



In the Matter of:

AMERICAN BUILDING AUTOMATION, INC.

ARB CASE NO. 00-067

***In re:* Addition of a building and automation technician to Davis-Bacon Wage Decision No. CA990033, which was incorporated into Contract No. DTCG5099-C-643PY for the installation of an Automated Logic Corporation Direct Digital Control System at the U.S. Coast Guard facility, San Pedro, Los Angeles County, CA.**

DATE: March 30, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Petitioner:

Adrian Philip Rosales, President, *American Building Automation, Inc., San Buenaventura, California*

For the Administrator:

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

DECISION AND ORDER

In this case, we review a June 6, 2000, final decision issued by the Wage and Hour Administrator's designee (Administrator) denying a request to add the classification "Building Automation and Controls Technician" to Wage Determination No. CA990033 (applicable to building, heavy and highway construction in Los Angeles County, California) under the Davis-Bacon conformance process found at 29 C.F.R. §5.5(a)(1)(v)(A) (2000). For the reasons discussed below, we agree with the Administrator's final decision and deny the Petition for Review.

On December 20, 1999, American Building Automation, Inc. (ABA), was awarded a subcontract to install a building automation and control system at a U.S. Coast Guard facility in San Pedro, California. The project was a federal construction contract; thus, the wage rates for work

^{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).

performed under the contract were established by the Department of Labor pursuant to the prevailing wage requirements of the Davis-Bacon Act, 40 U.S.C.A. §276a *et seq.* (West 1986). Wage Determination (WD) CA990033 applied to the project.

In ABA's view, the work of installing building automation and controls work did not fall squarely within any single trade classification listed in the wage determination, because in order to properly integrate the building's systems, ABA's workers had to be knowledgeable in all of the traditional trades including electrical, mechanical, telecommunications, and networks. For that reason, ABA submitted a conformance request to the U.S. Coast Guard (the contracting agency) asking that the classification for "Building Automation and Controls Technician" (BACT) be added to the Department's wage determination at an hourly rate wage of \$19.70, plus \$1.33/hr. in fringe benefits. The Coast Guard forwarded ABA's request to the Department's Wage and Hour Division.

The Wage and Hour Division reviewed ABA's submission. In addition, believing that the work to be performed by ABA's proposed new classification might also fall within the work performed by employees classified as plumbers, the Division contacted Plumbers Local 250^{2/} requesting evidence regarding local trade practices. Local 250 confirmed that the controls work to be performed by the proposed BACT classification fell within the work of the plumber classification, submitting a copy of its collective bargaining agreement and documentation of several recent construction projects where this work had been performed by workers classified and paid as plumbers.

Based on this information, and in light of the explicit requirements of the conformance regulations (discussed below), the Wage and Hour Division determined that it was prohibited from establishing an additional classification because the work in question could be performed under an existing classification, *i.e.*, plumbers. Therefore, ABA's request was denied by letter dated April 4, 2000. ABA requested reconsideration of that determination, but that request was denied by letter dated June 6, 2000. This appeal followed.

We have jurisdiction pursuant to 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 (West 1987)).

^{2/} The prevailing wage rate for plumbers in Los Angeles County is based on the collectively-bargained rate.

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. Under the applicable regulations, 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. *Pizzagalli Construction Co.*, ARB No. 98-090, slip op. at 5 (May 28, 1999). See also 29 C.F.R. §5.5; 48 C.F.R. Subpart 22.4 (2000).

Errors, omissions or ambiguities that may exist in a wage determination can be addressed by 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. It is undisputed that no such pre-award challenge was submitted with regard to the San Pedro project.

On appeal, ABA asserts that it did not have reason to believe that building automation and controls work fell within the ambit of the plumber classification and that the Administrator's decision is in error, stating *inter alia*:

- 1) The Department of Labor in San Francisco should not have instructed him to request a new classification through the conformance procedure if, in the Department's view, building automation and controls work was covered under an existing classification;
- 2) California State Contractor's License Board has never suggested that ABA obtain plumbers licenses for building automation and controls work and has only suggested that ABA obtain a C-7 Low Voltage Systems electrical license;
- 3) The existing Wage Determination does not expressly include "Building Automation" under any of the plumber's categories; and
- 4) ABA contacted almost every controls contractor in the Blue Book (a construction industry publication standard that contractors and buyers utilize to acquire services) and the majority of them did not consider themselves plumbers.

By design, the Davis-Bacon conformance process is an expedited proceeding created to "fill in the gaps" in the Wage and Hour Division's wage determinations. The narrow goal is to establish an appropriate wage rate for a trade classification needed to perform a federal construction contract when the Division's published wage determination does not already include a classification that performs the work. A conformance request does not call for a *de novo* evaluation of prevailing local

practices or wage rates, questions that might appropriately be raised in a pre-award request for review and reconsideration of a wage determination under 29 C.F.R. §1.8 (2000). As noted in *Pizzagalli, supra*, the limitations built into the conformance procedures are essential to maintaining fairness for all contractors competing for federal construction projects.

Under the conformance regulations, three distinct criteria must be met for an additional classification and wage rate to be approved:

- 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).

The threshold question before the Wage and Hour Division in this case was whether building automation and controls work could be performed by an existing classification in the wage determination. Because the prevailing wage rates in the wage determination were based on collectively-bargained rates, the Administrator inquired into trade jurisdiction practices under the collective bargaining agreements in accordance with the Wage Appeals Board's *Fry Brothers* decision:

When the Department of Labor determines that the prevailing wage for a particular craft derives from experience under negotiated arrangements, the Labor Department has to see to it that the wage determinations carry along with them as fairly and fully as may be practicable, the classifications of work according to job content upon which the wage rates are based.

Fry Brothers Corp., WAB Case No. 76-06, slip op. at 17 (June 14, 1977).

ABA's appeal appears to be premised, at least in part, on the assumption that the building automation and controls work cannot be included under the existing plumber classification unless the Wage and Hour Division first determines that plumbers actually perform most, or a significant part of, such work. However, it is well-established that in a conformance situation the Division is not required to determine that a classification in the wage determination actually is the prevailing craft for the tasks in question, only that there is evidence to establish that the classification actually performs the disputed tasks in the locality. See *U.S. Fire Protection, Inc.*, ARB Nos. 99-008, 99-139, slip op. at 6 (Aug. 30, 1999), and cases cited therein.

In reviewing ABA's request for a new classification, the Division determined that the Master Agreement of Plumber's Local Union No. 250 states that the Plumber classification contained in the

wage determination includes building automation and controls. However, the Division did not view this assertion by Local 250 as conclusive, but instead asked that Local 250 provide wage payment data to support the claim that building automation and controls work falls within the jurisdiction of the plumber craft and that plumbers actually perform such work. Local 250 responded by submitting wage payment data showing that plumbers do, in fact, perform the work in question within the locality. Based on this data, the Wage and Hour Division determined that ABA could not satisfy the first criterion for establishing a new classification under 29 C.F.R. §5.5(a)(1)(v)(A). For this reason alone, the Wage and Hour Division's decision denying the conformance request is supported by the record, and must be affirmed.^{3/}

With regard to ABA's other concerns, they are essentially anecdotal in nature and, as such, do not warrant a reversal of the Administrator's decision, or a remand for further inquiry. Moreover, it is unclear whether these arguments were first presented to the Administrator; in any event, they were not *decided* by the Administrator, which is a necessary prerequisite for review by this Board. *Millwright Local 1755*, ARB No. 98-015, slip op. at 12 (May 11, 2000) (ARB lacks jurisdiction to review issues not decided by the Administrator). We find ABA's arguments unpersuasive:

- When confronted with ABA's inquiries about adding a different classification and wage rate for the BACTs, it was entirely appropriate for the Labor Department's San Francisco office to refer the contractor to the Department's conformance procedures; we see no error here, nor was the office obligated immediately to explore the scope of duties performed by various trade classifications in the wage determination at this preliminary stage.
- While state licensure requirements may help inform the Wage and Hour Administrator concerning the job content of various construction trade classifications, they plainly are not controlling in a Davis-Bacon conformance case. What is dispositive in this case are the explicit requirements of the Secretary's conformance regulations.
- With regard to ABA's allegation that the wage determination did not expressly include mention of building automation work as falling within the trade jurisdiction of plumbers, we note that the Administrator is not required to detail the myriad duties performed by different trades found within a wage determination. Contractors who seek to perform work on a federal construction project subject to the Davis-Bacon Act have an obligation "to familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents." *Joe E. Woods*, ARB No. 96-127 (Nov. 19, 1996). There is no evidence

^{3/} We note also that the record is devoid of any evidence that building automation and controls work is not performed by plumbers; ABA's argument on this issue consists merely of unsupported assertions.

in this case to suggest that ABA made any timely effort to ascertain the requirements of the wage determination with regard to building automation and control work.

Because the Administrator properly determined that the work of the proposed BACT classification was performed by another classification already found within the wage determination, his decision denying the conformance request was correct and the Petition therefore is **DENIED**.

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member