In the Matter of:

MISTICK CONSTRUCTION and Associated Builders and Contractors of Western Pennsylvania, Inc.

ARB CASE NO. 04-051

DATE: March 31, 2006

With Respect to Review and Reconsideration of Davis-Bacon Wage Det. Nos. PA 020013, PA 20030033, PA 030013, PA 20030013, Residential Construction in Allegheny, Beaver, Butler, Fayette, Washington and Westmoreland Counties.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:
Maurice Baskin, Esq., ***Venable LLP, Washington, D.C.***

For Respondent Administrator, Wage and Hour Division:
Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., ***U.S. Department of Labor, Washington, D.C.***

DECISION AND ORDER OF REMAND

In fulfilling her responsibilities under the Davis-Bacon Act (DBA or the Act), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003) and regulations at 29 C.F.R. Part 1 (2005), the Administrator of the United States. Department of Labor's Wage and Hour Division conducted wage compilation surveys and subsequently issued a wage determination for six counties in the Pittsburgh, Pennsylvania area. Mistick Construction and the Associated Builders and Contractors of Western Pennsylvania, Inc., (Mistick) complained and asked the Administrator to review and reconsider the wage determination. With the exception of issuing a separate wage determination for Allegheny County, the Administrator denied this request. Mistick appealed to the Administrative Review Board (ARB or the Board). We remand to the Administrator because she abused her discretion in determining the prevailing wages to be included in the wage determination.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations. 29 C.F.R. § 7.1 (b). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002).

The Board's review of the Administrator's rulings 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 DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act. *Miami Elevator Co. and Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (ARB Apr. 25, 2000). *See also Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (ARB May 11, 2000); *Dep't of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 16 (ARB Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351 *et seq.*), *citing ITT Fed. Servs. Corp. (II)*, ARB No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (Aug. 28, 1992). The Board generally defers to the Administrator as being "in the best position to interpret [the DBA's implementing regulations] 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 Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

BACKGROUND

1. *The Legal Framework*

The DBA applies to every contract of the United States in excess of $2,000 for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States. 40 U.S.C.A. § 3142(a). It requires that the advertised specifications for construction contracts to which the United States is a party contain a provision stating the minimum wages to be paid to the various classifications of mechanics or laborers to be employed under the contract. *Id.* The Administrator determines these minimum wages and publishes them as "Wage Determinations." 29 C.F.R. Part 1. The minimum wage rates contained in the wage determinations derive from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements. 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

"Prevailing" wages are wages paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area. *See* 29 C.F.R. § 1.2(a)(1). "Majority" means more than fifty percent. In the event that the same wage is not paid to more than the majority of employees within a classification, the prevailing wage is the average of the wages paid, weighted by the total of those employed in the classification. *See* 29 C.F.R. § 1.2(a)(1).

Significantly, the DBA itself does not prescribe a method for determining prevailing wages, leading one court to observe that the statute "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." *Building & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983). Indeed, "the substantive correctness of wage determinations is not subject to judicial review." *Dep't of the Army*, slip op. at 25 (citing cases). Rather, courts limit review to "due process claims and claims of noncompliance with statutory directives or applicable regulations." *Id.*, quoting *Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979).

Thus, in the absence of a statutory formula for determining prevailing wages, the DBA implementing regulations charge the Administrator with "conduct[ing] a continuing program for the obtaining and compiling of wage rate information." 29 C.F.R. § 1.3. The Wage and Hour Division surveys wages and fringe benefits paid to workers on four types of construction projects: building, residential, highway, and heavy. The Administrator may seek data from "contractors, contractors' associations, labor organizations, public officials and other interested parties . . . ." 29 C.F.R. § 1.3(a). Other sources of information include statements showing wage rates paid on projects, signed collective bargaining agreements, wage rates determined for public construction by State and local officials under State and local prevailing wage legislation, and data from contracting agencies. 29 C.F.R. § 1.3(b). The county is the designated geographic unit for data collection, although in some instances data may derive from groups of counties. 29 C.F.R. § 1.7.

When the Administrator has completed the survey, he or she then publishes a "general" wage determination in the Federal Register and, thereafter, every week, the Government Printing Office publishes the general wage determination in a document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts." 29 C.F.R. § 1.5(b). General wage determinations may be modified from time to time. 29 C.F.R. § 1.6(c).

2. *Chronology of Events*

On April 13, 2000, Congressman William J. Coyne, representing the 14th District of Pennsylvania, requested on behalf of the Western Pennsylvania Regional District Council of Carpenters that the Wage and Hour Division conduct a residential construction wage survey for Allegheny County. *See* Tab M. Consequently, the Wage and Hour Division conducted Wage Compilation Surveys 01-PA-515 (for Allegheny County) and 01-PA-615 (for Beaver, Butler, Fayette, Washington and Westmoreland Counties), which collected Davis-Bacon residential construction wage payment data from 385 projects that were under construction during the time frame of September 1, 2000, through August 31, 2000. *See* Tab I. As a result of the survey, the Wage and Hour Division issued a wage determination for all of the above-referenced counties, General Decision No. PA020013, that was published on January 17, 2003. *See* Tab B.

On May 12, 2003, Mistick requested review of the wage determination as well as the underlying wage rate surveys that formed the basis for the wage determination. *See* Tab D. In relevant part, Mistick contended that significant sectors in the open shop/non-union side of the residential construction industry, including three residential construction trade associations, were not given notice of the survey of the Pittsburgh area counties, thereby skewing the results of the survey.

In addition, Mistick complained that the Wage and Hour Division had combined different collective bargaining agreement (CBA) wage rates and treated them as the "same" or a "single" wage rate. Mistick contends that this action violated 29 C.F.R. § 1.2(a)(1).

Finally, Mistick complained that the Wage and Hour Division improperly combined the wage survey data of the five "rural" counties with the data from the metropolitan Allegheny County and issued a single wage determination for all six of the counties. Mistick also contended that sufficient wage data was collected from metropolitan Allegheny County to justify issuing its own separate wage determination alone. Furthermore, it argued that the Wage and Hour Division should have conducted follow-up data collection efforts in the surrounding counties or considered data from prior years or "other alternatives" without resorting to merging the inadequate data with metropolitan Allegheny County's data.

In a letter dated December 31, 2003, the Administrator ruled on Mistick's request that she review the wage determination. *See* 29 C.F.R. § 1.9; Tab A. Specifically, the Administrator stated that letters providing notice of the survey had been sent to all relevant interested parties maintained on the Administrator's national organization list in accordance with the Administrator's Davis-Bacon Construction Wage Determination Manual of Operations (1986) (Operations Manual). Tab A at 1-2; *see also* Tab N at 50. In addition, the Administrator noted that her staff had met with Mistick representatives to discuss the upcoming survey and that two of the three residential construction trade associations that Mistick claimed had not been notified had been mailed notice of the survey, although one had been sent to a different address than the one Mistick provided. Finally, the Administrator asserted that she had also encouraged voluntary participation in the survey from all interested parties, in accordance with 29 C.F.R. § 1.3(a) because notice of the upcoming survey was available to any interested party on the Administrator's website.

In regard to Mistick's allegation that the Administrator treated different CBA wage rates as the "same" or "single" wage rate, the Administrator noted that some CBA rates varied because they covered different locations. She also stated that she "believe[d] it was appropriate" to treat other differing CBA wage rates as the "same" or "single" wage rate when a worker's total compensation (wage rate plus fringe benefits) was the same. Tab A at 3. Moreover, the Administrator stated that she "believe[d] it was appropriate" to consider and count those workers who were paid a higher "building" CBA wage rate for work for which they were only obligated to receive a lower "residential" CBA wage rate when determining whether union residential wage rates

were prevailing. *Id*. The Administrator also stated that she properly ignored escalator clauses found in CBA wage rates and instead relied on "current" CBA rates when determining prevailing wage rates. Tab A at 3-4.

Finally, the Administrator concluded that as the survey provided sufficient wage data for Allegheny County, a separate wage determination would be issued for Allegheny County alone. Tab A at 4; *see also* Tab B. As for the other five counties that did not provide sufficient wage data to warrant a separate wage determination on their own, the Administrator stated that as all six counties at issue, including Allegheny County, were part of the Pittsburgh Metropolitan Statistical Area (MSA), they could be considered together in order to gather sufficient wage survey data for the purposes of issuing a single wage determination for the other five counties in accordance with the Administrator's Operations Manual. *Id*.; *see also* Tab N at 39.

Consequently, with the exception of the issuance of the separate wage determination for Allegheny County, the Administrator denied Mistick's request for review and reconsideration and affirmed the single wage determination for the other five counties. Tab A at 6. The Administrator also denied Mistick's request to set aside the results of the survey and to conduct a new survey, noting that a new survey was tentatively scheduled for Fiscal Year 2005. Thereafter, Mistick timely petitioned the ARB to review the Administrator's December 31, 2003 final determination. *See* 29 C.F.R. § 7.2.[1]

DISCUSSION

In this appeal, Mistick requests that we set aside the single wage determination for the five suburban counties and remand this case to the Administrator to conduct a new survey. Mistick reiterates its contentions made before the Administrator. Specifically, Mistick asserts that proper notice of the survey at issue was not provided to all interested parties. In addition, Mistick argues that the Administrator erred when, in determining the prevailing wage rate, she combined different CBA age rates as a single rate. Finally, Mistick contends that that the Administrator erred in combining wage survey data from the five suburban counties with metropolitan Allegheny County when determining the prevailing wage rates.

[1] In response to Mistick's petition for review, the Administrator argued that, whether Mistick's allegations have some merit or not, there is no need for the Board to order a new survey because, as the Administrator stated in her December 31, 2003 final determination, "Pennsylvania is *tentatively* scheduled for a statewide survey in Fiscal Year 2005." *See* Administrator's Response Brief at 31, *citing* Tab A at 6 (emphasis added). Because a new survey in Fiscal Year 2005 would apparently render moot Mistick's request that a new survey be conducted, the Board issued an Order to Show Cause on January 12, 2006, ordering the parties to inform the Board whether the Administrator conducted a new Pennsylvania survey in Fiscal Year 2005 and, if so, to show cause why the Board should not dismiss Mistick's appeal and request that a new survey be conducted as moot. On January 20, 2006, the Board received the Administrator's response indicating that a new Pennsylvania survey had not been conducted and is not currently planned. Thus, the Board decides this case, herein, on its merits.

1. *Notice of the Wage Compilation Surveys*

Although Mistick did participate in the wage survey, it contends that three other leading open shop/non-union side residential construction industry trade associations and their contractor members were not given notice of the survey, despite the fact that they had participated in past wage surveys.[2] Thus, Mistick argues that the results of the survey were skewed and provided an unrepresentative sample of prevailing wage rates and job classifications. In response, the Administrator notes that 226 contractors, including many open-shop contractors, and 78 contractor associations had been mailed notice of the survey, including two of the three residential construction trade associations Mistick named as having failed to receive notice.[3] Furthermore, the Administrator points out that notice was available to any interested party on her website.

Despite the apparent lack of notice to at least two residential construction industry trade associations, the record demonstrates that wage survey data was solicited from 226 contractors and 78 contractor associations. *See* Tab P. Moreover, a review of the wage survey results indicates that a usable response rate from contractors ranging from 63% to 85% was achieved. *See* Tab S. The record supports the conclusion, therefore, that a meaningful and sufficient segment of the residential construction trade industry had notice of the Wage and Hour Division's wage survey during the relevant time period. Thus, we reject Mistick's contention and find that contractors in the residential construction trade industry were given adequate opportunity to provide wage data in the course of the wage survey. *See Washington, D.C., Nat'l Elec. Contractors Ass'n*, ARB No. 98-054, slip op. at 5-6 (ARB June 30, 1999).

2. *Determining the Prevailing Wage*

The Administrator found that union wage rates were paid to more than fifty percent of the workers in residential construction classifications. Mistick contends that the Administrator, in making this determination, violated the plain language of 29 C.F.R. § 1.2(a)(1) when she improperly treated various or different union CBA wage rates as the same or a "single" wage rate. Pursuant to 29 C.F.R. § 1.2(a)(1):

> The prevailing wage shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the

[2] Specifically, Mistick contends that the Builders Association of Metropolitan Pittsburgh, the Pennsylvania Utility Contractors Association and the Apartment Association of Metropolitan Pittsburgh did not receive notice of the wage survey. *See* Tab H.

[3] The Administrator admits that the letter sent to the Builders Association of Metropolitan Pittsburgh "may have been sent to a former address" and that it had no "listing" or address for the Apartment Association of Metropolitan Pittsburgh. But she asserts that she had subsequently updated her files with their current addresses for future survey notification purposes. *See* Administrator's Brief at 32-33 n.23.

> period in question. If the *same* wage is not paid to a majority of those employed in the classification, the prevailing wage shall be the average of the wages paid, weighted by the total employed in the classification.

29 C.F.R. § 1.2(a)(1) (emphasis added).

Prior to the current section 1.2(a)(1)'s implementation in 1983, the regulatory procedure, otherwise known as the "thirty-percent rule," stated that if there was no single wage paid to a majority of workers, any wage paid to at least thirty percent of the workers would then be the prevailing wage. *See* 29 C.F.R. § 1.2(a) (1982); *accord* Labor Department Regulation No. 503 § 2 (1935). The current section 1.2(a)(1) eliminated the "thirty-percent rule." *See* 47 Fed. Reg. 23,652 (1982). In upholding the new regulation, the United States Court of Appeals for the District of Columbia Circuit noted that "[t]he rationale offered by the Secretary for the change was that the thirty-percent rule does not comport with the definition of 'prevailing,' that it 'gives undue weight to collectively bargained rates,' and that it is inflationary." *Building & Const. Trades' Dept.*, 712 F.2d at 616-617, *citing* 47 Fed. Reg. 23,644-23,645. The Secretary said that allowing workers paid CBA wage rates that potentially were only paid to thirty percent of all workers in a particular classification "sometimes results in wage determination rates higher than the average" and, therefore, concluded that it does not reflect the prevailing wage "rates actually paid" or "the most widely paid rate." 47 Fed. Reg. 23,644-23,645.

Therefore, "if any *single* wage is paid to a majority of the workers in that class, that is deemed the prevailing wage." *Building & Const. Trades' Dept.*, 712 F.2d at 616 (emphasis added); *see also George Campbell Painting Corp. v. Chao,* F. Supp. , 2006 WL 197375, No. 3-05-CV-00716 (JCH), slip op. at 8 (D. Conn., Jan. 25, 2006) (referring to "single" wage paid to a majority of workers). If a majority of workers are not paid the "same" or "single" wage rate, then the various wage rates are averaged to obtain the prevailing wage rate. *See* 29 C.F.R. § 1.2(a)(1). The Administrator admits that the Wage and Hour Division's "practice" is to treat "variable rates" paid workers under a CBA as a "single majority rate" for the purposes of determining the prevailing wage rate. Administrator's Response Brief at 17, 22-23. By treating "variable" or different CBA wage rates as the "same" or a "single" wage rate, the Administrator thereby concluded that CBA wage rates were the prevailing wage paid to a majority of workers.

According to the Administrator, 29 C.F.R. § 1.2(a)(2) permits her to "consider the types of information listed in § 1.3 of this part," and thus "expressly authorize[s]" her to "interpret" the terms of CBA's in determining prevailing wages. Administrator's Response Brief at 17. Specifically, the Administrator argues that 29 C.F.R. § 1.3(b)(2) permits her to consider "signed collective bargaining agreements" in making wage determinations. In addition, the Administrator also admits that she does not treat "variable rates" paid to non-union workers as a "single majority rate" because there is no "uniformity" of wage rates paid to non-union workers. Administrator's Response Brief at 25 n. 18.

But we find nothing in sections 1.2(a)(2) and 1.3(b)(2) which permits, much less "authorizes," the Administrator to ignore the plain language of section 1.2(a)(1) that the "same wage," whether collectively bargained or not, must be paid to a majority of those employed in a worker classification before it may be considered the prevailing wage. Indeed, the record indicates that is there is the same lack of uniformity in CBA wage rates as the Administrator asserts exists with wage rates paid to open shop/non-union workers.

The Administrator argues that "it was appropriate" to treat different CBA wage rates as the "same" or "single" wage rate if a worker's total compensation (wages plus fringe benefits) is the same. Administrator's Response Brief at 19. But Mistick points out that such treatment is contrary to the practice described in the Administrator's own Davis-Bacon Construction Wage Determination Manual of Operations. The Administrator's Operations Manual indicates that "prevailing fringe benefits are determined separately" from the determination of the prevailing wage rate, *see* Tab N, Operations Manual at 64. In response, the Administrator notes that both the Act and the original section 1.2(a)(1) define "prevailing wage" to include both the hourly rate of pay and fringe benefits and that a preamble to the original section 1.2(a)(1) states that the practice of separating the determination of prevailing wage rates and the determination of prevailing fringe benefits was for the purpose of accounting for or calculating overtime payment premiums. Administrator's Response Brief at 20-21 n. 13. *See* 40 U.S.C.A. § 3141; 29 C.F.R. § 1.2(a)(1) (1982); 46 Fed Reg. 4306-4307 (1981).

But the Administrator's Operations Manual does not mention overtime in calling for the separate determination of prevailing wage rates and prevailing fringe benefits. *See* Tab N, Operations Manual at 64. Furthermore, the Administrator's argument about overtime is both unpersuasive and irrelevant as to why she combined "variable" CBA wage rates.

In addition, not only is the Administrator's "practice" of treating "variable" CBA wage rates as the "same" contrary to the plain language of the regulation, it also circumvents and defeats the purpose of section 1.2(a)(1). The purpose in eliminating the "thirty percent rule" under section 1.2(a)(1) was to prevent giving "undue weight" to CBA wage rates and, thereby, artificially inflating what actually is the prevailing wage rate. *See Building & Const. Trades' Dept.*, 712 F.2d at 616-617; 47 Fed. Reg. 23,644-23,645. Therefore, if a majority of workers are not paid the "same" or "single" wage rate, then the Administrator must average the various wage rates to determine the prevailing wage. *See* 29 C.F.R. § 1.2(a)(1).[4]

[4] We reject Mistick's contention that the Administrator erred in considering workers who were paid a higher "building" construction CBA wage rate for residential construction work for which they were only obligated to receive a lower "residential" construction CBA wage rate. The Administrator should consider whatever wage rates are paid for residential construction work in determining the prevailing residential wage rates, but, again, if a majority of workers are not paid the "same" or "single" wage rate, then a weighted average of the various wage rates paid, such as any higher "building" construction CBA wage rates, determines the prevailing wage rate. *See* 29 C.F.R. § 1.2(a)(1).

Consequently, we find that the Administrator not only ignored the plain language of section 1.2(a)(1) and circumvented its purpose, but she also offered no convincing explanation or legal authority for doing so. Thus, despite the deference owed to the Administrator when determining prevailing wage rates, we conclude that she abused her discretion. *See Laborers Int'l Union of N. Am.*, ARB No. 04-011, slip op. at 8 (ARB Apr. 29, 2005); *New Mexico Elec. Contractors Ass'n*, ARB No. 03-020, slip op. at 9 (ARB May 28, 2004), *citing Building and Constr. Trades' Dep't*, 712 F.2d at 616-617 (the Administrator did not adequately explain agency action).

3. *Consideration of Wage Rates in Surrounding Counties*

Finally, Mistick contends that the Administrator erred in combining the wage survey data of the five suburban counties with the data from the metropolitan Allegheny County in order to issue a single wage determination for the five suburban counties. Mistick argues that instead of resorting to combining the insufficient wage survey data of the suburban counties with metropolitan Allegheny County's data, the Administrator should have considered whether the wage survey had received useable response rates from the counties' residential construction industry. According to Mistick, the Administrator should also have considered wage data from federal residential construction projects or wage data from prior years, or conducted follow-up data collection efforts in the suburban counties.

Specifically, Mistick argues that the Administrator violated 29 C.F.R. § 1.7(b):

> If there has not been sufficient similar construction within the area in the past year to make a wage determination, the wages paid on similar construction in surrounding counties may be considered, *Provided* That projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county, and projects in rural counties may not be used as a source of data for a wage determination for a metropolitan county.

29 C.F.R. § 1.7(b). The Administrator found the private wage survey data submitted from each the five Pittsburgh area suburban counties surrounding Allegheny County was

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Similarly, we reject Mistick's argument that the Administrator erred in ignoring escalator clauses found in CBA wage rates and, instead, only relied on "current" CBA rates. Mistick asserts that the Administrator's practice is contrary to section 1.2(a)(1) and is not adequately explained. The Administrator's reliance on only "current" CBA rates when determining prevailing wage rates is consistent with the policy described in the Administrator's Operations Manual. *See* Tab N, Operations Manual at 58-59. Thus, as the Administrator's practice is not unreasonable and does not exhibit an unexplained departure from past practice, we defer to the Administrator's practice in this instance. *See Titan IV Mobile Serv. Tower*, slip op. at 7.

insufficient to issue a separate wage determination for each of these counties. Mistick argues that the five suburban counties were "rural" and, therefore, data from them should not have been combined with data from metropolitan Allegheny County. The Administrator determined, however, that all six counties at issue, including Allegheny County, were part of the Pittsburgh Metropolitan Statistical Area (MSA) and, therefore, could be considered together in order to gather sufficient wage survey data for the purposes of issuing a single wage determination for the five suburban counties. This calculation, she contends, is consistent with the policy set out in her Operations Manual. *See* Tab A at 4. Furthermore, the Administrator points to *Dep't of the Army* where the Board noted:

> The Federal Office of Management and Budget (OMB) has responsibility for developing a variety of statistical programs. *See generally* 44 U.S.C. §3504 (1994). Pursuant to this statutory directive, OMB devises standards for categorizing urban areas throughout the United States. . . .
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> The general concept of a "metropolitan area," as defined by OMB, is that it includes a core area containing a large population nucleus, together with adjacent communities having a high degree of economic and social integration with the core. Thus a metropolitan area typically includes central cities and their outlying – but integrated – counties. . . .
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> Under OMB's [standards], the basic urban unit is the "metropolitan statistical area" (MSA), which typically includes a city or urbanized area of at least 50,000 in population joined by surrounding counties where a sizeable portion of the population commutes to the center.

Dep't of the Army, slip op. at 4-5.

Consistent with OMB's standard, the Administrator's Operations Manual explains that "[f]or purposes of Davis-Bacon, if a county is located in an area designated by the Office of Management and Budget as a Metropolitan Statistical Area (MSA), it is to be classified as a metropolitan area for survey purposes. If not included in such an area, it will be considered rural." *See* Tab N, Operations Manual at 39. Thus, we find that since the five suburban counties at issue are in the Pittsburgh area MSA, they all must be classified as metropolitan for Davis-Bacon wage survey purposes. The fact that the regulations do not specifically authorize the use of MSA's to determine prevailing wages is not determinative because the Administrator reasonably applied the policy set out in her Operations Manual. That policy does not contradict the Act or the regulations. Therefore, we defer to the Administrator's determination that the outlying counties are metropolitan, not rural. *See Titan IV Mobile Serv. Tower*, slip op. at 7.

Mistick also quarrels with the Administrator's determination that the private wage survey data from each of the five Pittsburgh area suburban counties was insufficient so as to necessitate consideration of the wage survey data of all of the counties in the Pittsburgh area MSA together. Wage data from surrounding counties may be considered for wage determination purposes if the data for a particular county is determined to be inadequate. But "the starting point for wage data collection and evaluation is the county." *Laborers Dist. Council*, WAB No. 92-11, slip op. at 4 (WAB Oct. 21, 1992); 29 C.F.R. § 1.7(a), (b).

The regulations do not define the term "sufficient data." Even so, the Administrator has developed internal guidelines for determining whether sufficient wage survey data has been submitted to support the issuance of a wage determination. *See Plumbers Local Union No. 27*, ARB No. 97-106, slip op. at 3-5 (ARB July 30, 1998). Initially, the Administrator determines whether the wage survey has provided a useable response rate of at least 25%. *See Plumbers Local Union No. 27*, slip op. at 3; *see also* Tab N, Operations Manual at 62. As we previously noted, the wage survey results indicate that a usable response rate from contractors ranging from 63% to 85% was achieved. *See* Tab S. Thus, the record supports the conclusion that the response to the wage survey was sufficient and, therefore, that follow-up data collection efforts were not necessarily required.

When conducting Davis-Bacon wage surveys, the Administrator receives wage data on all projects in a locality, both private and federally-funded. *See Plumbers Local Union No. 27*, slip op. at 4. However, pursuant to 29 C.F.R. §1.3(d):

> In compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.

29 C.F.R. §1.3(d). The wage survey results here indicate that the Administrator did indeed collect wage data from federal residential projects. *See* Tab S. But the Administrator has informed the Board that the "data from federal projects ultimately were not included for purposes of determining prevailing wages because the data from private construction alone were sufficient to establish wages after the counties were combined." Administrator's Response Brief at 30 n.22. But here, the Administrator erred because she combined private wage data from all Pittsburgh area counties without first considering the wage data from federal projects in each of the counties.

Long-standing case law mandates that the Administrator "can not disregard federal project wage data where private sector data *in a given county* is insufficient and thereby choose wage data from surrounding counties in determining wage rates for that county." *Southeast Idaho Bldg. and Constr. Trades Council*, WAB No. 86-22, slip op. at 4 (WAB Feb. 4, 1987) (emphasis added); *see also Laborers Dist. Council*, slip op. at 4.

"[I]t is only after the Administrator reviews *all* the relevant data . . ., whether from federally- or privately-funded projects, that the Administrator can make a determination concerning the sufficiency of wage data" under section 1.7(b). *Plumbers Local Union No. 27*, slip op. at 6. A bare minimum or "de minimis" amount of wage data from privately-funded projects is not sufficient to exclude consideration of relevant wage data from federal projects when issuing wage determinations under section 1.3(d), as well as under section 1.7(b). *Plumbers Local Union No. 27*, slip op. at 6-7. Thus, the Administrator "must consider all the data before the Wage and Hour Division when determining the sufficiency of wage data" under section 1.3(d), including wage data from federal projects. *Id.* at 6.

In short, the record does not demonstrate that the wage survey data from the five counties was insufficient to support a wage determination. Nor has the Administrator offered a convincing explanation of why she found that data to be insufficient. Furthermore, even if the private wage survey data from the five counties was insufficient, we find that the Administrator abused her discretion because she did not first consider the wage data from federal projects and did not explain this departure from well-established case law.

CONCLUSION

We reject Mistick's argument to the contrary and conclude that the residential construction trade industry had adequate notice of the wage survey. But we agree with Mistick that the Administrator abused her discretion in combining the various CBA wage rates into a single rate in determining the prevailing wage rates. Moreover, she also abused her discretion when she did not adequately explain why she found the private wage data from the five counties insufficient, and, despite that finding, did not consider the federal project wage data. Accordingly, we **REMAND** this matter to the Administrator to reconsider the prevailing wages contained in Wage Determination Nos. PA020013 and PA030013 .

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge