U.S. Department of Labor

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

In the Matter of:

THE LAW COMPANY, INC. **ARB CASE NO. 98-107**

With respect to Wage Decision No. KS930008, Veterans Affairs Medical Center, Leavenworth County, Kansas (Contract No. V101CC0083) **DATE: September 30, 1999**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Charles E. Milsap, Esq., *Fleeson, Gooing, Coulson & Kitch, L.L.C., Wichita, Kansas*

For the Respondent:
Anne Payne Fugett, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Henry J. Solano, Esq., *U.S. Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to the Davis-Bacon Act, as amended, 40 U.S.C. §276a *et seq.* (1994) (DBA or the Act) and the regulations at 29 C.F.R. Parts 1, 5, and 7 (1999). Petitioner, The Law Company, Inc. (Law Company), seeks review of the February 19, 1998 final ruling issued under the authority of the Acting Administrator, Wage and Hour Division (Administrator). In the ruling, the Administrator disapproved Law Company's request to add three "Metal Building Assembler" classifications to a Davis-Bacon wage determination applicable to a hospital construction project in Kansas. The additional worker classifications were to have been used for the installation of a metal roofing system. Law Company does not contest the merits of the Administrator's decision denying the conformance request, but instead argues that the requested classifications should be approved because the Wage and Hour Division did not comply with a 30-day time limitation for issuing conformance decisions under the Davis-Bacon regulations at 29 C.F.R. §5.5(a)(1)(v).

We have reviewed the pleadings and administrative record in this proceeding, and conclude that the Administrator's ruling is in accordance with the Act, the regulations and case precedent. We therefore deny the Petition for Review and affirm the Administrator's final ruling of February 19, 1998.

BACKGROUND

On June 3, 1993, bids from construction contractors were opened by the Department of Veterans Affairs (VA) for Project No. 686-060, "Replace Domiciliary, Dietetics, and Chiller Plant" (the Project). A contract for construction of the Project (No. V101CC0083) was awarded by the VA to Law Company on July 29, 1993. The contract was subject to the labor standards provisions of the Act and the regulations at 29 C.F.R. Part 5. The contract contained a wage determination issued pursuant to the DBA, No. KS930008, dated February 19, 1993. The wage determination included a variety of job classifications and wage rates, but did not include a classification of "Metal Building Assembler." AR Tab H.[1/]

Work on the hospital contract commenced on September 1, 1993. Petitioner's Brief in Support of Petition for Review (Pet'r Brf.), [2/] Attachment 12. Part of the Project involved "the assembly of pre-engineered, pre-fabricated, light gauge steel components," to construct the metal roofing system. AR Tab F, Flap D.

On September 21, 1994, slightly more than a year after construction began, Law Company submitted a Standard Form (SF) 1444 (Request for Authorization of Additional Classification and Wage Rate) to the VA's contracting officer. AR Tab F, Flap B. By this submission, Law Company requested that three additional job classifications and wage rates be approved for use on the Project: Metal Building Assembler I ($7.65 wage plus $3.13 fringe benefits, hourly); Metal Building Assembler II ($9.85 wage plus $3.63 fringe benefits, hourly); and Metal Building Assembler III ($12.40 wage plus $3.63 fringe benefits, hourly). The SF-1444 was signed by representatives of the metal roofing system subcontractor; Law Company, as prime contractor; and an employee of the subcontractor. However, the submission was incomplete in several respects. No job title was specified for the employee and the SF-1444 did not reflect whether the employee representative agreed or disagreed with the proposed classifications or wage rates. In addition, the SF-1444 did not indicate whether the interested parties (*i.e.,* the employees, contractor and contracting officer) agreed

---

[1/] The Wage and Hour Division later determined that a modified version of WD No. KS930008 – Modification No. 2, dated May 7, 1993 – should have been applied to the Project. The change of the wage determination is not material to the issues raised in this case.

[2/] In this decision, citation to additional documents contained in the record before the Board are abbreviated as follows:

Adm'r Stmt.	Statement of the Acting Administrator in Response to Petition for Review
AR	Administrative Record

on the three Metal Building Assembler classifications. *Id.; see also* 29 C.F.R. §5.5(a)(1)(v)(B).

Law Company provided documentation in support of the requested classifications and wage rates. First was a listing of wage rates, dated January 27, 1994, purporting to demonstrate the payment of an $8.50 hourly wage rate for "Metal Bldg." construction under the State of Texas "Emergency Prison Bed Program" in Amarillo and Childress, Texas. AR Tab F, Flap E. Law Company also attached a portion of a DBA wage determination, No. KS940009, applicable to construction in Sedgwick County, Kansas. AR Tab F, Flap F. This wage determination – applicable to building construction projects (not including residential construction of single family dwellings and apartments up to and including four stories) – includes a classification for "Metal Building Assemblers (Prefab Buildings Excluding Structural Buildings)" with a listed hourly wage rate of $7.65 and no provision for fringe benefits. *Id.*

On October 11, 1994, the VA's contracting officer forwarded Law Company's request for the conformed classifications to the National Office of the Wage and Hour Division. AR Tab F. The contracting officer noted that the wage determination applicable to the Project, WD KS930008, contained "no worker classification for Metal Building Assemblers," but the contracting officer further observed with regard to Law Company's evidence that the "comparability of wage rates between the states of Texas and Kansas is not clear."[3/] *Id.* Apparently assuming that the disputed work of erecting the metal roofing structure ordinarily might be performed by the Roofers classification in the wage determination[4/], the contracting officer stated that there is "a notable difference between the work which would be done by a Metal Building Assembler and a Roofer." The contracting officer stated in his transmittal letter to the Wage and Hour Division that he "recommend[ed] acceptance of the proposed rate," and concluded his transmittal letter by stating that he would "accept the contractor's proposed rate unless . . . advised to the contrary within 30 calendar days." *Id.*

A response to the conformance request from the Wage and Hour Division was not forthcoming until August 2, 1996, when the Wage and Hour Division's Section Chief, Construction Wage Determinations (Section Chief), notified the VA contracting officer that Law Company's requested additional classifications and wage rates were disapproved. AR Tab C. The Section Chief noted that the conformance question properly was before the Wage and Hour

---

[3/] This reference apparently relates to Law Company's supporting documentation, *i.e.*, the wage rates for the Texas prison bed program and the Sedgwick County, Kansas wage determination which contained a classification for Metal Building Assemblers.

[4/] Earlier, on September 2, 1994, the contracting officer had rejected Law Company's request for conformance of a "lead" Metal Building Assembler with a proposed wage rate of $10.00 hourly with no fringe benefits. Pet'r Brf., Attcht. 4. This request had been initiated by Law Company's subcontractor on January 17, 1994. *Id.* at Attcht 3. In rejecting this proposal, the contracting officer had suggested that the appropriate classification was that of roofer, which was contained in the wage determination. *Id.* at Attcht. 4, p. 2.

Division for a decision because there had been no agreement by the interested parties at the agency level.[5/] *See* 29 C.F.R. §5.5(a)(1)(v)(B). The Section Chief also advised the contracting officer that the wage determination originally included in the Project contract had been superseded prior to the bid opening date, and that the later modification (Wage Determination KS930008 (Mod. No. 2), dated May 7, 1993) should be applied to the Project. *Id.* at p. 1.

With respect to the merits of the conformance request, the Section Chief rejected the relevance of Law Company's wage information on workers erecting metal buildings in Texas and Sedgwick County, Kansas. That data, stated the Section Chief, did "not provide a basis for a conclusion that a metal building assembler classification had been found to be prevailing on building construction in Leavenworth County, Kansas." *Id.* at p. 2.

The Section Chief also addressed Law Company's application in light of the criteria required for approving conformance requests under the Davis-Bacon regulations, 29 C.F.R. §5.5(a)(1)(v)(A).[6/] The Section Chief noted that the employee classifications contained in the applicable wage determination which "may perform the metal building assembly duties in question are based on union negotiated wage rates." *Id.* Citing the Wage Appeals Board's[7/] decision in *Fry Brothers Corp.*, WAB Case No. 76-6, June 14, 1977, the Section Chief stated that the Wage and Hour Division "must look to the classification practices utilized in the union sector for building construction projects to determine whether the classification in the wage determination performs the work in question." *Id.*

[5/] Law Company's September 14, 1994 SF-1444, although signed by an employee representative, did not note whether there was employee agreement to the proposed classification and rates. The form also did not reflect whether the "interested parties" agreed to the proposal or whether the contracting officer "recommends approval by the Wage and Hour Division." AR Tab F, Flap B. As noted above, however, the contracting officer did recommend approval of the requested classifications and rates in his transmittal letter of October 11, 1994.

[6/] The regulations provide that an additional job classification can be added through the conformance process only when these three criteria are met:

> (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)(v)(A).

[7/] The WAB issued final decisions pursuant to the DBA and its related Acts on behalf of the Secretary of Labor from 1964 until the creation of the Administrative Review Board in 1996.

Applying *Fry Brothers* to the conformance request before him, the Section Chief noted that the Wage and Hour Division had received evidence demonstrating that metal building assembly in Leavenworth County, Kansas had been performed by union sheet metal workers prior to award of the VA contract for the Project. No evidence had been received indicating that any union ironworkers or roofers had performed such work. *Id.* Accordingly, the Section Chief denied Law Company's conformance request because the proposed classifications failed the first requirement for approval under the regulations, *i.e.*, that "the work to be performed by a classification requested is not performed by a classification in the wage determination. . . ." *Id.* at pp. 2-3. The Section Chief advised the contracting officer that the minimum wage rate to be paid to workers assembling the metal roof structure was the Sheet Metal Worker wage rate in the wage determination. *Id.*

In sum, the August 2, 1996 letter from the Wage and Hour Division's Section Chief (a) distinguished and rejected as irrelevant Law Company's evidence concerning wage rates paid on metal building construction in other locations in Texas and Kansas; (b) directed that Wage Determination KS930008 (Mod. No. 2) be applied to the Project; and (c) denied the conformance request, and instead directed that the workers engaged in assembling the metal room structure on the hospital be paid no less than the wage determination rate for Sheet Metal Workers from the first day on which such work was performed in the classification, *i.e.*, retroactive to commencement of the disputed work. The Section Chief also informed the VA's contracting officer that his determination was subject to further review if any interested party desired to present additional information.

On November 17, 1997 – more than 15 months later – Law Company submitted a request to the Wage and Hour Division seeking reconsideration of the Section Chief's August 2, 1996 ruling. AR Tab B. The request briefly noted the prior history of the conformance request and the supporting documentation originally submitted by Law Company. Further noted were the VA contracting officer's recommendation for approval of the conformed classifications and his caveat to the Wage and Hour Division that he would "accept" the proposed Metal Building Assembler rates unless notified to the contrary within 30 calendar days. Law Company argued that the Wage and Hour Division was required either to rule on the conformance request or advise of the need for additional time to reach a decision within 30 days of the original submission, pursuant to the regulations governing DBA conformance actions. In addition, Law Company asserted that in light of the lengthy time period in which the conformance request had been pending before the Wage and Hour Division, it was reasonable for the contracting officer, Law Company and its subcontractors to conclude that they could pay workers based on the proposed Metal Building Assembler wage rates. Law Company presented neither additional information in support of the conformed classifications nor rebuttal to the Wage and Hour Division's evidence concerning employment of union sheet metal workers to perform the disputed work in Leavenworth County, Kansas during the period prior to commencement of construction of the Project.

On February 19, 1998, the Wage and Hour Division's National Office Program Administrator (Administrator) issued a final ruling on Law Company's request for

reconsideration of the Section Chief's August 2, 1996 initial determination. AR Tab A. In large part, the Administrator's 1998 determination reiterated the reasoning contained in the Section Chief's 1996 ruling. The Administrator rejected the contention that the VA's contracting officer had the authority to accept the proposed conformed classifications and rates in the absence of contrary advise from the Wage and Hour Division within 30 days. Citing the Wage Appeals Board's decisions in *Swanson's Glass*, WAB Case No. 89-20, Apr. 29, 1991 and *Mike J. Thiel*, WAB Case No. 92-24, July 22, 1994, the Administrator declared that the Wage and Hour Division's rulings on conformance requests were "authoritative whether or not issued within 30 days." *Id.* at pp. 2-3. On the merits of the conformance request, the Administrator reiterated that work to be performed by the requested classifications could be performed by a classification already found within the wage determination, and that approval of the Metal Building Assembler classifications and wage rates therefore would be "clearly inconsistent" with the regulatory criteria for approval of conformed classifications. *Id.* at 2. Finally, Law Company was notified of its right pursuant to 29 C.F.R. §1.9 and Part 7 to seek review before this Board. On March 19, 1998, the Petition for Review in this case was filed.

DISCUSSION

A. Overview of the Davis-Bacon wage determination and conformance processes

The Davis-Bacon Act requires that all federal[8/] contracts:

> for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there . . . .

40 U.S.C. §276a. The Secretary of Labor's designee, the Administrator, Wage and Hour Division, is charged with the compilation of schedules of wages and fringe benefits which

---

[8/] The prevailing wage requirements of the DBA also apply to many federally-assisted construction projects. *See* 29 C.F.R. §5.1 (1999) for a compilation of other statutes incorporating the Act's provisions.

prevail for various classifications of laborers and mechanics in localities where covered construction projects are performed. Regulations establishing the procedures for predetermining wages and fringe benefits are found at 29 C.F.R. Part 1. The wages established under these procedures are published in wage determinations which are incorporated into covered bid packages and contracts for construction by a contracting agency's contracting officer. *See* 29 C.F.R. §5.5(a).

If a bidder believes that the classifications or wage rates listed in a wage determination are incorrect, it is incumbent upon the bidder to challenge the substantive correctness of the wage determination prior to the award of the contract, in order "to ensure that competing contractors know in advance of bidding what rates must be paid so that they may bid on an equal basis." *In re Kapetan, Inc.*, WAB Case No. 87-33, Sep. 2, 1988, slip op. at 8 and the cases cited therein. Procedures for requesting reconsideration of a wage determination are found at 29 C.F.R. §1.8. The advance determination of Davis-Bacon prevailing wage rates, and the uniform distribution of these wage rates to all companies bidding on a federal construction project, is an important consideration in promoting fairness in the procurement system:

> [A]ll bidders for federal construction projects are provided with the same information concerning the minimum wage rates that must be paid on a federal construction procurement. Just as the Davis-Bacon prevailing wage requirements promote "the principle that all prospective federal construction contractors be on a 'level playing field' in the bidding process," *In the Matter of AC and S, Inc.*, WAB Case No. 93-16, March 31, 1994, the process of including the applicable wage determination in the construction project bid package and contract insures that all bidders are developing their bid proposals with the same expectations regarding the prevailing wage and fringe benefit rates that will be paid on the project.

Pizzagalli Construction Co., ARB Case No. 98-090, May 28, 1999, slip op. at 5.

There is, however, a process which allows for the addition of classifications and wage rates after award of a contract where it is discovered that a classification necessary to performance of the contract has been omitted from an applicable wage determination. This procedure is known as the conformance process, by which such missing classifications may be "conformed" to the wage determination. The regulations establishing the Davis-Bacon conformance procedures are found at 29 C.F.R. §5.5(a)(1)(v). As noted above, a proposed job classification and wage rate can be added through the conformance process only if it meets each element of the regulation's three-part test:

> (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.

The Davis-Bacon regulations specify two separate, although similar, procedures for processing contractor conformance requests. The first – applicable to situations where the contractor, employees and contracting officer all agree on the proposed classifications and wages (29 C.F.R. §5.5(a)(1)(v)(B)) – is not relevant to the present dispute. The second procedure applies when, as in this case, the contracting officer, contractor and employees do not reach agreement on the proposed conformed rate:

> In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), 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. The Administrator or an authorized representative, will issue a determination with[in] 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

29 C.F.R. §5.5(a)(1)(v)(C).

B. The Merits of Law Company's Petition for Review

In its Petition for Review, Law Company has not challenged the merits of the Wage and Hour Division's conformance ruling of February 18, 1998, in which the Administrator denied Law Company's request for conformed classifications of Metal Building Assemblers. Instead, Law Company raises one issue, only: whether the Administrator's ruling reaffirming the Section Chief's initial determination should be allowed to stand, when the Section Chief's August 2, 1996 ruling was issued more than 30 days after the VA's contracting officer submitted the request for conformed Metal Building Assembler classifications and wage rates to the Wage and Hour Division. In this case, it is undisputed

that the Wage and Hour Division neither issued a ruling on Law Company's conformance request within the 30-day period specified in the regulations, nor advised the VA contracting officer that the Wage and Hour Division needed additional time in which to make a determination.[9/] Law Company argues that the Wage and Hour Division is bound by the 30-day time limitation of the regulation, and that the Wage and Hour Division's failure to adhere to the time limitation – either by approving or denying the conformance, or by notifying the contracting officer that additional time would be needed – divests the Administrator of jurisdiction to review the conformance request later. For the reasons discussed below, we conclude that the elapsing of the 30-day time limitation does not compel the Administrator or this Board to approve the requested Metal Building Assembler classifications.

In support of the final determination, the Administrator relied on two Wage Appeals Board cases – *Swanson's Glass,* WAB Case No. 89-20, Apr. 29, 1991, and *Mike J. Thiel*, WAB Case No. 92-24, July 22, 1994. In both cases, the Wage Appeals Board had affirmed the Administrator's conformance ruling despite the fact that the ruling was issued after the period of limitation had passed. Law Company seeks to distinguish the *Swanson's* and *Thiel* precedents in several respects from the instant labor standards dispute. As we discuss below, we do not find these distinctions persuasive.

1. "General Contractor" vs. "Subcontractor"

In its Petition for Review, Law Company notes that the contractors seeking conformed classifications in the *Swanson's* and *Thiel* cases were the direct employers of the affected workers. In this case, Law Company notes that it was the prime contractor on the Project, and the employees installing the prefabricated roof panels were employed by a separate company under subcontract to Law Company. Law Company appears to be arguing that because the affected workers were not on Law Company's payroll, the Division's out-of-time decision to deny the conformance works an unfairness on the prime contractor.

In response, the Administrator notes that under the Davis-Bacon Act, a prime contractor is ultimately liable for *all* DBA wage violations, regardless of whether they are committed by the prime contractor or a subcontractor. 40 U.S.C. §276a; 29 C.F.R. §5.5(a)(6); *see Northern Colorado Constructors, Ltd.*, WAB Case No. 86-31, Dec. 14, 1987, slip op. at 4.

We agree with the Administrator. The contracting agency's contractual relationship is with the prime contractor, which bears responsibility for subcontractor legal compliance

---

[9/] The Wage and Hour Division concedes that the 22-month period in which the conformance request was being considered far exceeded the 30-day time period of the regulation. Counsel for the Administrator states that "Wage and Hour cannot specify a reason for the delay which occurred in this case." Adm'r Stmt. at p. 8 n.6.

with the Davis-Bacon Act and regulations. We do not view the general contractor-subcontractor distinction as significant, and discern no unfairness to Law Company flowing from its status as the general contractor on the Project.

2. "Approval of the contracting officer"

Law Company also argues that the instant conformance case is distinguishable from *Thiel* and *Swanson* because in this case, the VA contracting officer allegedly "approved" the conformance action (*see* Pet'r Brf. at 13) and informed Law Company that the Metal Building Assembler classification and wage rate could be used if "DOL failed to act on the request in a timely manner." *See* Pet'r Brf. at 14. In contrast, the company observes, the opinions in *Thiel* and *Swanson* do not suggest "approval" of the conformance requests by the respective contracting officers.

This distinction too has no legal significance, because there is nothing in either the Act or the implementing regulations giving an agency contracting officer power to make final conformance determinations. *See Swanson's Glass*, slip op. at 4 ("the conformance regulations do not give the contracting officer final authority to approve requested classifications and wage rates, but instead provide . . . for approval by the Administrator").[10/]

Although we do not discount the important role of contracting officers in the procurement process, they are subordinate to the Secretary of Labor and the Wage and Hour Administrator in questions involving interpretation and enforcement of the Act. *See generally*, Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix. The preeminent role of the Administrator in conformance actions also is clear from the Davis-Bacon implementing regulations; for example, under *both* tracks for processing conformance requests (*i.e.*, situations where the contracting officer, contractor and employees *agree* with the proposed classifications and wage rates, and situations where these parties *disagree*), the Administrator retains the ultimate authority to determine whether to approve the addition of a conformed job classification, and the wage rate to be paid. *Compare* 29 C.F.R. §5.5(a)(1)(v)(B) and (C). Thus it is clear that the contracting officer's "approval" of the conformance request was only preliminary, and Law Company could not have expected to rely upon it. The fact that there was no comparable preliminary "approval" by the contracting officers in *Swanson* and *Thiel* has no legal significance.

3. "Waiver" of the 30-day time limitation

[10/] This principle is consistent with a long line of other decisions, not necessarily concerning conformance questions, which the WAB summarized in *Swanson's Glass* as holding that "Board precedent established that erroneous contracting agency advice does not bar the Department of Labor from requiring payment of the appropriate wage rate." *Swanson's Glass*, *supra* at 4; citations omitted.

Law Company's central challenge to the Wage and Hour Division's tardy conformance action is its claim that the passing of the 30-day time limitation in the conformance regulations divests the Administrator of authority to act on a conformance request. This theory was considered and rejected repeatedly by our predecessor, the Wage Appeals Board, which long held that the 30-day time limitation contained in the conformance procedure regulation is not jurisdictional and that the Wage and Hour Division's failure to comply with the limitation does not deprive the Administrator of authority and responsibility for issuing final conformance determinations in accordance with the substantive requirements of the regulation:

> [T]he 30-day provision is not jurisdictional, and does not bar the Wage and Hour Division from taking action outside the 30-day time period. Indeed, the regulations expressly reference the possibility that additional time may be needed to complete action on the classification and wage rate request. Furthermore, the regulations do not specify that the failure of the Administrator to act within 30 days is effectively the Administrator's approval of or acquiescence in the proposed classification or wage rate. In sum, the 30-day time period referenced . . . does not provide a basis for Petitioner to presume that in the absence of a response from the Administrator, the request for additional classifications had been approved.

More Drywall, WAB Case No. 90-20, Apr. 29, 1991, slip op. at 5 *citing Swanson's Glass, supra,* at 5.

Law Company characterizes the issue as a question of waiver, implying that the Administrator effectively is granting himself a waiver from the Davis-Bacon Act regulations when a conformance determination is issued out-of-time. In support of this proposition, Law Company cites the Supreme Court's ruling in *American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532 (1970), and an unreported decision of a federal district court in *Woerner v. Small Business Administration*, 1990 WL 109018 (D.D.C. 1990). We disagree that either case is controlling in the present case.

In *American Farm Lines* the Court was presented with the issue whether the Interstate Commerce Commission (ICC) could waive agency application procedures established under its regulations. In discussing the ICC regulations at issue, the Court noted that

> [t]he rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion . . . nor is this a case in which an agency required by rule to exercise independent discretion has failed to

> do so. . . . Thus there is no reason to exempt this case from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable *except upon a showing of substantial prejudice to the complaining party*."

397 U.S. 538-539 (citations omitted; emphasis added). In Law Company's view, it follows that an agency cannot "waive" its procedural regulations in an instance where the result would be prejudicial to the party. The *Woerner* case, involving the failure of the Small Business Administration to respond timely to a filing submitted by the National Aeronautics and Space Administration, generally supports this proposition. Law Company asserts that the Wage and Hour Division's delay in processing the conformance request resulted in substantial prejudice to the company, and that the Administrator therefore was bound to issue a determination within the 30-day time limitation of the Davis-Bacon regulations.

We disagree with Law Company's contention that the Wage and Hour Division was barred from issuing a decision on the conformance request once the 30-day time limitation of 29 C.F.R. §5.5(a)(1)(v) passed, for several reasons.

First, the Administrator is correct in suggesting that the situation presented by the 30-day limitation is more properly viewed in light of the Supreme Court's decision in *Brock v. Pierce County*, 476 U.S. 252 (1986), rather than *American Farm Lines*. In *Pierce County,* the Court declined to hold void a Department of Labor investigation of questionable grant costs funded under the Comprehensive Employment and Training Act (CETA). A provision of CETA required that – after becoming aware of possible misuse of grant funds – the Secretary of Labor "shall" determine "the truth of the allegation or belief involved not later than 120 days after receiving the complaint." 29 U.S.C. §816(b) (1976 ed. Supp. V) (repealed). In the *Pierce County* case, the Department of Labor failed to conclude the investigation within the 120-day limitation period specified in the statute. In a unanimous decision, the Supreme Court ruled that the Department of Labor's investigation was not void, despite having been concluded after the 120-day deadline had passed:

> [The Court has] frequently articulated the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." . . . We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available

> to meet a . . . deadline, courts should not assume that Congress intended the agency to lose its power to act.

476 U.S. at 260; citations and footnote omitted. The Court went on to hold that CETA's 120-day provision was not jurisdictional and, further, that the Department's own regulations implementing the time limit – but which did "not specify any consequences of a failure to meet that deadline" – were not jurisdictional and, like CETA itself, did not prevent Department of Labor action outside the 120-day period. 476 U.S. at 265.

The Board regularly has distinguished between time limitations in statutes or regulations that are either mandatory or directory. For example, we recently rejected an administrative law judge's determination in a case brought under the Immigration Nursing Relief Act of 1989, 8 U.S.C. §§1101 *et seq.* (1994), in which the ALJ denied the Wage and Hour Administrator an opportunity to conduct discovery because this further investigation into the employer's records would have occurred beyond the 180-day time limitation prescribed by the regulation at 20 C.F.R. §655.405(c). In reaching this result, we observed that:

> The 180-day limitation for conducting investigations at issue in the instant case carries none of the indicia that would divest the Administrator of the authority to investigate after expiration of the limitation. While their language may be mandatory, the statutory and regulatory provisions imposing the investigatory time limitation nowhere specify the consequences of a failure to meet the limitation. Ordinarily, if there is congressional or administrative intent to foreclose action in the event that a time limitation is not met, the statute or regulations specify consequences that flow from the failure to meet the limitation. *Brock v. Pierce County*, 476 U.S. 253, 259 (1986) (parallel limitations without specified consequences in Comprehensive Employment and Training Act and implementing regulations were "intended to spur the Secretary to action, not to limit the scope of his authority"). Nothing in the legislative or regulatory history of the matters at issue here suggests an intent to bar agency action beyond the limitations period. Conducting an investigation and issuing a determination may pose unanticipated difficulties, and the ability of the Administrator to meet the limitation may be subject to factors beyond his control. Absent any statement of contrary intent, such a limitation provides a projected timetable for agency action on a given complaint, rather than curtailing the agency's authority to resolve complaints if the time limitation is not met. Mandatory

> language that an agency "shall" act within a limitations period, standing alone, "does not divest [the agency] of jurisdiction to act after that time." Id. at 266.

Administrator, Wage and Hour Division v. Nurses PRN of Denver, Inc. and Nurses PRN of Suncoast, Inc., ARB Case No. 97-131, ALJ Case No. 94-ARN-1, Second Ord. of Rem., June 30, 1999, 1999 WL 487057 at *6. *See also*, *Timmons v. Mattingly Testing Services*, Case No. 95-ERA-40, ARB Dec. and Ord. of Rem., June 21, 1996, 1996 WL 363348 at *2 (discussing directory nature of time limitations imposed on the Department of Labor for investigating and adjudicating whistleblower complaints under the Energy Reorganization Act). The DBA conformance regulations do not include any provision suggesting that action by the Administrator is foreclosed if the 30-day time limitation is not met. Based on *Pierce County* and its progeny, we conclude that the time limitations of 29 C.F.R. §5.5(a)(1)(v) are directory, and that the Administrator is not divested of jurisdiction to issue a conformance decision after the time period has elapsed.

Even if we were to review this case under the analysis of the *American Farm Lines* case, as urged by Law Company, we would reach the same result because we do not view the 30-day conformance provision as conferring any, let alone "important," procedural benefits upon interested parties requesting conformed classifications. Rather, the 30-day rule is intended to facilitate the orderly transaction of business of the Wage and Hour Division, and it is appropriate to relax or modify the provision in the interest of justice. The goal of the Davis-Bacon Act is to insure that federal construction dollars do not undermine locally prevailing wage rates; the intended beneficiaries of the Act are the laborers and mechanics working on federal and federally-assisted construction contracts. *U.S. v. Binghamton Construction Co.*, 347 U.S. 171 (1954). If Law Company's Petition for Review were to be granted, the employees working on the Project would be denied a portion of their lawful wages – a result that is contrary to the statute itself. Moreover, Law Company would reap a windfall when compared to the other contractors who submitted bids on the VA hospital project, who presumably based their bids on the wage rates in the published wage determination.

"Extent of delay" – In comparing the instant matter to *Swanson's Glass* and *Thiel*, Law Company notes that in these two earlier cases the Wage and Hour Division's action on the conformance request were only three or four months out of time, rather than the 22 months at issue here. This argument apparently relates to the Supreme Court's statement in *American Farm Lines* that agencies have broad discretion to relax procedural regulations, and that this discretion will not be reviewed by the courts "except upon a showing of substantial prejudice to the complaining party." 397 U.S. 538-539. Law Company asserts that it has been substantially prejudiced by the delay in this instance.

We do not condone the fact that nearly 22 months elapsed in this conformance dispute without initial action on the Wage and Hour Division's part. However, substantial delays in the conformance process have been affirmed in the past. For instance, a delay of nearly 19 months was found not to be fatal to the Wage and Hour Division's conformance ruling in *Iron Workers II*, WAB Case No. 90-26, Mar. 20, 1992. We share the sentiments expressed in *Iron Workers II* when, affirming the Administrator, the Wage Appeals Board noted that "[b]y so doing, the Board does not express its approval of the routine issuance of conformance rulings beyond the 30-day time period but instead simply recognizes that the Department's own regulations do not preclude the Wage and Hour Division from acting outside that 30-day period." *Id.* at p. 11.

We are not persuaded that Law Company has been prejudiced by the Wage and Hour Division's handling of the conformance request. We note first that Law Company submitted its bid on the VA hospital project with full knowledge that the Davis-Bacon wage determination incorporated into the bid specifications did not include any "Metal Building Assembler" classifications. Nothing in the record indicates that Law Company initiated any action prior to the bid to add the allegedly "omitted" Metal Building Assembler classifications to the wage determination. Second, Law Company did not even submit its conformance request to the VA until more than a year after construction had begun at the hospital. Third, after submitting the SF-1444, Law Company did not take any action when it failed to receive a ruling on its request. Petitioner could have contacted the contracting officer to follow up on the conformance application, or could itself have contacted the Wage and Hour Division directly to check on the status of the request. Finally, Law Company itself must be faulted for contributing to some of the delay in this case, given that the contractor did not seek reconsideration of the Wage and Hour Division's initial ruling for more than 15 months after receiving the Section Chief's adverse ruling.

CONCLUSION

For the foregoing reasons, we find that the Wage and Hour Division's failure to act on Law Company's conformance request within the 30-day time limitation specified in the Davis-Bacon conformance regulations does not bar the Wage and Hour Division from issuing a decision outside the time period. The Petition for Review therefore is denied and the Administrator's ruling letter of February 19, 1998 is affirmed.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member