



In the Matter of:

**DICK ENTERPRISES, INC.**

**ARB Case No. 95-046A**

**With respect to application of Wage  
Determination No. TX940014 to construction  
Contract No. JX00c-188, Bid Package #4, Federal  
Correctional Center (Beaumont, Jefferson  
County, Texas)**

**(Formerly WAB Case No. 95-07)**

**DATE: December 4, 1996**

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

### **FINAL DECISION AND ORDER**

This matter is pending before the Board pursuant to the Davis-Bacon Act, as amended (DBA or the Act), 40 U.S.C. § 276a *et seq.*, and the regulations at 29 C.F.R. Parts 5 and 7, on the petition of Dick Enterprises, Inc. (DEI or Petitioner), seeking review of the May 30, 1995 final ruling issued by the Administrator, Wage and Hour Division (Administrator). DEI requested addition of employee classifications and accompanying wage rates to DBA construction contract labor requirements. In large part, the Administrator denied DEI's request, finding that DEI made an untimely challenge to the contract's wage determination and that the requested additional classifications' wage rates were not reasonably related to the other wage rates listed in the applicable wage determination. For the reasons set forth below, the Administrator's ruling is affirmed.

### **BACKGROUND**

On May 5, 1994, the Federal Bureau of Prisons (BoP), U.S. Department of Justice, awarded Contract JX00c-188 to Petitioner for construction of a low security correctional institution in Beaumont, Jefferson County, Texas. Administrative Record (AR) Tab G. The contract specifications included construction of a low security prison, a central administration building, shared utilities structures and incidental site work. *Id.* The incidental site work

---

<sup>1</sup> On April 17, 1996, the Secretary of Labor re delegated authority to issue final agency decisions under, *inter alia*, the Davis-Bacon and Related Acts and their implementing regulations to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. *See also*, 29 C.F.R. Part 7 (1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization were also issued on that date.

included work related to parking areas and underground utilities to support the low security correctional facility and other future construction within the complex site. The original value of the contract was \$56,342,000.00. *Id.*

The contract was subject to the prevailing wage labor standards provisions of the Act and its implementing regulations at 29 C.F.R. Part 5. The contract documents included Wage Determination (WD) No. TX940014 -- dated February 11, 1994 -- that applied to "building construction." AR Tab H, Flap B, item 2 -- General WD No. TX 940014. At a March 2, 1994 pre-bid conference for the project, the BoP's Contracting Officer, Paul Duke, noted the absence of certain trades in WD TX940014. AR Tab H, Flap E, Item 4, at 7-8. Duke told the potential bidders that he had consulted with the United States Department of Labor (apparently, an office of the Wage and Hour Division) on two previous occasions and had been informed that additional job classifications would not be issued until after the contract was awarded. *Id.* He further advised the attendants at the pre-bid conference that, according to the Wage and Hour Division, in calculating their bids they should "look at what is being paid for commercial work in the area for that particular trade, look at [their] wage decisions, [and] see if their rates are in line with other trades as a comparison." *Id.* The BoP's Contracting Officer also cautioned that the Wage and Hour Division required that a successful bidder's final proposed rates "be equal to, or exceed, the lowest paid skill rate on the wage determination." *Id.*

This advice offered by BoP's Contracting Officer was based on at least one conversation he had with the regional Wage and Hour Division staff regarding a different construction project at the correctional complex, IFB #X00-170, issued January 31, 1994. AR Tab C, fax transmission cover sheet, Attachment No.1, at 7-9 and Attachment No.2. The wage determination contained in the bid package for that project had omitted a bricklayer classification. *Id.* Based on that experience, Contracting Officer Duke believed it was important to raise the question of conformance policy at the pre-bid conference for IFB #X00-171. *Id.* at Tab C, fax transmission cover sheet.

The bids were opened on April 7, 1994. AR Tab H, Flap A. The contract was awarded to DEI on May 24, 1994 and work began on June 10, 1994. *Id.* On August 11, 1994, DEI submitted to the BoP's Contracting Officer, pursuant to 42 C.F.R. §§ 22.406-3, 52.222-6 and 29 C.F.R. § 5.5(a)(1)(ii) a "Request for Additional Wage Rate Classifications." AR Tab H, Flap D. In this document DEI requested 67 additional classifications not contained in WD TX940014. *Id.* at Enclosure No. 5. In support of its requested conformed classifications and wage rates, DEI provided a list of rates from Davis-Bacon WD No. TX940048, dated February 11, 1994 and a January 3, 1994 Texas Department of Criminal Justice wage determination. AR Tab H, Flap D, Enclosure 2, at 46. Both these documents were applicable to construction work in Jefferson County, Texas at that time. The DBA wage rates were for heavy and highway construction; the State of Texas prevailing rates (also for heavy and highway construction work) were specifically noted to be applicable to site work and construction beyond five feet from the perimeter of building structures. *Id.* DEI also requested classifications and rates for four categories of helpers. *Id.*

In a letter dated August 22, 1994, Duke wrote to the Wage and Hour Division, stating that he disagreed with DEI regarding the use of “heavy and highway” construction rates. AR Tab G, at 2. He believed the appropriate rates were “building type” construction rates. *Id.* Duke based his position on his estimation that the non-building type construction work in dispute was 20% or less of the total project and therefore was “incidental.” *Id.*

On September 22, 1994, Wage and Hour’s Director of Wage Determinations (Director) ruled that “building type” construction schedules were appropriate for the work in question. AR Tab F. He based his determination on the conclusion that the incidental work was approximately 20% of the contract’s cost, citing as authority All Agency Memoranda (AAM) Nos. 130 and 131. *Id.* AAM 130 and 131 provide that “multiple schedules are issued if the construction items are substantial in relation to the project cost -- more than approximately 20%.” *Id.* The Director then conformed the requested additional classifications and wage rates to the applicable “building wage determination” in accordance with the pertinent regulatory criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A). *Id.*

Wage and Hour’s Director of Wage Determinations then approved six classifications at the rates DEI requested and denied the proposed classifications for carpenter, common laborer, and utility laborer because the work to be performed by the classification could be performed by the classifications of a carpenter and unskilled laborer which were already included the contract wage decision. *Id.* at 2. The Director denied conformance for the remaining proposed classifications and wage rates because they did not bear a reasonable relationship to the wage rates contained in the applicable wage determination. *Id.* He indicated reasonable hourly rates for these classifications would be at least \$7.88 for truck drivers (single axle, light, tandem axle semi-trailer and off-road dump truck) and \$11.00 for the remaining, skilled, construction crafts or trades, given that \$11.00 was the lowest rate listed in WD TX 940014 for a skilled classification. *Id.* Finally, based on Congressional prohibition (at that time) against the implementation or administration of DBA helper regulations (previously codified at 29 C.F.R. §§ 1.7(d), 5.2(n)(4) and 5.5(a)(1)(ii), DEI’s requested helper classifications and rates were denied as well. *Id.*

By letter dated October 7, 1994, DEI requested the Administrator’s reconsideration of the Director’s initial determination. AR Tab E, Attachment No.1. In her final ruling dated May 30, 1995, the Administrator principally held that DEI’s request for reconsideration of the denied classifications and wages was in fact an untimely request for modification of the BoP contract’s wage determination. AR Tab A, at 4-5. The Administrator concluded that the request was untimely, since it was not made until after the contract was awarded. *Id.* at 4. The final ruling was based on the regulatory requirement of 29 C.F.R. § 1.6(c)(3)(vi), requiring that a modification to wage determination must be published before contract award and well-settled Board precedent that post-contract award challenges to wage determinations are not timely.

*Gananda Development Corp.*, Wage Appeals Board<sup>2</sup> (WAB) Case Nos. 73-13 and 74-01, May 14, 1977; *Jordan & Nobles Construction Co.*, WAB Case No. 81-18), Aug. 19, 1983. *Id.* at 5.<sup>3</sup>

In affirming the Director's original conformance determination, the Administrator concluded that \$11.00 should apply be the hourly rate for the skilled classifications requested by DEI, based on Wage and Hour's policy of conforming rates for omitted skilled crafts at no less than the prevailing rates for the lowest skilled crafts listed in an applicable wage determination. *Id.* at 7. Further, the Administrator found that \$7.88 could be the conformed rate for the truck driver classifications, since truck drivers are normally paid less than workers in the skilled trades. *Id.* at 7, 8. Finally, the Administrator reaffirmed the Director's earlier denial of DEI's request for helper classifications.<sup>4</sup> *Id.* at 8.

## DISCUSSION

DEI's request for the addition of a new and separate heavy and highway wage schedule was posed to the Administrator as a request for conformed classifications. However, the request is more properly seen as a challenge to the sufficiency or substantive correctness of the wage determination included in the BoP contract. DEI requested 67 additional wage classifications (WD TX940014 listed 11 building construction classifications) with wage rates generally identical to a Wage and Hour Division heavy and highway wage determination and the State of Texas prevailing wage schedule for highway construction that applied locally. Petitioner submitted these documents as evidence of the reasonableness of its request.

Before a request to modify a wage determination can be substantively considered, it must meet procedural guidelines well-established by the regulations and Board precedent. Specifically, all modifications to wage determinations must be published *before* contract award. 29 C.F.R. § 1.6(c)(3)(vi). This is a position the Board has consistently supported. Adequate remedies for challenging deficiencies in wage determinations are available, but must be requested prior to the award of a contract. It is settled that the conformance procedure cannot be used as a substitute for the obligation to timely challenge the correctness of a wage determination. *Jordan and Nobles Construction Co. & W.R. Pierce & Associates, supra*; *Rite Landscape Construction Co.*, WAB Case No. 83-03, Oct. 18, 1983, slip op. at 5-6; *see also J. A. Languet Construction*, WAB Case No. 94-18, Apr. 27, 1995, slip op. at 9.

---

<sup>2</sup> See footnote 1, *supra*; 29 C.F.R. Part 7 (1995).

<sup>3</sup> The Administrator also noted that at least with regard to the concrete paving work and the incidental site work, it would have been appropriate to include the highway construction wage rate schedule in the bid specifications. And if prior to the contract award, had the issue of an additional wage schedule been raised, Wage and Hour could have ruled on that question.

<sup>4</sup> DEI does not challenge the Administrator's final determination denying conformed helper classifications in this proceeding.

A representative from DEI attended the BoP's pre-bid conference on March 2, 1994. The contract was awarded on May 5, 1994 and DEI began work on June 10, 1994. But, it was not until August 11 (a full five months after learning of the content of the wage determination; three months after contract award; and two months after construction work began), that DEI requested additional wage classifications.

As the Board stated in another matter deemed to constitute an untimely challenge to a wage determination, "retroactive modifications to the wage determinations are unfair to losing bidders." *Inland Waters Pollution Control Inc.*, WAB Case No. 94-12, Sept. 30, 1994, slip op. at 6. Thus, contractors may not rely on the conformance process to relieve themselves of their obligation under the regulations to seek review and reconsideration of a wage determination prior to contract award. See *J. A. Languet Construction, supra*; *Rite Landscape Construction Co., supra*.

DEI argues it failed to request the appropriate review because the BoP's Contracting Officer told them at the March 2, 1994 pre-bid conference that the Wage and Hour Division had refused on two occasions to issue additional classifications before the contracts were awarded, but would make adjustments after the contract was awarded. (Petition for Review at 11-12.) Based on this statement, DEI maintains the Administrator should be equitably estopped from denying Duke's request. *Id.* Further, according to DEI, it would have been futile at that time to challenge the sufficiency of the wage determination. *Id.*

These arguments fail for several reasons. First, BoP's Contracting Officer's comments were in reference to a *conformance* request. DEI seeks a *post-award modification* of the wage determination. Second, at least one of the elements of an equitable estoppel argument, justifiable reliance, is absent from the current case. See Williston, Samuel; *A Treatise on the Law of Contracts 3d*, Vol. 1, Section 11-29(b), Baker, Voorhis and Co., Inc. (1957). DEI claims to have relied on the BoP Contracting Officer's statement regarding the Department's position on pre-contract award adjustments. Yet, DEI ignored the rest of the BoP Contracting Officer's advice regarding acceptable wage rates. Specifically, the BoP's Contracting Officer advised DEI that the Wage and Hour Division required the contractor's final proposed rates "be equal to, or exceed, the lowest paid skill rate on the wage determination." AR Tab H, Flap E, Enclosure No. 5. DEI's proposed rates (see discussion, *infra*) were below the level suggested by the BoP's Contracting Officer. AR Tab H, Flap D, Enclosure No. 3.

More importantly, it has long been Board precedent that a contracting officer's (or other contracting agency's) advice is not binding on the Administrator. See *Tollefson Plumbing and Heating*, WAB Case No. 78-17, Sept. 24, 1979, slip op. at 8. As the Board found in *Languet*, in a different context, "there is no element of equitable reliance under the conformance process." *Languet, supra* at 8. We similarly conclude that a successful bidder may not estop the Administrator's enforcement of DBA prevailing wage provisions by claiming equitable reliance on another agency's representations. In this regard, we note that only the Administrator (or his or her delegatee) can issue authoritative and binding rulings and opinions (and then *only* in

writing) under the DBA (and its related Acts). *See Werzalit of America, Inc.*, WAB Case No. 85-19, Apr. 7, 1986.

Petitioner also argues that it would have been futile to make a pre-bid request to modify the wage determination. A portion of this Board's jurisdiction consists of the pre-award challenges to wage determinations. *See* 29 C.F.R. §§ 1.6, 7.4. Historically, when made, such challenges have been treated expeditiously in order to satisfy contract solicitation and award schedules established by contracting agencies. Thus, pre-award challenges to wage determinations are not futile and this Board's predecessor, the WAB, has entertained such appeals.

As noted, the Administrator conformed six of DEI's requested classifications and rates to the applicable wage determination. Three of the proposed classifications and rates (for carpenter, common laborer and utility laborer) were denied on the ground that the duties for the proposed classifications were performed by classifications already listed in the wage determination. The Administrator refused to approve the rates for the remaining classifications because they did not bear a "reasonable relationship" to the rates in the wage determination. AR Tab A, 7-8. We now address the question of the Administrator's ruling regarding this factor of the conformance regulation.

The governing regulation at 29 C.F.R. § 5.5(a)(1)(v)(A) provides three criteria to be satisfied before a conformance may be approved:

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

Emphasis supplied. DEI challenges the Administrator's conformance ruling only with respect to criterion 3, *i.e.*, whether the rates requested bear a "reasonable relationship" to the wage rates listed in the applicable wage determination. Petition at 12-15. Specifically, and in spite of the fact that the BoP's Contracting Officer cautioned all bidders on this issue at the pre-bid conference, DEI objects to the Administrator's conforming rates for skilled classifications at rates no lower than the lowest rate for skilled classifications contained in the contact wage determination. DEI argues that "the wage determination omitted so many of the classifications necessary for performance that [the wage determination] is an inadequate baseline against which to gauge the reasonableness of the additional rates." Petition at 13. But given our foregoing conclusion affirming the Administrator's determination that DEI's request for a wage determination modification was untimely, it is our further determination that the Administrator

acted well within the bounds of her discretionary authority under the conformance regulation in conforming DEI's requested skilled classifications to the lowest skilled rated in the wage determination applicable to the BoP contract.

DEI cites *M. Z. Contractors Co., Inc. (I)*, WAB Case No. 92-06, Aug. 25, 1992, in support of its argument that the Administrator was not required to apply the Wage and Hour Division's general policy of conforming skilled wage classifications to the lowest skilled classifications in the applicable wage determination. Petition at 14. In that case, the Board rejected a strict application of this policy because the wage determination's lowest rate for a skilled classification was below the rate listed for unskilled laborers. *Id.* at 4. But *M. Z. Contractors* is distinguishable from the present matter on the facts. As noted, in *M. Z. Contractors*, the lowest wage determination rate for a skilled classification (painter) was below the listed rate for laborers. *Id.* at 4. That is not true in this case. Here, the rate for the lowest skilled craft (sheet metal worker) was \$11.00, while the laborer's rate was \$7.88.

Finally, DEI argues its requested rates were reasonably related to those in the wage determination by submitting several documents; including (by way of example) an affidavit of Jon Kingsley, AR at Tab E, Attachment 13, the President of one DEI's subcontractors. But such information is not relevant to analysis of the conformance process, since none of these documents is relevant to the issue of whether the requested rates are reasonably related to the applicable wage determination. Such wage information might have been relevant in a pre-contract award challenge -- based on DEI's version of purported state of current Jefferson County, Texas area practice -- to the correctness of the BoP contract's wage determination, but not in deciding appropriate wage rates to be conformed in "reasonable relationship" to the rates contained in the wage determination.

Our final observations and conclusions regarding DEI's Petition for Review -- to the extent that it is a post-award challenge to the correctness of the BoP contract wage determination -- are as follows. First, we find no significance whatsoever in the Administrator's statement in her final ruling that it "would have been appropriate for the highway wage determination to have been incorporated. . ." in the BoP project's bid specifications. AR Tab A at 4. In that passage of the determination, the Administrator was merely opining as to the outcome of a timely request for modification of the applicable wage determination, had DEI followed the requirements of the regulations and challenged the correctness of the single bid specification wage determination, No. TX940014, prior to the award of the contract. Nor is the Administrator's citation to the area practice information "[h]istorically" available to the Wage and Hour Division of any import. This Board, as does the Administrator, presumes that bidders on contracts subject to the Act are familiar with the area practice currently prevailing in a given jurisdiction. In this regard, we note that if bidders on the BoP project believed the wage determination was "cursory" or otherwise obviously deficient, it was incumbent upon the bidders to raise a timely challenge to the Act's wage determination. Moreover, if bidders on a federal construction project choose to forego their regulatory right to pre-award challenges to a wage determination (clearly delineated in the applicable regulations at 29 C.F.R. Part 1), and instead rely on the conformance process, they

must do so at their own risk, given the Administrator's discretionary authority under 29 C.F.R. § 5.5(a)(1).

We finally note that Petitioner's reliance on the WAB's decision in *Hawk View Apartments*, WAB Case No. 85-20, Apr. 24, 1986, is in our opinion misplaced.<sup>5</sup> In *Hawk View*, the WAB reversed the Administrator's ruling in a conformance matter, thereby permitting the prime contractor and subcontractor to utilize, without back wage liability, the wage rates listed as prevailing in a State of Nevada prevailing wage determination. However, in that case, unlike here, the State wage determination had actually been incorporated into the bid specifications and contract for construction of an apartment complex funded or assisted partially by federal monies, thus bringing into play both State and federal prevailing wage requirements. Moreover, in that case there was record evidence that the State of Nevada's prevailing wage schedule was more consistent with the current locally prevailing wage standards than the classifications and wages reflected in the DBA wage determination. (In fact, the WAB noted in its decision that the record demonstrated that all bidders based their submissions to the contracting agency on the basis of the Nevada wage determination.) In this case where only the DBA wage determination was incorporated in the bid specifications and contract and the BoP's contracting officer placed all bidders on notice of the Wage and Hour Division's "*de facto* floor" policy -- as characterized

---

<sup>5</sup> While noting the distinctions between *Hawk View Apartments* and the situation presented by DEI's Petition for Review, we emphasize that the Board expresses no opinion concerning any future matter factually similar to *Hawk View Apartments*.

by DEI -- concerning the minimum wage rate acceptable for a skilled classification utilized in constructing the BoP project.<sup>6</sup>

For the foregoing reasons, the Administrator's final ruling is **AFFIRMED**.

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member

---

<sup>6</sup> With respect to Petitioner's allegation that the BoP erred in interpreting the Administrator's final ruling so as to preclude use of the \$11.00 hourly minimum rate for the requested conformed classification of "Ironworker, reinforcing," we note that the applicable wage determination contained the classification of "Ironworker, structural," with the accompanying hourly wage rate of \$12.79. As with the remainder of DEI's proposed classifications, no timely evidence was presented to the Wage and Hour Division as to whether there should be a separate classification for "Ironworker, reinforcing." Accordingly, we affirm the application of the "Ironworker, structural" classification and wage rate to the disputed duties performed on the BoP contract.