



In the Matter of:

**EXCELL ERECTION, INC.**

**ARB CASE NO. 99-115**

***In re:* Application of Wage Determination No. VA930015 applied to sheet metal mechanics on Contract No. N62470-89-C-9148 at Acute Care Facility - Portsmouth Naval Hospital, Portsmouth, Virginia. DATE: September 29, 2000**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

**Appearances:**

*For the Petitioner:*

John J. Vermeire, III, President, *Excell Erection, Inc., Gloucester, Virginia*

*For the Deputy Administrator:*

Roger W. Wilkinson, Esq.; Douglas J. Davidson, Esq., *U.S. Department of Labor, Washington, D. C.*

**FINAL DECISION AND ORDER**

The petitioner in this case, Excell Erection, Inc. (Excell), is a construction subcontractor performing work on an Acute Care Center at the Portsmouth Naval Hospital, Portsmouth, Virginia. The facility is being built pursuant to a contract with the U.S. Department of the Navy, Naval Facilities Engineering Command (Navy), and is subject to the Davis-Bacon Act, as amended, 40 U.S.C. §276a *et seq.* (1994). Excell is responsible for installing aluminum sheeting on the project's mansard roof, and aluminum roofing and siding on the project's rooftop mechanical room.

The wage determination applicable to the project did not include a sheetmetal worker job classification and wage rate. After the contract was awarded, Excell requested that a sheet metal worker classification be added through the Davis-Bacon conformance procedure found at 29 C.F.R. §5.5(a)(1)(v) (2000). After investigation, the Wage and Hour Administrator's designee (Administrator) concluded that the tasks to be performed by Excell's employees fell within the work jurisdiction of the ironworker job classification already contained in the

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<sup>1/</sup> 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).

applicable wage determination. The Administrator therefore denied the conformance request in a final decision letter issued July 14, 1999. This appeal followed.

We have jurisdiction pursuant to 29 C.F.R. §§7.1 and 7.9 (2000).

## **BACKGROUND**

Late in 1993, the Navy awarded a construction contract to Centex Bateson Construction Company as the prime contractor on the Acute Care Center at the Portsmouth Naval Hospital, Contract No. N62470-89-C-9148. Administrative Record (AR) Tab O. The wage determination applicable to the project was WD VA91005, Mod. 3 (5/21/93). AR Tab P. This wage determination included a total wage/fringe rate of \$20.10/hr. for the ironworker classification, but did not include a sheetmetal worker classification and rate. *Id.*

Excell was awarded a subcontract to perform roofing and siding work on the project. The scope of Excell's subcontract was described by the Navy as follows:

Excell Erection is responsible for the installation of the mansard roofing on the Acute Care Facility (ACF) and for the installation of aluminum siding and roofing on the penthouse mechanical rooms.

a. The ACF is a poured in place concrete structure with brick veneer. The penthouse mechanical rooms are pre-formed metal buildings on top of the ACF. The siding on the mechanical rooms is screwed directly to 3/4" plywood.

b. The mansard roofing comes in sheets approximately three feet wide and 20+ feet long. It is attached to structural steel frames installed by ironworkers on the concrete roof. To install the roofing, a channel is screwed to the steel decking, the sheet aluminum is then attached to the channel with a clip, the channel and clip are covered with a metal batten which fits over the channel, clip and aluminum edges. The gauge of the aluminum is 040, and it is manufactured by Merchant Evans. Workers installing the mansard roofing utilize tools such as drills, screw guns, gas metal cutting saws, metal snips, and rubber mallets.

AR Tab E.

In December 1994, Centex Bateson submitted a conformance request to the Navy at Excell's request, asking that a "sheetmetal mechanic" classification be added to the wage determination at a total wage/fringe rate of \$12.19/hr. The conformance request described the proposed sheetmetal mechanic's tasks as "installation of metal roofing, siding and

insulation.” AR Tab O. The Navy subsequently transmitted Excell’s conformance request to the Wage and Hour Division with a recommendation that the additional classification not be approved by the Labor Department “since the duties described can be performed by a classification of employee (Ironworker) which is already contained in the applicable wage determination. . . .” *Id.*

Several months later, in July 1995, Centex Bateson submitted a slightly different conformance request to the Navy at the behest of another subcontractor on the project, Baker Roofing Company. Baker Roofing, which held the roofing subcontract, similarly asked that a sheetmetal mechanic classification be added to the wage determination at a \$12.19/hr. rate; however, the tasks to be performed by this classification under Baker Roofing’s conformance request were described as “installation of gutters, roof flashing, downspouts, fascia, coping and all other related materials.”<sup>2/</sup> AR Tab N. Like Excell’s earlier request, this conformance request was transmitted to the Wage and Hour Division by the Navy. However, whereas the Navy had not recommended approval of Excell’s proposed classification, the Navy affirmatively did recommend approval of Baker Roofing’s proposal. *Id.*

Baker Roofing’s request was approved promptly by the Wage and Hour Division (AR Tab M), but Excell’s request was delayed while the Division investigated whether the tasks to be performed under Excell’s subcontract might fall within the scope of the ironworker classification already found within the wage determination. On July 26, 1996, the Division advised the Navy’s Contractor Labor Relations Advisor that it was denying Excell’s conformance request “because the work to be performed by this [sheetmetal mechanic] classification may be performed by a classification already included in the wage determination[,]” citing 29 C.F.R. §5.5(a)(v)(A)(1). The Division’s letter specifically noted that “[t]his matter is subject to further review if any interested party should wish to present additional information for consideration.” AR Tab I.

Excell was notified of the Division’s action and immediately notified Centex Bateson that it planned to seek further review. AR Tab H. Excell filed a letter with the Wage and Hour Division a month later in August 1996. AR Tab F. Excell’s appeal to the Division prompted further inquiries to the Navy concerning the precise scope of the work within Excell’s subcontract. AR Tab E.

It appears from the record that the Division took no formal action on Excell’s conformance request until 1998. Apparently assuming that the Wage and Hour Division’s July 1996 letter was dispositive of the conformance request, in April 1998 the Navy ordered Centex Bateson to withhold more than \$43,000 from Excell for alleged underpayment of workers on the Acute Care Center project. AR Tab D.

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<sup>2/</sup> In addition, Baker requested that a “roofer” classification be added through the conformance process, because wage determination WD VA91005, Mod. 3, did not include this job category.

According to Excell, it repeatedly contacted the Division's headquarters staff by telephone in an effort to obtain a final decision on the conformance request, without success. Finally, in October 1998 Excell contacted Congressman Herb Bateman of Newport News, Virginia, seeking his assistance with the matter. AR Tab C.

By letter dated July 14, 1999, addressed to Rep. Bateman, the Division issued a final decision denying the conformance request, thereby affirming the preliminary ruling that had been issued fully three years earlier in July 1996. Excell petitioned for review by this Board.

### **ISSUES PRESENTED**

1. Whether the Administrator was correct in refusing to add the sheetmetal mechanic classification through the conformance mechanism because the tasks to be performed by the new classification were within the scope of a job classification already in the wage determination applicable to the project.
2. Whether the conformance should be granted because of the long period of time that Excell's request was pending before the Administrator.

### **DISCUSSION**

The Board's review of decisions issued by the Administrator is in the nature of an appellate proceeding. 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 Case Nos. 98-086/97-145 , slip op. at 16 (Apr. 25, 2000), *citing Dep't of the Army*, ARB Case 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. §351-358 (1994)).

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. §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 provided with the same information concerning 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. §36.213-(c)(1)(1999).

Although the primary objective of the Davis-Bacon Act is to protect local labor standards, the vehicle for achieving this end – the Labor Department's determination of a prevailing wage schedule, and the incorporation of that wage schedule into construction project bid specifications and contracts – also promotes fairness in the procurement system generally:

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

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

The Davis-Bacon regulations include a mechanism for addressing errors, omissions or ambiguities that may exist in a wage determination: submitting a written request to the Administrator seeking reconsideration of the wage determination. 29 C.F.R. §1.8 (2000). However, challenges to a wage determination must be made prior to the award of a construction contract "to ensure that competing contractors know in advance of bidding what rates must be paid so that they may bid on an equal basis." *See Kapetan Inc.*, WAB Case No. 87-33 (Sept. 2, 1988), and cases cited therein.

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). However, the 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 requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

29 C.F.R. §5.5(a)(1)(v)(A).

In its Petition for Review, Excell lodges two major charges against the Administrator's August 1999 final decision letter: first, that the Administrator erred on the merits in refusing

to add a sheetmetal mechanic classification; and second, that the conformed wage rate should be ordered by the Board because of the Administrator's lengthy delay in issuing the final decision letter. We consider each of these arguments in turn.

**1. Whether the Administrator was correct in refusing to add the sheetmetal mechanic classification through the conformance mechanism because the tasks to be performed by the new classification were within the scope of a job classification already in the wage determination applicable to the project.**

In its submissions to the Wage and Hour Division and this Board, Excell makes several arguments in support of its conformance request. The company notes that its work on the Acute Care Center involves affixing relatively thin (.040") aluminum sheeting, using basic small tools such as hand snips, screw guns and drills. Although the company acknowledges that this "prefomed aluminum standing seam roofing and siding" is attached to heavier metal elements that are erected by ironworkers, it argues that the roofing and siding material is very different in character from the structural elements of the mansard roof and mechanical penthouse structures and traditionally is installed by tradesmen classified as sheetmetal workers. Excell contends that it has used a sheetmetal mechanic classification for years to perform this work on many different Davis-Bacon jobs, all without complaint by the government agencies involved.<sup>3/</sup> Excell supports its arguments with excerpts from the contract specifications from the Acute Care Center project, as well as a letter from the manufacturer of the aluminum sheeting product indicating that the material normally is installed by sheetmetal mechanics.

In addition, Excell notes that the Administrator ultimately added a sheetmetal mechanic classification to the wage determination in 1995 in response to Baker Roofing's conformance request. Excell observes that if it had learned about the Baker Roofing conformance approval, it would not have pursued its separate request for the classification, which Excell apparently views as identical.

While Excell's arguments are interesting, they miss the mark. In order to add an additional job classification and wage rate through the conformance process, the proposed classification must fall squarely within each element of the three-part conformance test, *supra*. With specific regard to the first element of the test ("The work to be performed by the classification is not performed by a classification in the wage determination"), the Board has held that

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<sup>3/</sup> Excell does not provide any specific information about these other federal projects, such as their locations, the nature of the construction element assembled, whether the sheetmetal mechanic classification was included in the original wage determination or added through a conformance, the relative wage rates of the sheetmetal mechanic and ironworker classifications, etc.

in a conformance case, which always occurs *after* a contract has been awarded, the Administrator is not required to prove that the work of the proposed conformed classification already is performed on a prevailing basis by a classification in the wage determination. All that is required is a showing that one of the classifications in the wage determination performs the work of the proposed conformed classification, even if that practice does not prevail in the area. [*Pizzagalli*], slip op. at 8. Nothing more is needed: "Board precedent makes clear that in applying the first criterion [of the regulations] it need not be established that the classification listed in the wage determination is the prevailing practice, but only that the work in question is performed in that area by that classification of worker." *In the Matter of Iron Workers II*, WAB Case No. 90-26, March 20, 1992, citing *TRL Systems*, WAB Case No. 86-08 (Aug. 7, 1986), *Warren Oliver Company*, WAB Case No. 84-08 Nov. 20, 1984; see also *J.A. Languet Construction Co.*, WAB Dec. April 27, 1995 (request for conformance of job classification "Concrete Worker-Form" denied because work was already performed by Carpenter classification in wage determination).

*U.S. Fire Protection, Inc.*, ARB Case Nos. 99-008, 039, slip op. at 5-6 (Aug. 30, 1999). In other words, when evaluating a proposed job classification under the expedited conformance process, the Administrator is not required to reevaluate prevailing practices in the area.

In this case, the Administrator correctly noted that the ironworker classification in the wage determination was based on rates found in a collective bargaining agreement. Pursuant to the Wage Appeals Board's decision in *Fry Brothers Corp*, WAB Case No. 76-06 (June 14, 1977), the Administrator appropriately considered the jurisdictional scope of the ironworker job classification in the collective bargaining agreement underlying the wage rate. In his investigation into the conformance request, the Administrator contacted both the Iron Workers and Sheet Metal Workers unions and determined that the particular tasks contemplated under the Excell conformance request fell within the scope of duties that would be performed by ironworkers under the collective bargaining agreement. This conclusion was supported by communications from both unions, as well as evidence that ironworkers had performed similar work previously in the locality (including correspondence from employers that hired iron workers on similar projects).

Based on the materials in the Administrative Record, we are satisfied that the Administrator's decision denying Excell's conformance request comports with the requirements of the regulation and governing legal standards. The record plainly includes sufficient evidence to conclude that the workers in the ironworker classification perform the disputed work; thus, because there is a classification within the wage determination that can

perform these tasks, it would be inappropriate to add another classification through the conformance process.

We also reject Excell's claim that it should have been allowed to use the sheetmetal mechanic classification that was granted in response to the Baker Roofing conformance request. The scope of work that was identified by Baker Roofing was very specific: installation of gutters, roof flashing, downspouts, fascia, coping and all other related materials. There is no evidence in the record suggesting that these tasks are performed by ironworkers or any other classification found in the wage determination; thus a conformance was appropriate within the specific scope of the Baker Roofing request. However, as discussed above, this cannot be said of the tasks required under Excell's subcontract. In this case, the two requests are separate and distinct, and Excell is not entitled to rely on the sheetmetal mechanic classification and wage rate granted to Baker Roofing.

**2. Whether the conformance should be granted because of the long period of time that Excell's request was pending before the Administrator.**

In addition to challenging the merits of the Administrator's final decision, Excell argues that it has been prejudiced by the extended period of time in which its request was pending before the Administrator between 1996 and 1999, and that this Board therefore should grant Excell's petition.

Nowhere in the record or in the Administrator's statement to this Board is there any explanation for the lengthy delay by the Wage and Hour Division. In fact, it appears that the Division was moved to act only after receiving an inquiry from a Member of Congress. We do not condone such delay, and recognize Excell's frustration in this regard; but sympathy alone does not provide a justification for granting a conformance request that plainly does not meet the regulatory standard.

The Board considered a similar issue in another Davis-Bacon conformance case, and concluded that the contractor (The Law Company) had not provided a sufficient justification for overturning the Administrator's decision based on delay:

The goal of the Davis-Bacon Act is to insure that federal construction dollars do not undermine locally prevailing wage rates; the intended beneficiaries of the Act are the laborers and mechanics working on federal and federally-assisted construction contracts. *U.S. v. Binghamton Construction Co.*, 347 U.S. 171 (1954). If Law Company's Petition for Review were to be granted, the employees working on the Project would be denied a portion of their lawful wages – a result that is contrary to the statute itself. Moreover, Law Company would reap a windfall when compared to the other contractors who submitted bids on

the VA hospital project, who presumably based their bids on the wage rates in the published wage determination.

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

*The Law Company*, ARB Case No. 98-107, slip op. at 15-16 (Sept. 30, 1999).

As in *The Law Company*, we cannot conclude from the record before us that Excell has been prejudiced by the delay in this case. Although the Wage and Hour Division's actions have delayed the ultimate resolution of this dispute (*i.e.*, a final agency decision rejecting the conformance request, and the associated payment of back wages to the affected employees), the net financial impact on Excell essentially is unchanged. Arguably, the greater harm has been experienced by Excell's employees on the project, who have been denied their full wages during this period. Accordingly, we find that Excell has not demonstrated prejudice that would warrant reversing the Administrator's decision on this ground.

## CONCLUSION

For the foregoing reasons, the decision of the Administrator is **AFFIRMED**, and the Petition for Review is **DENIED**.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**CYNTHIA L. ATTWOOD**

Member