



In the Matter of:

SPENCER TILE COMPANY, INC.

ARB CASE NO. 01-052

In re: Contract No. GS06P96GZC0508
at Roman L. Hruska Federal Courthouse,
Omaha, Nebraska

DATE: September 28, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Petitioner:

Adam M. Nahmias, Esq., *Stewart, Wilkinson and Wilson, PLLC, Memphis, Tennessee*

For the Acting Administrator:

Joan Brenner, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

By letter dated March 14, 2001, a representative of the Acting Administrator, Wage and Hour Division ("Administrator"), issued a final decision adding a conformed "tile finisher" classification and wage rate for work performed on a construction contract at the Roman Hruska Courthouse in Omaha, Nebraska, subject to the Davis-Bacon Act, 40 U.S.C.A. §276a (West 1986). In its petition for review, Spencer Tile Company, Inc. ("Spencer Tile"), a subcontractor working on the project, challenges both the classification and the wage rate.

BACKGROUND

In June 1997, Spencer Tile entered into a subcontract with Clark Construction Group ("Clark"), a general contractor, to perform tile installation work at the Roman Hruska Courthouse. The contract was subject to the Davis-Bacon Act, and specifically the prevailing wage requirements of Wage Determination NE960011 (modification 7) (dated Jan. 17, 1997). This wage determination was a multi-county wage determination, and included wage rates applicable to work performed in Washington and Douglas Counties, Nebraska. *See*

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

Administrative Record (AR) Tab J. Although some of the trade classification wage rates in the wage determination applied equally in both counties, in some instances the wage rates applied either to Douglas County or Washington County, but not both. For example, the wage determination had a single hourly wage rate for “tile setters” of \$15.70 (with no fringe benefits), which apparently applied in both counties. However, different wage rates applied for “laborers” working in the two counties. The hourly wage rate for laborers in Douglas County ranged from \$11.22 to \$12.72 (with fringe benefits of \$2.75), while the rate for laborers in Washington County ranged from \$8.20 to \$8.58 (with fringe benefits of \$1.50). *Id.*

According to Spencer Tile, its subcontract with Clark specified that it was entered into subject to the tile setter and laborer wage rates “in Attachment D-2, page 27” of the contract. This particular sheet – which was only a portion of the overall wage determination – included the \$15.70/hr. rate for tile setters (applicable in both counties), and the \$8.50/hr. rate for laborers in Washington County. *See* AR Tab E. Spencer Tile asserts that Clark approved these wage rates, agreeing that the rates in Washington County would control for the project. *Id.* The Courthouse is located in Douglas County.

In January 2000, the General Services Agency (the contracting agency) forwarded to the Labor Department a request to add several job classifications for work on the Courthouse project that were not found in the wage determination. AR Tab H. This request was made pursuant to the Davis-Bacon conformance procedure, 29 C.F.R. §5.5(a)(1)(v) (2000). The conformance request included two classifications sought by Spencer Tile: Helper 1 and Helper 2. Spencer Tile’s description of the tasks performed by the two Helper classifications was identical, the only difference between the two classifications being that the Helper 2 worker had more experience than Helper 1:

Assist [tile setting] installer in various ways, including, handing out tools, mixing compounds used for installation, cutting pieces of tile and stone or assisting the installer in doing so, assisting installer in bringing materials close to site of installation, cleaning and storing tools and equipment.

Spencer Tile proposed an hourly wage rate for both classifications of \$8.20, and fringe benefits of \$1.50. *Id.* This was the same as the base rate for the laborers in Washington County.

In an undated letter apparently issued in early May 2000, the Labor Department’s Section Chief, Construction Wage Determinations, rejected the proposed Installer Helper classifications, observing that “[t]he request for installer helper cannot be approved because the duties of the installer helper are not separate and distinct from the duties of the journeyman [tile setter] classification.” AR Tab G. The Section Chief’s decision was transmitted first to Clark, which then advised Spencer Tile to “begin immediately to pay the employees you have regarded as Helpers the back wages owed to them as per the Journeyman’s wage.” AR Tab F.

Spencer Tile contacted the Section Chief in June 2000, asking that the conformance request be revisited and that the company be allowed to classify its non-journeyman workers as

laborers paid at the Washington County laborer wage rate. AR Tab E. The Section Chief responded in October 2000, advising Spencer Tile that the workers in question could be classified as “tile finishers” and paid an hourly wage of \$11.22 plus \$2.75 in fringe benefits. AR Tab C. This was the same as the base laborer rate in Douglas County. The Section Chief’s letter specifically noted that it was not a final decision, but would be subject to further review if Spencer Tile wanted to present additional information. *Id.* Spencer Tile requested another review by letter dated November 1, 2000, but did not submit any new materials or argument.

On March 14, 2001, the Administrator issued the final decision letter that is challenged now before the Board. AR Tab A. The Administrator recognized the apparent confusion between the use of Douglas County versus Washington County wage rates in the multi-county wage determination, and noted that “wage rates from one geographical area cannot be used to support additional classification requests in other geographical area(s) covered by the wage determination.” *Id.* While reaffirming the earlier decision that added the tile finisher classification, the Administrator specifically warned that the duties of cutting stone and tile fall within the scope of the journeyman tile setter classification, and that any employee cutting stone or tile should be paid the tile setter wage rate. *Id.* This appeal followed.

We have jurisdiction pursuant to the Davis-Bacon Act, 40 U.S.C.A. §276a; Reorganization Plan No. 14 of 1950, 5 U.S.C.A. Appendix (West 1986) (assigning to the Secretary of Labor responsibility for developing government-wide policies, interpretations and procedures to implement the Davis-Bacon Act and the Related Acts); and 29 C.F.R. §§7.1 and 7.9 (2000).

SCOPE OF REVIEW

The Board's review of decisions issued by the Administrator is in the nature of an appellate proceeding, and the Board “will not hear matters de novo except upon a showing of extraordinary circumstances.” 29 C.F.R. §7.1(e). We assess the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act. *Miami Elevator Co.*, ARB Nos. 98-086/97-145 , slip op. at 16 (Apr. 25, 2000), *citing Dep't of the Army*, ARB Nos. 98-120/121/122 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. §351-358 (1987)).

DISCUSSION

The Davis-Bacon Act requires that laborers and mechanics employed on federal construction contracts be paid no less than the locally prevailing wage, as determined by the Secretary of Labor. 40 U.S.C.A. §276a. Contracting agencies incorporate prevailing wage determinations into bid packages and construction contracts. Through this process of predetermining the prevailing wage rates, all bidders for federal construction projects are notified

of the minimum wage rates that must be paid on a federal construction procurement. 29 C.F.R. §5.5; *see also* 48 C.F.R. §36.303 (2000).

Under the Davis-Bacon regulations, the Wage and Hour Division may add an additional job classification and wage rate *after* the award of the construction contract through a procedure known as a conformance action. 29 C.F.R. §5.5(a)(1)(v). The conformance procedure is designed to be very narrow in scope. The Administrator will add a new job classification through a conformance action *only* if it meets all the elements of this 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. “The conformance process is not a *de novo* proceeding to retroactively determine the prevailing wage for a particular classification. . . . In establishing a conformed rate the Administrator is given broad discretion. The Administrator's decision will be reversed only if it is inconsistent with the regulations, or is ‘unreasonable in some sense or . . . exhibits an unexplained departure from past determinations. . . .’” *Childress Painting & Assoc., Inc.*, ARB No. 96-121 (Aug. 23, 1996), quoting *Titan IV Mobile Service Tower*, WAB No. 89-14 (May 10, 1991) (citations omitted).

In its letter brief, Spencer Tile makes only two substantive arguments in opposition to the conformance decision. Neither is persuasive.

First, Spencer Tile argues that the Administrator’s conformance action should have been based on the \$8.20/hr. base wage rate for laborers in Washington County (plus fringe benefits) because this was the information that Clark provided to Spencer Tile, and which Spencer Tile used with Clark’s approval when bidding the subcontract. This argument is flawed in several respects. For example, the Courthouse project was in Douglas County, not Washington County, and the \$8.20/hr. Washington County rate therefore was not relevant under any circumstances to the Courthouse project.^{2/}

Perhaps more important, there is no legal basis for claiming that the Administrator in some manner should defer to erroneous advice provided by a contractor to its subcontractor. It

^{2/} We note also that the Davis-Bacon statute itself directs the Secretary (and, by extension, the Administrator) to establish prevailing rates geared to rates paid “in the city, town, village, or other civil subdivision of the State in which the work is to be performed.” 41 U.S.C.A. §276a. The Administrator’s decision to rely on the Douglas County wage determination rates, rather than the Washington County rates advocated by Spencer Tile, therefore enjoys direct support in the statute itself.

is by now well-established that only the Administrator may offer authoritative decisions with regard to Davis-Bacon matters; contractors on Davis-Bacon-covered contracts may not even rely on interpretations offered by agency contracting officers. See *The Law Co.*, ARB No. 98-107 (Sept. 30, 1998); *Swanson's Glass*, WAB No. 89-20 (Apr. 29, 1991). By extension, it is even less plausible to suggest that the Administrator is barred from establishing an appropriate conformed wage rate under the Davis-Bacon regulations because of the erroneous actions or advice of a private third party.

Second, Spencer Tile objects to a statement in the Administrator's final decision letter in which the Administrator states that the "duties of the proposed classification include the cutting of stone and tile." Spencer Tile asserts that its tile finishers do not perform stone or tile cutting work. In this regard, the company simply has misread the Administrator's letter.

The final decision letter states, in relevant part:

We additionally note that the duties of the proposed [Helper] classification include the cutting of stone and tile. We normally consider those duties to fall within the scope of the tile setter classification. Therefore, in the absence of any information that such duties are not performed by tile setters in Douglas County, any employee while performing the cutting of stone and tile should be paid the tile setter's wage rate.

AR Tab A. By way of review, the original conformance request from Spencer Tile (for Helper classifications) indicated that the Helpers' duties *included* tile and stone cutting. The Administrator refused to add these conformed classifications because, *inter alia*, the tasks described by Spencer Tile were insufficiently distinct from the tasks performed by journeyman tile setters. Ultimately, the Administrator agreed to add the tile finisher classification with the *specific understanding* that the tile finishers would not be performing the tile and stone cutting function at the lower conformed wage rate. *Id.* Thus, to the extent that the tile finishers are not cutting tile or stone – as claimed by Spencer Tile in its letter petition – this fact merely indicates that they are not performing work out of their proper classification. It does not suggest, however, that the Administrator's final decision is in error.

Finally, we note that the Administrator's conformance action was reasonable. When the Administrator finally accepted the tile finisher classification, the wage rate chosen was the same as the basic laborer rate in Douglas County. Under the facts of this case, we find that this was an acceptable benchmark for a lesser-skilled position like the tile finisher.^{3/}

^{3/} In setting a wage rate for the tile finisher equal to the Douglas County laborer rate, the Administrator apparently concluded that the tile finisher was not a skilled trade. Ordinarily, when conforming a wage rate for a skilled trade classification, the Administrator will assign a wage rate no-less-than the rate paid to lowest-paid skilled classification, so long as that rate is *higher* than the
(continued...)

CONCLUSION

For the foregoing reasons, we conclude that the Administrator's final conformance decision of March 14, 2001, is appropriate under the Davis-Bacon statute and regulations. The petition for review therefore is **DENIED**.

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

^{3/}(...continued)

unskilled laborer rate. *See, e.g., Childress Painting & Assoc., Inc.*, ARB No. 96-121 (Aug. 23, 1996); *Clark Mechanical Contractors, Inc.*, WAB No. 95-03 (Sept. 29, 1995); *M.Z. Contractors Co. (I)*, WAB No. 92-06 (Aug. 25, 1992). The fact that the Administrator relied on the basic laborer rate in this instance suggests that the Administrator viewed the tile finisher position as being relatively low-skilled.