



In the Matter of:

COBRO CORPORATION

ARB Case No. 97-104

**With respect to Department of the Army
Contract No. DAAD05-96-D-7010 for
Services at Aberdeen Proving Ground,
Harford County, Maryland**

**DATE: July 30, 1999
[CORRECTED]**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioners:

Charlotte Rothenberg Rosen, Esq.
Dickstein Shapiro Morin & Oshinsky LLP, Washington, D.C.

For the Respondent:

Steven J. Mandel, Esq., Douglas J. Davidson, Esq., Lois R. Zuckerman, Esq.
U.S. Department of Labor, Washington, D.C.

DECISION AND ORDER OF REMAND

This case is before the Board on the petition of COBRO Corporation (COBRO) seeking review of the May 2, 1997 final ruling issued by the Administrator, Wage and Hour Division (Administrator), pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351, *et seq.* (SCA or the Act). *See* 29 C.F.R. §§8.1(b)(6), 8.7(b) (1998). COBRO challenges the Administrator's decision that employees performing work in the conformed classification of Data Collector/Coordinator under Contract No. DAAD05-96-D-7010 at the Aberdeen Proving Ground (APG), Harford County, Maryland should be paid \$13.34 per hour.

In this decision, we first review briefly the process for determining wage rates under the Service Contract Act and its implementing regulations, followed by a statement of the facts of the case. We conclude with our analysis of the legal issues presented by the parties. For the reasons set forth below, COBRO's petition is denied in part and granted in part, and the case is remanded to the Administrator.

WAGE DETERMINATION AND CONFORMANCE PROCEDURES

Under the Service Contract Act, the Secretary of Labor is responsible for determining the minimum wage rates to be paid to various classifications of service workers who may be employed on service procurement contracts subject to the Act. 41 U.S.C. §351 (1994). The minimum wage and fringe benefit rates are based either on the locally prevailing rates for service workers, or the rates in any collective bargaining agreements that already may be in effect governing the pay of the workforce at the facility. *Id.* Prior to entering into a service contract, a contracting agency is required to notify the Department of Labor's Wage and Hour Division of the various classifications of workers that will be employed on the procurement, typically submitting a Standard Form (SF-)98 (Notice of Intention to Make a Service Contract) and SF-98A. 29 C.F.R. §4.4 (1998); *see also* 48 C.F.R. Part 22, Subpart 22.10 (Federal Acquisition Regulations) (1997). In response to the contracting agency's request, the Wage and Hour Division issues a wage determination identifying the minimum hourly wage and fringe benefits that must be provided to the classifications of workers employed on the contract. 29 C.F.R. §4.3 (1998).

There are occasions when the performance of a procurement contract may require a contractor to hire a classification of worker that is not listed in the wage determination. When a job classification necessary for the contract has been omitted from the wage determination, "the contracting officer shall require that any class of service employee which is not listed . . . be classified by the contractor so as to provide a reasonable relationship . . . between such unlisted classification and the classifications listed in the wage determination." 29 C.F.R. §4.6(2)(b)(2) (1998). This procedure for adding a "missing" job classification and wage rate to a wage determination is known as a "conformance action." When seeking a conformed wage rate, the contractor is required to submit to the contracting officer a report of the proposed wage and fringe benefit rates for the job title, and indicate whether the affected employees agree or disagree with the proposed rates.^{1/} The contracting officer reviews the contractor's proposal, and then transmits it to the Wage and Hour Division for issuance of a wage determination. The contractor's application is accompanied by the contracting officer's recommendation. The Wage and Hour Administrator then approves, modifies or disapproves the contractor's proposed rates, and transmits the final conformance decision to the contracting officer for implementation. *Id.*; *see, e.g., Kord's Metro Services, Inc.*, BSCA Case No. 94-06, Aug. 24, 1994. Parties who disagree with a final decision of the Administrator may appeal the decision to this Board. 29 C.F.R. §§8.1(b)(6), 8.7(b) (1998).

^{1/} This information is provided on the SF-1444, Request for Authorization of Additional Classification and Rate. The form includes a provision for the signature of the employee, indicating whether the employee agrees or disagrees with the employer-proposed wage rate. *See, e.g.,* Tab D of the Administrative Record.

FACTUAL BACKGROUND

In December 1995 the Department of the Army (Army) awarded a contract to COBRO under which COBRO would provide data collection services at the Aberdeen Testing Center, located at the Aberdeen Proving Ground. The contract provided for a one-year base period beginning January 1, 1996, with four one-year renewal options. AR Tab H.^{2/} The data collection services required under the contract awarded to COBRO at Aberdeen previously had been performed by DynTel Corporation (DynTel) between October 1, 1988, and December 31, 1995. AR Tab D/1.^{3/}

^{2/} The abbreviation “AR” refers to documents found in the Administrative Record. Those documents are identified by AR tab, and page number where possible; when necessary, a brief description of the document has been provided for clarity. Citations to the parties’ pleadings are abbreviated as follows:

Pet. for Rev.	COBRO Corporation’s Petition for Review
Am. Pet. for Rev.	COBRO Corporation’s Amendment to Petition for Review
Brief in Supp. of Pet. for Rev.	COBRO Corporation’s Brief in Support of Its Petition for Review and COBRO’s Amendment to Petition for Review
Reply Brief	COBRO Corporation’s Brief in Reply to Acting Administrator’s Statement in Opposition to Petition
[First] Suppl. Reply Brief	COBRO Corporation’s Supplement to Reply Brief, filed Mar. 27, 1998
Second Suppl. Reply Brief	COBRO Corporation’s Second Supplement to Reply Brief, filed July 22, 1998
Resp. Brief	Statement of the Acting Administrator in Opposition to Petition for Review

COBRO filed a Motion for Leave to Submit a Reply Brief Exceeding the Page Limitation; that motion is hereby granted. This decision reflects consideration of the Reply Brief in its entirety, as well as the Supplement to Reply Brief that was filed by COBRO on March 27, 1998, and the Second Supplement to Reply Brief that was filed by COBRO on July 22, 1998.

^{3/} Tab D is comprised, in part, of several exhibits that were initially submitted to the Administrator as attachments to a letter from COBRO dated March 14, 1997, and which are identified as “COBRO exhibits” in the Administrative Record. The numbered exhibits found at Tab D are referred to in this decision by tab and exhibit number, for example, “Tab D/1.”

The 21-month long solicitation process that culminated in the December 1995 contract award to COBRO began when the Army issued a request for proposal (RFP) in April 1994.^{4/} AR Tab D/1. Unlike the prior DynTel procurement, in which data collection activities had been performed by workers classified as “Data Coordinator,” “Senior Data Collector,” “Intermediate Data Collector” and “Junior Data Collector,” the Army stated as part of the RFP that there would be only two job classifications involved in data collection under the new contract: “Project Coordinator” and “Data Collector/Coordinator.” AR Tab H, Job Description at C-25.

The Army’s RFP included wage determination (WD) 87-0357 (Rev. 10), dated September 13, 1993. AR Tab D/1. That wage determination did not include a classification and wage rate for the required Data Collector/Coordinator, but listed the classification of Data Collector at \$7.22 per hour, and provided a position description for that classification.^{5/} The RFP did include a job description for the Data Collector/Coordinator position, however. *Id.*

The reclassification of the data collection workers in the April 1994 RFP provoked several exchanges between the Army and prospective bidders concerned with the wage rates that would be paid to employees on the new procurement contract, and the duties they would perform. The Army clearly and repeatedly advised bidders that the Data Collector/Coordinator position was different from and more complex than the data collector positions that existed under the prior DynTel procurement:

- In an amendment to the RFP issued May 12, 1994, the Army advised the contractors that the Data Coordinator/Collector position must be conformed (*i.e.*, added later) “using WD 87-0357 (Rev. 10)” as the basis for the new job classification. AR Tab D/2 (5/12/94 amend.) at 2.
- In responding to contractor inquiries in the course of the solicitation process, the Army stated that the Data Collector/Coordinator “job description was written as such because personnel may not always be collecting data.” *Id.* at 5-6.
- In response to one contractor’s inquiry regarding why the position of Data Coordinator/Collector had been specified in the RFP, whereas wage determination WD 87-0357 (Rev. 10) listed only the Data Collector classification, the Army stated, “CSTA [Combat Support Test Activity] has added responsibilities to the requirements of a ‘Data Collector.[’] Therefore, the new title of Data Collector/Coordinator is appropriate for the new job description.” *Id.* at 2, 11.

^{4/} Solicitation No. DAAD05-93-R-0285.

^{5/} Position descriptions for typical classifications that are listed on the wage determination are found in the Wage and Hour Division’s SCA Directory of Occupations (SCA Directory). WD 87-0357 (Rev. 10) contained a position description for each job classification not listed in the SCA Directory, including the Data Collector job title. AR Tab D/1.

- In an amendment to the RFP, the contracting officer clarified that “Data Coordinators/Collectors are not subject to the Wage Determination since it is a new labor category and contains more duties than the current Data Collector job description on the Wage Determination [87-0357 (Rev. 10)].” AR Tab D/3 (5/13/94 amend.) at 3.
- In responding to contractors’ inquiries on October 19, 1994, the Army contracting officer stated that “CSTA only wants one level of data coordinators/collectors as specified in the SOW [Statement of Work,]” in contrast to the multiple classifications of data collector and the data coordinator under the prior procurement. AR Tab D/5 (10/19/94 amend.) at 3.

On September 23, 1994, the contracting officer advised the prospective bidders that the wage determination included in the original solicitation (WD 87-0357 (Rev. 10)) had been superseded by a new wage schedule, WD 94-2247 (Rev. 2). AR Tab D/4 (9/23/94 amend.) at 5. Like the first wage determination, however, wage determination WD 94-2247 (Rev. 2) did not list the new position of Data Collector/Coordinator, nor did it provide a wage rate for the job classification. AR Tab D/11.

During the period leading up to the bid, the Army advised COBRO (by telephone conversation on September 26, 1995, and by letter dated October 1, 1995) that the Data Collector/Coordinator position was currently being paid \$11.70 per hour and that conformed pay rates were subject to approval by the Department of Labor.^{6/} AR Tab H, S. Kelly ltr. of 10/1/95 at 1. On October 12, 1995, the Army requested that COBRO submit its best and final offer (BAFO), again advising COBRO that the Data Collector/Coordinator position was currently being paid an hourly wage of \$11.70, and noting that “the Data Collector (GS-07) and Data Coordinator (GS-09) were two separate labor categories . . . [which] were combined into one labor category” in the new contract solicitation. AR Tab H, S. Kelly ltr. of 10/12/95. Nevertheless, in its cost proposal submitted to the Army on November 21, 1994, COBRO indicated that it would pay the Data Collector/Coordinator position at the wage rate for the General Clerk II category listed on wage determination WD 94-2247 (Rev. 2), which was \$7.30 per hour. AR Tab D, J. Marsh ltr. of 11/21/94, Cost Proposal Notes at 9.

The record before us does not indicate any further action regarding conformance of the Data Collector/Coordinator position until after the December 13, 1995 award of the contract to COBRO. After winning the contract, COBRO sent a letter to the DynTel workforce offering

^{6/} Although the record contains statements by the contracting officer expressing uncertainty whether the duties of the Data Collector and the Data Coordinator had been merged *before* the DynTel contract was completed, the later report of the Wage and Hour investigator indicates that employees were working in a combined Senior Data Collector and Data Coordinator position under the DynTel contract during 1995. AR Tab H, Narrative Rept. at 2; Tab H, S. Kelly ltrs. of 10/1/95, 3/13/96, 5/14/96. The report states that the employees performing in the combined data collector/coordinator position were Senior Data Collectors, who continued to receive the Senior Data Collector wage. *Id.* at 4.

employment in the position of Data Collector/Coordinator at an hourly wage of \$7.60 plus \$.90 in health and welfare benefits, based on the General Clerk II classification. AR Tab M, COBRO form letter dated 12/20/95. The COBRO contract commenced on January 1, 1996; later that month, seventeen employees who had been hired by COBRO as Data Collector/Coordinators at the Aberdeen Proving Ground submitted complaints to the Wage and Hour Division regarding, *inter alia*, the basic hourly wage rate they were receiving from COBRO. AR Tab H, Wage and Hour Investigator's Narrative Rept. of 7/31/96 at 2.

On February 23, 1996, the Army advised COBRO that its failure to submit the conformance papers necessary to establish wage rates for the positions that were not listed in wage determination WD 94-2247 (Rev. 2) could result in "serious penalties." The Army directed COBRO to submit such documentation no later than March 27, 1996. AR Tab D, S. Kelly ltr. of 2/23/96. In its March 7, 1996 response, COBRO noted that its October 1995 "best and final offer" had expressed COBRO's view that the Data Collector/Coordinator position functionally matched the General Clerk II classification (\$7.30/hr.) listed on wage determination WD 94-2247 (Rev. 2). AR Tab D, M. Fischer ltr. of 3/7/96. COBRO also submitted copies of the Standard Form 1444, Request for Authorization of Additional Classification and Rate, signed by the employees who had been employed by COBRO in the Data Collector/Coordinator position. *Id.* On those forms, all thirty-one employees indicated that they disagreed with the proposed classification and wage rate, which was \$7.60 per hour for most of those employees, \$7.30 for others. AR Tab L; *see n.8 infra*.

On March 13, 1996, the Army contracting officer referred the conformance question for the Data Collector/Coordinator classification to the Wage and Hour Division. AR Tab H, S. Kelly ltr. of 3/13/96. To aid in the Wage and Hour Division's review of the conformance question, the contracting officer subsequently submitted a list of pertinent hourly wage rates paid over the more-than-seven-year span of the DynTel contract, summarized as follows:

DynTel job title	October, 1988 hourly rate	December, 1995 hourly rate
Data Coordinator	\$8.93	\$11.70
Senior Data Collector	7.38	9.66
Intermediate Data Collector	6.11	8.00
Junior Data Collector	5.71	7.47

AR Tab K, S. Kelly ltr. of 5/14/96 at 1-2. The contracting officer also stated that of the four job classifications that had been utilized under the prior DynTel contract, only the Junior Data Collector had been included on wage determination WD 87-0357. *Id.* at 2.^{7/}

The Army contracting officer recommended that the Wage and Hour Division reject the \$7.30 hourly wage rate proposed by COBRO, explaining that although the Data Coordinator and Data Collector positions had been combined in the new procurement contract, COBRO was paying the Data Collector/Coordinators a rate lower than had been paid by DynTel to the Junior Data Collector under the prior procurement.^{8/} *Id.* The contracting officer recommended a wage rate of \$10.68 per hour, based on the average of the respective rates most recently paid for the Data Coordinator (\$11.70) and Senior Data Collector (\$9.66) positions. *Id.*

The Wage and Hour Division referred the matter to the Division's regional office for investigation. AR Tab L. The Wage and Hour investigator visited the Aberdeen Proving Ground site and interviewed employees working as Data Collector/Coordinators for COBRO. He also received input from COBRO management regarding the skills and duties required of the Data Collector/Coordinator position. AR Tab H.

^{7/} The Army and the predecessor contractor, DynTel, had agreed that workers under the prior contract would be employed under these four classifications, but only one, Data Collector, was included in the wage determinations that were in effect over the course of the DynTel contract. AR Tab D/15, S. Kelly ltr. of 5/14/96 at 2. The wage rate for Data Collector in the 1993-94 wage determination, WD 87-0347 (Rev. 9), corresponded to the lowest-paid Junior Data Collector classification. *Id.* The decision to subdivide the "Data Collector" job title into three levels (Junior, Intermediate and Senior), with premium pay for the higher-classified data collectors, was an *ad hoc* arrangement negotiated between the Army and DynTel. AR Tab H, Narrative Rept. at 3-4; *see* AR Tab D/15.

Although not an issue in our review of COBRO's conformance request in this case, we note that the Secretary's regulations implementing the SCA require contracting agencies to list *all* classes of employees that will be employed on the service contract. 29 C.F.R. §4.4(b) (1998). The listing of all job classifications by the contracting agency permits the Secretary to determine appropriate minimum wage levels in a timely fashion. The job classification and rating issues that are central to the matter now before the Board might have been framed differently if the Army earlier had asked the Labor Department to issue wage determination rates for all three of the Data Collector classifications, as required by the SCA regulations. If the Army, during the prior procurement contract, had indicated to the Wage and Hour Division that there were three levels of Data Collector and a Data Coordinator with differentiable job duties, the Division would have had an opportunity to perform an appropriate assessment of the job titles and issue appropriate SCA minimum wage rates, thereby developing a better record with regard to these site-specific job classifications.

^{8/} The Wage and Hour investigator's report indicates that COBRO classified the employees in the Data Collector/Coordinator position as General Clerk II and paid them \$7.30 per hour, but that "[m]ost [of those employees] were raised to \$7.60 an hour after the contract commenced." AR Tab H, Narrative Rept. at 2; *see* AR Tab L.

With regard to the history of the four positions employed under the prior DynTel contract (Data Coordinator, and Senior, Intermediate and Junior Data Collector), the Wage and Hour investigator found that the number of employees working in those positions had decreased over the course of the DynTel contract from a total of approximately 150 to only 31 at the time of the investigation. AR Tab H, Narrative Rept. of 7/31/96 at 5. The investigator also found that during the latter years of the DynTel contract, the less senior employees who occupied the Junior and Intermediate Data Collector positions had been terminated by DynTel, thus leaving a workforce composed of the more experienced senior employees in the Data Coordinator and Senior Collector positions. *Id.* at 2, 4-5. In addition, the investigator found that the Data Coordinator position had been abolished by DynTel under the prior contract and the duties of that position had been merged with those of the Senior Data Collector position, without a change in the rate of pay for the Senior Data Collectors. *Id.*

In response to COBRO's claim that the data collecting staff appropriately could be classified under the General Clerk II classification in the wage determination, the Wage and Hour investigator concluded that the Data Collector/Coordinator position differed from the General Clerk II classification, and that the SCA Directory of Occupations did not contain any other classification that was sufficiently similar to the Data Collector/Coordinator position to tie an existing wage rate to the new job title. *Id.* Subsequently, the Wage and Hour Division agreed with the Army that the Data Collector/Coordinator position would be equivalent to the GS-8 Federal grade for employees hired directly by the government. AR Tab G, Position Description for Data Collector/Coordinator and accompanying materials.

On December 3, 1996, the Wage and Hour Division issued a letter advising the Army that, based on the Federal grade equivalency of GS-8, the Data Collector/Coordinator wage should be \$13.34 per hour. AR Tab D/1. On December 23, 1996, the Army contracting officer transmitted the Wage and Hour letter of December 3 to COBRO and advised the contractor that the higher wage rate was effective retroactive to the first day of performance of the contract, *i.e.*, January 1, 1996. *Id.*

On March 14, 1997, COBRO submitted a request for reconsideration of the Wage and Hour Division's conformance decision to the Administrator. AR Tab D, COBRO ltr. of 3/14/97. In support of its request, COBRO urged that the conformed rate did not "equate with the actual job duties of the position based upon historical data," asserting that the determination was inconsistent with prior wage determination rates for positions that performed the job duties for the Data Collector classification, and also asserting that the duties of the Data Collector/Coordinator position most closely mirrored those of the General Clerk II classification. *Id.* at 2. In the alternative, COBRO argued that no separate conformed classification was needed because the General Clerk II classification in the wage determination covered the duties of the Data Collector/Coordinator position. *Id.*

On March 25, 1997, the Administrator forwarded to the Army a response to COBRO's request for review and reconsideration. AR Tab C. The Administrator reaffirmed the conclusion that the Data Collector/Coordinator position could not be classified as the General

Clerk II, GS-2, classification. *Id.* at 1. The Administrator also reiterated that the Data Collector/Coordinator position was equivalent to the GS-8 grade for employees hired directly by the Federal government and explained that the GS-8 wage rate (\$13.34/hr.) was adopted “directly from the Federal White Collar Pay Schedule (FWCPS) since some of the wage rates contained in Wage Determination (WD) 94-2247 (Rev. 2) were adopted directly from the FWCPS.” *Id.* The Administrator also explained that if the traditional “slotting” method were used to develop the conformed wage rate (*see* 29 C.F.R. §4.51(c) (1998)), the higher wage of \$14.97 per hour for the Secretary V classification (the only GS-8 equivalent listed under the “Administrative Support and Clerical” personnel section of WD 94-2247 (Rev. 2)), would be adopted. *Id.* In addition, the Administrator stated that the duties described by the employees working for COBRO in the Data Collector/Coordinator position at the APG were “more detailed in nature, but in essence” were the same as the duties included in the job description that was provided in the Army’s contract solicitation. AR Tab C, 3/25/97 ltr. at 1-2. The Administrator also noted the distinction between setting a wage rate for a conformed classification and the issuance of prevailing wage rates. *Id.* at 2. Finally, the Administrator stated that the \$13.34 hourly wage was to be paid retroactively and in addition to the fringe benefits required by the WD. *Id.*

On April 2, 1997, the Army contracting officer transmitted the Administrator’s March 25, 1997 decision letter to COBRO. On May 2, 1997, the Administrator addressed a letter directly to COBRO, also referring the contractor to the March 25, 1997 letter. AR Tab A. On May 22, 1997, COBRO petitioned this Board for review of the Administrator’s final ruling.

DISCUSSION

It is important to note at the outset of this discussion the narrow scope of the Board’s review in a conformance challenge. A conformance proceeding under 29 C.F.R. §4.6 has the limited purpose of adding an employee classification that was not listed in the applicable wage determination. The process takes place after the competing contractors have submitted their bids and a winning contractor has been identified. The conformance process begins with the presumption that the wage determination that was included in the bid specifications essentially is correct, and that the limited deficiency is that a needed job classification and wage rate are missing. The question presented to the Administrator is really quite simple: *Which job title (or titles) already listed within the wage determination is most comparable to the skill level classification that was omitted?* Once the Administrator determines which classification in the wage determination is most similar in skill level to the classification to be conformed, the Administrator derives a wage rate for the conformed classification, ordinarily from the rates published in the wage determination.

Significantly, our review of a conformance determination by the Administrator is not a proceeding in which the Board retroactively reviews the original wage determination rates. The Secretary’s SCA regulations specifically require that any challenge to a wage determination must be made *prior* to the date that bids are submitted on a procurement. 29 C.F.R. §4.56 (1998) (“In no event shall the Administrator review a wage determination or its applicability after the

opening of bids[.]”^{9/} The requirement that wage determination challenges be made *prior* to the award of a contract is essential to a fair procurement process, ensuring that “competing contractors know in advance of bidding what rates must be paid so that they bid on an equal basis.” *Pizzagalli Construction, Inc.*, ARB Case No. 98-090, May 28, 1999, slip op. at 5 (quoting *Kapetan, Inc.*, WAB Case No. 87-33, Sept. 2, 1988 (under analogous provisions of the Davis-Bacon Act regulations)).

In the case before us, all the bidders were on notice for fully 21 months of the procurement process for the APG contract that the wage determination found in the Army’s bid specifications lacked a job classification (Data Collector/Coordinator) needed to perform the project. COBRO had ample opportunity *prior to the bid date* to seek clarification of the wage rates directly from the Labor Department through the “review and reconsideration” process of 29 C.F.R. §4.56. A timely request from COBRO would have allowed COBRO *and the other bidders* to be certain of the wage rate that would be mandated for workers in the Data Collector/Coordinator position; no such request was filed.

The process for determining a wage rate through a conformance action is significantly different from the process used in developing the original full wage determination. The procedures utilized by the Wage and Hour Division for issuing an initial wage determination typically involve extensive analysis of statistical data (*see* 29 C.F.R. §4.51), but an expedited process is used to determine the appropriate hourly wage for classifications conformed under the Service Contract Act. Sound policy underlies this distinction: “The conformance process should not replicate the initial wage determination procedure, since that could create an unfair advantage for some contractors, and also create more lengthy post-contract-award conformance procedures.” *Biospherics, Inc.*, ARB Case Nos. 98-141 and 97-086, May 28, 1998, slip op. at 18 (quoting *CACI, Inc.*, Case No. 86-SCA-OM-5, Dep. Sec. Dec., Mar. 27, 1990, slip op. at 17). After bid opening, the Administrator’s sole task in a conformance action is to evaluate the relative ranking of the job classification that has been omitted from a wage determination, and to assign a wage rate for the omitted classification that is comparable to the wage rates for job classifications involving similar levels of skill in the wage determination using the “slotting” procedure. *See* 29 C.F.R. §4.6(b)(2) (1998). It is designed to be a limited process, with limited review by the Board. As we have observed previously, “[i]n establishing a conformed rate, the Administrator is given broad discretion and his or her decisions will be reversed only if inconsistent with the regulations, or if they are ‘unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations’” *Environmental Chemical Corp.*, ARB Case No. 96-113, Feb. 6, 1998, slip op. at 3 (quoting *Titan IV Mobile Service Tower*, WAB Case No. 98-14, May 10, 1991).

^{9/} We cite regulatory provisions as currently codified in Title 29 of the Code of Federal Regulations. We note, however, that former Sections 4.52 through 4.55 were redesignated as Sections 4.53 through 4.56 in December 1996, without substantive change. 61 Fed. Reg. 68647, 68664 (Dec. 30, 1996).

In its multiple filings before the Board, COBRO raises numerous challenges to different aspects of the Administrator's conformance decision, with some arguments raised by COBRO in the alternative. COBRO's challenges can be organized into four broad arguments:

1. The Administrator's conformance decision should be reversed because of irregularities or errors in the SF-98 process, *i.e.*, the process through which the Army obtained SCA wage determinations from the Labor Department.
2. The Administrator's conformance decision should be reversed because there was no need to issue a conformed wage rate or, alternatively, because the Administrator's comparison of the duties of the Data Collector/Coordinator position with the duties performed by other job classifications was flawed.
3. If the Administrator was correct in concluding that a conformed job classification and wage rate needed to be recognized, the conformed \$13.34/hr. wage rate is erroneous and should be reversed.
4. The Administrator erred in finding that the conformed wage rates should be applied retroactively to the beginning of COBRO's contract with the Army.

We examine each of these arguments in turn. In this process, we review the Administrator's decision in light of the challenges raised by the Petitioner, consistent with the regulatory mandate that the Board "pass upon the points raised in the petition upon the basis of the entire record before it." 29 C.F.R. §8.9(b) (1998).^{10/} We conclude that none of the challenges raised by COBRO conclusively demonstrates that the Administrator's conformance determination was incorrect or unreasonable; however, we also find that the Administrator's determination is

^{10/} COBRO attached a variety of documents to its pleadings as exhibits, including many documents that were not before the Administrator as part of the Administrator's conformance deliberations. The Board's review of the Administrator's ruling is in the nature of an appellate proceeding, and we generally focus our attention on the formal administrative record in this case, *i.e.*, the materials that were before the Administrator. 29 C.F.R. §8.1(d)(1998); *Harbert International, Inc.*, Case No. 91-SCA-OM-5, Sec. Dec., May 5, 1992, slip op. at 6. In its submissions before this Board, COBRO has provided support for its argument that its submission of the exhibits at this stage, rather than when the matter was before the Administrator, is justified. *Id.* In the interest of administrative efficiency, we have reviewed the exhibits to determine whether any of the evidence should have been considered by the Administrator; if so, it is possible that the disclosure of additional evidence might interfere with our review of the May 2, 1997 ruling. *Cf. Mercury Consolidated, Inc.*, Case No. 88-SCA-OM-2, Dep. Sec. Dec., Mar. 23, 1988 (remanding to Administrator for review of evidence not previously available that was submitted on appeal). As discussed in the body of our decision, we conclude that none of the exhibits submitted by COBRO directly to the Board required consideration by the Administrator. On remand, however, the Administrator is free to consider any of the COBRO exhibits that he deems relevant to the conformance request.

flawed, because the Administrator does not provide a clear justification for the crux of his conformance decision: the determination that the Data Collector/Coordinator position has a Federal grade equivalence of a GS-8.

1. Whether the Administrator's conformance decision should be reversed because of irregularities or errors in the SF-98 process, i.e., the process through which the Army obtained SCA wage determinations from the Labor Department.

COBRO asserts that the Administrator's conformance decision should be reversed because of alleged errors by the Army's contracting officer when requesting wage determination from the Labor Department and incorporating them into the procurement contract. In support of this argument, COBRO makes several specific charges of procedural error:

- *Because the contracting officer failed to submit a Standard Form SF-98 ("Notice of Intention to Make a Service Contract") form, wage determination WD 94-2247 (Rev. 2) was not properly issued for application to the APG contract, and therefore the conformance ruling is invalid. Additionally, the contracting officer failed to identify the various classes of data collection employees utilized under the predecessor contract when submitting the SF-98, which is required as part of the SF-98 submission. Brief in Supp. of Pet. for Rev. at 25-28.*
- *The contracting officer incorporated wage determination WD 94-2247 (Rev. 2) into the contract solicitation prematurely, prior to receiving the wage determination from the Wage and Hour Division in response to the SF-98 request. This premature adoption of the wage determination was a violation of 29 C.F.R. §4.4. Reply Brief at 1-4.*
- *In submitting the blanket SF-98 that covered the procurement, the Army's contracting officer did not follow the procedures provided by a Memorandum of Understanding (MOU) between the Army and the Wage and Hour Division. [First] Suppl. Reply Brief at 1-7. The contracting officer followed a similarly faulty SF-98 process in connection with the follow-on contract for data collection services at the Aberdeen Testing Center. Brief in Supp. of Pet. for Rev. at 27 n.16.*

We first address COBRO's argument that wage determination WD 94-2247 (Rev. 2) was not properly designated as applicable to the contract at issue because the contracting officer failed to follow regulatory procedures and internal guidelines when submitting the SF-98 to the Wage and Hour Division. The Administrative Record indicates that the Army contracting office filed an SF-98 on December 21, 1994. In response to the SF-98, the Wage and Hour Division designated wage determination WD 94-2247 (Rev. 2) as being applicable to the data collection contract on March 7, 1995. COBRO was awarded the contract in December 1995. AR Tab H,

exh. C. Contrary to COBRO's claim, it is clear that the Wage and Hour Division affirmatively designated WD 94-2247 (Rev. 2) as the wage determination applicable to the contract at issue, and the designation was made prior to the award of the contract, as provided for by 29 C.F.R. §4.3(b) (1998).

Similarly unavailing is COBRO's argument that any SF-98 filed by the Army contracting officer was fatally defective because "upon information and belief, it [the Army's SF-98] failed to identify the relevant classes and rates from the incumbent's [*i.e.*, DynTel's] contract." Brief in Supp. of Pet. for Rev. at 27. This argument has several infirmities. First, the SCA regulations (and the instructions accompanying the SF-98 form) require contracting agencies to identify the classes of employees that will be required on the *new* contract, not the prior contract. Second, the regulations and form require contracting agencies to advise the Wage and Hour Division of the wage rates that these classifications of workers would be paid if the workers were being paid as Federal employees – not the wage rates paid by the predecessor contractor. 29 C.F.R. §4.4(b)(1) and (2). Thus, contrary to COBRO's assertion, there was no requirement that the Army advise the Division of DynTel's job classifications and pay rates when requesting a wage determination as part of the bid process. Inasmuch as the Army had reconfigured the duties of the data collectors and data coordinators, and had assigned a new unified job title to the position, disclosure of the classifications and wage rates of employees on the predecessor DynTel contract would have been of limited value in any event.

We also are not persuaded by COBRO's claim that the conformance determination must be overturned because the Army did not provide the Wage and Hour Division with full and accurate information concerning the classes of employees that were to be employed on the Aberdeen procurement when it submitted the SF-98 form. Even if the Army's submission was incomplete, it does not follow that the Board would be required to reject any resulting wage determination or conformance determination issued by the Administrator. Indeed, the existence of the conformance procedure (*i.e.*, a mechanism for adding needed wage rates and job classifications that are not found in the wage determination initially issued by the Division) plainly anticipates that contracting agencies may not always provide full information to the Division when requesting a wage determination, and that the Division will be required to "fill in the gaps" after contract award. 29 C.F.R. §4.6(b)(2). We note particularly that in this instance, COBRO and the other bidders on the procurement repeatedly were advised by the Army prior to bid that the wage determination in the bid documents did not include a wage rate for the Data Collector/Coordinator, and that a rate would be determined post-award through the conformance procedure. *See* discussion at pp. 4-5, *supra*.

In its reply brief, COBRO argues that the Administrator's conformance determination is incorrect because wage determination WD 94-2247 (Rev. 2) – the underpinning of the conformed wage rate – never was properly issued for use on the Aberdeen Proving Ground procurement. Reply Brief at 1-4. The contracting officer advised the bidders on September 23, 1994, that the original wage determination included in the RFP (WD 87-0357 (Rev. 10)) had been superseded by a new wage determination, WD 94-2247 (Rev. 2), and that the later wage determination would apply to the procurement contract. Apparently the contracting officer was

aware of the new wage determination because of the Army's participation in the Wage and Hour Division's "blanket wage determination" program. However, the contracting officer did not specifically submit an SF-98 form requesting a wage determination for the APG contract until December 21, 1994 (almost two months after advising the bidders that WD 94-2247 (Rev. 2) applied), and the Division did not formally issue a notice to the Army applying the wage determination until March, 1995.

Although COBRO arguably has a point that the contracting officer's decision to incorporate wage determination WD 94-2247 (Rev. 2) into the RFP may have been premature, it is clear that this is not the kind of error that would call into question the Administrator's reliance on WD-94-2247 (Rev. 2) when determining the conformed wage rates. To demonstrate reversible error, a party challenging agency action based on non-compliance with agency rules must establish consequential prejudice to its interests associated with the non-compliance. *See generally Wirth v. United States*, 36 Fed.Cl. 517, 524-25 (1996), and cases cited therein. The SCA regulations provide that if a contracting agency awards a contract that does not include an SCA wage determination, or which includes an incorrect wage determination (as COBRO alleges in this instance), then the Wage and Hour Division is authorized later to issue a wage determination upon learning of the mistake – even if the Division learns of the problem *after* the contract has been awarded. In all situations, the contracting agency is required to incorporate the correct wage determination into the procurement contract. 29 C.F.R. §4.5(c)(1), (2). It is clear, then, that the contracting officer's possibly premature incorporation of WD94-2247 (Rev. 2) into the Aberdeen Proving Ground contract has not resulted in prejudice to COBRO, because the Administrator would have directed the Army to incorporate the same wage determination into the contract in any event.

This same analysis applies to COBRO's argument that alleged defects in the process used by the Army in requesting "blanket wage determinations," both in the initial procurement and in the follow-on procurement, should prompt this Board to overturn the conformance determination. Suppl. Reply Brief at 1-7; Brief in Supp. of Pet. for Rev. at 27 n.16. The Service Contract Act requires that "every contract . . . entered into by the United States . . . the principal purpose of which is to furnish services in the United States through the use of service employees" must include a wage determination specified by the Secretary of Labor. 29 U.S.C. §351. The statute itself therefore mandates that a wage determination issued by the Department at some point must be incorporated into the procurement. COBRO has not demonstrated that the Army's alleged non-compliance with MOU guidelines regarding the filing of requests for blanket wage determinations interfered materially with the conclusions drawn by the Administrator when issuing conformed wage rates for the Data Collector/ Coordinator position under the January 1996 COBRO contract.

Ultimately, COBRO's claims of irregularities in the Army's handling of the SF-98 process simply do not raise a serious challenge to the labor standards dispute at issue in this proceeding, *i.e.*, the reasonableness of the Administrator's conformance decision. The allegation of errors on the part of the contracting agency may raise a question of which party ultimately must bear any increased contract costs resulting from the underpayment of misclassified

workers, but that issue is beyond our jurisdiction. *See, e.g., Burnside-Ott Aviation Training Center v. United States*, 985 F.2d 1574 (Fed. Cir. 1993); *Biospherics, Inc.*, slip op. at 29. It is well-settled, however, that contractual disputes between the contracting agency and the contractor do not negate the need for compliance with wage determinations and related rulings properly issued under the SCA by the Administrator. *See Reddick & Sons of Gouverneur, Inc. v. United States*, 31 Fed.Cl. 558, 562-63 (1994) (construing *Burnside-Ott Aviation Training Center*, 985 F.2d at 1579-80); *see generally* 48 Fed. Reg. 49736, 49739-40 (Oct. 27, 1983) (comments to publication of final rules under 29 C.F.R. Part 4, stating that Contract Disputes Act of 1978, 41 U.S.C. §§601-613, did not affect Secretary's authority to resolve disputes arising under the SCA). We therefore reject COBRO's argument that wage determination WD 94-2247 (Rev. 2) was not designated by the Wage and Hour Division as applicable to the COBRO contract in accordance with regulatory guidelines, as well as COBRO's corollary argument that the resulting conformance determination was erroneous.

2. Whether the Administrator's conformance decision should be reversed because there was no need to issue a conformed wage rate or, alternatively, because the Administrator's comparison of the duties of the Data Collector/Coordinator position with the duties performed by other job classifications was flawed.

COBRO raises a series of specific challenges to the Administrator's decision to establish a conformed wage rate of \$13.34 per hour for the Data Collectors/Coordinators, and asserts error on the part of the Administrator and the contracting agency. COBRO argues that the conformance determination should be reversed because:

- *The Administrator erred in issuing a conformed rate for the Data Collector/Coordinator, because the duties of that job are encompassed within the duties of the General Clerk II classification. The General Clerk II classification already is included in wage determination WD 94-2247 (Rev. 2) at an hourly wage rate of \$7.30. Pet. for Rev. at 5; Brief in Supp. of Pet. for Rev. at 21-24.*

Additional support for the argument that no conformance was needed comes from a 1998 wage determination ruling applicable to testing work at the National Training Center in San Bernardino County, California. In February, 1998 (i.e., after the conformance decision in this matter), the Wage and Hour Division concluded that the duties of a "Data Monitor" working on a data collection contract in California were encompassed within the General Clerk II job classification, and that no conformance was needed to add a "Data Monitor" classification. COBRO contends that the tasks performed by the "Data Monitor" at the California site are "substantially the same" as the Data Collector/Coordinator position at the Aberdeen Proving Ground, and that the Administrator's equating the Data Monitor with the General Clerk II classification at the California site supports COBRO's claim that no conformance was needed at the Aberdeen site. Second Suppl. Reply Brief at 1-3.

- *The physical conditions in which the Data Collectors/Coordinators must work are not relevant to the question whether the Data Collector/Coordinator position is encompassed by the General Clerk II classification, and therefore should not have been considered by the Administrator when deciding that the classification merited conformance. Reply Brief at 11 n.14.*
- *When concluding that the Data Collector/Coordinator position had to be conformed as a separate classification, the Administrator erred by not examining the actual duties of the Data Collector/Coordinator, the history of the classes of data collection employees under the predecessor DynTel contract, or whether the Data Collector/Coordinator position was no more than a mere change in job title by the contracting officer. Pet. for Review at 4-5; Amended Pet. for Rev. at 3-4; Brief in Supp. of Pet. for Rev. at 6-13; Reply Brief at 5-9; see Brief in Supp. of Pet. for Rev. at 25-28.*
- *The contracting agency acted in violation of the SCA when it established three levels of Data Collectors under the DynTel contract based on the employees' respective years of experience. Reply Brief at 8-9.*

In any conformance case, the threshold consideration that must be addressed is whether a conformed wage rate is needed at all, based on the job classifications in the existing wage determination. A position will warrant conformance as a classification separate from job titles listed on the wage determination only if the duties of the job classification being conformed do not fall within the scope of the duties of any of the classifications already listed in the wage determination. 29 C.F.R. §4.6(b)(2)(i) (1998); see *Environmental Chemical Corp.*, slip op. at 4-5; *CACI, Inc.*, slip op. at 20-26.

COBRO contends that no conformance action is needed in this instance because the duties of the Data Collector/Coordinator position already are encompassed within the General Clerk II classification listed on WD 94-2247 (Rev. 2).^{11/} In support of its position, COBRO

^{11/} General Clerk II is a standard classification (number 01116) found under the Administrative Support and Clerical category of the Wage and Hour Division's SCA Directory of Occupations. AR Tab H, Conformance of Data Collector/Coordinator at unnumbered p.2. The Directory provides the following description of the General Clerk II's duties:

Performs a combination of clerical tasks to support office, business, or administrative operations, such as: maintaining records, receiving, preparing, or verifying documents; searching for and compiling information and data; responding to routine requests with standard answers (by phone, in person, or by correspondence). The work requires a basic knowledge of proper office procedures. Workers at levels I, II, and III follow prescribed procedures or steps to process paperwork; they may perform other routine office support work, (e.g. typing, filing, or operating a keyboard controlled

(continued...)

asserts that the Acting Administrator failed to examine the duties that were actually being performed by the Data Collector/Coordinator employees under the COBRO contract and the history of the division of data collection responsibilities under the DynTel contract. We disagree.

COBRO's suggestion that the Administrator did not analyze the duties of the Data Collector/Coordinator is incorrect. The record evidence clearly demonstrates that, in accordance with Section 4.6(b)(2)(i), the Administrator examined the duties being performed by the employees working in the Data Collector/Coordinator position, and also considered the data collection positions under the predecessor contract. AR Tab H, Narrative Rept. at 2-5.^{12/} Furthermore, none of the exhibits proffered by COBRO as relevant to the duties actually performed by the Data Collector/Coordinator employees under the COBRO contract raise a material question regarding the accuracy of the position description relied on by the Administrator. The two affidavits from COBRO managers either address job duties that were not relied on by the Administrator or actually support the Administrator's reliance on other job duties.^{13/} Assuming, *arguendo*, that the 1997 Data Collection Handbook that COBRO has

^{11/}(...continued)

data entry device to transcribe data into a form suitable for data processing). Workers at level IV are also required to make decisions about the adequacy and content of transactions handled in addition to following proper procedures. Clerical work is controlled (e.g. through spot checks, complete review, or subsequent processing) for both quality and quantity. Supervisors (or other employees) are available to assist and advise clerks on difficult problems and to approve their suggestions for significant deviations from existing instructions.

AR Tab H, Conformance of Data Collector/Coordinator at unnumbered p.2.

^{12/} As COBRO notes and as previously discussed at n.7 *supra*, the record indicates that the Army had not sought approval of the three additional data collection positions (Intermediate and Senior Data Collector and Data Coordinator) from the Wage and Hour Division, as required by the regulations at 29 C.F.R. §4.6(b)(2). AR Tab H, Narrative Rept. at 3-4. Although this omission is unfortunate, the history of the data collection classifications under the DynTel contract ultimately is irrelevant to the question of the actual skills and duties of the Data Collector/Coordinator position under the COBRO contract and whether those skills and duties require the position to be conformed as a classification separate from the General Clerk II position.

^{13/} For example, COBRO's affidavits state that the Data Collectors/Coordinators do not (a) supervise other data collection employees, (b) test the equipment, (c) undergo a "technical course of study" regarding the operation and maintenance of the equipment being tested, or (d) interpret test results. Reply Brief exh. 3 at 2-4, exh. 4 at 2-5. However, the March 25, 1997 ruling does not indicate that the Administrator relied on any of these duties when making the conformance determination. AR Tab C at 1-2; Tab H, Narrative Rept. at 2-5, attachment. Furthermore, neither the detailed Data Collector/Coordinator position description that was related by the data collection employees to the investigator nor the more general position description issued by the Army as part of the contract
(continued...)

submitted is similar to one in use during the 1996 contract, a review of its contents indicates that, similarly, it raises no material issue regarding the duties that were relied on when the Administrator determined that the Data Collector/Coordinator position did not fall within the scope of the General Clerk II classification.^{14/} Thus, the record demonstrates that the Administrator examined the duties of the Data Collector/Coordinator, and did not make incorrect assumptions about these duties.

Furthermore, and as urged by the Administrator, two factors beyond the type of duties being performed by the Data Collector/Coordinator employees provide crucial support for the Administrator's conformability ruling. The first factor is the skill level needed to qualify for the job. The Data Collector/Coordinator position requires a higher level of qualifications than the General Clerk II classification.^{15/} The higher level of qualifications that is required of candidates

^{13/}(...continued)

solicitation indicates that the Data Collectors/Coordinators supervised other employees, actually tested equipment, interpreted test results or participated in technical training courses regarding the equipment. AR Tab H, Narrative Rept. attachment; Tab H, Tech. Exh. 6, Job Descriptions. Although the affidavits indicate that the Data Collector/Coordinator employees had not been attending scoring conferences, the Administrator's ruling does not indicate that attendance at such conferences was a determinative factor in the conformance decision below. AR Tab C; Tab H, Narrative Rept. at 3-4; *cf. Harbert International*, slip op. at 15-16 (contractor's contention that mason classification was erroneous because mason did no welding rejected because "welding requirement did not play a major role" in Administrator's conformance ruling).

In addition, the affidavits' statements that the continuous testing of some items for weeks or months allows the Data Collector/Coordinators to become familiar with the item being tested and therefore to "fill out their forms with minimal effort," Reply Brief exh. 3 at 4, exh. 4 at 5, is consistent with the contracting agency's requirement that the Data Collector/Coordinator candidates have a specified level of experience in data collection, AR Tab H, Job Description at p. C-25, ¶C.5.4.2.2. Typically, the more experience an employee has in performing a particular task, the more proficient the employee becomes.

^{14/} If anything, the Handbook supports the Administrator's conclusion that the Data Collector/Coordinator's work goes beyond that of the General Clerk II. The Handbook is prefaced by statements regarding the necessity for the "complete and detailed reporting of information" to assist the Army in its research and development efforts. Brief in Supp. of Pet. for Rev. exh. 6 at 2. The Handbook states that forms "must be accurately and thoroughly completed" and that narrative accounts "must be clear, simple, concise, and completely describe the action that has occurred (i.e. incident, maintenance, servicing, missions, SSP remarks, BIT, failure, etc [.])." *Id.* (emphasis in original). The complexity of the instructions, the required alphabetic forms, and the number of codes and technical terms provided in the Handbook clearly do not support COBRO's position on this issue.

^{15/} According to the contract solicitation Job Description, Data Collectors/Coordinators are expected to have "four years experience in data collection or automotive mechanics. A two year degree in a technical area can substitute for three years experience." AR Tab H, Job Description at p. C-25, (continued...)

for the Data Collector/Coordinator position supports the conclusion that, under Section 4.6(b)(2)(i), the General Clerk II classification does not provide an “appropriate level of skill comparison.” *See* 29 C.F.R. §4.6(b)(2)(iv)(A) (1998) (“a pay relationship should be maintained between job classifications based on the skill required and the duties performed”); *cf.* *BDM Management Services*, slip op. at 5-7 (rejecting contractor’s proposal to combine position requiring technical qualifications with lower paid position not having such requirement).

A second factor that distinguishes the Data Collector/Coordinator from the General Clerk II is the physical environment in which the Data Collector/Coordinator works and the concomitant physical effort required. The investigator reported that “depending on where the piece of equipment was being tested, their work would be performed in the field in any type of weather conditions.” AR Tab H, Narrative Rept. at 3; *see id.* at attachment, unnumbered p.2. (position description provided by employees states that the work is done both inside and outside and in environments that may be hot, damp, cold, drafty or poorly lit; that bending, stooping, climbing, and sometimes riding in the test items is required; that it is necessary to wear safety equipment, there is a routine risk of minor accidents, and work is performed in the vicinity of hazardous materials and unexploded ordnance).^{16/} In contrast, the General Clerk II classification clearly contemplates work in a less-demanding office environment. *See* n.11, *supra*. In addition to the higher qualifications and the additional physical effort required, the risk of physical injury that is integral to performance of the Data Collector/Coordinator’s duties removes that work from the scope of the General Clerk II classification. Contrary to COBRO’s assertion, Reply Brief at 11 n.14, working conditions such as these are clearly pertinent to the proper classification of the Data Collector/Coordinator position.^{17/} *See Rural/Metro Corp.*, slip op. at

^{15/}(...continued)

¶C.5.4.2.2. In contrast, the General Clerk II classification from the SCA Directory is described as requiring only “a basic knowledge of proper office procedures.” AR Tab H at unnumbered p.2.

^{16/} The employees’ statements regarding the work environment are consistent with contract solicitation documents issued by the contracting officer. For example, the Statement of Work indicates that the contractor shall be responsible for “data collection support on a wide variety of automotive, combat, electronic, general equipment, and ordnance materiel undergoing extensive testing.” AR Tab L, Job Description, p. C-21 at ¶C.5. The Job Description for the contract also requires the contractor to provide “protective equipment, such as safety shoes, hearing protection, safety glasses, hard hats, etc.” *Id.* at ¶C.4.9.

^{17/} Not only is COBRO’s assertion unsupported, it is also contradicted by one of the exhibits proffered by COBRO in this appeal. The excerpt from the Office of Personnel Management guidelines for classification of employees working under the Tax Examining Series addresses the Physical Demands and Work Environment factors that are routinely considered under the point system used for classifying Federal employee jobs. Brief in Supp. of Pet. for Rev. exh. 4 at 81; *see* 29 C.F.R. §4.6(b)(2)(iv) (1998) (providing that “[s]tandard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors . . .” and “the way different jobs are rated under the Federal pay systems (Federal Wage Board Pay System and the General
(continued...)

5, 10 (relying on wage data for “other comparable protective service occupations” in determining whether laborer wage rate was reasonable for firefighter position); *Harbert International*, slip op. at 11 (addressing relative risks attendant to low voltage and high voltage electrician positions in determining proper wage rate).

In sum, although both the General Clerk II classification and the Data Collector/Coordinator position require the recording of data, we find that the Administrator reasonably concluded that “the level of education, training, experience and skill required” of the Data Collector/Coordinator goes well beyond the level required for the General Clerk classification, and thus properly concluded that the “appropriate level of skill comparison” requirement of Section 4.6(b)(2)(i) could be met only by conforming the Data Collector/Coordinator position as a separate classification.

In further support of its claim that the duties of the Data Collector/Coordinator are encompassed within the General Clerk II position, COBRO cites a recent determination by the Wage and Hour Division made in connection with an Army contract at a California facility. In that instance, the Division found that the data collection position of “Data Monitor” was encompassed within the General Clerk II classification. COBRO urges that the Data Monitor and Data Collector/Coordinator positions are substantially the same. Second Suppl. Reply Brief at 4.

We agree that the Wage and Hour Division must be consistent when it determines whether the duties of a particular position already are encompassed within an existing job classification in a wage determination, or must be conformed as a separate classification. Based on the record in this case, however, we do not agree with COBRO’s contention that the Data Monitor position is substantially the same as that of the Data Collector/Coordinator. First, it is essential to note that the merits of the Wage and Hour Division’s determination regarding the Data Monitor position are not before us, and there is nothing in the record providing background on the Administrator’s decision. Second, COBRO’s comparison of the Data Monitor and Data Collector/Coordinator positions fails to address factors that distinguish the Data Collector/Coordinator position from the General Clerk II classification, such as the higher qualifications required by the Data Collector/Coordinator position and the physically demanding work environment. *Compare* AR Tab H, Job Description at p. C-25, ¶C.5.4.2.2 with AR Tab H at unnumbered p.2; *see* discussion *supra*.

Finally, we reject as both irrelevant and inaccurate COBRO’s argument that the Army erred when it established three levels of Data Collectors under the predecessor DynTel contract based on the employees’ differing levels of experience. The claim is irrelevant, because the Army’s actions on the predecessor contract are at best tangential to the question that confronted the Administrator in this case: what is an appropriate wage rate to be paid the Data

¹⁷(...continued)
Schedule) . . .” may be utilized in conformance determinations).

Collectors/Coordinators, based on a comparison of the skills needed to perform their job with the skills of other job classifications listed in wage determination WD 94-2247 (Rev. 2)? Additionally, COBRO's reliance on *Joseph C. Kirchdorfer*, Case No. 83-SCA-111, Dep. Sec. Dec., Sept. 28, 1988, to support its argument that the Army erred when establishing three levels of Data Collectors is misplaced. The *Kirchdorfer* case involved a contractor's attempt to establish classes of a service occupation at rates of pay *lower* than the rates in the designated wage determination based on the hiring of "new and supposedly lesser experienced employees." *Kirchdorfer*, slip op. at 8-10, 11, 14-15; *see also* 29 C.F.R. §4.152(c)(1) (1998) (prohibiting conformance of trainee classifications). In the instant matter, however, the Army and DynTel created additional job titles at wage levels *higher* than the Data Collector classification in the prior contract's wage determination. It is well established that the SCA does not prohibit the payment of higher wage rates to employees. *See, e.g.*, 29 C.F.R. §4.165(c) (1998); *cf. United States v. Binghamton Const. Co.*, 347 U.S. 171, 177-78 (1954) (Davis-Bacon wage determination did not ensure contractor that it would not have to pay more than "the specified minima" stated in the wage determination).

The Administrator's ruling that the Data Collector/Coordinator position is not encompassed within the General Clerk II classification, and therefore must be added to the wage determination through the conformance procedure, is well supported. We therefore affirm the Administrator's determination that the Data Collector/Coordinator position must be conformed as a separate classification.

3. If the Administrator was correct in concluding that a conformed job classification and wage rate needed to be recognized, whether the conformed \$13.34/hr. wage rate is erroneous and should be reversed.

In addition to challenging the underlying need for a conformed wage rate, COBRO contends in the alternative that the wage rate determined by the Administrator (\$13.34/hr.) is erroneous. In support of this claim, COBRO argues that:

- *Specifications for a later follow-on contract at the Aberdeen site indicate that a similar data collection position is ranked by the Army as equivalent to the GS 7, step 3 Federal grade level, thus undermining the Administrator's reliance on the GS-8 grade level as support for the \$13.34 hourly wage rate for the Data Collector/Coordinator position. Pet. for Rev. at 6.*
- *The Administrator failed to compare the \$13.34/hr. wage rate with the \$7.22/hr. wage rate provided for Data Collectors under the predecessor wage determination. Brief in Supp. of Pet. for Rev. at 13-14.*
- *The Administrator failed to consider the small amount of time spent by the Data Collector/Coordinators under the COBRO contract in performing the duties of the former Data Coordinators. Pet. for Rev. at 3-4; Brief in Supp. of Pet. for Rev. at 11.*

- *In arriving at the \$13.34 hourly rate, the Administrator relied on the contracting officer's recommendation that the Data Collector/Coordinator was equivalent to the Federal grade GS-8 without independently evaluating the Federal grade equivalency of these positions. Pet. for Rev. at 2-3; Brief in Supp. of Pet. for Rev. at 2-5, 15-16; Reply Brief at 15-19.*

When making a conformance determination, the Administrator must assign a wage rate for the job classification that is missing from the wage determination “so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination.” 29 C.F.R. §4.6(b)(2)(i) (1998). This comparison of jobs and skill levels is not a mechanical process, but instead calls upon the Administrator to exercise discretion in a rational manner, applying appropriate expertise and judgment to the facts before him. *See Dyncorp*, Case No. 87-SCA-OM-5, Dep. Sec. Dec., Jan. 22, 1991, slip op. at 3 (noting that the Administrator’s “determination may be less reasonable than another without being altogether unreasonable”).

Our review of the Administrator’s determination in a conformance action must focus on the *Administrator’s* choice, and the rationale that he advances to support it. In challenging the Administrator’s conformance action, the burden on a petitioner is not merely to prove that other choices were available – or perhaps even preferable – but to demonstrate affirmatively that the Administrator’s choice was unreasonable. Evidence regarding wage determination actions in different locations, or actions involving other job titles in the same location, often have little relevance to our evaluation of the reasonableness of the Administrator’s determination.

In this case, the Administrator concluded that the Data Collector/Coordinator position was equivalent in skill to a Federal Grade Equivalent (FGE) 8 position. Based on this assessment, the Administrator assigned a conformed wage rate of \$13.34 per hour based on the wage schedule for Federal white collar employees, reasoning that a number of the wage rates for wage determination WD 94-2247 (Rev. 2) had been taken directly from the Federal employees’ General Schedule. AR Tab C. In our review of the Administrator’s action, we must determine whether the Administrator has established a reasonable relationship between the skills and duties of the job classification being conformed when compared with the other job titles found in the wage determination. 29 C.F.R. §4.6(b)(2)(iv)(A) (1998).

We address first COBRO’s arguments relating to other job titles and wage rates. In each instance, we find that COBRO’s evidence does not convince us that the Administrator’s conformance decision is in error.

COBRO asserts that the Administrator’s conformance ruling with regard to the Data Collector/Coordinator position in this case (based on a GS-8 equivalence) must be in error because the Army’s solicitation for a follow-on contract indicates that a “similar” data collection position is the equivalent of a Federal grade of GS-7, step 3, position. Like the issue of the “Data Monitor” job classification in California, discussed above, the wage rate for a differently-

configured job title on a separate procurement contract can be of little relevance in our review of the Administrator's conformance action in this case, especially where we do not have a full record detailing the facts of the later action. The issues of conformability and proper wage rate turn on the actual skills and duties of the *specific* position at issue, (*i.e.*, the Data Collector/Coordinator position under the January 1996 contract between the Army and COBRO), and not a later reconfiguration of the job. *See* 29 C.F.R. §4.6(b)(2) (1998). We see nothing in COBRO's submissions regarding the data collection position in the follow-on contract at the Aberdeen site that would lead us to question the Administrator's conformance action for the Data Collector/Coordinator under the 1996 procurement.

COBRO also asserts that the \$13.34/hr. wage rate for the Data Collector/Coordinator position under the 1996 procurement is excessive by pointing to the discrepancy between the \$13.34 hourly wage set by the Administrator and the \$7.22/hr. wage rate for the Data Collector found in the first wage determination that had been attached to the Army's RFP in April, 1994 (*i.e.*, WD 87-0357 (Rev. 10)). We do not find this argument compelling. As we noted earlier in this decision, the Data Collector wage rate in the wage determination represented the lowest of the several levels of Data Collectors that were employed under the DynTel contract, and did not reflect at all the work performed by Data Coordinators under the predecessor procurement. Moreover, by the time COBRO and its competitors bid on the contract, virtually all the data collection work at the Aberdeen site was being performed by the highest-paid data collection classifications. Most important, the Data Collector/Coordinator position was a new amalgamation of the duties performed by multiple job classifications under the prior contract, unlike the Data Collector classification in the old wage determination; it was fully appropriate for the Administrator to determine a wage rate for this classification through the conformance process by assessing the relative skill level of the position and adopting an appropriate wage rate.^{18/}

^{18/} COBRO raises other tangential arguments with regard to classifications found in wage determination WD 94-2247 (Rev. 2), and particularly in reference to the Administrator's declared view that the Data Collector/Coordinator position could have been assigned an hourly wage rate of \$14.97, equivalent to the wage rate of the GS-8 equivalent Secretary V position. Foreexample, COBRO contends that the position of Medical Laboratory Technician (a GS-4 equivalent), included in the wage determination with a \$7.88 hourly wage, is more comparable to the skills required of the Data Collector/Coordinator than is the Secretary V position. Brief in Supp. of Pet. for Rev. at 24-25. It is not the Board's role, however, to assess competing job classifications from the wage determination and decide whether the Administrator made the optimum choice. If the Administrator found that the Data Collector/Coordinator position is a GS-8 equivalent in its skill level, and can justify this finding, then it plainly would have been inappropriate to issue a conformed wage rate based on the lower-skilled Medical Laboratory Technician job.

Similarly, COBRO takes issue with the Administrator's March 25, 1997 statement that "the more traditional method of slotting the Data Collector/Coordinator to the Secretary V, the only GS-8 equivalent within the broad occupational category of Administrative Support and Clerical in Wage
(continued...)

In our view, COBRO's strongest argument relates to the core determination underlying the Administrator's action: the finding that the Data Collector/Coordinator position is comparable to a Federal grade equivalent (FGE) of a GS-8. The Army's contracting officer had suggested that the new Data Collector/Coordinator position should be viewed as a GS-8 equivalent because it was produced by merging the Senior Data Collector (GS-7 equivalent) and Data Coordinator (GS-9 equivalent) positions under the prior DynTel contract. AR Tab D/15, S. Kelly ltr. of 5/14/96 at 3. COBRO asserts that the Administrator uncritically accepted the Army's recommendation that the new job title was equivalent to an FGE 8. COBRO also asserts that the GS-7 and GS-9 ratings for the prior Senior Data Collector and Data Coordinator were themselves incorrect, thus raising doubts about any subsequent conformance action that relied on these rankings. Moreover, COBRO argues that the amount of time that the Data Collector/Coordinator spends performing the work of the former Data Collector is minimal, and that the Administrator erred by failing to take this into account.

The record shows that the Administrator made an independent finding that the Data Collector/Coordinator position was equivalent to the Federal GS-8 level. AR Tabs C, G. Consequently, COBRO's argument that the Administrator blindly accepted the FGE 8 ranking recommended by the Army contracting officer is incorrect, and it serves no purpose to explore the basis for the contracting officer's recommendation. In addition, the conformance process requires that the Administrator analyze the duties of the job title being conformed (*i.e.*, the Data Collector/Coordinator position on the COBRO contract) and determine its level of skill, and then choose a job classification from the current wage determination that matches the level of skill; it is unnecessary for the Administrator or this Board to explore the Federal grade equivalents of job classifications as they were configured under the prior DynTel contract.

Although it is clear that the Administrator did not rely exclusively on the Army's recommendation, but independently made a determination that the Data Collector/Coordinator position is equivalent to the Federal GS-8 classification in its level of skill, the record conspicuously is silent regarding the Administrator's justification for reaching this result. A basic tenet of administrative law is that even in connection with an informal adjudication, an agency must take the necessary steps "to provide an explanation that will enable the court to evaluate the agency's rationale at the time of the decision." Kenneth C. Davis, *Administrative Law Treatise* §8.5 (3d ed. 1994) (citing *Pension Benefit Guaranty Corp. v. LTR Corp.*, 110 S. Ct. 2668, 2679-81 (1990)). Although we do not stand as a court reviewing the Administrator, both the Board and the Secretary similarly have insisted that the Administrator provide an

^{18/}(...continued)

Determination (WD) 94-2247 (Rev. 2), . . . would have yielded an hourly wage rate of \$14.97." AR Tab C. COBRO argues that the Secretary V classification clearly requires a higher level of analytical skills, judgment, and discretion than the Data Collector/Coordinator position. Pet. for Rev. at 2; Brief in Supp. of Pet. for Rev. at 18-21. Here again, the central question is whether the Administrator has made a reasonable determination that the Data Collector/Coordinator is comparable in skill level to GS-8 classification positions, and articulated the basis for that determination. It is not the Board's role to substitute our judgment in such matters for the Administrator's.

appropriate explanation in support of his determination. *United States Dept. of Energy*, Case No. 88-SCA-WD-1, Dep. Sec. Dec., May 28, 1992, slip op. at 2 (remanding case based on inadequate support for Administrator's conclusion that work at issue was similar to demolition); see *Biospherics, Inc.*, slip op. at 8, n.12; see also *Aleutian Constructors*, WAB Case No. 90-11 (Apr. 1, 1991) (under the Davis-Bacon Act, remanding case to Administrator because "final rulings of the Acting Administrator failed completely to set out any legal reasoning or the pertinent facts" supporting agency position).

Although COBRO has presented neither evidence nor argument that convinces this Board that the Administrator's determination is incorrect -- *i.e.*, the determination that the Data Collector/ Coordinator position is an FGE 8 equivalent, and the associated decision to issue a conformed wage rate of \$13.34/hr. -- we also conclude that the Administrator has failed to provide an adequate justification in support of this determination. Surprisingly, the only explanation offered for the Wage and Hour Division's conclusion that the Data Collector/Coordinator position is equivalent to the Federal GS-8 level is a hand-written note indicating that the "job description was submitted to Carolyn Alston to be evaluated for FGE" and another hand-written note stating "Carolyn Alston ESA Personnel agrees" with the recommendation that the Data Collector/Coordinator position is equivalent to a GS-8. AR Tab G.

The Administrator may have ample support for the finding that the Data Collector/Coordinator position equates to the GS-8 pay level, but we cannot gauge the reasonableness of that ruling without a clear explanation by the Administrator. Other than the assurance that "Carolyn Alston ESA Personnel agrees," there is none. Based on the record before us, therefore, we cannot affirm the Administrator's determination that \$13.34 (plus fringe benefits) was an appropriate conformed hourly wage rate for Data Collector/Coordinators under the 1996 COBRO contract for data collection services at the Aberdeen Testing Center. We therefore will remand this issue to the Administrator. See *United States Dept. of Energy, supra*; see also *Florida Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985) ("[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course . . . is to remand to the agency for additional investigation or explanation.").

On remand, the Administrator shall provide a reasoned analysis comparing the work performed by the Data Collector/Coordinator with other job classifications found in wage determination WD 94-2247 (Rev. 2). See *Kord's Metro*, slip op. at 5; *Burnside-Ott*, Case No. 87-SCA-OM-2, Dep. Sec. Dec., Jan. 10, 1989, slip op. at 6-7, 10-11. As provided by the Secretary's regulations, Federal grade equivalency is a pertinent factor that may be used in this analysis. 29 C.F.R. §4.6(b)(2)(iv)(A) (1998).

4. Whether the Administrator erred in finding that the conformed wage rates should be applied retroactively to the beginning of COBRO's contract with the Army.

Finally, COBRO contests the Administrator's order to apply the conformed \$13.34 per hour wage rate retroactively to the beginning of the procurement contract, asserting that retroactive application is improper because the contracting officer failed to follow the guidelines for the submission of the SF-98. Pet. for Rev. at 5-6; Brief in Supp. of Pet. for Rev. at 25-28. However, the retroactive effect of the "wage rate and fringe benefits finally determined" through the conformance process is mandatory. 29 C.F.R. §4.6(b)(2)(v) (1998); *Burnside-Ott*, slip op. at 11. Section 4.6(b)(2)(v) requires that the wage rate for Data Collector/Coordinators that is finally established will be effective "the first day on which contract work" was performed under the COBRO contract at issue in this proceeding.

ORDER

COBRO's petition for review is granted in part, and denied in part. The Administrator's conclusions that the Data Collector/Coordinator position must be conformed as a separate classification, with the conformed wage rate applied retroactively, are affirmed. The Administrator's determination of a conformed wage rate is remanded for further explanation. On remand, the Administrator is directed to issue a supplemental determination providing a clear rationale in support of whatever conformed wage rate is determined appropriate for the Data Collector/Coordinator classification. The Administrator's supplemental determination in this matter shall be issued within 45 days of the date of this decision and order.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member