

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 07 October 2016**

**Case Numbers: 2016-DBA-00012  
2016-DBA-00013**

*In the Matter of:*

Disputes concerning payment of prevailing wage rates by:

**MAT CONCESSIONAIRE, LLC**  
Prime Contractor

**BOUYGUES CIVIL WORKS OF  
FLORIDA, INC.**  
First-Tier Subcontractor

**DYNALECTRIC COMPANY**  
Second-Tier Subcontractor,

*Respondents,*

With respect to electricians employed by  
DYNALECTRIC COMPANY on Contract RFP-  
FDOT-06/07-6084DS, at the Port of Miami Tunnel  
in Miami-Dade, Florida

AND

Disputes concerning payment of prevailing wage rates by:

**MAT CONCESSIONAIRE, LLC**  
Prime Contractor

**BOUYGUES CIVIL WORKS OF  
FLORIDA, INC.**  
First-Tier Subcontractor

**STRYKER ELECTRICAL  
CONTRACTING, INC.**  
Second-Tier Subcontractor,

*Respondents,*

With respect to electricians employed by  
STRYKER ELECTRICAL CONTRACTING, INC.  
on Contract RFP-FDOT-06/07-6084DS, at the Port  
of Miami Tunnel in Miami-Dade, Florida

**ORDER GRANTING PLAINTIFF’S CROSS-MOTION FOR SUMMARY DECISION**

This matter arises under Reorganization Plan No. 14 of 1950, 64 Stat. 1267, the Davis-Bacon Act (“DBA” or “the Act”), 40 U.S.C. § 3141, *et seq.*, and the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. § 3701 *et seq.* and the applicable regulations issued at 29 C.F.R. Parts 5 and 6. In accordance with the *Order of Reference* issued in the above-captioned case, this matter has been referred to the Office of Administrative Law Judges (“Office”) for a hearing pursuant to 29 C.F.R. § 6.30.

**Background**

The Florida Department of Transportation contracted with MAT Concessionaire, LLC (“Prime Contractor”), which contracted with Bouygues Civil Works of Florida, Inc. (“First-Tier Subcontractor”), who then entered into contracts with Dynalectric Company (“Dynalectric”) and Stryker Electrical Contracting, Inc. (“Stryker”) (“Second-Tier Subcontractors”) to perform electrical work on Contract RFP-FDOT-06/07-6084DS, at the Port of Miami Tunnel in Miami-Dade, Florida (“Project”). Through Supplemental Agreements to these contracts, Respondents were obligated to pay minimum wages established by General Decisions FL126 and FL267.

The Wage and Hour Division, Department of Labor, in Atlanta (“Plaintiff” or “Administrator”) subsequently initiated labor standards investigations of the Project. After completing the investigations, Plaintiff determined that Dynalectric and Stryker violated several provisions of the applicable statutes by failing to pay the wage rates specified in General Decisions FL126 and FL267 (collectively, “Wage Determinations” or “WD”), which read as follows:

	RATES	FRINGES
Electrical contracts including materials that are over \$2,000,000.00	\$29.61	\$8.71
Electrical contracts including materials that are under \$2,000,000.00	\$27.15	\$8.44

Plaintiff found that Dynalectric and Stryker incorrectly paid electricians at the wage rate applicable to electrical contracts under two million dollars in value, instead of at the higher rate applicable to electrical contracts over two million dollars in value.

Plaintiff notified Respondents of the alleged violations on May 14, 2014, and provided an opportunity to request a hearing. Respondents requested a hearing on May 20, 2014.<sup>1</sup> On February 18, 2016, the Atlanta Office of the Solicitor, U.S. Department of Labor, counsel for Plaintiff, filed *Orders of Reference* and an *Unopposed Motion to Consolidate* (“Motion to Consolidate”) with the Office of Administrative Law Judges (“Office” or “OALJ”), initiating these matters before this Office.

On February 25, 2016, this Office issued a *Notice of Docketing, Order of Consolidation, and Prehearing Order* (“Notice”) instructing Plaintiff to provide Respondents with certain information.<sup>2</sup> Respondents were given twenty days after service of the aforementioned information to serve and file an Answer. Plaintiff filed its prehearing information on March 29, 2016; Respondents filed their Answer and Affirmative Defenses on April 11, 2016. Thereafter, this matter was assigned to me for hearing and disposition.

On April 26, 2016, Respondents filed a *Motion for Summary Decision and Incorporated Memorandum of Law* (“Resp. Motion”), arguing that the Plaintiff’s interpretation of the Wage Determinations in this case is erroneous as a matter of law. Specifically, Respondents aver that the plain language of the Wage Determinations establishes that the basis for distinguishing wage rates for electricians is “the value of the individual electric contracts on the Project, and not the aggregate value of the electrical contracts on the Project.” Resp. Motion at 7. Respondents further argue that the Plaintiff’s reliance on the Miami Dade County Ordinance in support of its interpretation is inappropriate. *Id.* at 4. Respondents explain that while the Miami Dade County Ordinance does provide for wage rates based on the total value of electrical projects, this provision applies only to Miami Dade County projects, and does not apply to the Project. *Id.* at 4-5. Respondents therefore assert their entitlement to a summary decision denying the Plaintiff’s claims against them and rescinding the Notices of Certified Payroll Violation. *Id.* at 7.

In support of its Motion, Respondents cite to *Warshauer v. Solis*, 577 F.3d 1330 (11<sup>th</sup> Cir. 2009), which stated, in part, that, “If the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case and the statutory scheme is coherent and consistent, the inquiry is over.” Resp. Motion at 6; *see* 577 F.3d 1330, 1335. Respondents also attach the following evidence in support of its arguments:

1. The Miami Dade County Ordinance on Responsible Wages and Benefits (“RX1”)
2. Affidavit of Giuseppe Folco, Commercial Manager for the First-Tier Subcontractor with responsibility for the Project (“RX2”)

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<sup>1</sup> Plaintiff’s *Order of Reference* states that Respondents requested a hearing on May 20, 2014. Attached to the Orders of Reference are letters dated March 24, 2014, purportedly in response to March 17, 2014 Referrals for Determination Regarding the Withholding of Contract Funds. In those letters, Dynalectric, Stryker, and First-Tier Subcontractor, through counsel, requested reconsideration of Plaintiff’s position regarding wage rate determinations. Specifically, counsel argued that Plaintiff was improperly aggregating all the electrical subcontracts under the prime contract and applying the wage rate for electrical contracts over \$2,000,000. Counsel argued that, according to the applicable wage rate decisions, the wage rate for electrical contracts under \$2,000,000 should be applied because each of the subcontracts individually is less than the threshold. Counsel further stated that it had provided Plaintiff with “affidavits from local union electrical contractors” that agree with this position, and that Plaintiff had “indicated that the affidavits had been rescinded.” Counsel stated that it made a FOIA request for “evidence of such rescission” and was told that “responsive documents were being withheld.”

<sup>2</sup> Plaintiff was directed to provide Respondent with more information regarding its alleged violations; the contract disputed; if applicable, the specific employees who allegedly did not receive compensation or were improperly classified; a brief statement of the issues in the case; estimated length of and location for the hearing; and any related proceedings.

3. General Decision FL126 (“RX3”)
4. General Decision FL267 (“RX4”)
5. Supplemental Agreement between Florida Department of Transportation and Prime Contractor (“RX5”)
6. Supplemental Agreement between Prime Contractor and First-Tier Subcontractor (“RX6”)

After being granted an extension of time to respond,<sup>3</sup> Plaintiff filed its *Response to Respondents’ Motion for Summary Decision and Incorporated Memorandum of Law and Countermotion for Summary Decision* (“Pl. Response”) on May 23, 2016. Plaintiff also filed a *Response and Additions to Respondents’ Statement of Undisputed Facts* (“Pl. Statement”). In its Response, Plaintiff counters that the undisputed material facts and the applicable regulations show as a matter of law that the Administrator’s interpretation of the Wage Determinations is correct. Pl. Response at 3. Plaintiff argues that summary decision is indeed appropriate in this case, as the only issue in dispute is a legal question. *Id.* at 5-6. However, Plaintiff argues that “contrary to Respondents’ assertions, this case does not hinge on the ‘interpretation of a contract’ or ‘plain language of a contract.’” *Id.* at 6. Instead, Plaintiff asserts that “the case depends on the correct interpretation of applicable general wage decisions and whether the Respondents complied with the proper interpretation.” *Id.*

Plaintiff avers that the applicable statutory guidance, case law, and conduct of other similarly situated contractors support its entitlement to summary decision. First, Plaintiff argues that the Administrator of the Wage and Hour Division properly considered the relevant collective bargaining agreement in setting the Wage Determinations at issue. *Id.* at 7. Specifically, Plaintiff points to the applicable regulations at 29 C.F.R. § 1.3, which state that in order to make wage determinations, the Administrator of the Wage and Hour Division will obtain and compile wage rate information reflecting wage rates paid to laborers and mechanics in the area. *Id.*; § 1.3(a). This information may include wage rate data collected from contractors, labor organizations, public officials, state and local guidelines, and any other information pertinent to the determination of prevailing wages. Pl. Response at 7; 29 C.F.R. § 1.3(a), (b). Proper sources of information also include wage rate data reflected in signed collective bargaining agreements. § 1.3(b)(2). Plaintiff therefore argues that, contrary to Respondents’ assertions, the Miami Dade County Ordinance was a proper source of information to be considered by the Administrator. Pl. Response at 8 (citing *Fry Brothers Corp.*, 1977 WL 24823 (DOL W.A.B. 1977); *Abhe & Svogoda*, 2006 WL 2474202, at \*1). Plaintiff asserts that the Administrator also considered information from wage rate surveys, Field Operations Handbook Chapter 15 Section 15f05, and the collective bargaining agreement (“CBA”) between the International Brotherhood of Electrical Workers Local Union 349 (“IBEW LU 349”) and the South Florida Chapter of the National Electrical Contractors Association (“NECA”) in order to develop the Wage Determinations. *See* PX E, F. The language of the CBA “holds that it is the value of the electrical portion of the prime contract, and not the individualized subcontracts, which controls the applicable wage rates.” Pl. Response at 11; PX F. Because the CBA and the Miami Dade County Ordinance both provide for wage rates based on the total value of the electrical portion of

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<sup>3</sup> Plaintiff filed a *Motion to Extend Time to File Administrator’s Response in Opposition to Respondent’s Motion for Summary Decision and to File Counter Motion for Summary Decision for Good Cause* on May 2, 2016. I granted the extension request by Order dated May 10, 2016.

the prime contract, Plaintiff argues that Respondents' arguments rely on the "flawed assumptions that the 'plain language' of the wage determination, without context whatsoever, controls." Pl. Response at 11.

Second, Plaintiff argues that if Respondents disagreed with the Wage Determinations at issue, Respondents should have sought clarification from the Administrator prior to the contract award. Such appeals of wage determinations are governed by the procedures promulgated under 29 C.F.R. § 1.8, which states that "any interested person may seek reconsideration of a wage determination." *Id.* The applicable regulations further state that "all questions relating to the application and interpretation of wage determinations . . . shall be referred to the Administrator for appropriate ruling or interpretation" and that these "rulings and interpretations shall be authoritative." 29 C.F.R. § 5.13.<sup>4</sup> Plaintiff therefore argues that "an employer cannot raise an objection to the wage determination once a matter has entered the enforcement stage." Pl. Response at 12 (citing *In the Matter of Fry Bros. Corp.*, 1977 WL 24823 (DOL W.A.B. 1977); *Grochowski v. Phoenix Cont.*, 318 F.3d 80, 87 (2nd Cir. 2003); *In the Matter of U.S. Fire Protection Inc.*, 1999 WL 702413, at \*3 (1999)).

Third, Plaintiff argues that Respondents' plain language argument ignores the clear intent of the Wage Determinations. Plaintiff asserts that the Respondents' reliance on *Warshaur v. Solis* is misplaced, as "the case specifically states that the 'specific context' of the language and the 'broader context of the statute' must be considered." Pl. Response at 14. Plaintiff also notes that "the *Warshaur* decision involved the consideration of statutory language, not the language of a wage determination, and that the case stands for the prospect that the Administrator's interpretation of the statute in question was found to be a reasonable application." *Id.* Given the context "derived from sources such as the CBA, the Miami-Dade County Wage Schedules, and the interpretation of the Administrator himself," as discussed above, Respondents' interpretation runs contrary to the plain language of the Wage Determinations, which contemplate multiple contracts being issued under their provisions. *Id.* at 14-17. Plaintiff therefore requests that Respondents' motion for summary decision be denied, that the Plaintiff's counter-motion for summary decision be granted, and that Respondents be ordered to pay back wages due as alleged. *Id.* at 17. Plaintiff includes sixteen exhibits, labeled Plaintiff's Exhibits A through P ("PXA" through "PXP") in support of its filing.

On June 2, 2016, Respondents filed their *Opposition to Administrator's Counter-motion for Summary Decision* (Resp. Opp.). In this filing, Respondents state that they "do not take issue with the background, context, or wage rate survey undertaken by the Administrator." Resp. Opp. at 1. Respondent also do not dispute the additional undisputed facts provided by Plaintiff. Nonetheless, Respondents assert that the language of the Wage Determinations clearly and unambiguously supports Respondents' interpretation. *Id.* at 2. Specifically, Respondents aver that once the locally prevailing wage is reduced to and embodied by a General Decision, Respondents are entitled to rely upon it, and that absent ambiguity, "the Administrator's intent . . . cannot properly be considered. *Id.* at 2-3 (citing *Ball, Ball & Brosamer, Inc. v. Reich*,

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<sup>4</sup> Plaintiff notes that the Administrator provided guidance to Respondents regarding its interpretation of the Wage Determinations after Respondents sent letters disputing FDOT's finding of wage violations. Pl. Response at 13. This guidance "contains the Administrator's consistent conclusion: that the applicable wage determination is based on the total value of the electrical work on the project, and not the value of the individual subcontracts." *Id.*

24 F.3d 1447 (DC Cir. 1994).<sup>5</sup> Respondents argue that because the language of the Wage Determinations was unambiguous, “it was not incumbent upon Respondent to divine that what was written was not what the Administrator meant or to seek clarification of what is not in need of any further clarity.” *Id.* at 4-5. Respondents further argue that, while the Wage Determinations were not patently ambiguous, if there is any ambiguity, it must be construed against the Administrator. *Id.* at 5 (citing *H&M Moving, Inc. v. United States*, 499 F.2d 660, 716-717 (1974)). Respondents assert that their good faith reliance on the plain meaning of the Wage Determinations is demonstrated by their correspondence history with the Administrator, which consistently presents and documents Respondents’ interpretation of the applicable wage rates. *Id.* (citing 29 U.S.C. § 259(a)).

Furthermore, Respondents object to Plaintiff’s reliance on Plaintiff’s Exhibit E, the Affidavit of Former Wage Determination Section Chief Forest Randall, and Plaintiff’s Exhibit G, the CBA between IBEW LU 349 and NECA for September 1, 2007 through August 31, 2010. Respondents argue that they were free to contract with non-union entities, which were not bound by the terms of this CBA. *Id.* at 7-8. Respondents also assert that Plaintiff’s arguments ignore the expedited design-build nature of the Project, which was completed through the staggered award of multiple electrical contracts to more than one electrical subcontractor. *Id.* at 9. Respondents argue that this design-build nature of the Project was the “driving force behind the staggered procurement of multiple electrical subcontracts,” not a desire to avoid paying a higher wage as Plaintiff suggests. *Id.* at 9-10. Respondents provide a Supplemental Affidavit of Giuseppe Folco in support of its contentions (“RX7”).

### **Applicable Law**

Under the Davis-Bacon Act, laborers and mechanics on certain federal contracts must be paid the prevailing rate and fringe benefits, as well as the applicable overtime compensation due under CWHSSA, as required by the applicable Wage Determination. 40 U.S.C. § 3141, *et seq.*; 40 U.S.C. § 3701 *et seq.*; 29 C.F.R. Parts 5 and 6. The DBA is designed to give local laborers and contractors a fair opportunity to participate in federal building programs, to protect employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap labor from distant sources. *L.P. Cavett Co v. U.S. Dep’t of Labor*, 101 F.3d 1111 (6th Cir. 1996); *United States v. Binghamton Const. Co.*, 347 U.S. 171, *reh’g. denied*, 347 U.S. 940 (1954). Similarly, the CWHSSA ensures that laborers are properly compensated for any overtime work done under federal service contracts. Under these Acts, a general contractor is responsible for ensuring that all persons engaged in performing the duties of a laborer or mechanic on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged between the contractor and such persons. 29 C.F.R. 5.2(o), 5.2(i), 5.5(a)(2), 5.5(a)(6); *Arliss D. Merrell, Inc.*, 1994-DBA-41 (ALJ Oct. 26, 1995); *Commonwealth of Massachusetts v. U.S. Dep’t of Labor*, 1998 JTP-6 (ALJ Oct. 29, 2001).

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<sup>5</sup> Finding, in a case challenging the Secretary’s regulatory definition of “the site of work” under the Davis-Bacon Act, that the Secretary’s inclusion of workers at off-site facilities was inconsistent with the plain language of § 276a(a) of the Davis-Bacon Act, which requires the payment of prevailing wages only to “mechanics and laborers employed directly upon the site of the work.”

**Standard of Review for Summary Decision**

The standard of review for a motion for summary decision is essentially the same as the one used in Rule 56 of the Federal Rules of Civil Procedure. *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-000006, slip op. at 6 (ARB Jan. 30, 2011). According to the Rules of Practice and Procedure for Administrative Hearings before the OALJ, an Administrative Law Judge “shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law.” 29 CFR § 18.72(a). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when the nonmoving party produces sufficient evidence of a material fact that a factfinder is required to resolve the parties’ differing versions at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat’l Bank of Ariz. V. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968). No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

**Findings of Fact**

Based on the record before me, I find the following facts to be undisputed by the parties and material to the issues presented:

1. In 2009, the Florida Department of Transportation (“FDOT”) contracted with the Prime Contractor, which contracted with the First-Tier Subcontractor, who then entered into contracts with Dynalectric and Stryker to perform electrical work on the Project. Resp. Motion at 2-3.
2. The total value of the contract between FDOT and the Prime Contractor was \$607,000,000. Pl. Response at 2.
3. The total value of electrical work for general construction under the contract between FDOT and the Prime Contractor was \$21,210,469. Pl. Response at 3. The general contract also included work at an electrical substation and service area which totaled \$1,853,863. *Id.*
4. Through Supplemental Agreements to these contracts, Respondents were obligated to pay the minimum wages established by General Decisions FL126 and FL267. Resp. Motion at 3.
5. In 2009, the wage rates specified in General Decisions FL126 and FL267 read as follows:

	RATES	FRINGES
Electrical contracts including materials that are over \$2,000,000.00	\$29.61	\$8.71
Electrical contracts including materials that are under \$2,000,000.00	\$27.15	\$8.44

Pl. Response at 3; RX A, B, E.

6. The Administrator determined the wage rates in the General Decisions by considering the results of surveys promulgated according to 29 C.F.R. 1.3 and the Field Operations Handbook Chapter 15 Section 15f05. Pl. Response at 6. These surveys determined that negotiated wage rates prevailed for electricians in Miami-Dade County. *Id.*
7. The wage rates in the General Decisions were informed by the wage rates listed in the CBA between the International Brotherhood of Electrical Workers Local Union 349 (“IBEW LU 349”) and the South Florida Chapter of the National Electrical Contractors Association (“NECA”). *Id.* at 6 – 7. The CBA wage rates were controlled by the value of the electrical portion of the prime contract, and not by the value of individualized subcontracts. *Id.*
8. Dynalectric and Stryker paid electricians at the wage rate applicable to electrical contracts under \$2,000,000.00 in value, instead of at the higher rate applicable to electrical contracts over \$2,000,000.00 in value.
9. When initially entered into, the Dynalectric and Stryker subcontracts at issue were each valued at under \$2,000,000.<sup>6</sup> Resp. Motion at 2; Pl. Response at 4-5.
10. Respondents did not request an interpretation or ruling regarding the General Decisions through the procedure promulgated under 29 C.F.R. § 5.13. Pl. Response at 5.
11. The Administrator’s investigation determined that, as a result of the alleged misclassification of electricians, Dynalectric owed \$82,760.92 in back wages and Stryker owed \$10,489.93 in back wages for failure to pay prevailing wages and fringe benefits. The Administrator also determined that Dynalectric owed \$9,332.76 in back wages and Stryker owed \$2,261.08 in back wages for failure to pay overtime wages. Pl. Response at 6; DOL Wage and Hour Division Form 56 (attached to Plaintiff’s Prehearing Submission).

### Discussion

Upon consideration of the undisputed material facts and the record as a whole, I find that as a matter of law, there are no issues of fact remaining in dispute in this matter. The only issue that remains for my consideration is a question of law, that is: whether Respondents violated the Act by paying employees the rate for “electrical contracts that are under \$2,000,000.00” instead of the rate for “electrical contracts that are over \$2,000,000.00”, thereby entitling the employees to payment of back wages and overtime at the higher, over \$2,000,000.00, rate. For the reasons explained below, I find that the undisputed material facts establish that the employees in this case were misclassified and paid less than the prevailing wage rate.

First and foremost, in order to comply with the Davis-Bacon provisions of a contract, contract workers must be paid according to the classifications used in the locality in which the contract is performed.<sup>7</sup> To determine classifications in the relevant locality, the Administrator

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<sup>6</sup> Plaintiff’s *Response* states that one of the Dynalectric subcontracts was valued at \$100,000,000.00 upon signing. Pl. Response at 4. Cross referencing this assertion with Plaintiff’s Exhibit C reveals that the \$100,000,000.00 value is a typographic error, as the cited contract is valued at \$100,000.00. See PX C at 10.

<sup>7</sup> *Building & Construction Trades’ Dept., AFL-CIO v. Donovan*, 229 U.S. App. D.C. 297, 712 F.2d 611, 614 (D.C. Cir. 1983); *Emerald Maintenance, Inc. v. U.S.*, 925 F.2d 1425, 1427 (Fed. Cir. 1991) citing *Building & Construction Trades’ Dept. AFL-CIO v. Donovan*, 712 F.2d 611, 614 (D.C. Cir. 1983) and *Johnson-Massman, Inc.*, ARB Case No. 96-118 (ARB, 1996).

may properly consider the practices documented in collective bargaining agreements.<sup>8</sup> In the instant case, it is undisputed that the prevailing wage rates in the General Decisions at issue were established in reference to the rates contained in the CBA between IBEW LU 349 and NECA. It is also undisputed the CBA specified that wage rates for electricians were determined according to the value of the electrical portion of the prime contract, and not the value of individualized subcontracts. Respondents have not presented any countervailing evidence that would lead me to question that payment according to the value of the prime contract constitutes the prevailing practice. Without any such countervailing evidence, I find that the wage rates in the General Decisions are classified in reference to the value of the prime contract, not the value of a subcontract.

In so finding, I agree with Plaintiff that the issue before me is not one of contract interpretation, but instead one of proper application of wage rates under the Act. I therefore reject Respondents' contention that because the wage rate language at issue was plain and unambiguous, there was no duty on the part of Respondents to seek clarification as to the proper interpretation of the wage rates. Similar arguments have been proposed in other cases and have been continuously rejected by ALJs and their reviewing authorities.<sup>9</sup> Simply stated, it is incumbent upon a Davis-Bacon contractor to be certain that its employees are properly classified when performing a job where the Act applies.<sup>10</sup> An employer may not unilaterally classify employees based upon its own interpretation of wage rates, as the Secretary or his designatee, the Administrator of Wage and Hour Division, have sole authority under the Act to interpret and enforce the proper wage rate and employee classifications.<sup>11</sup>

Furthermore, this Office does not possess the authority to consider questions regarding the validity of the Wage Determinations. In fact, the Act explicitly provides that all questions relating to the application and interpretation of wage determinations shall be referred to the Administrator for appropriate ruling or interpretation.<sup>12</sup> Furthermore, the Department of Labor has an established procedure for resolving disagreements as to proposed classifications and wage

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<sup>8</sup> *Thomas and Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001) (Respondent's argument, that the Administrator's prevailing wage determination was incorrectly based on union wages in the area rather than the wage survey, amounted to a request for review of the wage determination which must be made prior to the contract award and must be timely filed directly with the ARB).

<sup>9</sup> *See, e.g., Batteast Construction Company*, WAB Case No. 83-12 (WAB, June 22, 1984) ("The Board rejects petitioner's contention that the contractor should be excused from liability because the Wage and Hour Division did not make an early investigation, detect the violations, and notify the firm. It is the responsibility of contractors and subcontractors performing on the project to abide by the labor standards provisions of the contract. The Davis-Bacon and related acts were intended to protect the rights of laborers and mechanics employed on Federal and federally assisted projects, not to protect contractors who have violated the law and then attempt to mitigate the violations through alleged dereliction of enforcement by either the Wage and Hour Division or the contracting agency.").

<sup>10</sup> *P & N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116 (Oct. 25, 1996); *In the Matter of Tele-Sentry Security*, WAB Case No. 87-43 (WAB, June 7, 1989) (finding that, "in choosing to utilize misclassified and thus underpaid workers, the [employer] proceeded at its own peril.").

<sup>11</sup> *Actus Corp.*, 1996 DBA-1 (ALJ, Jan. 29, 1999); *Berbice Corp.*, 1998-DBA-9 (ALJ, Apr. 16, 1999) (finding that the Secretary determines the classification of employees, and that a company cannot escape liability for misclassification or underpayment by reliance on a contracting officer's advice, or by reliance on the classification of a prior contract).

<sup>12</sup> 29 C.F.R. § 5.13

rates, as set forth at 29 C.F.R. 5.5(a)(1)(ii)(A), (B) and (C). Should Respondents have wished to challenge the basis for the Wage Determinations, they should have done so in a timely manner before the ARB.<sup>13</sup> Having failed to avail themselves of these procedures, Respondents should not expect their ignorance of the accurate interpretation of the prevailing wage rates to excuse their liability under the Act.

### **ORDER**

Based on the foregoing, I find that there are no genuine issues of material fact concerning the allegations of violations of the Davis-Bacon Act by the Respondents. As the value of the prime contract in this case was well over the \$2,000,000.00 threshold, I further find that the undisputed material facts establish that Respondents misclassified their workers and failed to pay workers the proper prevailing wage rates in violation of the DBA.

Accordingly, it is hereby **ORDERED** that Respondents' Motion for Summary Decision is **DENIED** and Plaintiff's Countermotion for Summary Decision is **GRANTED**.

It is further **ORDERED** that Respondents are liable for payment of back wage amounts totaling \$93,250.85, and for payment of back wage amounts for overtime totaling \$11,593.84, each, as itemized in Plaintiff's Prehearing Exhibit.

**SO ORDERED.**

CARRIE BLAND  
Administrative Law Judge

Washington, D.C

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<sup>13</sup> See *Thomas and Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001) (Respondent's argument, that the Administrator's prevailing wage determination was incorrectly based on union wages in the area rather than the wage survey, amounted to a request for review of the wage determination which must be made prior to the contract award and must be timely filed directly with the ARB).