



In the Matter of:

U.S. FIRE PROTECTION, INC.

ARB CASE NO. 99-008
(Formerly ARB Case No. 98-140)

In re: Palestine Gardens North
Number 084-EE-0019-WAH
Wage Decision No. MO970009
Kansas City, Missouri

DATE: August 30, 1999

and

U.S. FIRE PROTECTION, INC.

ARB CASE NO. 98-139

In re: The Avalon at South Mountain
Project/Contract No. 123-35278
Wage Decision No. AZ970004
Phoenix, Maricopa County, Arizona

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner

Connie Kremer, *U.S. Fire Protection, Inc., Garland, Texas*

For the Administrator

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

For Intervener Road Sprinkler Fitters Local Union No. 669

Francis R.A. Sheed, Esq., *Osborne Law Offices, P.C., Washington, D.C.*

FINAL DECISION AND ORDER

These two consolidated cases are before the Administrative Review Board (ARB) on the petitions of U.S. Fire Protection, Inc. (Fire Protection). Fire Protection seeks review of the final rulings of the National Office Program Administrator (Administrator) denying requests that a "Residential Sprinkler Installer" classification and wage rate be added to two wage determinations applicable to residential construction projects in Phoenix, Arizona ("The Avalon at South Mountain") and Kansas City, Missouri ("Palestine Gardens North"), through the so-called conformance process under the Davis-Bacon Act regulations, 29 C.F.R. §5.5(a)(1)(v)(1998). This

Board has jurisdiction to review the Administrator's final rulings pursuant to 29 C.F.R. §§7.1 and 7.9 (1998).

For the reasons discussed below, we deny Fire Protection's petitions for review and affirm the Administrator's determinations.

BACKGROUND

Case No. 99-008, Palestine Gardens – Construction on the Palestine Gardens North (Palestine Gardens) project began on April 29, 1997. Administrative Record (AR) Tab F, at p.2.^{1/} General Wage Determination No. MO970009, covering residential construction projects in five counties in Missouri, was applicable to the project. AR Tab M. The wage determination included a classification of "Sprinkler Fitters" at a wage rate of \$22.80 per hour and \$6.95 per hour in fringe benefits. AR Tab M, pp. 1 and 5.

Fire Protection was engaged as a subcontractor to install the indoor fire sprinkler system on the project. On November 11, 1997 (*i.e.*, eight months after construction began at the site), Fire Protection asked the prime contractor, Neighbors Construction, Inc., to seek the addition of a "Residential Sprinkler Installer" classification to the wage determination through the Davis-Bacon conformance process, 29 C.F.R. §5.5(a)(1)(v). Fire Protection proposed a wage rate of \$9.50 per hour for the new classification. AR Tab J. The conformance request was submitted to the Department of Housing and Urban Development, which forwarded the request to the Department of Labor's Wage and Hour Division on March 19, 1998. AR Tab G. In its transmittal to the Wage and Hour Division, HUD advised the Division that it did not agree with the proposed conformance action. *Id.*

On April 1, 1998, the Wage and Hour Section Chief denied the request for the proposed additional classification, reasoning that the work that would be performed by the proposed classification could be performed by the "Sprinkler Fitters" classification already included in the wage determination. AR Tab F.

Fire Protection petitioned the ARB for review of the Section Chief's decision, and the appeal was docketed as ARB Case No. 98-140. The Acting Administrator (Administrator) moved to dismiss the petition for review without prejudice because he had not yet issued a final, appealable decision; we granted the Administrator's motion and dismissed the case. *U.S. Fire Protection Services, Inc.*, ARB Case No. 98-140, Order of Dismissal, Aug. 17, 1998.

The Administrator issued a final decision in the Palestine Gardens matter on October 9, 1998, denying Fire Protection's request for an additional classification because the wage determination contained a "Sprinkler Fitter" classification. In reaching this conclusion, the Administrator found that the work of the proposed "Residential Sprinkler Installer" classification was encompassed

^{1/} The Administrator has filed a single, consolidated Administrative Record covering both of these cases.

within the duties performed by the “Sprinkler Fitter” classification already found in the wage determination, and that this new classification therefore could not be added under the conformance regulations. AR Tab A; *see* 29 C.F.R. §5.5(a)(1)(v)(A). Fire Protection’s petition for review of this final ruling was docketed as ARB Case No. 99-008.

Case No. 98-139, The Avalon at South Mountain – Like the Palestine Gardens project, Fire Protection was engaged as a subcontractor to install indoor fire sprinklers on a construction project known as The Avalon at South Mountain (Avalon) in Phoenix, Arizona. General Wage Determination No. AZ970004, applicable to residential construction projects in Maricopa and Pinal Counties, Arizona, was included in the project specifications. This wage determination specified an hourly wage rate for “Sprinkler Fitters, Fire” of \$15.68, and also fringe benefits. AR Tab T.

At Fire Protection’s request, the general contractor on the project submitted a request to add a “Residential Sprinkler Installer” to the wage determination at an hourly rate of \$9.00, using the Davis-Bacon conformance procedures. AR Tab S. The request was submitted to HUD, which in turn forwarded the proposal to the Wage and Hour Division. *See* AR Tabs R, S.

On June 17, 1998, the Administrator denied Fire Protection’s request for a separate classification of “Residential Sprinkler Fitter” at the Avalon project. Like the Palestine Gardens case, the Administrator found that the proposed “Residential Sprinkler Installer” classification could not be added through the conformance process because the work of the proposed classification already could be performed by a job title found in the wage determination, “Sprinkler Fitter, Fire.” AR Tab P. Fire Protection petitioned for review of this determination, which was docketed as ARB Case No. 98-139.

DISCUSSION

The Davis-Bacon Act and the Davis-Bacon Related Acts^{2/} require generally that laborers and mechanics employed on federal and federally-funded construction contracts be paid no less than the locally prevailing wage, as determined by the Secretary of Labor. 40 U.S.C. §276a. Under the regulations, contracting agencies incorporate prevailing wage determinations into bid packages and construction contracts. Through this process of predetermining the prevailing wage rates, all bidders for federal construction projects are provided with the same information concerning the minimum wage rates that must be paid on a federal construction procurement. 29 C.F.R. §5.5; *see also* 48 C.F.R. §36.303.

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

[A]ll bidders for federal construction projects are provided with the same information concerning the minimum wage rates that must be

^{2/} For a list of the Davis-Bacon Related Acts, *see* 29 C.F.R. Part 1, Appendix A.

paid on a federal construction procurement. Just as the Davis-Bacon prevailing wage requirements promote “the principle that all prospective federal construction contractors be on a ‘level playing field’ in the bidding process,” *In the Matter of AC and S, Inc.*, WAB Case No. 93-16, March 31, 1994, the process of including the applicable wage determination in the construction project bid package and contract insures that all bidders are developing their bid proposals with the same expectations regarding the prevailing wage and fringe benefit rates that will be paid on the project.

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

The Davis-Bacon regulations include a straightforward mechanism for clarifying any errors, omissions or ambiguities that may exist in a wage determination. If Fire Protection believed that the work of its proposed “Residential Sprinkler Installer” classification was different from the sprinkler fitter classifications already found in the published general wage determinations, the company could have submitted a written request to the Administrator for reconsideration of the wage determination. 29 C.F.R. §1.8. However, it is well-established that challenges to a wage determination must be made prior to the award of a construction contract “to ensure that competing contractors know in advance of bidding what rates must be paid so that they may bid on an equal basis.” *See In re Kapetan Inc.*, WAB Case No. 87-33, Sept. 2, 1988, and cases cited therein.

The regulations authorize the Wage and Hour Division to add an additional job classification and wage rate *after* the award of the construction contract (29 C.F.R. §5.5(a)(1)(v)), but the procedure is designed to be very narrow in scope. A conformed classification will be recognized *only* if it meets all the elements of the following three-part test:

- (1) The work to be performed by the classification 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.

Id.

Fire Protection argues before the Board (as it did before the Administrator) that a separate classification and wage rate for “Residential Sprinkler Fitter” is justified because the work of its employees on the Palestine Gardens and Avalon residential construction projects differs substantially from the work performed by fitters who install steel pipe automatic sprinkler systems. Fire Protection contends that installing plastic CVPC pipe sprinkler systems – the work performed by its employees – does not require the same level of expertise and skill required in metal pipe sprinkler installations. *See, e.g.*, AR Tab B.

The Administrator specifically rejected this argument in connection with his Palestine Gardens opinion, observing that even if Fire Protection were correct in its position that there is an industry practice establishing two separate rates for metal versus plastic sprinkler system installers, an area practice wage survey conducted *prior* to bid opening and contract award would be needed to establish the existence of such a separate classification. AR Tab A. With respect to the Avalon project, the Administrator also noted that the classification and wage rate for the “Sprinkler Fitters, Fire” was derived from a classification in a collective bargaining agreement specifically intended for use on residential construction, further undermining any notion that a new and different sprinkler fitter rate was needed for residential work. *See* AR Tab U.

The situation before us in this case is analogous to our recent decision in *Pizzagalli, supra*. There, we upheld a decision of the Administrator denying the contractor’s post-award request to add a conformed classification of “Reinforcing Ironworker” when the wage determination in the bid specifications had included an “Ironworker” classification. Like this case, the Administrator in *Pizzagalli* held that the contractor’s proposed additional classification did not meet the first criterion for a conformance request, *i.e.*, that the work to be performed by the proposed classification is not performed by a classification in the wage determination.

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

Applying this principle to the case now before us, it is clear that Fire Protection’s post-award arguments concerning the prevailing local practice in installing plastic pipe fire sprinkler systems are inapposite. If Fire Protection believed that the wage determinations did not reflect prevailing local practice, the time for making its case was prior to the bid dates on the projects.

Fire Protection was aware when it bid on the Avalon and Palestine Gardens jobs that the bid packages contained classifications that, on their face, appear to encompass sprinkler installation work: “Sprinkler Fitters, Fire” and “Sprinkler Fitters.” We hold that the Administrator reached a reasonable conclusion when denying the requests for the new conformed wage rates, because the proposed classifications did not meet the first prong of the test in the Davis-Bacon conformance regulations – that the work to be performed by the classification requested is not performed by a

classification in the wage determination. 29 C.F.R. §5.5(a)(1)(v)(A)(1). Fire Protection's petitions for review therefore are **DENIED**.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member