



In the Matter of:

PIZZAGALLI CONSTRUCTION CO.

ARB Case No. 98-090

**With respect to application of Wage
determination No. SC940002 to Construction
Contract No. N62467-93-C-1096, Naval
Weapons Station, South Annex, Charleston, SC
Decision DC970003**

DATE: May 28, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Gary B. Warner, *Pizzagalli Construction Co., South Burlington, Vermont*

For the Respondent:

Steven J. Mandel, Esq., Douglas J. Davidson, Esq., Lois R. Zuckerman, Esq.
U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

This case is before the Board on the petition of Pizzagalli Construction Company (Pizzagalli) seeking review of the April 3, 1997 final ruling issued by the designee of the Acting Administrator, Wage and Hour Division, (the Acting Administrator) pursuant to the Davis-Bacon Act, 40 U.S.C. §276a *et seq.* (1994) (DBA). *See* 29 C.F.R. Parts 1, 5 and 7 (1998). Pizzagalli challenges the Acting Administrator's denial of its request to add a conformed Reinforcing Ironworker classification to Wage Determination (WD) No. SC940002-2, issued February 11, 1994. This wage determination was applicable to Pizzagalli's contract with the Department of the Navy for construction of an Engineering Facility at the Naval Weapons Station, South Annex, Charleston, Charleston County, South Carolina. Pizzagalli specifically argues that the Acting Administrator cannot properly base denial of the conformance request on the Ironworker classification included in the 1994 wage determination, because the job classifications and wage rates in the wage determination are based on a 1980 Davis-Bacon wage survey. As relief, Pizzagalli requests that the Board direct the Wage and Hour Division to conduct a full area practice survey to determine whether area practice currently supports the use of the Reinforcing Ironworker classification for the duties at issue.

For the reasons set forth below, we deny the petition for review, and affirm the Acting Administrator's April 3, 1997 ruling.

BACKGROUND

On September 16, 1994, Pizzagalli was awarded a contract for construction of a naval engineering facility in Charleston, South Carolina, Navy Contract No. N62467-93-C-1096. Administrative Record (AR), Tab G. Work under the contract commenced October 1, 1994. *Id.* Davis-Bacon Wage Determination No. SC940002-2 (applicable to Berkeley, Charleston and Dorchester counties, S.C.) was included in the contract specifications for the construction project. The wage determination included a job classification of "Ironworker" at an hourly wage of \$10.00, with an hourly fringe benefit rate of \$1.64. Significant to this case, "Ironworker" was the sole ironworker classification in the wage determination, with no differentiation between structural and reinforcing ironwork. AR, Tab H.

On November 13, 1995 (*i.e.*, more than a year after the company began work on the engineering facility project), Pizzagalli initiated a request to add a "Reinforcing Ironworker" classification to the wage determination through a conformance action. *See* 29 C.F.R. §5.5(a)(1)(ii)(A). The company proposed an hourly wage of \$6.47 for the additional job classification, with no fringe benefits.^{1/} AR, Tab G.

Pizzagalli's conformance request was forwarded to the Wage and Hour Division by the Navy Labor Advisor on December 8, 1995; however, the Navy Labor Advisor disagreed with the classification proposed by Pizzagalli. *Id.* In response to an inquiry by the Wage and Hour Division, the Labor Advisor indicated that the employees and the contracting officer believed that a \$10.00 per hour wage rate, plus \$1.65/hr. in fringe benefits, was the appropriate rate for the Reinforcing Ironworker classification proposed by Pizzagalli. AR, Tab F. Thus, the wage rate recommended by the contracting officer and employees for the Reinforcing Ironworker classification was identical to the Ironworker classification wage rate already found in the wage determination applicable to the project. AR, Tab H. In support of the Navy's position on this issue, the Navy Labor Advisor explained that the tying of reinforcing steel on the Engineering Facility project was a full-time job requiring the use of side cutters and pliers. AR, Tab F.

^{1/} The duties proposed by Pizzagalli for the requested classification are as follows:

Positions and secures steel bars in concrete forms to reinforce concrete: Determines number, sizes, shapes, locations of reinforcing rods from oral instruction. Selects and places rods in forms, spacing and fastening them together, using wire and pliers. Cuts bars to required lengths using acetylene torch. May reinforce concrete with wire mesh. On most projects that do not have an extensive amount of reinforced concrete on them a carpenter usually sets and ties reinforcing bars and wire mesh.

AR, Tab G.

On March 4, 1996, the Wage and Hour Division notified the Navy Labor Advisor that the proposed Reinforcing Ironworker classification had been reviewed under the criteria applicable to conformed classifications, found at 29 C.F.R. §5.5(a)(1)(v)(A), and that the proposed classification did not meet the requirements for approval. AR, Tab D. Specifically, the Division's March 4 letter explained that the duties proposed for the Reinforcing Ironworker could be performed by the Ironworker classification already included in the wage determination; therefore, the proposed classification did not meet the first criterion for approval of a conformance request, *i.e.*, that "[t]he work to be performed by the classification [to be added] is not performed by a classification in the wage determination." 29 C.F.R. §5.5(a)(1)(v)(A)(1); AR, Tab D.

Pizzagalli sought reconsideration of the March 4 ruling, urging that it was local area practice for "Reinforcing Ironworkers" to perform the work identified in the conformance request. AR, Tab C. The company asserted that the Ironworker classification in the wage determination covered the erection of structural steel but not the tying of reinforcing steel, proffering copies of position descriptions for Ironworker and Reinforcing Ironworker from the Department of Labor's Dictionary of Occupational Titles (DOT). *Id.*

With regard to area practice, Pizzagalli's position was disputed by the Navy Labor Advisor, who transmitted Pizzagalli's submission to the Wage and Hour Division for review on August 1, 1996. In the Labor Advisor's view, the counties covered by the wage determination had "historically . . . honored the 'Iron Worker' classification" for all ironwork (both structural and reinforcing), although "the contractor population" had objected. *Id.* The Labor Advisor also stated that it was area practice to "group the various Reinforcing-Metal type workers into the job classification of 'Iron Worker.[']" *Id.*

On October 18, 1996, the Wage and Hour Division's representative at the regional office provided a summary of the wage survey upon which the 1994 wage determination was based. AR, Tab B. The wage survey was conducted in 1980 and covered the category of structural and ornamental ironworkers as well as the reinforcing ironworkers category. AR, Tab I. The wage determinations issued in the years following the survey contain only the single "Ironworker" classification, with a wage rate based on the merged data from ornamental, structural and reinforcing ironworkers. AR, Tab H.

The Acting Administrator issued a final determination on April 3, 1997, reiterating that the work to be performed by Pizzagalli's proposed Reinforcing Ironworker classification could be performed by the Ironworker classification already listed in the wage determination, and thus did not meet the first threshold criterion for approving a conformance request under Section 5.5(a)(1)(v)(A). AR, Tab A. The April 3 determination also addressed Pizzagalli's reliance on the Dictionary of Occupational Titles, explaining that for purposes of the Davis-Bacon Act the general information provided by the DOT is superseded by specific information regarding area practice. *Id.* The final determination further explained that the Ironworker classification included within the wage determination was based on wage survey data for ornamental, structural *and reinforcing ironworkers* and thus encompassed the duties performed by the

classification proposed by Pizzagalli. *Id.*; see AR, Tabs H, I. The April 3 ruling concluded by noting that any question whether the Ironworker classification in the wage determination included reinforcing ironworkers' duties should have been raised by Pizzagalli prior to award of the contract. AR, Tab A. This appeal followed.^{2/}

DISCUSSION

In its appeal to this Board, Pizzagalli raises several arguments challenging the Acting Administrator's determination. Citing the Wage Appeals Board's decision in *In re Aleutian Constructors*, WAB Case No. 90-11, April 1, 1991, Pizzagalli contends that the Administrator's April 3, 1997 final determination is deficient because it fails to provide an adequate factual and legal basis for the ruling. Petitioner's Resp. to the Acting Administrator's Pet. Opposing Review at 10-11. Pizzagalli also asserts that the April 3, 1997 determination denying the conformance request is improper because the prevailing area practice in the three South Carolina counties calls for recognition of a "reinforcing ironworker" classification for the installation of reinforcing steel. *Id.* at 3. In a related argument, Pizzagalli contests the Wage and Hour Division's reliance on job classifications and wage rates from a 1980 Davis-Bacon wage survey, asserting that it was the Administrator's reliance on outdated data that compelled Pizzagalli to resort to the conformance process. *Id.* at 4-10.

A. *Overview of the conformance process*

As a threshold matter, we review briefly the context in which conformance actions arise. The Davis-Bacon Act requires generally that

The advertised specifications for every contract in excess of \$2,000 to which the United States ... is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States ... 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 ... in the city, town, village or other civil subdivision of the State in which the work is to be performed.

^{2/} Pizzagalli initially submitted its appeal of the April 3, 1997 decision letter to the Administrator rather than to the Board. As a result, the appeal was not actually filed with the Board until January 16, 1998. See Board's Order of Mar. 11, 1998. Under the regulations governing appeal of a conformance decision, an aggrieved party may file a petition for review "within a reasonable time." 29 C.F.R. §7.9(a) (1998). We note that the Administrator does not object to this appeal on timeliness grounds. Administrator's Statement in Opp. to Pet. for Rev. at 2 n.1. Under the specific circumstances of this case, we conclude that the appeal meets the "reasonable time" requirement of the regulations.

40 U.S.C. §276a. Pursuant to the statute, the Wage and Hour Division issues wage determinations reflecting the locally prevailing wage rates for the various job classifications used on construction projects. *See generally* 29 C.F.R. Part 1. In turn, the contracting agencies incorporate these wage determinations into bid packages and construction contracts. 29 C.F.R. §5.5; *see also* 48 C.F.R. §36.303. Thus, all 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.

In compiling wage determinations under the Davis-Bacon Act, the Wage and Hour Division obtains data from a variety of sources. 29 C.F.R. §1.3. Bidders who believe that the resulting wage determination is erroneous may submit a written request for reconsideration of the wage determination. 29 C.F.R. §1.8. However, it is well-established that challenges to a wage determination must be made prior to the award of a construction contract “to ensure that competing contractors know in advance of bidding what rates must be paid so that they may bid on an equal basis.” *See In re Kapetan Inc.*, WAB Case No. 87-33, Sept. 2, 1988, and cases cited therein.

Although challenges to a wage determination must be made prior to contract award in order to be timely, the regulations recognize that occasionally a class of laborers or mechanics are required on a construction project that are not found in the wage determination. The Wage and Hour Division is authorized to add an additional job classification and wage rate after the award of the construction contract through a process known as a *conformance*. 29 C.F.R. §5.5(a)(1)(v). The conformance procedure is designed to be a simple, expedited process for adding wage rates needed for job classifications not found in the wage determination. In order to protect the integrity of the competitive bidding system, the requirements for the addition of a conformed classification and wage rate are narrowly limited, and a conformed classification will be recognized only if it meets the following three-part test:

- (1) The work to be performed by the classification is not performed by a classification in the wage determination; 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.

Id. Significantly, the conformance process is not to be used as a back-door vehicle for making an untimely challenge to a wage determination. *See, e.g., In re Clark Mechanical Contractors*, WAB Case No. 95-03, Sept. 29, 1995; *In re Rite Landscape Construction Co., Inc.*, WAB 83-3, October 18, 1983.

B. The merits of Pizzagalli's petition

1. Whether the Acting Administrator's April 3, 1997 final determination failed to articulate a sufficient factual or legal basis.

We disagree with Pizzagalli's contention that the Acting Administrator's April 3, 1997 determination fails to provide an adequate explanation for the ruling, under the standard enunciated in *In re Aleutian Constructors*, WAB Case No. 90-11, Apr. 1, 1991. The April 3 determination clearly delineates the Acting Administrator's reasoning, thus providing a proper basis on which the petitioner could frame an appeal and on which this Board can dispose of that appeal. AR, Tab A; *cf. Aleutian Constructors*, slip op. at 3-5 (remanding case to the Wage and Hour Division because legal and factual bases for the Administrator's determination were not discernible).

2. The "prevailing area practice" issue and the Wage and Hour Division's use of 1980 wage survey data when issuing the wage determination

In its Petition, Pizzagalli challenges the Acting Administrator's reliance on the 1980 wage survey, asserting that the conclusions drawn by the Acting Administrator concerning the job duties of the Ironworker job classification do not reflect prevailing area practice in the locality. Pizzagalli argues that the information from the wage survey is out of date, and that the Acting Administrator therefore was without authority to rely upon it.

We agree with Pizzagalli that the survey data underlying the wage determination is old. If Pizzagalli had submitted a timely challenge to the 1994 wage determination (*i.e.*, a challenge submitted prior to bidding on the Navy contract), Pizzagalli's argument that the wage survey data does not reflect contemporary prevailing practice might be persuasive. However, this matter is before us as a challenge to a *conformance request*, and not as an *appeal of a wage determination*; as such, Pizzagalli's challenge to the underpinnings of the wage determination as out-of-step with current prevailing practice in South Carolina is misplaced.

It is well settled that the DBA conformance process "does not require the Administrator to conduct a *de novo* proceeding to retroactively determine the prevailing wage for a particular job." *In re Sumlin & Sons*, WAB Case No. 95-08, Nov. 30, 1995, slip op. at 4; *see* 29 C.F.R. §5.5(a)(1)(v) (1998).^{3/} It also is well established that the appropriate time to raise objections to

^{3/} The pertinent regulation, Section 5.5(a)(1)(v), is a former regulation that was reinstated in (continued...)

a wage determination, including objections concerning the wage survey upon which it is based, is prior to contract award. *See, e.g., In re Warren Oliver Co.*, WAB Case No. 84-08, Nov. 20, 1984, slip op. at 6 and cases there cited. Contrary to Pizzagalli's contention, a contractor is not permitted to rely on the conformance process to remedy perceived deficiencies in the applicable wage determination that allegedly result from outdated wage survey data. *See In re Clark Mechanical Contractors*, WAB Case No. 95-03, Sept. 29, 1995, slip op. at 3-5. There is no indication that Pizzagalli, or the other contractors who submitted bids on this contract, was not fully aware at the time that bids were solicited that the applicable wage determination contained only one classification in the ironworker category. *See AR, Tabs G, H.* Consequently, there is no justification for Pizzagalli's failure to raise any objections to the substance of, or the basis for, the wage determination at that time. *Cf. In re Utility Services*, WAB Case No. 90-16, July 31, 1991, slip op. at 5-6 (holding that contractor did not have adequate notice prior to contract award that the wage determination raised a question requiring clarification, and declining to reject challenge as untimely). The Acting Administrator therefore properly characterized Pizzagalli's challenge to the wage survey underlying the wage determination as untimely.

In reviewing the April 3, 1997 ruling, it must be borne in mind that, in the conformance process, "the Administrator is required only to be fair and reasonable, not precise." *Clark Mechanical Contractors*, slip op. at 5. As delineated above, the DBA conformance regulations provide a three prong test under which the Wage and Hour Division must examine the proposed classification. 29 C.F.R. §5.5(a)(1)(v)(A)(1)-(3). In regard to the first prong of the conformance test – whether the work to be performed by the proposed classification is performed by a classification already in the applicable wage determination – *prevailing* practice is not controlling. All that is necessary is a demonstration that *some* classification within the wage determination performs the tasks that would be assigned to the conformed job classification that has been requested. *See Sumlin & Sons*, slip op. at 4. Therefore, a finding that the work to be performed by the proposed classification is performed in the pertinent locality by a classification already included in the wage determination, *regardless of whether that practice prevails in the area*, will sustain the denial of a conformance request under Section 5.5(a)(1)(v)(A)(1). *Id.*

Contrary to Pizzagalli's contention, therefore, it was not necessary for the Administrator to conduct an area practice survey to determine area practice regarding the work proposed by Pizzagalli for the Reinforcing Ironworker classification. Not only does the generic classification of Ironworker included on the applicable wage determination clearly encompass the duties of the proposed Reinforcing Ironworker classification, but Pizzagalli also has not provided evidence to refute the Navy Labor Advisor's statement that the area practice was to "group the

^{3/}(...continued)

November 1993 to replace the conformance regulation found at Section 5.5(a)(1)(ii). 58 Fed. Reg. 58954 (Nov. 5, 1993). At that time, Section 5.5(a)(1)(ii), which contains language regarding conformance of "helpers" under the DBA, was suspended indefinitely based on appropriations legislation prohibiting the expenditure of DOL funds to administer "helper" regulations. *Id.*; *see* 59 Fed. Reg. 1029 (Jan. 7, 1994). A final rule continuing the suspension of Section 5.5(a)(1)(ii) was published on December 30, 1996. 61 Fed. Reg. 68641 (Dec. 30, 1996); *see* 63 Fed. Reg. 61284 (Nov. 9, 1998).

various Reinforcing-Metal type workers into the job classification of ‘Iron Worker,’” AR, Tab C. We also do not agree with Pizzagalli that precedent established by the Administrative Review Board or its predecessor, the Wage Appeals Board, dictates that area practice surveys be conducted as a prerequisite to denying a conformance request. The decisions cited by Pizzagalli stand for the proposition that the Administrator may exercise discretion to conduct an area practice survey in various circumstances.^{4/}

Similarly, this case is distinguishable from *In re Audio-Video Corp.*, ARB Case No. 95-047, July 17, 1997, which Pizzagalli cites in support of its request for a full area practice survey. In *Audio-Video Corp.*, the Board declined to affirm the Administrator’s denial of conformance requests for the classification of low voltage installer in six cases, which were consolidated before the Board. The Board’s focus in *Audio-Video Corp.* was whether the classifications in the wage determination were “generally complete.” Based on the evidence in the record, the Board was unconvinced that the “journeyman electrician” job classification in the wage determination performed low-voltage installation work, which the Board viewed as specialized. The Board therefore concluded that the wage determination lacked a *generic* classification of worker that performed the work of the proposed low-voltage installer, and directed the Administrator to reconsider the denial of the conformance request. *Audio-Video Corp.*, slip op. at 6. In contrast, the wage determination in the instant case clearly contains a job classification that covers the work to be performed by the proposed Reinforcing Ironworker classification. We therefore agree with the Administrator’s conclusion that the classification proposed by Pizzagalli fails to meet the first criterion for conformance under Section 5.5(a)(1)(v)(A)(1).

^{4/} In support of its argument that a proper area practice survey was not conducted, Pizzagalli relies on an excerpt from the Department of Labor’s manual regarding DBA enforcement which states that it “may be necessary” to examine local area practice in order to determine the proper classification of work performed under DBA contracts. Petitioner’s Resp. to the Acting Administrator’s Pet. Opposing Review at 3-4. Circumstances that have prompted the Administrator to conduct area practice surveys in connection with review of conformance requests include the following: in the course of a labor standards compliance investigation, *In re J.A. Languet Const. Co.*, WAB Case No. 94-18, Apr. 27, 1995; in determining whether the laborer classification in the wage determination performed work of proposed TV/Grout technician, sewer cleaner operator and helper classifications, *In re Inland Waters Pollution Control, Inc.*, WAB Case No. 94-12, Sept. 30, 1994; in determining whether wage determination’s carpenter classification performed work of proposed drywall mechanic, *In re More Drywall, Inc.*, WAB Case No. 90-20, Apr. 29, 1991. It is clear, however, that these inquiries are conducted at the discretion of the Acting Administrator, and Pizzagalli does not argue that the manual’s “may be necessary” provision *mandates* that an area practice survey be conducted in connection with review of a conformance request.

ORDER

The Acting Administrator's April 3, 1997 ruling denying conformance of the proposed Reinforcing Ironworker classification is affirmed, and the petition is **DENIED**.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member