U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

IN THE MATTER OF:

COURTLAND CONSTRUCTION CORP., WASHINGTON COUNTY, VERMONT.

ARB CASE NO. 2017-0074

DATE: SEP 30 2019

With respect to wage Determination VT140033, Modification No. 2, for Concrete Finisher Classification In Washington County, Vermont

Appearances:

For the Respondent:

C. Roth Perry; *pro se*; Washington, Pennsylvania

For the Administrator, Wage and Hour Division:

Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Jonathan T. Rees, Esq.; and Wilson Osorio, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

Before: William T. Barto, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Heather C. Leslie, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. This matter is before the Administrative Review Board (the Board) pursuant to the provisions of the Davis-Bacon Act (DBA) and "Related Acts" (DBRA), 40 U.S.C. § 3141 et seq. (2006), and the applicable implementing

regulations at 29 C.F.R. Parts 1, 3, 5, and 7 (2018). The DBRA apply DBA labor standards to certain federally-assisted construction projects, such as the project at issue here. Courtland Construction Corp. seeks review of a determination by the Administrator of the U.S. Department of Labor's Wage and Hour Division (Administrator) denying its request to add a "Concrete Finisher" classification to a wage determination under a DBA contract. We affirm.

BACKGROUND

The Administrator has denied Courtland Construction's requests (and requests for reconsideration) to add the Concrete Finisher classification to the applicable wage determination at a conformed hourly rate of $25.34 without any fringe benefits. The Administrator ruled that the requested rate did not satisfy the regulatory requirements for adding a classification to a wage determination because the proposed wage rate did not bear a reasonable relationship to the wage rates contained in the wage determination. The Administrator explained that the requested hourly wage rate was "considerably below the lowest wage rate for a skilled classification" under the contract.

The Administrator instead approved a wage rate of $21.69 per hour plus $17.39 in fringe benefits for the Concrete Finisher classification. The Administrator explained that as the contract contained three skilled classifications, the agency had properly conformed the skilled Concrete Finisher classification to the median of the three wage rates. The Administrator rejected Courtland Construction's arguments that Wage & Hour should consider wage rates in unrelated wage determinations based on the regulations and Board precedent.

Courtland Construction petitioned the Board for review. Both the Administrator and Courtland Construction filed briefs.

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JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final decisions under the DBA.[1] The ARB's review of the Administrator's ruling is in the nature of an appellate proceeding and the Board "will not hear [factual] matters de novo except upon a showing of extraordinary circumstances." 29 C.F.R. § 7.1 (e). The ARB will assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA. *William J. Lang Land Clearing, Inc.*, ARB Nos. 01-072, -079; ALJ Nos. 1998-DBA-001 through -006, slip op. at 5 (ARB Sept. 28, 2004). "In considering the matters within the scope of its jurisdiction," the Board acts "as fully and finally as might the Secretary of Labor." 29 C.F.R. § 7.1 (d).

In establishing a conformed rate for a wage classification, "the Administrator is given broad discretion and his or her decisions will be reversed only if inconsistent with the regulations, or if they are unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations . . . ." *Millwright Local 1755*, ARB No. 98-015, 2000 WL 670307, at *6 (ARB May 11, 2000) (quoting *Envtl. Chem. Corp.*, ARB Case No. 96-113, slip op. at 3 (ARB Feb. 6, 1998).

DISCUSSION

1. Courtland's Motion

As an initial matter, there is a pending motion before the Board. Before briefing in this matter, Courtland Construction filed a Motion to Review the Validity of the Administrator's Ruling and Strike Tab I from the Administrative Record. In support of its motion, it argues that it never received a letter dated January 27, 2016, notifying it that the Administrator needed additional time to provide a response to Courtland Construction's request for reconsideration. Courtland Construction questions the authenticity of the letter itself and asks that

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[1] Secretary's Order 01-2019 (5)(a)(1) (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019). Reference to DBA in this decision shall include the DBRA unless otherwise noted.

it be stricken from the record. For these reasons, Courtland Construction requests that the Board determine whether the Administrator's July 24, 2017 ruling is valid.

The Administrator filed a response to Courtland Construction's motion. In it the Administrator requests that the Board deny the motion. The Administrator first asserts that Wage & Hour mailed the January 27, 2016 letter to Courtland Construction regardless of whether it was received and asks that the Board deny the motion to strike it from the record. With respect to the validity of its ruling, the Administrator asserts that regardless of whether Courtland Construction received the letter or whether it remains in the administrative record, it had the authority to issue its July 24, 2017 conformance ruling. We agree. Precedent establishes that the Administrator retains authority over this matter even if regulatory time periods for issuance have elapsed.[2] Courtland Construction's motion is hereby **DENIED**.

2. Merits of the Appeal

On appeal, Courtland Construction makes the same arguments it made to the Administrator below. To summarize, it argues that Wage & Hour's conformed rate does not represent an appropriate wage rate for the classification Concrete Finisher because the position is not a skilled position, Vermont is not a union state, and application of a wage rate from another wage determination and contract is more appropriate.

In opposition, the Administrator argues that the Administrator's denial of the conformance request was within the Administrator's discretion because the wage rate proposed by Courtland Construction did not bear a reasonable relationship to the wage rates contained in the wage determination, as it was well below any of the applicable skilled wage rates. The Administrator argues that the wage rate determination was proper because it bears a reasonable relationship to the wage rates contained in the determination. The Administrator explained that Concrete Finisher is a skilled position,[3] so only skilled wage classifications were considered in making the determination.

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[2] *The Law Company, Inc.*, ARB No. 98-107, 1999 WL 801184, at *10 (ARB Sept. 30, 1999).

[3] Brief at 14 (citing *Coleman Constr. Co.*, ARB No. 15-002, 2016 WL 4238468, at *6 (ARB June 8, 2016). Courtland Construction appears to take issue with the Administrator's position that Concrete Finisher is skilled. It argues that it can train anyone to do the work in a day, and this is not true of other skilled classifications. Other than these assertions, Courtland Construction has failed to cite to law or other authority that persuades us that

Further, under longstanding agency policy and Board precedent, the reasonableness of a wage rate is determined with respect to wage rates in the wage determination incorporated into the contract at issue and not to any other contract.[4] The contract at issue lists three skilled classifications with wage rates of $22.36 per hour plus $20.07 in fringe benefits, $21.69 per hour plus $17.39 in fringe benefits, and $25.00 per hour plus $4.50 in fringe benefits. Again, Courtland Construction's requested rate of $25.34 with no fringe benefits fell below all three of the wage rates for skilled classifications in the contract and so was rejected.

To determine a wage rate that bore a reasonable relationship to the wage rates in the wage determination, the Administrator chose the median rate of the three skilled classifications ($21.69 per hour plus $17.39 in fringe benefits). While the wage rate is a union rate, the Administrator explained that two out of the three wage rates for skilled classifications in the contract are union rates, and thus selection of the median rate (and lowest union rate) was reasonable.

The Administrator stresses that she must conform wage rates based on the relevant wage rates in the wage determination and not on what pay practices exist in a particular geographical area, on other contract or wage determination wage rates, what would normally be paid to a wage classification on contracts in a particular area, or any other method of determining wage rates.

With the parties' arguments in mind, we turn to our analysis and we begin with the regulations. The regulations implementing the DBA provide a mechanism for contractors to challenge the accuracy or completeness of a wage determination prior to bidding or the award of a contract in order to provide the government the full benefits of the procurement process, assure fairness to potential bidders, and "provide a reasonable floor [] within the context of a local wage-determination for federal construction contract wages." *Sumlin & Sons, Inc.*, WAB No. 95-08, 1995 WL 732673, at *2 (WAB Nov. 30, 1995); *see* 29 C.F.R. § 1.6(c)(3). By allowing for a challenge prior to the initiation of work, the regulations seek to avoid unfair surprise to an employer, its employees, or the government respecting the wage

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the Administrator abused her discretion in considering Concrete Finisher a skilled classification.

[4] All Agency Memorandum (AAM) No. 213, at 3 (March 22, 2013) (wage rate for additional classifications relates to same category in the wage determination); *Tower Constr.*, WAB No. 94-17, 1995 WL 90010, at *4 (WAB Feb. 28, 1995).

standards governing a particular contract. *Id.* Thus, "[t]here is an attendant obligation on the part of would-be contractors to familiarize themselves with the governing wage determination and to take advantage of the challenge procedure should the wage determination be deficient." *Id.*

Through the conformance process, the Administrator may grant a measure of relief to a contractor "(w)here due to unanticipated work or oversight, some job classifications necessary to complete the work are not included in the wage determination . . . . " *Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *2 (WAB Sep. 29, 1995). "However, the conformance procedure is not intended to be a substitute process for challenging wage determinations in a timely manner." *Id.* The Administrator has broad discretion to accept or reject any given conformance request. *Id.*

In order for a proposed job classification to be approved to be added to an existing wage determination in conformance with a wage determination, the following criteria must be met: (1) the work to be performed by the classification requested is not performed by a classification already in the wage determination; (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); AAM No. 213.

In this matter, the Administrator acted within the broad discretion afforded her to both reject Courtland Construction's conformance request and determine the appropriate wage rate for the conformed wage classification as added to the wage determination.

CONCLUSION

Because we conclude that the Administrator did not abuse her discretion in rejecting Courtland Construction's conformance request and by determining a wage rate for the Concrete Finisher classification that bears a reasonable relationship to the wage rates in the contract, we **AFFIRM**.

SO ORDERED.