

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

CASE NO.: 2012-CBV-00001

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*In the Matter of:*

IN THE MATTER OF APPLICABILITY OF WAGE RATES COLLECTIVELY BARGAINED BY BAE SYSTEMS, INC. AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW) LOCAL UNION 1260 (AFL-CIO) UNDER CONTRACT NOO604-08-C-0002 FOR NAVAL AND SATELLITE TELECOMMUNICATIONS SERVICES FOR THE DEPARTMENT OF THE NAVY AT NAVSUP FLEET LOGISTICS CENTER PEARL HARBOR, JOINT BASE PEARL HARBOR IN HI 96860-4549

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**DECISION AND ORDER**

The above-captioned matter arises under Section 4(c) of the Service Contract Act of 1965, as amended, 41 U.S.C. § 6701 *et seq.*, and its implementing regulations at 29 C.F.R Parts 4 and 6. The United States Department of the Navy (“Navy”) seeks to be relieved of the collectively bargained wages negotiated between BAE Systems, Inc. (“BAE”) and the International Brotherhood of Electrical Workers (“IBEW”) Local Union 1260 (AFL-CIO), contending that a substantial variance exists between the collectively negotiated wages and those wages which prevail for similar services in the locality.

**I. STATEMENT OF THE CASE**

On October 15, 2007, the Navy awarded contract N00604-08-C-0002 to BAE. EX D-1, Att. 1. The contract was for a base year and three one-year options. EX D-1, Att. 1 at 35; TR 77. Under the terms of the contract BAE was to supply telecommunications support for the Naval Computer and Telecommunications Area Master Station Pacific (“NCTAMS”),<sup>1</sup> as well as facilities, emergency power, and grounds maintenance. The final option period in the contract expired on September 30, 2011, but the contract has been extended for a period of six months as

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<sup>1</sup> NCTAMS provides critical Command, Control, Telecommunications, Computers and Intelligence (C4I), and Strategic Communications throughout the Pacific theatre and Indian Ocean for several federal agencies and departments including the Department of Defense, the National Security Agency, and the Homeland Security Department, among others.

permitted under Federal Acquisition Regulation (FAR) 52.217-8. EX D-1 at 2; PreHearing Conf. (PHC) at 5; TR 77-79. The Navy intends to release a Request for Proposal (RFP) for a new source selection for these services in early 2012, once the issue presented in this matter is resolved. PHC at 6; TR 79-80. As of September 9, 2010, the contract was covered by the U.S. Department of Labor Service Contract Act Wage Determination (“SCA WD”) No. WD 05-2153 Rev 14. EX D-1, Att. 4.

The IBEW and BAE entered into a Collective Bargaining Agreement (CBA) on October 1, 2010. EX D-1, Att. 2. The CBA includes seventeen wage classifications. *Id.* The CBA provided for a raise in wage rates for all seventeen classifications at issue here. On July 28, 2011, the Navy requested a substantial variance hearing regarding the increased wage rates. EX D-1.

The DOL Wage and Hour Division issued an Order of Reference on October 12, 2011, referring this matter to the Office of Administrative Law Judges for hearing on October 31, 2011. This matter was set for hearing on December 15, 2011. The Navy requested a continuance, and the hearing was rescheduled for January 19, 2012. A pre-hearing conference was conducted pursuant to regulation immediately preceding the hearing. The Navy’s witnesses were Jason Thomas, Dr. Eugene Bingue, Richard Shutters, Richard Cajimat, and Kim Krause. The IBEW’s witnesses included William Shawl, Brian Ahakuelo, and Keith Lyerson. The Navy’s exhibits EX D1-3, D-5-D-18 were admitted.<sup>2</sup> TR 5, 42, 47. The IBEW exhibits IBEWX 1-3 were admitted over the Navy’s objection.<sup>3</sup> TR 6, 219, 224, 233.

The hearing transcript was received on January 30, 2012. The parties were given until February 6, 2012 to submit post-hearing briefs.<sup>4</sup> (“N. Br.” and “IBEW Br.” respectively). Under the regulations, the decision must be issued within fifteen days after receipt of the transcript. 29 C.F.R. § 6.56.

## II. PARTIES’ POSITIONS

The Navy contends that the wage rates in the CBA are substantially at variance with the SCA WD and prevailing rates for similar work in the locality. N. Br. at 11-15. The Navy argues that the appropriate locality is the state of Hawaii. *Id.* at 12. The Navy maintains that the wage rates in the CBA between BAE and the IBEW are substantially higher than the wage rates prevailing in the locality for similar work which are reflected in the SCA WD, and further supported by data from Economic Research Institute (“ERI”) and Kenexa (“Salary.com”). *Id.* at 14-18; EX D-1, Att. 4; EX D-9; EX D-10. Relying on a comparison of position descriptions in

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<sup>2</sup> The Navy withdrew exhibit EX D-4. TR 50.

<sup>3</sup> The Navy objected to the IBEW exhibits as they were exchanged beyond the date set for exchange of exhibits in the Pre-Hearing order. After the Navy declined the undersigned’s offer of additional time to respond to the IBEW exhibits, the exhibits were admitted. TR 218-219, 224, 233.

<sup>4</sup> The Deputy Administrator of the Department of Labor’s Wage and Hour Division did not appear at the hearing or file a post-hearing brief. However, the Deputy Administrator filed a Pre-Hearing Statement on January 4, 2012, addressing the controlling caselaw.

the SCA Directory of Occupations, Salary.com and the BAE technical proposal, the Navy argues that other employees in the locality are performing similar services.<sup>5</sup> N. Br. at 12-13. According to the Navy, a substantial variance exists between the SCA WD wage rates and the wage rates in the CBA.<sup>6</sup> *Id.* at 18-21.

The IBEW argues that the Navy has failed to establish a substantial variance. IBEW Br. at 24-36. In support of its position, the IBEW contends that the locality for comparisons purposes is the city and county of Honolulu, rather than the state of Hawaii. IBEW Br. at 26-27. Therefore, IBEW contends that wage rates at the Navy's PMRF facility on Kauai are not proper comparables to the CBA wage rates, as Kauai is outside the proper geographic locality. *Id.* Anticipating that the Navy's post-hearing argument would be consistent with its position at hearing, the IBEW's also asserts that the Electronic Technician positions under the CBA are not similar to the Electronic Technician positions at PMRF, and discusses the differences in the education, training and duties of the technicians under the CBA and those working at PMRF. IBEW Br. at 27-31. Therefore, the IBEW maintains the PMRF positions are not sufficiently similar to the CBA positions to compare wage rates. *Id.* at 31.

With regard to the wage rate comparison, the Union notes that the Navy's witnesses testified they were comparing wage rates for Electronic Technician IIs in the CBA with wage rates at PMRF. The IBEW argues that should it be determined that the Electronic Technicians working at PMRF are performing work of a similar character to Electronic Technicians under the CBA; the evidence establishes that the prevailing wage for services similar to those provided by an Electronic Technician II under the CBA would be the wage rate set for a T-4 Electronic Technicians at PMRF, which is \$30.18 per hour. IBEW Br. at 32. The IBEW points out that wage rates set in the SCA WD are "minimum monetary compensation" rates. *Id.* at 32. The IBEW relies upon other collective bargaining agreements for similar services in Honolulu County as evidence of the wage rates in the locality for similar work. Specifically, under the collective bargaining agreement at Hickham Air Force Base in Honolulu County Electronic Technician IIs earn between \$30 and \$38 dollars per hour. *Id.* at 32. The IBEW contends that the duties of electricians under the contract with Hawaii Electric Company are comparable to the duties of Electronic Technician IIs under the CBA, and therefore wage rates under that

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<sup>5</sup> Positions in the BAE technical proposal correspond with the labor classifications in the CBA between BAE and the IBEW.

<sup>6</sup> The Navy's brief represents a change in theory as it disavows prior position statements and some of the evidence it submitted. N. Br. at 14-18. For instance, the Navy's Pre-hearing Statement argues that the wage rates in the CBA were substantially at variance with the wage rates in collective bargaining agreements between IBEW and other companies providing services to the Navy at its Pacific Missile Range Facility ("PMRF") on the island of Kauai. At hearing, the Navy's witnesses testified that the Electronic Technician "B" positions at PMRF were similar to the Electronic Technician II positions under the CBA and the witnesses compared the wage rates under the PMRF collective bargaining agreement and the challenged CBA. TR 38, 42, 104-106, 112, 134, 157-159; EX D-2; EX D-3. The Navy's brief now argues that in evaluating whether others in the locality are performing similar work as those under the CBA, the undersigned should look only at DOL position descriptions for the same labor classification and position descriptions used by Kenexa (Salary.com). N. Br. at 12-13. In addition, the Navy's brief argues that in evaluating the prevailing wage, the undersigned ought to ignore evidence of wage rates in collective bargaining agreements at the Navy's PMRF and should, instead, determine the prevailing wage based only upon the SCA WD and survey data from Salary.com and ERI. N. Br. 14-18.

agreement are properly compared to wage rates under the CBA. *Id.* at 32. Accordingly, the IBEW argues that the Navy failed to establish that there is a substantial variance between the prevailing wage rate and the CBA wage rate. *Id.* at 33-36.

### III. FINDINGS OF FACT

The parties stipulated to the following:

1. The Navy awarded contract N00604-08-C-0002 for electronic communications services to BAE, Systems (BAE) on or about 15 October 2007. The contract term was one year with three one-year options.
2. Following award of the contract to BAE and in anticipation of the expiration of the previous CBA, BAE and IBEW negotiated and entered into the current CBA with an effective date of 1 October 2010. By its terms, the CBA is set to expire on 30 September 2013.
3. By letter dated 28 July 2011 and in preparation for solicitation of a successor contract, the Navy requested a Substantial Variance hearing challenging the wage rates in the CBA in accordance with FAR Part 22 and 29 CFR 4.10.
4. The contract was due to expire on 30 September 2011 but was extended by the Contracting Officer until 31 March 2012 to accommodate this DOL variance proceeding.
5. Contract N00604-08-C-0002 is a service contract within the meaning of the Service Contract Act.
6. For purposes of this hearing, BAE-IBEW CBA rates will be compared with SCA WD 05-2153 (Rev.14).

N. Br. at 1-2; IBEW Br. at 2-3.

The Navy's contract specialist, Jason Thomas, reviewed the CBA wage rates in response to a price-adjustment submitted by BAE, and as a result of his review, the Navy requested this variance hearing contending that the CBA wage rates are substantially at variance with the prevailing wage rates for similar services in Honolulu, Hawaii.<sup>7</sup> TR 9-10; EX D-1 at 2. Contract N00604-08-C-002 between the Navy and BAE covers electronic communication services provided at three different locations on the island of Oahu.<sup>8</sup> TR 16. Approximately 50-70 IBEW members are covered by the BAE contract. TR 134, 213. The CBA between BAE and the IBEW includes seventeen job classifications.<sup>9</sup> EX D-1, Att. 2 at 83; TR 16. The Navy's case,

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<sup>7</sup> Under the contract between BAE and the Navy, the Navy can reject the price increase and any increase would have to be funded by BAE. TR 136.

<sup>8</sup> The three locations on Oahu are SATCOM, Lualualei, and TISCOM. TR 89-90.

<sup>9</sup> The following positions are within the bargaining unit for the CBA: Antenna Specialist/Lead; Facilities Supervisor; Lead Electronics Tech III(3-M.QC); Electronics Technician II; Antenna Mechanic; High

and its witnesses' testimony, was focused primarily upon the job classifications of Electronic Technician III, Electronic Technician II and MIDAS Operator. TR 24, 43; 51-52, 130, 134, 137.

In reviewing the CBA, Mr. Thomas first consulted with BAE and obtained information BAE had prepared in anticipation of negotiations with the IBEW, in other words, BAE's pre-negotiation position.<sup>10</sup> TR 12-14, 16-17; EX D-1; EX D-12. Mr. Thomas reviewed the base hourly rate, escalations, premiums and fringe benefits in the CBA and he compared these to the SCA WD. TR 11, 32. He prepared the following chart comparing the CBA wage rates with and without premiums to the wage rate in the SCA WD.<sup>11</sup> TR 11-12.

CBA Job Title	AWD Job Title Used	CBA Rates 10/1/2010	Lead/Shift Premium Included** *	WD 2005-2153 REV 14	% Difference w/out premiums	% Difference w/ premiums
Antenna Specialist/Lead	Not Provided by BAE	\$34.84	\$36.59		Compare Cannot Compare	Cannot Compare Cannot
Facilities Supervisor	Not Provided by BAE	\$37.82	N/A***		Compare Cannot Compare	Cannot Compare Cannot
Lead Electronics Tech III (3-M, QC)	Not Provided by BAE	\$38.80	\$40.55	\$30.56	26.96%	32.69%
Electronics Technician II	Electronics Technician Maint. II (BAE use III)	\$32.77	\$37.28	\$28.69	14.22%	29.95%
Antenna Mechanic	Telecommunications Mechanic I	\$31.73	N/A	\$27.52	15.30%	N/A
High Voltage Electrician	Electrician Maintenance	\$31.73	N/A	\$28.25	12.32%	N/A
Maintenance Electrician	Electrician Maintenance	\$31.73	N/A	\$28.25	12.32%	N/A
HVAC Technician	HVAC Mechanic	\$31.73	N/A	\$24.07	31.82%	N/A
Generator Maintenance	Machinery Maintenance Mech.	\$31.73	N/A	\$24.7	28.46%	N/A
Maintenance Mechanic	Machinery Maintenance Mechanic	\$31.73	N/A	\$24.7	28.46%	N/A
Supply Technician/Admin Asst.	Supply Technician	\$30.90	N/A	\$25.82	19.67%	N/A

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Voltage Electrician; Maintenance Electrician; HVAC Technician; Generator Maintenance; Maintenance Mechanic; Supply Technician/Admin. Asst; Supply Clerk; Electronic Operator/Shift (Midas); BMD/MIDAS Operator I; BMD/MIDAS Operator II; MIDAS Operator III; and Ground Maintenance/Custodian. EX D-1, Att. 2 at 83. The Facilities Supervisor position is an exempt position and was not considered in the Navy's analysis. TR 23.

<sup>10</sup> BAE's pre-negotiation planning had concluded that the wage rates it was paying union employees in Hawaii was 17.83% over the average wage determination. EX D-12; EX D-7.

<sup>11</sup> The SCA WD 05-2153 (Rev. 14) covers Hawaii statewide. EX D-1, Att. 4; TR 38, 42.

Supply Clerk	Stock Clerk	\$28.88	N/A	\$18.58	55.44%	N/A
Electronics Operator/Shift (Midas)	Computer Operator III (BAE used V)	\$28.59	\$30.88	\$22.8	25.39%	35.43%
BMD/MIDAS Operator I	Computer Operator III	\$28.59	N/A	\$22.8	25.39%	N/A
BMD/MIDAS Operator II	Computer Operator IV	\$30.68	N/A	\$24.81	23.66%	N/A
MIDAS Operator III	Computer Operator V	\$32.77	N/A	\$27.45	19.38%	N/A
Ground Maintenance/Custodian	Laborer/Grounds Maintenance	\$26.60	N/A	\$13.55	96.31%	N/A
	Health & Welfare	\$3.86	N/A	\$3.59	7.52%	N/A
Fringe Benefits:	Vacation	2, 3, or 4 weeks		2, 3, or 4 weeks		
	Paid Time Off	1 week		None		
	Holidays	11 paid		10 paid		
	401K	50% matching up to 6%		None		

Mr. Thomas then attempted to “compare the overall basket of labor categories to the same basket in the SCA using statistical analysis” and concluded that the CBA wage rates were approximately 28.17% higher than the SCA WD rates. TR 11-12, 19-20, 22-25, 34; EX D-1 at 2. His statistical analysis used the wage rates with premiums and shift differentials for labor classifications where employees were eligible for such premiums under the CBA. TR 35. Mr. Thomas explained that in calculating the lead/shift premium wage reflected in column 4 of the chart, he used a blended rate of eight percent because the evening shift differential is seven percent and the mid-shift differential is nine percent, plus he also included the lead differential of \$1.75 an hour. TR 25-26; EX D-1 at 2-3. He agreed that there is only one lead employee on each shift. TR 26. However, he candidly acknowledged he included the lead premium into the wage rate for lead/shift premium for comparison purposes because he was trying to show a “worst case scenario,” that is, the Navy paying the most and the differential being the greatest. TR 26, 98.

Mr. Thomas also examined the annual wage escalations under the CBA and determined the annual increases in the CBA were rising at a higher rate than projected by various data providers and higher in comparison to the escalation rate in other collective bargaining agreements. TR 64-65, 68; *see also* EX D-7; D-8. Mr. Thomas noted that the escalation rate for the CBA was 2.5% for the first two years and 3% for the final year. The statements of BAE’s Ms. Willoughby and Mr. Perniciaro reflect that in negotiating this CBA with IBEW, one of the company’s goals was to reduce what had been the 4-5% annual escalation rate, and the CBA terms reflect that the company successfully reduced the escalation rate to the 2.5 to 3% rate.<sup>12</sup> EX D-7; D-8.

<sup>12</sup> In prior collective bargaining agreements, the annual wage escalation had been four to five percent. EX D-7; D-8. I note that the annual escalation in the current CBA appears consistent with the annual wage increases BAE management personnel receive. EX D-8. BAE’s primary goals in negotiating the CBA at issue, was to minimize its pension plan liability and exposure to increased pension and health care costs. *Id.* BAE officials stated that the company met those goals in the current CBA. *Id.*

Approximately 40% of the IBEW employees under the CBA, work shifts and receive shift premiums. TR 23, 92, 169-172. The wage rates in the SCA WD 05-2153 (Rev.14) are minimum wage rates. TR 86. Mr. Thomas could not state with certainty whether the SCA WD rates he used for comparison included a base wage only or whether the SCA WD rate also included premium and shift differentials. TR 24, 94-95.

In addition to comparing the CBA wage rates to the SCA WD rates, Mr. Thomas compared the CBA wage rates to the wage rates in the collective bargaining agreement between ITT Systems and the IBEW in place at PMRF on the island of Kauai. TR 39, 43; EX D-2 at 165. He compared the Electronic Technician II and III and MIDAS Operator positions under the CBA. TR 4. Relying on discussions with former employees at PMRF, Mr. Thomas stated that the Electronic Technician positions under the CBA are equivalent to the Electronic Technician T-5 and T-4 labor classifications under the ITT collective bargaining agreement at PMRF. TR 43; EX D-2 at 165. Specifically, he equated the CBA Electronic Technician II position with the T-4 Electronic Technician “B” under the ITT agreement. *Id.* Mr. Thomas noted the base hourly wage rate for the T-4 Electronic Technician “B” was \$30.18. TR 44; EX D-2 at 170. He considered the CBA MIDAS Operator position as equivalent to the T-3 Computer Operator position under the ITT agreement. TR 44-45; EX D-2 at 165. The base hourly wage rate for the MIDAS Operator position under the CBA ranged from \$28.59 to \$32.77 depending upon classification and the computer operator position under the ITT agreement was \$28.21. EX D-2 at 170. Mr. Thomas went through the same comparison between the CBA and the collective bargaining agreement between the IBEW and Akimeka Technologies also at PMRF for the Electronic Technician II and III and operator positions. TR 45-48; EX D-3.

Mr. Thomas also referred to data prepared by Economic Research Institute (“ERI”). TR 56-57; EX D-9 at 324. He stated that ERI is third-party corporation that specializes in providing the data such as that reflected in the chart at EX D-9 at 324 to human resources departments around the nation. TR 57. The ERI chart lists salary rates for Electronic Technicians based upon years of experience and indicates that those having 10 or more years of experience earn at the higher end an hourly base wage of \$32.93. The base wage rate under the CBA for Electronic Technician IIs is \$32.77. TR 60.

In an effort to demonstrate that the positions in the CBA were similar to the positions in the SCA WD, Mr. Thomas compared the position descriptions for twelve labor categories in the BAE technical proposal with position descriptions in the SCA Directory of Occupations publication and those appearing in Salary.com, another private data company that he deemed similar. TR 50, 100; EX D-6, Att. 1. The twelve position descriptions compared correspond with some but not all seventeen labor classifications in the CBA between BAE and the IBEW. EX D-1, Att. 2 at 83. Mr. Thomas conducted a “word by word” comparison which he stated showed the position descriptions were essentially the same. TR 51, 101; *see also* TR 127 (testimony of Dr. Bingue). Mr. Thomas acknowledged however, that once the general nature of the duties was established in the side by side comparison of position descriptions, the BAE contract proposal included additional specific duties the Electronics Technician would be expected to perform under the CBA. TR 51-52; EX D-6, Att. 1. He also said that the Electronics Technician position is a broad position category and that different sites or employers

might require different duties or the use of different equipment of an individual employed as an Electronic Technician. TR 52.<sup>13</sup>

As noted, the Navy's witnesses' testimony addressed primarily the job classifications of Electronic Technician III, Electronic Technician II and Midas Operators under the CBA. TR 24, 43, 51-52, 130, 134, 137. The Navy's Dr. Bingue testified that he is familiar with the position of Electronics Technician and that the job has changed over time with advancements in technology and that it now requires a different skill set than in prior years. TR 124-125. Dr. Bingue agreed that Electronic Technicians covered by the CBA must have and maintain security clearances. TR 130-131, 138-139. He suggested that Electronic Technicians working on government-related jobs would require a security clearance, but he could not state, based on first hand information, that Electronic Technicians on non-government jobs were required to have security clearances. TR 137-40. The individuals working as Electronic Technician II's under the CBA are experienced and have, on average, 10 or more years of experience in the field. TR 158.

The Navy's Mr. Cajimat started working at NCTAMS 30 days before the hearing. Immediately prior to coming to NCTAMS, Mr. Cajimat worked at PMRF in Kauai. TR 151. Having come from PMRF, he is familiar with the electronic positions at PMRF. *Id.* Mr. Cajimat claimed "brief" familiarity with the work performed by Electronic Technician IIs under the BAE contract obtained from site visits and talking to some of the Electronic Technician IIs and operators at the three sites covered by the BAE contract. TR 151, 159. Mr. Cajimat testified that the work of an electrician is not similar to the work performed by Electronic Technicians. TR 272-273.

The business manager for the IBEW Local 1260 Mr. Ahakuelo reported that he oversees 35 collective bargaining agreements the Union has with various entities. TR 211-12. The IBEW has a contract at Hickham Air Force Base in Honolulu County and the Electronic Technicians under that contract earn between \$30 and \$38 dollars an hour. TR 213. Mr. Ahakuelo pointed to the IBEW's collective bargaining agreement with Hawaiian Electric Company in Honolulu and stated that some of the positions under that contract were similar to the work being performed under the CBA. TR 225-227; IBEWX 2. Specifically, he said the Senior Meter Electricians and Substation Electrician positions under the Hawaiian Electric Company collective bargaining agreement were similar to the Electronic Technician II position under the BAE CBA. TR 225-228, 230; IBEWX 2. He stated the senior warehouse attendant position performs similar duties as the supply clerk under the CBA. TR 232. Mr. Ahakuelo noted that the Hawaiian Electric Company collective bargaining agreement includes shift premiums and an annual wage escalation of 2-3 percent. TR 236, 238. On cross-examination he acknowledged that he was not aware of any electricians who had become Electronic Technicians. TR 238.

Mr. Shawl and Mr. Lyerson are Electronic Technicians working under the CBA and are IBEW members. TR 167, 239. Both have extensive experience in the field. TR 167-169; 240-241. They described their duties as Electronic Technician IIs are to operate, maintain including preventative maintenance activities on a scheduled daily, weekly, monthly, quarterly and annual

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<sup>13</sup> Mr. Thomas conceded he did not know whether an Electronic Technicians or Computer Operators working under the ITT and Akimeka agreements at PMRF performed similar work as the Electronic Technician IIs or MIDAS Operators working under the challenged CBA at NCTAMS. TR 103, 117-118.

basis, configure, trouble-shoot, test and analyze, monitor, set up systems, diagnostic testing, phone isolation and detection of terrestrial and satellite-based systems. TR 169-170, 198, 242. In performing these responsibilities they may work on high powered amplifiers carrying 15,000 volts and climb satellite dishes. TR 172, 189. SATCOM where they work is the largest such facility in the world and it has grown larger with the increase in the number of satellite dishes from 5 to 16. TR 175. Mr. Lyerson testified that the Midas Operator position under the CBA differs from the computer operator position in the Salary.com data and he disagreed with Mr. Thomas and other navy witnesses who equated the job duties of the two positions. TR 250-253, 261-262. He explained that the Midas Operator under the CBA provides system set-up, phone installation, and tests and analysis of the strategic links; it is not a computer operator which he describes as an IT function. TR 250-251. Mr. Lyerson also noted that there are other facilities both civilian and military in Honolulu County which are comparable to SATCOM. TR 248.

#### IV. DISCUSSION

##### A. Controlling Legal Principles

Under Section 2(a) of the Service Contract Act (“SCA”) every contract or bid specification for a contract in excess of \$2,500 that is entered into by the Federal Government or the District of Columbia, the principal purpose of which is to furnish services in the United States through the use of service employees, shall (unless otherwise exempted) contain the following terms:

(1) **MINIMUM WAGE.**—The contract and bid specification shall contain a provision specifying the minimum monetary wage to be paid each class of service employee in the performance of the contract or any subcontract, as determined by the Secretary or the Secretary’s authorized representative, in accordance with prevailing rates in the locality, or, where a collective-bargaining agreement covers the service employees, in accordance with the rates provided for in the agreement, including prospective wage increases provided for in the agreement as a result of arm’s length negotiations. In any case the minimum wage may not be less than the minimum specified in section 6704 of this title.

(2) **FRINGE BENEFITS.**—The contract and bid specification shall contain a provision specifying the fringe benefits to be provided to each class of service employee engaged in the performance of the contract or any subcontract, as determined by the Secretary or the Secretary’s authorized representative to be prevailing in the locality, or where a collective-bargaining agreement covers the service employees, to be provided for under the agreement, including prospective fringe benefit increases provided for in the agreement as a result of arm’s-length negotiations.

41 U.S.C. § 6703(1)-(2) (emphasis supplied).

Section 4(c) of the SCA, 41 U.S.C. § 6707(c) states:

(1) IN GENERAL.—Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor shall not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm’s-length negotiations.

By its terms, Section 4(c) provides that a successor contractor is to pay its service employees at least the wages and fringe benefits they would have been entitled to had they been employed under the terms of the CBA applicable to the predecessor contract, including any prospective increases.<sup>14</sup> The intent of this provision is to set a wage rate and fringe benefits floor for successor contracts by preventing the loss of wages and benefits fairly bargained for by the Union. *Congressional Oversight Hearings: The Plight of the Service Worker Revisited; Report of the Subcommittee on Labor-Management relations of the U.S. Congress, House Committee on Education and Labor, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 7-8 (Comm. Print 1975).*

However, Section 4(c)(2) includes the following exception to the statutory requirement to pay at least the wages employees would have been entitled to under the CBA applicable to the predecessor contract:

(2) EXCEPTION—This subsection does not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that wages and fringe benefits under the predecessor contract are substantially at variance with the wages and fringe benefits prevailing in the same locality for services of a similar character.

The exception in Section 4(c)(2) permits a modification of the applicable wage rates and fringe benefits in limited situations. The CBA rates under a predecessor contract will not apply to the successor contract if, after a hearing, an Administrative Law Judge finds the CBA rate to be “substantially at variance” with the prevailing rate for similar services in the same locality. *Id.* The burden of establishing that a substantial variance exists rests on the moving party. The party asserting that a substantial variance exists must establish by a “clear showing” that the variance exists and that it is substantial. *In re Big Boy Facilities, et al.*, Case No. 88-CBV-7, 29 Wage & Hour Cases 356, 358-59 (L.B.S.C.A. Jan. 3, 1989); *In re Applicability of Wage Rates Collectively Bargained by Am. Guard Servs. Inc., et al.*, Case No. 2001-CBV-1, slip op. at 4 (ALJ April 25, 2001). As the moving party in this dispute, the Navy must establish by a “clear showing” that the variance exists and that it is substantial.

The term “substantial variance” is not defined in the statute or regulations, nor is any

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<sup>14</sup> A contractor can be its own successor, when an option contract is extended it is considered a successor contract. 29 C.F.R. §§ 4.143(b) and 4.163(e).

numerical value for what is considered “substantial” provided. *In re Applicability of Wage Rates Collectively Bargained by Akal Sec., Inc.*, Case No. 2000-CVB-2, slip op. at 9 (ALJ April 19, 2000). In determining whether a variance is substantial, the Department of Labor’s *All Agency Memorandum 166, Requirements for Substantial Variance Proceedings under Section 4(c) of the Service Contract Act*, Memorandum from Karen R. Keesling, Acting Administrator of Wage and Hour, Oct. 8, 1992 (“AAM 166”) provides some guidance.<sup>15</sup> The AAM 166 as well as prior decisions have required a review of multiple sources of wage data to determine whether the CBA rate is “clearly...out of line,” with a “comprehensive mix of rates.” See AAM 166 at 2; *In re Applicability of Wage rates Collectively Bargained by United Healthserv, Inc.*, 89-CVB-1, 1991 WL 733658, slip op. at 19 (L.B.S.C.A., Feb. 4, 1991) (Healthserv). The AAM 166 recognized that collectively bargained rates may exceed the wage rates reflected in other data submitted in substantial variance proceedings, and rejected the notion that the SCA WD could serve as the only benchmark for comparison findings under Section 4(c) proceedings. AAM 166 at 2; *Healthserv* at 19. Sources of wage data appropriate and relevant for review include federal wage board rates and surveys, Bureau of Labor Statistics survey data and current SCA area wage determinations, other relevant wage data reflecting rates other employers pay for similar services, and other collectively bargained wages and benefits. Because Section 4(c) of the SCA requires a comparison against rates “prevailing in the same locality for services of a similar character” the comparison is limited to those employees providing similar services in the same locality.

## B. Locality

The term locality has reference to a geographic area, but it has an elastic and variable meaning. 29 C.F.R § 4.54(a). Determining the geographic limits of a locality requires a fact-based inquiry, but locality is ordinarily limited to a particular county or cluster of counties comprising a metropolitan area. *Id.* The work performed under the BAE CBA at issue is performed at the Navy’s NAVSUP Fleet Logistics Center Pearl Harbor at the Joint Base Pearl Harbor, Hawaii. The Navy urges that the entire state of Hawaii is the locality for comparing data. When it sought the substantial variance hearing, the Navy alleged that the CBA rates were substantially at variance with prevailing rates in the locale of Honolulu. The IBEW argues the appropriate locality is restricted to the city and county of Honolulu.

The testimony at hearing demonstrated that there is a facility in Honolulu County at Hickham Air Force Base that is similar to the NCTAMS and that there are several collective bargaining agreements at other Department of Defense facilities and private companies in Honolulu County providing services of like character. However, based on the record before me, only the collective bargaining agreement at Hickham Air Force Base in Honolulu County appears to have employees performing work similar to that performed under the CBA, in particular the Electronic Technician positions. Additional comparison rates are necessary to perform an adequate comparison. The evidence also indicated that the SCA WD rates are the same for the county of Honolulu and the state of Hawaii. One might expect this as the population of the county of Honolulu represents approximately two-thirds of the total population of the state of Hawaii. Although Honolulu County is a largely urban area and the other islands in Hawaii are more rural, there was no evidence that the cost of living varies from one island to

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<sup>15</sup> Available at: <http://www.wdol.gov/aam/AAM166.pdf>.

another, which might render a state-wide locality unreasonable. I find the state of Hawaii is the proper locality.

### C. Services of a Similar Character

Factors considered in determining whether services are of a similar character include the job duties, training, expertise and experience. In the present matter, the Navy is comparing position descriptions for labor classifications under the CBA with descriptions of positions in the SCA Directory of Occupations (“SCA Description”) and in the Salary.com data, to show individuals working under the CBA are performing similar work as others in the same “position” working on other unidentified contracts in the locality. N. Br. at 12-14; EX D-6, Att. 2. The Navy does not compare the work performed by those under the CBA to work performed by other employees working for an actual employer in order to show other employees are performing work of a like character.<sup>16</sup> Instead, the Navy simply compares the words contained in position descriptions to show that “others” are performing work similar to that done by employees under the CBA.<sup>17</sup> That said, as an initial matter, the Navy failed to provide position descriptions for four of the labor classifications in the CBA.<sup>18</sup> Consequently, no position comparisons for four of the labor classifications in the CBA were offered, and therefore, for these four positions, the Navy has failed to show other employees are performing similar services in the locality. Accordingly, the Navy cannot establish a substantial variance between the CBA wage rates for these four positions and those prevailing for similar services in the locality.

In arguing that other employees in the locality are performing services similar to those performed under the CBA, the Navy’s brief addresses only the CBA position of Electronics Technician II. N. Br. 12-13. The broad position description of Electronics Technician II in the SCA and Salary.com materials and BAE’s technical proposal provide a general summary of the job and educational requirements of the position. BAE’s proposal and work performed under the CBA for the position however, includes specific additional duties not reflected in the general position descriptions by the SCA and Salary.com data. Moreover, the IBEW witnesses testified that they are required to climb satellite towers to perform the testing and repair duties. Additionally, the Electronic Technician IIs under the CBA are required to obtain and maintain a

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<sup>16</sup> At hearing the Navy sought to compare the Electronic Technicians positions at PMRF on Kauai to the Electronic Technician II positions under the CBA. In its brief, the Navy has abandoned that effort and urges a finding that the similarity of work comparison is between the standard labor classification descriptions in the SCA Description and the Salary.com data. N. Br. 12-13. The Union’s brief did not address the issue of whether the SCA Directory positions were appropriate comparisons or, if they were, whether the positions used as comparison with CBA labor classifications were performing work of a similar character to those in the CBA labor classifications.

<sup>17</sup> The undersigned has not identified any other substantial variance case in which the challenged collective bargaining position is compared simply to a generic position description rather than to specific employees alleged to be performing similar work for an actual employer.

<sup>18</sup> No position descriptions or comparisons were provided for the following labor classifications in the CBA: antenna specialist, high voltage electrician, generator maintenance, electronic operator/shift. EX D 1, Att. 2 at 83; EX D-6, Att. 2.

security clearance given the national security implications associated with their responsibilities.<sup>19</sup> I credit the IBEW witnesses who are performing Electronic Technician II jobs under the CBA with regard to the actual job duties and requirements. It is also worth noting that the Electronic Technician II positions under the CBA require a minimum two-year training school, and six years of experience, reflecting the high level of expertise required of Electronic Technician IIs under the CBA. In contrast, the SCA position description omits any reference to educational or training requirements and the Salary.com position description requires a high school diploma and may require a formal training period and 2-5 years of experience. TR 157.<sup>20</sup> For these reasons, I find that the Navy has failed to demonstrate that positions under the CBA are sufficiently similar to the position descriptions contained in the SCA Description or the Salary.com descriptions, for purposes of comparing wage rates.

#### D. Substantial Variance

In the interest of completeness and assuming *arguendo* that the positions in the CBA were similar in character to those in the SCA Description and the Salary.com description, I address the issue of whether a substantial variance exists between the wage rates in the CBA and the comparable wage rates cited and relied upon by the Navy. The existence of a variance between the CBA wage rates and the prevailing rates in the locality is not sufficient to negate the collectively bargained wage rates. The variance must be substantial. In determining the prevailing wage rate, I must consider a mix of rates, including current SCA area wage determinations, data reflecting rates other employers pay for similar services, and other collectively bargained rates. *See* AAM 166. The challenged wage rates under the CBA are the result of collective bargaining and collectively bargained rates “often can be expected to exceed

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<sup>19</sup> The Navy’s Mr. Cajimat testified that Electronic Technicians at PMRF are also required to have security clearances. TR 153-154. The Navy’s effort to downplay the importance of the requirement of security clearance for Electronic Technician position under the CBA is unpersuasive. Dr. Bingue’s testimony that private companies including Google would conduct background security checks on their own personnel is not credited because there is no evidence that he has first-hand knowledge of Google or any other private IT company policies in this regard. In addition, I am not convinced that performing a preliminary background security check at the time of hire or having security requirements is the same as requiring an employee to both obtain and maintain a security clearance as required by the CBA given the nature of the duties and services provided. *See* TR 138-140.

<sup>20</sup> Although the Navy did not discuss the similarity of Electronic Technician III and Midas Operator positions under the CBA with the Electronic Technician III and Computer Operator position descriptions provided in the SCA Description and Salary.com, I note that the word-by-word comparison of the position descriptions shows the BAE Electronic Technician III position includes additional duties not included in the descriptions for the same position by the SCA Description or the Salary.com position description. For example, the BAE Electronic Technician III position description requires the individual to conduct orientation and technical instruction for other site personnel in addition to lower level technicians, whereas the SCA and Salary.com positions require instruction only for lower level technicians. In addition, the BAE Electronic Technician III is required to create and prepare multiple reports, update standard operating procedures and ensure CPR training as required by OSHA. *See* EX D-6, Att. 1 at 286-288. As for the MIDAS Operator position, BAE equated that position with a Computer Operator position. *See* D-6, Att. 1 at 298-299. The word-by-word comparison of the Computer Operator III position shows that the BAE position differs in that it involves handling classified material and appears to be a more critical operations position than the positions described by the SCA Description and Salary.com position description for a Computer Operator III.

service industry ‘prevailing’ rates in these circumstances.” AAM 166 at 2. Collectively bargained wage rates must “clearly fall out of line when compared to a comprehensive mix of rates.” *Id.* The parties do not agree on the prevailing wage rate.

The Navy contends that the SCA WD is the prevailing wage and is supported by data from ERI and Salary.com. N. Br. at 14-17. The Navy asserts that data on wage rates in other collective bargaining agreements whether limited to Honolulu County, or expanded to the state of Hawaii, is unreliable and should not be considered. *Id.* As a mix of wage rates must be considered, the Navy’s attempted effort to rely on the SCA WD and exclude wage rates from other collective bargaining agreements runs counter to the statutory intent.

The SCA WD rates establish a minimum wage rate. Based on the evidence presented, I cannot conclude that the SCA WD rates include premium or shift differentials.

With regard to the ERI and Salary.com data relied upon by BAE in anticipation of negotiating the CBA with the IBEW, and cited by the Navy in the present matter, no evidence as to the factors considered and weighed by ERI and Salary.com in developing its survey results was presented. The record lacks testimony from ERI personnel or from any individual with first hand-knowledge of ERI’s processes and methodology, and the same is true for the Salary.com data. That said, the ERI data provided general information on wage rates for twelve of the labor classifications under the CBA by years of experience. Some of the wage rates for labor classifications in the CBA were above ERI mean wage rates, and others were below. (Compare EX D-9 at 324 and 327). That alone, however, would not establish that any such variance was substantial.

Examination of the Salary.com data for the Electronic Technician II position reflects a median salary for Electronic Technician II of \$24.31 and the SCA WD rate is \$28.69, with the SCA WD rate 15.2% higher than the Salary.com data. Salary.com reflects the median hourly wage for Computer Operator IIIs as \$25.73 and the SCA WD for that position is \$22.08, a difference of 14.8% with the Salary.com data reflecting a higher wage rate than the SCA WD for that position. The Electronic Technician IIIs are reflected in the Salary.com data as earning an hourly wage of \$28.07 and the SCA WD rate is \$30.56, with the SCA WD rate for that position 8.1% higher than the Salary.com figure. These results demonstrates that wage rates for specific positions can vary between surveys, presumably depending upon the data considered, and it highlights the importance of considering a mix of rates.

In addition to the SCA WD, the ERI and Salary.com data, the parties submitted evidence on wage rates in other collective bargaining agreements. The IBEW’s effort to equate electricians working under the Hawaiian Electric Company collective bargaining agreement with Electronic Technician IIs under the CBA for purposes of showing the prevailing wage rate is unpersuasive. Based upon the testimony, I cannot find the two positions perform similar work and therefore wages paid to electricians under the Hawaiian Electric Company agreement cannot be compared to wage rates paid Electronic Technician IIs under the CBA for determining whether a substantial variance exists. The IBEW witness also established that Electronic Technician IIs working under a collective bargaining agreement at Hickham Air Force Base and

performing similar services earned between \$30 to \$38 dollars per hour. The minimum hourly rate for the position is \$30, higher than the SCA WD rate of \$29.59.<sup>21</sup>

After considering all of the evidence, I conclude that although the collective bargaining agreement at Hickham reflects that the wage rate paid, at least for Electronic Technician II positions as of October 10, 2010, is higher than the SCA WD for that labor category at approximately \$30, the record lacks information on wage rates under other collective bargaining agreements for the remaining labor classifications in the CBA. In my view, the Navy's prevailing wage evidence does not rise to the level of the "comprehensive mix of rates" required for determining the prevailing wage, as it fails to include other collectively bargained rates for all labor classifications in the challenged CBA. However, on the evidence presented, I am left to rely upon SCA WD rates for the prevailing wage.

The Navy supports its position that the CBA wage rates vary substantially from the prevailing wage rates with data from ERI. The Navy's assertion that all of the CBA rates fall at or near the 90<sup>th</sup> percentile, indicating all are excessive, is not supported. N. Br. at 20; EX D-9 at 314. A review of the ERI data demonstrates that of the twelve labor classifications under the CBA that were analyzed, several do not fall at or near the 90<sup>th</sup> percentile. Additionally, the evidence here demonstrates that Electronic Technician IIs working under the CBA are highly experienced having worked in the field for ten or more years, and could be expected to earn wages at the higher end of the pay scale for such positions. If one considers the mean wage in the ERI data, again some of the wage rates for labor classifications under the CBA are above the mean, and some are below. The mere existence of a variance in wage rates between the CBA and the ERI data for twelve of the labor classifications alone does not establish that the variance is substantial.

The Navy contends the wage rates in the CBA are 28.17% higher than the wage rates in the SCA WD.<sup>22</sup> The Navy obtains this figure by artificially inflating the CBA wage rates by

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<sup>21</sup> The Navy submitted the collective bargaining agreements between the IBEW and ITT and Akimeka companies providing services to the Navy at its PMRF facility on Kauai, but now disputes the relevance of those agreements. Assuming for argument sake, the Electronic Technician II position under the CBA is similar in character to the Electronic Technician position under the PMRF collective bargaining agreements, I note Navy witnesses equated Electronic Technician II positions under the CBA to Electronic Technician "B"s under the PMRF collective bargaining agreements with corresponding wages rates of \$32.77 and \$29.59, respectively. The \$29.59 wage rate for the Electronic Technician "B" positions under the PMRF contract is higher than the \$28.69 SCA WD rate for Electronic Technicians, suggesting the SCA WD may be lower than the prevailing wage in the locality for this position. Taken together, the collective bargaining agreement wage rate, at least for Electronic Technician II and "B" positions, whether in Honolulu County or on the island of Kauai, suggest that the SCA WD wage rate is below the rate paid by other employers in the locality.

<sup>22</sup> An analysis by BAE in preparation for negotiating the current CBA indicated that the difference in wage rates between the rates under the prior collective bargaining agreement and the SCA WD was 17.83 percent. See EX D-12. The BAE analysis includes only twelve of the labor classifications under the CBA. Additionally, the Navy contends that BAE's later evaluation of the difference in wage rates between those paid under its CBA and the SCA WD is 26.18 percent, supporting its view of a substantial variance. N. Br. at 19. The data included in the two charts prepared by BAE and admitted as Navy exhibits EX D-12 and EX D-9 at 315 are identical. However, the chart prepared later and appearing at EX D-9 at 315, states the Union rates are 26.18% over the Area Wage determination. As the data included in each of the charts are

including lead and shift premiums in order to show a “worst case scenario,” that is, one showing the greatest variance in wage rates. Because the lead premium wage rate is available to only one lead employee per shift and because 60 percent of the employees do not work shifts, including premiums in the wage rate inaccurately reflects the CBA wage rate for comparison purposes with the SCA WD. Therefore, it is reasonable to compare the CBA wage rate without premiums to the SCA WD for the fifteen positions for which both wage rates are known in determining whether a substantial variance exists. The difference in CBA wage rates without premiums and those in the SCA WD ranges from 12.32% for high voltage electricians to 96.31% for grounds maintenance/custodians.<sup>23</sup> As a whole, the difference in wage rates between the fifteen labor categories under the CBA where the CBA and SCA WD rates are both available for comparison indicates the CBA wage rates are 15.40% higher than the wage rates in the SCA WD.<sup>24</sup>

The Navy additionally contends that the annual escalation in wages under the CBA for the Electronic Technician II and Midas Operator positions are approximately 3% and are substantially higher than annual escalations under the PMRF collective bargaining agreements. N. Br. 7, 20. The annual wage escalation for Electronic Technician IIs under the PMRF collective bargaining agreement is approximately 2%. The annual wage escalations under the collective bargaining agreement at Hickham Air Force base is approximately 3%. A one percent difference in annual escalation rates is not substantial.

That challenged CBA wage rates may be higher than, or vary from, the prevailing wage is not sufficient, there must be a substantial variance between the wage rates to overcome collectively bargained rates. Under the facts presented, I conclude that a 15.40% difference as a whole between the CBA wage rates and the minimum rates set by SCA WD, is not substantial. Based upon the above, the Navy has failed to make a clear showing of evidence sufficient to establish a substantial variance.<sup>25</sup>

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the same, and BAE has not explained its more recent assessment that a wage variance of 26.18 percent exists, its statement to that effect as reflected on EX D-9 at 315 is accorded little weight.

<sup>23</sup> The difference is 14.22 % for Electronic Technician IIs according to Mr. Thomas’s calculations at Ex D-1 at 3. I note in passing that my own quick calculation results in a difference of 12.45% for the base wage rate for this labor classification.

<sup>24</sup> The wage rates for the fifteen labor categories reflected in the chart depicted on Navy EX D-1 at 2-3, excluding the antennae specialist/lead and facilities manager labor categories, taken together are 15.40% higher than the SCA WD rates for those same positions.

<sup>25</sup> In light of the decision, I decline to address the IBEW’s argument that the Navy failed to comply with the Federal Acquisition Act’s requirement to immediately contact the Agency Labor Advisor to consider instituting a substantial variance proceeding. IBEW Br. at 36-38. I note, that the IBEW fails to cite authority for a penalty for failing to comply with the FAR 22.1103(a)(1).

**V. ORDER**

It is ordered that the petition for a collective bargaining variance is denied.

**SO ORDERED.**

**A**

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts.

**NOTICE OF APPEAL:** Within 10 days after the date of the decision of the Administrative Law Judge, any interested party who participated in the proceedings before the Administrative Law Judge and desires review of the decision shall file a petition for review by the Administrative Review Board pursuant to 29 C.F.R. Part 8. The petition shall refer to the specific findings of fact, conclusions of law, or order accepted to. 29 C.F.R. § 6.57. The Administrative Review Board may be served at: Administrative Review Board, U.S. Department of Labor, Room S-5220, and 200 Constitution Ave., N.W., Washington, D.C. 20210.