proposed combined hourly wage rate and fringe benefits of $21.00 for the Ironworker classification for projects in 2014 and 2012. *See* AR Tab 3a. Similarly, on November 5, 2014, Velocity Steel requested that the WHD reconsider its decision in regard to the Broadway Road and Gowen Road projects, and on December 10, 2014, it requested that the WHD reconsider its decision in regard to the Nampa Precast project, including with its request four similar conformance requests in which the WHD had approved a proposed combined hourly wage rate and fringe benefits of $21.00 for the Ironworker classification for two projects in 2014 and two projects in 2010. *See* AR Tab 3b, c, d.

By email on September 29, 2014, the WHD affirmed its approval of an hourly wage rate of $23.92 plus $9.75 in fringe benefits for the Meridian Road project based on the guidelines in AAM 213. *See* AR Tab 4a. By letter dated December 4, 2014, the WHD similarly affirmed its approval of an hourly wage rate of $23.92 plus $9.75 in fringe benefits for the Broadway Road and Gowen Road projects, noting in regard to the four similar conformance requests Velocity Steel submitted in which the WHD had approved a proposed combined hourly wage rate and fringe benefits of $21.00 for the Ironworker classification for other projects in 2014 and 2010 that those conformance requests involved other wage determinations not related to the wage determination applicable to and incorporated into the Broadway Road and Gowen Road contracts. In addition, because the Broadway Road and Gowen Road contracts were awarded after AAM 213 was issued in March 2013, the WHD stated that the guidelines in AAM 213 apply to the Broadway Road and Gowen Road contracts. *See* AR Tab 4b. Finally, by letter dated December 23, 2014, the WHD similarly affirmed its approval of an hourly wage rate of $23.92 plus $9.75 in fringe benefits for the Nampa Precast project. *See* AR Tab 4c.

4. Request for review and reconsideration of conformance decisions

Velocity Steel timely requested review and reconsideration pursuant to 29 C.F.R. § 5.13[6] of the conformance decisions. *See* Tab 5a-d. Velocity Steel requested that the Administrator reverse the conformance decisions, contending that the WHD had approved its proposed combined

[6] 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."

hourly wage rate and fringe benefits of $21.00 for the Ironworker classification for other projects in neighboring counties in Idaho, even including a 2014 project that was approved after the issuance of AAM 213 in March 2013. *See* AR Tab 5d, Tab 7. Alternatively, Velocity Steel argued that, in accordance with the guidelines in AAM 213, the WHD should have at most conformed the Ironworker classification at the same combined hourly wage rate and fringe benefits of $21.41 as found in all three of the applicable wage determinations for a Cement Mason/Concrete Finisher, the lowest of the five skilled classifications found in the wage determinations, as it is also a skilled classification. *Id*.

5. Administrator's final determination

On April 12, 2016, the Administrator issued a final determination. AR Tab 7. Initially, the Administrator noted that AAM 213 applies to the conformance requests at issue in this case because all four highway construction projects were awarded after AAM 213 was issued in March 2013. *See* AR Tab 7, Apr. 12, 2016 Final Determination (FD) at 3, n.3. The Administrator explained that in accordance with the guidelines in AAM 213, the reasonableness of the proposed combined hourly wage rate and fringe benefits of $21.00 for the requested additional Ironworker skilled classification must be determined in relationship to the non-union (weighted average) prevailing wage rates for the five skilled classifications in the applicable wage determinations. AR Tab 7, FD at 3. Because Velocity Steel's proposed combined rate of $21.00 for the Ironworker classification is lower than all of the five wage rates for the skilled classifications in the applicable wage determinations, the Administrator determined that the proposed rate could not be approved under AAM 213, citing *Tower Constr*., WAB No. 94-17, 1995 WL 90010, slip op. at 3 (Feb. 28, 1995) "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" applicable wage determinations. *Id*.

The Administrator also determined that Velocity Steel's proposed alternative combined hourly wage rate and fringe benefits of $21.41 for the Ironworker classification, the same combined rate listed for a skilled Cement Mason/Concrete Finisher found in all of the applicable wage determinations, could not be approved because it was "substantially (more than 33%)" lower than the other four skilled classification rates contained in the applicable wage determinations and also lower than rates for non-union common laborers in two of the wage determinations and lower than the non-union prevailing combined hourly wage rate and fringe benefits for a "laborer, asphalt" classification in all three of the wage determinations. *Id.* The Administrator explained that the WHD no longer uses "the lowest [wage] rate as a benchmark" pursuant to the guidelines in AAM 213 and generally only considers proposed rates for a skilled classification that are higher than the rates for unskilled laborers. *Id*.; *see also* AAM 213 at 1-2; *Childress Painting & Assoc., Inc.*, ARB No. 96-121, slip op. at 3 (ARB Aug. 23, 1996) ("a proposed rate for a skilled classification must be . . . above the unskilled classification of laborer"). Thus, instead, the Administrator determined that the WHD's approval of a wage rate of $23.92 per hour, plus $9.75 in fringe benefits, is appropriate as it is "the second lowest skilled wage rate" (the combined rate of $33.67 listed for a carpenter) contained in the applicable wage determinations and because it is

above the wage rates for non-union laborers in the applicable wage determinations. AR Tab 7, FD at 3-4.

Finally, the Administrator rejected Velocity Steel's contention that the WHD had approved its proposed combined rate of $21.00 for the Ironworker classification for other projects in neighboring counties in Idaho, explaining that a contractor such as Velocity Steel "may not rely on wage rates previously approved" in other similar conformance requests, citing *Childress Painting*, ARB No. 96-121, slip op. at 3. *Id*. In addition, the Administrator noted that Velocity Steel could not reasonably have relied on the previously approved conformance requests for other projects that it submitted with its request for review dating from 2012 and 2010, as they had been approved before AAM was issued in 2013. AR Tab 7, FD at 4, n.4. Moreover, the Administrator pointed out that Velocity Steel could not have relied on another conformance request dating from 2014 that it also submitted with its request for review, where the WHD had approved its proposed combined rate of $21.00 for the Ironworker classification, as Velocity Steel had bid on the four highway construction projects involved in this case, and the contracts had been awarded, before it had even submitted the other conformance request it allegedly relied on. *Id*.

Velocity Steel 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 wage determinations in cases arising under the DBA and the DBRA statutes. 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 and DBRA 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); *see also City of Ellsworth*, ARB No. 14-042, slip op. at 8 (ARB June 7, 2016). 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 the DBRA statutes and their implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Acts. *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 and DBRA'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 issues on appeal are: (1) whether the Administrator properly affirmed the WHD's refusal to approve Velocity Steel's proposed wage rate for the requested additional Ironworker skilled classification and (2) whether the WHD's approval of the addition of a new Ironworker classification and wage rate satisfy the conformance criteria established under 29 C.F.R. § 5.5(a)(1)(ii)(A).

As the Administrator determined, Velocity Steel's initial proposed combined rate of $21.00 for the Ironworker classification in the four conformance requests is lower than all of the five wage rates for the skilled classifications in the applicable wage determinations. Because a proposed rate for a skilled classification must "be equal to or exceed the lowest rate of the skilled classifications already contained in the" applicable wage determinations, *see Tower Constr.*, WAB No. 94-17, slip op. at 3, the Administrator properly determined that the proposed combined rate of $21.00 could not be approved as it does not bear a reasonable relationship to the wage rates contained in the relevant wage determinations in accordance with the criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) and the guidelines in AAM 213.

Next, the Administrator considered Velocity Steel's proposed alternative combined hourly wage rate and fringe benefits of $21.41 for the Ironworker classification, which is the same as the lowest combined rate listed for a skilled classification found in all of the applicable wage determinations for a Cement Mason/Concrete Finisher. Not only is the combined rate for a Cement Mason/Concrete Finisher the lowest combined rate listed for a skilled classification, the Administrator determined that it is "substantially" lower than the other four skilled classification rates contained in the applicable wage determinations and lower than rates for non-union common laborers in two of the wage determinations relevant to three of the highway construction projects involved in this case. Pursuant to the guidelines in AAM 213, 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. In addition, "a proposed rate for a skilled classification must be . . . above the unskilled classification of laborer." *Childress Paining & Assoc., Inc.*, ARB No. 96-121, slip op. at 3; *see also* AAM 213 at 1-2. Thus, the Administrator properly determined that the proposed combined rate of $21.41 also could not be approved as it does not bear a reasonable relationship to the wage rates contained in the relevant wage determinations in accordance with the criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) and the guidelines in AAM 213.

Instead, the Administrator determined that the WHD's approval of a wage rate of $23.92 per hour, plus $9.75 in fringe benefits, for the Ironworker classification is appropriate as it is "the second lowest skilled wage rate" (the combined rate of $33.67 listed for a carpenter) contained in the applicable wage determinations and because it is above the wage rates for non-union laborers in the applicable wage determinations. The Administrator's determination that the approved

combined rate of $33.67 bears a reasonable relationship to the wage rates contained in the applicable wage determinations in accordance with the criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A)(3) and the guidelines in AAM 213 was a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Acts. *See Y-12 Nat'l Sec. Complex*, ARB No. 11-083, slip op. at 5.

On appeal, Velocity Steel contends that when it bid on the four highway construction projects involved in this case, it could only refer to previously approved wage rates for the Ironworker classification, as no wage rate for the Ironworker classification had been determined after AAM 213 was issued in March 2013. Moreover, Velocity Steel asserts that AAM 213 "is not completely clear" in describing how such a wage rate should be determined and, therefore, argues that AAM 213 has created an "unfair" situation for contractors in their attempt to submit competitive bids on such projects. Thus, Velocity Steel urges that "under the circumstances" in this case, considering the timing of its bids coming before AAM 213 had ever been implemented, the Administrator should grant contractors a "grace period" and, therefore, approve the lowest combined rate listed for a skilled classification for a carpenter found in all of the applicable wage determinations of $21.41 for the Ironworker classification.

But as the Administrator properly stated, contractors "may not rely on wage rates previously approved" in other similar conformance requests. *Childress Painting*, ARB No. 96-121, slip op. at 3. In addition, 29 C.F.R. 5.5(a)(ii)(3) requires the WHD to determine whether a proposed rate for an additional classification bears a reasonable relationship "only to the rates contained in the wage determination *applicable* to the contract under consideration." *Tower Constr.*, WAB No. 94-17, slip op. at 3 (emphasis added). Thus, any approved wage rates for the Ironworker classification in other conformance requests involving other wage determinations are not relevant to whether the proposed wage rates in this case bear a reasonable relationship to the rates contained in the applicable wage determinations in this case.

We also reject Velocity Steel's request that it be given some sort of equitable consideration in this case because it asserts that AAM 213 was only newly issued when it bid on the projects or that the guidelines in AAM 213 are not clearly understood. "Contractors who seek to perform work on a federal construction project subject to the [DBA and DBRA] have an obligation to 'familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents.'" *Abhe & Svoboda, Inc.*, ARB Nos. 01-063, et al; ALJ Nos. 1999-DBA-20 through 27, slip op. at 18 (ARB July 30, 2004), (citing *American Bldg. Automation, Inc.*, ARB No. 00-067, slip op. at 6 (ARB Mar. 30, 2001) (quoting *Joe E. Woods*, ARB No. 96-127 (Nov. 19,1996))), *aff'd sub nom. Abbhe & Svoboda, Inc. v. Chao*, Civ. Action No. 04-1973, 2006 WL 2474202 (D.D.C. 2006), *aff'd Abhe & Svoboda v. Chao*, 508 F.3d 1052, 1060 (D.C. Cir. 2007) (in a DBRA case, noting that "[p]arties dealing with the government are expected to know the law, and there is no grave injustice in holding parties to a reasonable knowledge of the law" (citations and internal quotation marks omitted)).

Thus, Velocity Steel has not demonstrated that the Administrator's conformance decision in this case was inconsistent with the regulations, unreasonable, or an unexplained departure from

precedent. *See Strickland*, ARB No. 13-088, slip op. at 10.

CONCLUSION

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. Accordingly, we **AFFIRM** the Administrator's determination that the WHD appropriately denied the conformance requests and properly approved the addition, to the applicable wage determinations, of an Ironworker classification at a combined rate of $33.67, as the additional wage rate bears a reasonable relationship to the wage rates contained in the applicable wage determinations.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge