



In the Matter of:

CENTRAL ENERGY PLANT

ARB CASE NO. 01-057

***In re:* Contract No. F29651-H-0001
at Fort Campbell, Christian County,
Kentucky**

DATE: September 30, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

Appearances:

For Petitioner:

**Robert W. Pessolaro, Esq., *U.S. Army Corps of Engineers, Office of Counsel,
Louisville, Kentucky***

For Respondent Administrator, Wage and Hour Division:

**Carol Arnold, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Howard
M. Radzely, Esq., *U.S. Department of Labor, Washington, D.C.***

For Intervenor Foley Company:

**Michael P. Davis, Esq., Sharla A. Barlow, Esq., *Shapiro, Fussell, Wedge,
Smotherman, Martin & Price, LLP, Atlanta, Georgia***

For Intervenor Kentucky State District Council of Carpenters:

**Thomas J. Schultz, Esq., *Kentucky State District Council of Carpenters,
Frankfort, Kentucky***

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (ARB), pursuant to the Davis-Bacon Act, as amended, 40 U.S.C.A. §§ 276a to 276a-5 (West 2001) (DBA or

¹ The U.S. Army Corps of Engineers desires a decision by the entire Board, rather than by a single member, as authorized at 29 C.F.R. § 7. This appeal has been assigned to a panel of three Board members, as authorized by Secretary's Order 1-2002. 67 Fed. Reg. 64,272 § 5 (Oct. 17, 2002).

Act)² and the implementing regulations at 29 C.F.R. § 7.9 (2000). The U.S. Army Corps of Engineers (Corps) seeks review and reversal of the April 12, 2001 final determination of William W. Gross, Director, Office of Wage Determinations, Employment Standards Division, on behalf of the Acting Administrator, Wage and Hour Division (Administrator).

The Administrator's final determination concluded that pursuant to 29 C.F.R. § 1.6(f), the Corps contract for the upgrade of the Central Energy Plant at Ft. Campbell, Kentucky should contain the already existing general wage determination (GWD) for "building" construction³ (*see* Record Tab H) and retroactively incorporate the GWD for "heavy" construction for the piping work⁴ (*see* Record Tab G). For the reasons set forth below, we grant the Petition for Review and affirm the Administrator's final determination.

BACKGROUND

This case involves a construction contract between the Corps and the Foley Company (Foley). The wages paid under the contract must comply with the provisions of the Davis-Bacon Act and its implementing regulations.

The Act requires that the advertised specifications for construction contracts to which the United States is a party must contain a provision stating the minimum wages to be paid the various classifications of mechanics or laborers to be employed under the contract, based on wage rates determined by the Secretary of Labor to be prevailing in the geographic locality where the contract is performed. 40 U.S.C.A. § 276a. The Secretary's function of issuing minimum wage determinations is delegated under the implementing regulations to the Administrator of the Wage and Hour Division. 29 C.F.R. § 1.1(a). The minimum wage rates contained in the determinations derive from rates the Administrator finds prevailing in the locality where the work is to be performed. 29 C.F.R. § 1.3. Wage determinations are incorporated into bid solicitations by

² The Act requires prime contractors and subcontractors to pay prevailing wage rates, as determined by the Secretary of Labor, to all laborers and mechanics that perform work on federal public construction contracts in excess of \$2,000. The Secretary of Labor predetermines these prevailing wages by locality. The prevailing wage rates and labor standards provisions establishing the Act's requirements are included in each covered contract and are made part of the performance requirements of federal construction contracts.

³ The applicable wage determination for the new building portion of the Central Energy Plant contract.

⁴ The applicable wage determination for the utility piping distribution portion of the upgrade.

contracting agencies (in this case the Corps). *See* 29 C.F.R. § 5.5(a); *see also* 48 C.F.R. § 36.213-3(c).

There are two different ways that contracting agencies obtain wage determinations for their construction projects. When wage patterns for a particular type of construction in a locality are established and when a large volume of procurement is anticipated in the area for the construction, the Administrator may furnish notice in the Federal Register of a GWD. 29 C.F.R. § 1.5(b). GWDs are published in a special Government Printing Office document.⁵ Contracting agencies may use general wage determinations without notifying the Administrator. *Id.* However, the contracting agency is to refer any question regarding application of wage rate schedules to the Administrator. 29 C.F.R. § 1.6(b). Alternatively, contracting agencies may ask the Wage and Hour Division (WHD) to issue a project wage determination which is a wage determination for particular contracts to cover specified employment classifications on an individual construction project. *See* 29 C.F.R. § 1.5(a). The instant case involves one of WHD's section 1.5(b) general wage determinations.

The WHD's implementing regulations for the Act also provide a mechanism for the incorporation of proper wage determinations in covered contracts after contract award and after construction begins, noting that its authority in this regard is derived from the Act as well as from Reorganization Plan 14 of 1950. *See* 47 Fed. Reg. 23,646-23,647 (May 28, 1982). This regulation states:

The Administrator may issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate *a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act*, or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may issue a wage determination that shall be applicable to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination. Under any of the above circumstances, the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the

⁵ The Department of Labor has distinguished four types of construction for purposes of making prevailing wage determinations: building, residential, heavy and highway construction.

beginning of construction through supplemental agreement or through change order, *Provided* That the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.

29 C.F.R. § 1.6(f) (emphasis added).

The WHD published guidelines in the form of All Agency Memoranda (AAM) Nos. 130 and 131 to assist contracting agencies in the use of wage determinations and to assure that proper wages are paid to the workers as intended by the Davis Bacon Act. *See generally Almeda-Sims Sludge Disposal Plant*, WAB No. 78-13 (Jan. 5, 1979).⁶

AAM No. 130 states, in relevant part, “[g]enerally construction projects are classified as either Building, Heavy, Highway or Residential.” Record Tab K - AAM No. 130 at 2. Water and sewer supply line projects (not incidental to building) are considered heavy construction. *Id.* at 4-5. In addition:

Generally, for wage determination purposes, a project consists of all construction necessary to complete a facility regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place ... for example, water or sewer line work which is part of a building project would not generally be separately classified. Where construction is “incidental” in function, *20 percent of project cost* is used as a *rough guide for determining* when construction is also *incidental* in amount to the overall project.

Id. at 2 n.1 (emphasis added). “Contracting agencies should seek a determination from the Department of Labor on close questions or when the appropriate classification is in dispute.” *Id.* at 2. Finally, “[I]n applying these guidelines contracting agencies are reminded that they have the authority only in the first instance to designate the appropriate wage schedule” and “[a]ny questions regarding the application of the guidelines set forth in this memorandum [sic] to a particular project or any disputes regarding the application of the wage schedules are to be referred to the Wage and Hour

⁶ Prior to the establishment of the ARB in 1996, the WAB (Wage Appeals Board) was responsible for issuing final agency decisions under the DBA and its related Acts.

Division for resolution, and the instructions of the Wage and Hour Division are to be observed in all instances.” *Id.* at 6.

AAM No. 131, a clarification of AAM No. 130, similarly states in relevant part that “if the contracting agency has any questions regarding the application of the guidelines in a specific case, or if a question is raised with the agency by interested parties, the issue of application of the wage rate schedules should be referred to the Wage and Hour Division.” Record Tab L – AAM No. 131 at 1. In addition, “the contracting agency should consult with the Wage and Hour Division whenever it appears that more than one schedule of rates is appropriate for a project.” *Id.* at 2. Specifically, AAM No. 131 states:

Generally, multiple schedules are issued if the construction items are substantial in relation to project cost – more than approximately 20 percent. Only one schedule is issued if construction items are “incidental” in function to the overall character of a project ... and if there is not a substantial amount of construction in the second category. Note, however, that 20 percent is a rough guide. For example, when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost.

Id. Finally, AAM No. 131 states that “[I]f any questions arise regarding the application of the schedules to the project in accordance with these guidelines, or if it appears that a wage schedule may have been issued in error, a ruling should be requested from the Wage and Hour Division.” *Id.*

In this case the Corps initiated a renovation of facilities at Ft. Campbell, Kentucky in 1998, which included renovations of barracks, dining facilities, gymnasiums and the central energy plant. The renovation of the central energy plant included a building addition, as well as the installation of new piping necessary for the conversion of the existing steam distribution piping system to a new, low temperature, hot water piping system from the central energy plant to the other facilities.

The barracks upgrade contract was awarded in June 1998, and separate contracts for the renovations of dining facilities and gymnasiums were awarded in September 1998. Finally, the Central Energy Plant contract⁷ was awarded to Foley Company (Foley) in September 1999. All of the contracts’ estimates, solicitations, as well as the

⁷ Contract No. DACA27-99-C-0050.

contract bids and awarded contracts, incorporated only the “building” construction wage determination.

The Corps calculated the total dollar amount for all of the contracts awarded for the renovation “project” at \$61,471,734, whereas the amount of the piping work included in the Central Energy Plant contract totaled \$11,809,821 or 19.2% of the total amount of the overall project. The Corps used the wage determination for “building” construction to calculate the costs of the entire Central Energy Plant contract.⁸ It did not use the higher wage determination for “heavy” construction because it concluded that the higher wage was not necessary based on its interpretation of AAM Nos. 130 and 131. As indicated above, these memoranda, allow a contracting agency to use the primary wage determination (in this case the “building” construction wage determination) for work that is simply “incidental” to the overall contract. The Corps concluded that the “heavy” construction piping work was incidental to and not a substantial part of the “building” work to be performed in the overall “project.” It reasoned that the piping work amounted to less than 20% of the cost of the overall project. Thus, the Corps used only the lower “building” construction wage determination for all of the contract work to be performed on the project, including the piping work.⁹

The Central Energy Plant contract was awarded to Foley, a Kansas City, Missouri firm, on September 22, 1999. The Corps sent a letter to Foley on October 22, 1999, authorizing Foley to proceed with the construction project. Foley contacted Local 181 of the International Union of Operating Engineers (Union) on November 24 to discuss the possibility of signing an agreement with Local 181. Foley and Union representatives met on November 30, 1999, but did not reach an agreement because the “heavy” construction wage determination was not in the contract. The meeting concluded with the understanding that the Union would contact the Corps regarding the inclusion in the contract of the higher “heavy” construction wage determination. Accordingly, in December 1999, the Union contacted William Dean of the Corps regarding their concerns. Dean said he would check into the matter and get back to the Union sometime after the first of the year.

On January 6, 2000, Anita Chadwell of the Corps called the Union District Representative and stated that there had been a mistake on the classification and that the

⁸ The Corps did not refer to the WHD the question of whether to incorporate the “heavy” construction wage rate into the Central Energy Plant contract.

⁹ The Corps concedes that the piping work “would normally be classified” using the higher “heavy” construction wage determination, *see* Corps Brief at 5. The Corps estimates the current (2001) costs of the piping work under the “heavy” construction wage would have added \$3 million to the cost of the contract. Corps. Pet. for Rev. at 8. Foley contends that the piping work would have amounted to \$13,455,953 or 22% of the total renovation contract. *See* Foley Brief at 4.

higher heavy construction wage determination would apply. Record Tab D. The District Representative relayed this information to Chris Caligeri of Foley Co. on January 11. Caligeri told the District Representative that the Corps had in contacted Foley to obtain cost information and that a final decision would be made on January 11, 2000. Also on January 11, Chadwell faxed the Union to inform the District Representative that the initial ruling was not reversed and that the lower “building” construction wage determination would still apply. *See* Record Tab D.

Construction began on the Central Energy Plant contract in early January 2000, Corps Brief at 5. The Corps asserts in its brief on appeal that “[i]n *late* January 2000, subsequent to award of contract and commencement of construction, the [Corps] received oral inquiry from labor union sources, operating engineers, who expressed the opinion that work under this contract was subject to heavy rates.” Corps Brief at 5, ¶ 25 (emphasis added). The Corps does not cite to the record in support of its assertion that the Union initially questioned the wage determination in “late” January 2000. The Corps further asserts on appeal that “[a]s a result of this inquiry, the [Corps] revisited the issue and confirmed that building rates were the appropriate wage determination and that heavy work was incidental to the building work and thus heavy wage rates did not need to be incorporated into the contract.” Corps Brief at 5, ¶ 26.

A January 11, 2000 fax from the Corps and a letter dated January 13, 2000, from a District Representative of the Union to the Business Manager of the Union, *see* Record Tab D, and the amicus brief of the Kentucky State Council of Carpenters provide a different version of the timing of the Union’s expressions of concern with the “building” construction wage determination used in the Central Energy Plant contract.

In February 2000 Foley wrote the Corps a letter inquiring as to the reasoning for the Corps’ ruling. The Corps responded by letter dated April 11, 2000, that:

We concluded that this project did not match any of the list of projects identified as heavy construction projects by USDOL and accordingly concluded that the project more closely resembled a building construction project and therefore stuck by the initial decision to incorporate building wage determination in the project.¹⁰

Record Tab F. The Corps further noted, however, that “the USDOL is the final arbiter and determiner of the proper wage rates contained in the various construction contracts,”

¹⁰ The Corps concedes that the piping work falls under the “heavy” construction wage determination. However, the Corps used the lower “building” construction wage to calculate costs and percentages. Corps Brief at 5.

that the “union involved has the right to submit this to the USDOL for its ultimate resolution” and that the DOL “could conceivably reverse our decision and direct us to incorporate the heavy decision into the contract,” but we “have not heard that this matter has been referred to the USDOL for its adjudication.” *Id.*

In May and June 2000, private individuals working on the Central Energy Plant contract, as well as a representative of the Kentucky State District Council of Carpenters, requested that the local Louisville Wage and Hour office apply the higher “heavy” construction wage determination to the piping work on the Central Energy Plant contract. Record Tabs C, E.

The request for the application of the “heavy” construction wage determination to the piping work portion of the contract progressed through the WHD’s local office, regional office and finally to the national office resulting in an April 12, 2001 decision by the Acting Administrator of the Wage and Hour Administration.¹¹

Final Determination of the Administrator

The Administrator determined that, pursuant to 29 C.F.R. § 1.6(f), the “heavy” construction wage determination should be included in the Central Energy Plant contract for the piping work. The Administrator noted that AAM Nos. 130 and 131 provide guidelines to contracting agencies regarding the application of multiple or different wage determinations to projects involving more than one type of construction. Final Determination at 2. The Administrator stated that a project is considered mixed and “more than one [wage determination] applies” if the different construction items are “substantial in relation to the project cost,” i.e., “valued at more than 20 percent of the total cost or at a cost of \$1,000,000 or more.” *Id.* Based on the contract information and cost amounts provided by the Corps, the Administrator found that the project includes “substantial” amounts of different construction items, i.e., the total cost of the “project” is “over \$61,000,000” and that the cost of the piping work is “over \$11,000,000.” *Id.* at 2-3. Consequently, based on the information the Corps provided and in accordance with AAM Nos. 130 and 131, the Administrator concluded that the wage determination for “heavy” construction, including applicable modifications, applies to the piping work and

¹¹ On November 20, 2000, the local Louisville Wage and Hour Division office forwarded the inquiries to the regional Atlanta office, stating that the matter should be forwarded to the national office for a determination and opining that “since the ‘heavy’ portion of the project is almost \$12 million that is substantial per the WAB ruling in the Virginia Interstate Highway project even that at 19.3% it is less than the 20% called for in AAM [Nos.] 130 and 131.” Record Tab C. On February 22, 2001, the WHD’s regional Atlanta office requested that the national office issue a letter pursuant to 29 C.F.R. § 1.6(f) ordering the Corps to modify the contract to include the heavy wage decision for the piping work because the Corps had refused to do so. Record Tab B.

that the “building” wage determination already in the contract applies to the new building addition portion of the Central Energy Plant contract.

JURISDICTION

The ARB has jurisdiction over this dispute 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 2001) (delegating to the Secretary of Labor responsibility for developing government-wide policies, interpretations and procedures to implement the Davis-Bacon Act and the Related Acts); Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), and 29 C.F.R. §§ 7.1 and 7.9.

STANDARD OF REVIEW

The proceedings before the ARB are 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). The Board acts as fully and finally as might the Secretary of Labor concerning the matters within its jurisdiction. 29 C.F.R. § 7.1(d). The Board will 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 Department 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). The Board generally defers to the Administrator as being “in the best position to interpret those rules in the first instance . . . and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator’s interpretation aside.” *Titan IV Mobile Service Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

STATEMENT OF ISSUES

The Board considers the following issues:

1. Whether the Administrator properly invoked his authority under 29 C.F.R. § 1.6(f) to reconsider the wage determination after the Central Energy Plant contract was awarded and construction had begun.
2. Whether it was a reasonable exercise of the Administrator’s authority to conclude that the Corps should retroactively modify the Central Energy Plant contract to

include a wage determination for “heavy” construction because the piping work under the contract constituted a substantial portion of the overall project.

3. Whether the Central Energy Plant contract is its own independent project for the purposes of determining the appropriate wage determination to be used for the piping work to be performed on the contract.

DISCUSSION

1. Timeliness of the Administrator’s Final Determination

The Administrator determined that he had the authority to retroactively modify the Central Energy Plant contract after award and after construction had begun. He specifically cited 29 C.F.R. § 1.6(f) as his authority for issuing the decision. Final Determination at 1.

The Corps argues that the “decision of the Administrator is untimely.” Corps reply brief at 9. It states “[Some] two years later, the UDSOL [sic] attempts to subvert the clear intent of the parties as expressed in the contractual agreement entered into between the United States and the contractor.” *Id.* The Corps continues to argue that “the complaining parties did not object [to the terms of the contract] until after the contract was awarded and construction work commenced.”¹² *Id.* at 10. Finally, the Corps concludes, “The role of the Department of Labor in this process ceases once the wage determination has been incorporated into the contract.” *Id.* at 12.

The Corps does not discuss or even recognize the existence of 29 C.F.R. § 1.6(f) in its Petition for Review or in the Reply Brief. Instead, the Corps relies on case law that either predates the promulgation of 29 C.F.R. § 1.6(f) or is relevant to the timeliness of a request for reconsideration or modification of a wage determination pursuant to 29 C.F.R. §§ 1.6(c) and 1.8 or to the “conformance action” procedures under 29 C.F.R. Part 5.¹³ Again, the regulation at issue here is 29 C.F.R. § 1.6(f).

¹² The record shows that the dispute over the proper wage determination was brought to the Corps’ attention in December 1999, or at least prior to January 6, 2000. Construction began in early January 2000. The Corps states in its brief that it did not know until January 20, 2000, of these concerns.

¹³ See generally *ICA Constr. Corp. and Tropical Vill., Inc.*, WAB No. 91-31 (Dec. 30, 1991); *Dairy Dev. Ltd.*, WAB No. 88-35 (Aug. 24, 1990); *Granite Builders, Inc.*, WAB No. 85-22 (Jan. 27, 1986)(specifically holding that 29 C.F.R. § 1.6(f) was not applicable to the case). The Corps also relies, in part, upon *Universities Research, Inc. v. Coutu*, 450 U.S. 754, 761 n.9 (1981) (wherein the Supreme Court declined to address the issue) and General

Continued . . .

Section 1.6(f) was promulgated to provide a mechanism for the incorporation of proper wage determinations in covered contracts after contract award and after construction begins. *See* 47 Fed. Reg. 23,646-23,647 (May 28, 1982). Specifically, section 1.6(f) grants the interested parties the opportunity to challenge the wage determination incorporated in the Central Energy Plant contract, and gives the Administrator the authority to modify the wage determination incorporated in the Central Energy Plant contract, after the contract award or after the beginning of construction so long as at least one of the criteria set out in the regulation is met. *See* 29 C.F.R. § 1.6(f);¹⁴ *Farmer's Branch*, WAB No. 90-19 (May 17, 1991); *see also E & M Sales, Inc.*, WAB No. 91-17 (Oct. 4, 1991); *TRL Systems*, WAB No. 86-08 (Aug. 7, 1986).

The Board concludes that the plain language of section 1.6(f) provides the Administrator with authority to modify the Central Energy Plant contract “*after contract award or after the beginning of construction*” so long as the contracting agency, the Corps, has “failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act” *See* 29 C.F.R. § 1.6(f) (emphasis added). We now must determine whether the Corps failed to

Accounting Office opinions at 40 Comp. Gen. 565 (1961) and 17 Comp. Gen. 471 (1937), which predate the promulgation of 29 C.F.R. § 1.6(f) and are not on point. *See Farmer's Branch*, WAB No. 90-19 (May 17, 1991).

In addition, the Corps relies on a holding in *A.S. McGaughan Co., Inc.*, WAB No. 92-17 (May 26, 1993), which involved the responsibility of contractors to timely resolve questions as to which wage rates within a particular wage determination should be applied for the work done by the contractor before the contract award. *McGaughan* does not address, however, the authority of the Administrator to require, even after a contract award or after the beginning of construction, that another wage determination be applied to work performed under a contract other than the wage determination specified in the contract pursuant to 29 C.F.R. § 1.6(f), applicable in this case.

The Corps' reliance on the holding in *Heavy Constructor's Ass'n of the Greater Kansas City Area*, ARB No. 96-128 (ARB July 2, 1996), is also misplaced as that case is relevant to the Administrator's discretionary authority to retroactively correct a clerical error in a wage determination after a contract award or construction has begun pursuant to 29 C.F.R. 1.6(d), but not to the Administrator's authority under 29 C.F.R. § 1.6(f). Finally, the Corps' reliance on the holding in *Almeda-Sims Sludge Disposal Plant*, WAB No. 78-13 (Jan. 5, 1979), is misplaced because that decision holds that the WAB cannot direct that the wage rates included in a contract be changed after the contract's award, but does not address the Administrator's authority under 29 C.F.R. § 1.6(f).

¹⁴ The issue of whether the criteria are met in this case is the focus of discussion under the second issue discussed herein.

incorporate into the Central Energy Plant contract a wage determination that is in accordance with the Davis-Bacon Act.

2. The Piping Work Was Substantial and Must Be Included In The Contract

The Corps argues that the Administrator erred in his determination that a separate GWD for heavy construction should be included in the Central Energy Plant contract to cover the piping work. The Corps determined that the guidance in AAM No. 130 provided that no separate GWD for “heavy” construction was required in the contract because the piping work represented an “incidental” portion of the overall project. Therefore, the Corps specified only the “building” construction GWD for the Central Energy Plant contract. At issue is whether the Corps should have applied the heavy construction GWD to the piping work. AAM No.130 allows the Corps to use the primary GWD (building construction GWD in this case) for all work projects in the contract so long as a work project is an “incidental” part, not a “substantial” part of the overall project.

The Davis-Bacon Act requires government contracts to contain the appropriate prevailing wage determinations. Contracting agencies are responsible for insuring that appropriate wage determinations are incorporated in bid solicitations and contract specifications and for designating specifically the work to which each GWD will apply. 29 C.F.R. § 1.6(b). Section 1.6(f) authorizes the Wage and Hour Division to modify a contract *after* award and *after* construction has begun, so long as at least one of the specified criteria is met. One such criterion is satisfied when a contracting agency has “failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act,” 29 C.F.R. § 1.6(f). A contract governed by the Davis-Bacon Act may be required to contain multiple GWDs. 29 C.F. R. § 1.6(b) and AAM No. 131. The WHD has provided the Corps with guidance in the form of AAM Nos. 130 and 131 to assist it in placing the proper wage determinations in the contract. 29 C.F.R. § 1.6(b) and AAM No. 131

The Corps’ argument is that the “heavy” piping work to be performed on the Central Energy Plant contract is not a “substantial” part of but only “incidental” to the “building” construction work to be performed in the overall barracks renovation project because it amounted to \$11,809,821 or 19.2% of the cost of the overall project which totaled \$61,471,734. The Corps interprets AAM Nos. 130 and 131 to provide that, if a portion of the work under the contract amounts to less than 20% of the total contract, it is considered “incidental” to the contract and no separate wage determination is required. Thus, the Corps contends that, because the amount of the piping work represented less than 20% of the total, it properly utilized only the lower “building” construction wage determination for the work to be performed on the Central Energy Plant.

The WHD disagreed with the Corps' rationale concluding:

We understand that the total cost of this project is over \$61,000,000 and that the cost for the distribution piping work is over \$11,000,000. Based on this information and in accordance with All Agency Memoranda Nos. 130 and 131, we conclude that GWD No. KY 990025, for heavy construction, including applicable modifications, applies to the utility piping distribution system. The building decision already in the contract applies to the new building addition at the Central Energy Plant.

Record Tab A at 2-3.

The Administrator stated that AAM Nos. 130 and 131 are guidelines to be used when instructing contracting agencies and contractors about the application of multiple schedules. As previously noted AAM No. 131 specifically states:

Generally, multiple schedules are issued if the construction items are substantial in relation to project cost – more than approximately 20 percent. Only one schedule is issued if construction items are “incidental” in function to the overall character of a project ..., and if there is not a substantial amount of construction in the second category. Note, however, that 20 percent is a rough guide. For example, *when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost.*

Record Tab L-AAM No. 131 at 2 (emphasis added). Additionally, the Corps completely ignores the language in AAM No. 131 stating that “when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost.”

Moreover, the WAB has held that “[b]y its own terms [AAM No. 130] is intended to be flexible and illustrative – a guideline rather than a set of hard and fast rules” and “caution[ed] against a mechanical application of that document.” *Dutch Hotel (SRO) Kitchen Project*, WAB No. 90-29 (Mar. 22, 1991). *See also, Alameda-Sims Sludge*

Disposal Plant, WAB No. 78-13.¹⁵ In a similar case, the WAB held that that heavy construction work totaling slightly over \$4 million and 17.8% of an overall highway construction contract was not “incidental” to the highway construction and did not consider the cost of \$4 million to be “nominal” and therefore affirmed the decision of the Assistant Administrator that higher heavy wage rates should apply to this work. *Interstate 66 Project*, WAB No. 77-33 (Mar. 21, 1978). *Interstate 66* was issued on March 21, 1978, whereas AAM No. 130 was issued contemporaneously on March 17, 1978, and AAM No. 131 was issued on July 14, 1978. In *Farmer’s Branch*, the WAB affirmed the Administrator’s order pursuant to section 1.6(f) that an appropriate wage determination be included in a contract and applied retroactively to a portion of work called for in the contract amounting to \$2.3 million, which the WAB held was “not incidental but manifestly substantial,” even without reference to the overall contract’s cost.

Section 1.6(f) grants the Administrator the discretion to issue a wage determination after a contract award or after the beginning of construction under the circumstances delineated therein, such as when the contracting agency has failed to incorporate a required wage determination in a contract, used a wage determination which does not apply to the contract, or incorporated the wrong wage determination in the contract because of an inaccurate description of the project. See 29 C.F.R. § 1.6(f);

¹⁵ In this regard, the Acting Administrator notes that in 1987 and 1989 published editions of “Conducting Surveys for Davis-Bacon Construction Wage Determinations: Resource Book,” the Wage and Hour Division has published that, as a guideline, “a portion of a project that is incidental to the rest of the project,” which may be considered “in the same category as the main type of construction,” “means less than \$ one million and/or less than 20% of the total value of the project.” Record Tab N. Similarly, the April 1998 and November 1994 editions of the USDOL Davis-Bacon Resource Book regarding Davis-Bacon Wage Determinations states that: “[t]he application of wage schedules/determinations for more than one type of construction is appropriate if such items that fall in a separate type of construction will comprise at least 20% of the total project cost and/or \$1 million dollars cost” and “if such items that in themselves would be classified as a separate type of construction will be less than 20% of the total project cost and will cost less than \$1 million dollars, they are considered **incidental** to the primary type of construction involved on the project, and a separate wage determination is not applicable.” Record Tab M.

Finally, the Acting Administrator notes that in another case, the Administrator similarly advised the Corps by letter dated September 25, 1992, that “a project is considered mixed and more than one schedule of wage rates would be applied if the construction items are substantial in relation to the project cost,” i.e., “valued at more than 20 percent of the total cost or at a cost of \$1,000,000 or more.” Record Tab J. Thus, in that case, the Administrator advised the Corps to apply a different, higher wage schedule to separate work that amounted to \$2 million, \$3 million and \$4 million each, respectively, in an overall project whose total cost was over \$100 million. *Id.*

Farmer's Branch, WAB No. 90-19. The Board generally defers to the Administrator as being "in the best position to interpret those rules in the first instance ... and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside and will reverse the Administrator's decision only if it is inconsistent with the regulations. See *Titan IV Mobile Service Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

The Corps views the language in AAM Nos. 130 and 131 relating to "20 % of the project" as representing a hard "bright line" test. It appears to calculate the piping work to represent 19.2% of the overall project and then apply a hard line threshold of 20% to determine whether the work is substantial or incidental to the overall project. Since the piping work comes in under 20%, the Corps reasons that it is incidental and that is the end of the Corps' analysis. This is not the Administrator's or the Board's reading of AAM Nos. 130 and 131. In addition, the Act places the burden on the contracting agency, the Corps, to use the proper wage determination(s) in a contract and the implementing regulations specifically state that where there is a question the contracting agency should turn to the Administrator.

The Corps concedes that the "heavy" construction GWD applied to the piping work. That is the reason it turned to AAM Nos. 130 and 131 for guidance. The Corps is not new to Davis-Bacon contracts. It is very familiar with the process. In its April 11, 2000 letter to the Vice President of Operations for Foley the Corps acknowledged that "the USDOL is the final arbiter and determiner of the proper wage rates contained in the various construction contracts. Moreover, the labor union involved has the right to submit this to the USDOL for its ultimate resolution. In reaching this ultimate determination, the USDOL could conceivably reverse our decision." Record at Tab F. In addition, the record reflects that in late December or early January the Corps told the Union that the contract would be modified to incorporate the "heavy" construction GWD in the Central Energy Plant contract. Only after learning that it would cost an additional \$3 million did the Corps decide to stay with its original contract.

AAM Nos. 130 and 131 clearly state that in determining whether work is incidental, the contracting agency must consider two factors. One is the "rough" guide of 20% and the other part of the analysis is whether the specific work project is itself a substantial amount of construction. The piping work amounted to over \$11 million and was part of a \$61 million overall project. By almost any standard the piping work is substantial. The work was most certainly substantial compared to the threshold amount for Davis-Bacon Act coverage: \$2,000. The Board finds, at a minimum, there were questions regarding whether the heavy GWD should have been included in the Central Energy Plant contract and that those questions should have been referred to the WHD.

Based on the Board's careful analysis of the Administrator's decision and supporting law, regulations and guidance and the briefs of the parties, we conclude that the Administrator's analysis of AAM Nos. 130 and 131 and his application of the

guidance to the Central Energy Plant contract were reasonable exercises of the Administrator's authority. Therefore we affirm the Administrator's determination pursuant to section 1.6(f) that the wage determination for "heavy" construction applies to the piping work portion of the Central Energy Plant contract and that the "building" wage determination already in the contract applies to the remaining portion, as a reasonable exercise of the Administrator's discretion, in accordance with guidelines enunciated in AAM Nos. 130 and 131.¹⁶

In addition the Board notes a troubling flaw in the Corps' argument to the Administrator. Both Foley and the Corps agree that the total amount for all of the contracts awarded for the renovation of the facilities at Ft. Campbell was over \$61 million. The Corps concedes that the piping work would normally be classified as "heavy" construction work. The Corps provided cost figures for the piping work of \$11,809,821 or 19.2% of the total amount of the overall project (\$61,471,734). The Corps also states that incorporating the "heavy construction" wage determination into the Central Energy Plant contract will cost an additional \$3 million.¹⁷ Corps Brief at 5. The record supports the conclusion that the \$11 million cost of the piping work was calculated at the lower building wage. It appears to the Board that the actual cost of the piping work should have been calculated at the "heavy" construction GWD which would clearly place the piping work costs at more than 20% of the overall projects. This being true, the piping work is clearly substantial and the "heavy" contract wage determination is required.

The Board concludes that the Administrator's determination that a "heavy" construction wage determination should be included in the Central Energy Plant contract as the proper wage determination for the piping work portion of the contract was a reasonable interpretation of the discretionary authority granted to the Administrator under

¹⁶ We note that our deference to the Administrator's final determination in this case, in light of the Administrator's experience in these matters, was reached with some reluctance, given the Administrator's cursory reference to section 1.6(f) in support of the determination, without any further explanation or rationale provided, and given the scant record developed by the Administrator, which does not even include a copy of the contract at issue. While we, nevertheless, affirm the Administrator's determination pursuant to section 1.6(f) that the wage determination for "heavy" construction applies to the piping work portion of the Central Energy Plant contract, we can anticipate that such cursory rationales and factual records provided by the Administrator in the future will not provide the Board with sufficient means to look as favorably on the Administrator's determinations.

¹⁷ Foley and the Solicitor of Labor contend that the contract amount for the piping work (using the "heavy" construction wage rate) amounts to over \$13 million or approximately 22% of the total amount of the contract.

section 1.6(f). We also consider the Administrator's determination that the Central Energy Plant contract properly required two wage determinations to be a reasonable exercise of her authority. Finally, since the Corps failed to include a proper wage determination in the Central Energy Plant contract, the Administrator did have the authority to modify the contract after contract award and after construction began.

3. Whether the Central Energy Plant Contract is its Own Independent Project

Finally, Foley contends that the Central Energy Plant contract should have been considered as its own independent "project," rather than as part of the overall facilities renovation project of the 3700 and 4000 blocks of Ft. Campbell, for the purposes of determining the appropriate wage determination for the piping work portion of the contract.¹⁸ In support of its contention, Foley notes that the Central Energy Plant contract was not awarded to Foley until more than one year after any of the other contracts were awarded for the renovation of the barracks, dining facilities and gymnasiums in the 3700 and 4000 blocks of Ft. Campbell. If the Central Energy Plant contract is its own independent "project," then Foley asserts that the piping portion of the contract would be over 81% of the project, thereby far exceeding the 20% threshold guideline in AAM Nos. 130 and 131.¹⁹

The Administrator relied on the Corps' characterization of all of the contracts awarded for the renovation of the 3700 and 4000 blocks of Ft. Campbell as one "project" when making his determination. In any event, even based on or accepting the the Corps' characterization (that was relied on by the Administrator) that the Central Energy Plant contract was merely a part or portion of the overall facilities renovation project for the purposes of determining the appropriate wage determination for the piping work portion of the contract, we affirm the Administrator's final determination that the wage determination for "heavy" construction applies to the piping work portion of the contract

¹⁸ AAM No. 130 states, in relevant part, "generally, for wage determination purposes, a project consists of all construction necessary to complete a facility regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place." Record Tab K – AAM No. 130 at 2 n.1.

¹⁹ While the Corps asserts that the total cost of the Central Energy Plant contract is over \$17 million, Foley asserts that the total cost is less than \$17 million. Again, as the official record WHD in this case does not contain the Central Energy Plant contract, it is not possible to verify either the Corps' allegation, which was relied on by the Administrator, or Foley's allegation. The discrepancy is of no consequence in regard to this issue, however, because the piping portion of the Central Energy Plant contract would exceed the 20% threshold guideline in AAM Nos. 130 and 131 if the Central Energy Plant contract is considered as its own independent "project" using either the Corps' or Foley's figures.

in accordance with the guidelines enunciated in AAM Nos. 130 and 131 (that an item of work may be substantial to warrant a separate wage schedule even though it does not amount to 20 percent of the total project cost). Thus, we need not address or determine whether the Central Energy Plant contract should have been considered as its own independent “project,” rather than as part of the overall barracks renovation project, for the purposes of reviewing and affirming the Administrator’s determination regarding the appropriate wage determination for the piping work portion of the contract.

CONCLUSION

For the foregoing reasons, we hold that that the wage determination for “heavy” construction applies to the piping work portion of the Central Energy Plant contract. Accordingly, the Petition for Review is **GRANTED** and the Administrator’s April 12, 2001 final determination is **AFFIRMED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

Oliver M. Transue, Administrative Appeals Judge, dissenting:

The majority holds that the Administrator, by authority of 29 C.F.R. § 1.6(f), properly exercised her discretion in changing the construction wage rate from “building” to “heavy” for the utility piping distribution system portion of the Central Energy Plant Upgrade contract. I disagree with this holding and therefore dissent.

As the majority correctly states, the Board examines the Administrator’s final determinations in Davis-Bacon Act cases to “determine whether they are consistent with the statute and regulations, and are a reasonable exercise of ... discretion.” *See Miami Elevator Co.*, ARB Nos. 98-086/97-145, slip op. at 16 (ARB Apr. 25, 2000). But the Administrator’s decision to apply the “heavy” construction wage rate here is not reasonable because the plain language of § 1.6(f) precludes her from modifying the contract’s existing wage rate for the piping distribution work.

Where the contract has been awarded and, as is the case here, construction has begun, the Administrator’s authority to change the existing wage determination is conditional. Thus, the Administrator had the authority to change the wage rate from “building” to “heavy” only if (1) the Corps had “failed to incorporate a wage

determination” in the Central Energy Plant Upgrade contract, or (2) the “building” wage rate “clearly does not apply to the contract,” or (3) the Administrator found that the contract incorporated the “building” rate because the Corps had inaccurately described the project or its location when requesting that wage determination. *See* 29 C.F.R. § 1.6(f).²⁰

Here, however, none of the three conditions exists. As to condition (1), despite its explicit language that the Administrator may issue a wage determination only if the agency fails to incorporate a wage determination into the contract, the majority asserts that § 1.6(f) authorizes the Administrator to substitute the “proper” heavy construction wage determination for the building wage determination. Here, of course, the Corps did *incorporate a wage determination*, i.e., the “building” wage, into the Central Energy Plant Upgrade contract. Therefore, condition (1) clearly does not apply, and the Administrator cannot, by virtue of “discretionary authority,” change the wage rate. To construe § 1.6(f)’s condition (1) as permitting the Administrator to substitute the “proper” wage rate into a contract that already contains a wage determination contradicts the regulation’s unequivocal language.²¹

The Administrator, on the other hand, appears to rely upon § 1.6(f)’s condition (2) as the basis for her final determination that the “heavy” wage rate applies to this contract. That is, she asserts that according to the “guidance” provided in All Agency Memoranda Nos. 130 and 131 (AAMs), the “heavy” wage rate applies because the cost of the piping distribution part of the contract is “substantial.” Therefore, the Administrator seems to conclude, she has authority to change the wage rate pursuant to condition (2) because the “building” rate “clearly does not apply to the contract.” And the majority ratifies this interpretation of § 1.6(f) because they find that it is not unreasonable or inconsistent with the regulations.²²

But AAM No. 130 is, by its own terms, a “guideline ... to be used by the contracting agencies in selecting the proper schedule(s) of wage rates.” Furthermore, AAM No. 131’s purpose is to “clarify” No. 130.²³ The guidelines inform the contracting

²⁰ Hereinafter the conditions contained in 29 C.F.R. § 1.6(f) will be referred to as “condition (1), (2), or (3).”

²¹ *See Farmer’s Branch*, WAB No. 90-19 (May 17, 1991) (holding that, where none of the contracts and subcontracts at issue contained Davis-Bacon wage determinations, § 1.6(f) permits the Administrator to retroactively include the appropriate wage rates in the contracts).

²² *See Titan IV Mobile Service Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991).

²³ *See* All Agency Memorandum Nos. 130 and 131 found at Tab K, L.

Continued . . .

agency that construction items like the piping work are “substantial” and require a separate wage schedule when they cost “more than approximately 20 percent” of the total project cost. But, warns the memorandum, the 20 percent figure is only a “rough guide.”

The Corps relied upon this direction and “clarification” in preparing the Central Energy Plant Upgrade contract.²⁴ As a result the Corps was certainly entitled to conclude that the “building” rate was the appropriate wage determination for the piping work since the agency’s guideline, notwithstanding its designation as a “rough guide,” specifically authorized that conclusion.²⁵ Because the cost of the piping work was less than 20 percent of the project’s entire cost, the piping work was “incidental” rather than “substantial” and therefore the contract required only one (e.g. “building”), not multiple (e.g. “building” and “heavy”) wage determinations.

In short, the Corps did exactly what the Department requires when an agency prepares a construction contract involving complex Davis-Bacon provisions: it referred to the Department’s guidelines and, in compliance with the 20 percent rough guide, incorporated the “building” rate into the contract. Then, however, after the contract was awarded and construction had begun, the Administrator, invoking § 1.6(f)’s condition (2), changes the existing wage rate because the “building” wage *clearly* does not apply to the contract. But the very necessity for publishing “guidelines,” “clarifications” of guidelines, “rough guides” and “approximate” percentages indicates that the Department of Labor was well aware that contracting agencies would face murky, complicated situations in trying to decide which wage rates to include in Davis-Bacon contracts.²⁶ Thus, these guidelines, by definition, do not lend themselves to *clear* or unequivocal interpretation, and neither the Administrator nor the majority can rightfully assert that their reading of the AAMs is correct while Corps’ interpretation is *clearly* wrong.

²⁴ See Department of Army, Corps of Engineers’ Petition for Review and Memorandum of Law, para. 13.

²⁵ “Generally, multiple schedules are issued if the construction items are substantial in relation to the project cost—more than approximately 20 percent. Only one schedule is issued if construction items are ‘incidental’ in function to the over-all character of the project ...” Tab L, All Agency Memorandum No. 131, at 2. See also, at Tab N, “Conducting Surveys for Davis-Bacon Construction Wage Determinations: Resource Book,” at 7 (“Incidental means less than \$ one million *and/or* less than 20% of the total value of the project.” (Emphasis supplied.)).

²⁶ “[T]he Wage and Hour Division is aware that in some circumstances the category [of the wage determination] of a project may appear to be unclear or a literal application of the guidelines may be inappropriate.” Tab L, All Agency Memorandum No. 131, at 1.

After all, the Corps did not randomly choose the “building” wage but relied upon the Department’s All Agency Memorandum No. 131’s 20 percent rough guide. The Corps’ reliance on the Department’s published guidelines as to incorporating the appropriate wage determinations in Davis-Bacon contracts was certainly reasonable. Therefore, to the extent that the Department’s guidelines shed *any* light on the potentially complicated task of determining the appropriate wage determination, the Corps’ decision to incorporate the “building” wage into the contract was correct. As a result, the Administrator cannot rightfully change the wage rate by contending, under § 1.6(f)’s condition (2), that the “building” wage “*clearly* does not apply to the contract.”

Finally, neither the Administrator nor the majority claims that condition (3) applies here. The Corps never inaccurately described the project or its location. In fact, the Administrator based her final determination that the “heavy” rate applies on information that “the Corps provided about the cost of the different items,” i.e. the total project cost (over \$61,000,000) and the cost for the distribution piping work (over \$11,000,000).²⁷

Section 1.6(f), the Secretary’s regulation governing the unusual situation where a wage determination (or the absence of same) is challenged after contract award or after the start of construction, contains special and very specific conditions, at least one of which must be met before the Wage and Hour Administrator may intervene and change the existing wage rate. Neither the Administrator nor the majority has demonstrated that any of § 1.6(f)’s three conditions have been met. Instead, the majority attributes a sweeping discretionary authority to the Administrator by which she may, in effect, ignore the unambiguous language of the regulation and change the existing wage determination.

I dissent because, as none of the special conditions exist, the Administrator may not act. Therefore, the final determination should be vacated, and the “building” rate should remain the sole wage determination in the contract.

OLIVER M. TRANSUE
Administrative Appeals Judge

²⁷ Tab A, Final Determination Letter dated April 12, 2001, at 2-3.