



In the Matter of:

**RAYTHEON SYSTEMS COMPANY  
(formerly Hughes Technical Services),  
Prime Contractor and Cubic Corporation,  
Subcontractor,**

**ARB Case No. 98-157**

**DATE: April 26, 2000**

**Re: Contract No. N61339-94-C-0027,  
Ft. Irwin, California**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**Appearances:**

*For the Petitioners:*

Gregory D. Wolflick, Esq., *Wolflick & Simpson, Glendale, California*

*For the Respondent:*

Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, DC*

*For the Intervenor Voice and Video Control and Editing Center DOL Committee:*

Marcus Bunnett, *Barstow, California*

**FINAL DECISION AND ORDER**

Raytheon Systems Company and Cubic Corporation petition for review of administrative action by the Administrator of the Wage and Hour Division in this case arising under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.S.C. §§351-358 (1994), and implementing regulations at 29 C.F.R. Part 4 (1999). The Administrator affirmed an action conforming a wage determination issued for Contract No. N61339-94-C-0027 at the National Training Center (NTC), Fort Irwin, San Bernardino County, California, to add classes of employees conformed as the Audio Visual (AV) Specialist I, II and III classifications. The Administrator stated that conformed wage rates for the classifications were determined by establishing a corresponding Federal Grade Equivalency (FGE) for each of the three levels of AV Specialists, and by assigning wage rates to those three levels which corresponded to the average rates of comparable employee classifications with the same FGEs listed in the wage determination. Petitioners complain that the Administrator denied them adequate process, and that he conformed the employee classes erroneously. We conclude that, on the record as it now exists, Petitioners received adequate process, and the Administrator's choice of methodology

in conforming the classes was consistent with the SCA and its implementing regulations and was reasonable.

## BACKGROUND

### *A. Regulatory Framework*

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 pursuant to the contract, typically submitting a Standard Form (SF-)98 (Notice of Intention to Make a Service Contract) and SF-98A. 29 C.F.R. §4.4 (1999); *see also* 48 C.F.R. Part 22, Subpart 22.10 (Federal Acquisition Regulations) (1999). In response to the contracting agency's request, the Wage and Hour Division issues a wage determination identifying the minimum hourly wages and fringe benefits that must be provided to the classifications of workers employed on the contract. 29 C.F.R. §4.3 (1999).

There are occasions when the performance of a service contract may require a contractor to hire a classification of worker that is not listed in the wage determination. When a job classification necessary to carry out 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(b)(2) (1999). This procedure for adding a "missing" job classification and wage rate to a wage determination is known as a "conformance action." Conformance entails compiling a description of duties performed by the employee classification under the contract and deriving wage rates for the classification which reasonably relate to rates already included in the wage determination for comparable classifications.

The SCA implementing regulations discuss the procedure to be used to establish wage rates that bear a reasonable relationship to those listed in the wage determination. The regulations emphasize that "[t]he process of establishing wage and fringe benefit rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to a single formula." 29 C.F.R. §4.6(b)(2)(iv)(A). However, methods are suggested:

Standard wage and salary practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may . . . be relied upon. Guidance may also be obtained from the way different jobs are rated under Federal pay systems

(Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. Basic to the establishment of any conformable wage rate(s) is the concept that a pay relationship should be maintained between job classifications based on the skill required and the duties performed.

*Id.* The federal contractor is required to compensate employees performing in a conformed classification at the conformed wage rate retroactive to the date work began. 29 C.F.R. §4.6(b)(2)(v).

The conformance procedure is carried out in one of two different ways. In the typical case, the contracting officer of the contracting agency requires the contractor to classify any class of employee employed under the contract but not listed in the wage determination “so as to provide a reasonable relationship (*i.e.*, appropriate level of skill comparison)” between the unclassified employees and classifications of employees listed in the wage determination. 29 C.F.R. §4.6(b)(2)(i).

Thereafter, the responsibility for initiating a conformance falls to the contractor, who is required to begin that process prior to performance of the work by the unlisted class of employees. The contractor must submit a written report of the proposed conformance action, including information about agreement or disagreement by the affected employees or their authorized representative, to the contracting officer no more than 30 days after the unclassified employees begin to perform any work under the contract. The contracting officer is required to review the report and to submit it promptly along with the contracting agency’s recommendation and all pertinent information, including the positions of the contractor and employees, to the Wage and Hour Division (Division). The Division then approves, modifies or disapproves the action or renders a final determination in the event of disagreement. 29 C.F.R. §4.6(b)(2)(ii). The Division transmits the final determination to the contracting officer who then must notify the contractor. The contractor in turn must furnish the affected employees with a written copy of the determination or post it as part of the wage determination. 29 C.F.R. §4.6(b)(2)(iii).

The second method for conforming a classification of employees to a wage determination occurs if the Division discovers that the contracting agency and the contractor have not initiated a conformance and determines that one is required. In that circumstance the Division “shall make a final determination of conformed classification, wage rate, and/or fringe benefits which shall be retroactive to the date such class of employees commenced contract work.” 29 C.F.R. 4.6(b)(2)(vi).

### ***B. Procedural History***

In February 1994 the Department of the Navy (Navy) awarded prime contractor Hughes Technical Services Company (HTSC), now Raytheon Services Company (Raytheon), a contract for the provision of support operations at Fort Irwin, California. HTSC in turn subcontracted

with Cubic Corporation (Cubic) for the provision of audio visual and photographic support services. Contract performance commenced in May 1994.

Cubic determined that contract performance would require the services of Audio Visual Systems Specialists employed by its subdivision, Cubic Applications, Incorporated (CAI), for purposes of producing battle training films and related functions. The contract wage determination did not include an AV Specialist classification, however. AV Specialists employed by CAI and assigned to perform the audio visual portion of the contract at the Voice and Video Control and Editing Center (VVCEC) at Fort Irwin complained to the contractors immediately upon discovering the omission and anticipated that HTSC, on behalf of Cubic, would initiate a conformance. Administrative Record (AR) Tab I. However, in late 1994, HTSC determined instead that the AV Specialists should receive the wage rates designated for Photographer I, II and III classifications in the wage determination.<sup>1/</sup> In 1995, Cubic concurred that conformance was unnecessary. CAI proposed using the first three skill grades of the photographer series. The Intervenor VVCEC DOL employee committee thereafter complained to the Division about the wage rates adopted by the contractors.

The Division investigated the complaint and attempted conciliation during 1996 and 1997. HTSC/Raytheon, Cubic and the Navy adopted the position that the AV Specialists were appropriately classified at the Photographer I, II and III wage rates, whereas the Intervenor employees urged that they be classified and paid at the Photographer IV level. The Division ultimately determined that conformance was necessary because the AV Specialists' job duties did not fall within the scope of the Photographer classifications listed in the wage determination. In early 1998, the Division advised the parties that it intended to conform the AV Specialist classifications and requested that the parties provide input on the subject of conformance. The contractors and contracting agency declined. The Division issued the conformance in April 1998. AR Tab B. Thereafter, HTSC/Raytheon, Cubic and the Navy notified the Division that they objected to the conformance. The Administrator affirmed the conformance in a final ruling issued in July 1998.

HTSC/Raytheon and Cubic petitioned this Board for review of the Administrator's decision, arguing in part that the Administrator's failure to disclose the AV Specialist job descriptions and the calculations which were used in determining the conformed classifications and wage rates denied them adequate process. The Administrator responded with further explication of the methodology employed. The Intervenor also responded. The Petitioners then filed a reply in which they proposed an alternative methodology for determining conformed wage rates for the AV Specialist classifications.

On December 17, 1999, we issued an Order to Supplement Record. We permitted the Administrator an opportunity to provide evidence of the methodology that the Division had

---

<sup>1/</sup> The photographer classifications in the wage determination ranged from the entry-level Photographer I classification to the supervisory Photographer V classification.

employed to determine the conformed AV Specialist wage rates, as well as evidence of how the methodology was applied. We also permitted the Petitioners and other interested parties an opportunity to respond to any filing. The Administrator thereafter filed an explanatory memorandum and supporting documentation (AR Supplement (Supp.)) to which the Petitioners replied. On February 18, 2000, the Administrator moved for leave to file a memorandum in response to Petitioners' reply. Petitioners opposed the motion, but nonetheless submitted responsive argument. Upon consideration, the motion is granted. The Administrator's memorandum and Petitioners' response are accepted for filing. The Intervenor has filed further argument which also is accepted.

## DISCUSSION

This conformance admits to a singularly tortuous history, spanning a period of more than six years. The incomplete record proffered by the Administrator has required development before the Board, compelling us to prolong the proceeding.<sup>2/</sup> Conformance is designed instead for expedition. See discussion under Part II, *infra*. The Administrator could facilitate this objective in the future by providing thorough contemporaneous explication of the Division's decisions. See *Biosperics, Inc.*, ARB Case Nos. 98-141/97-086, May 28, 1999, slip op. at 8 n.12 (Administrator's failure to provide adequate explanation of rationale for conformance determination may delay Board's decision); *cf. COBRO Corporation*, ARB Case No. 97-104, Jul. 30, 1999, *corrected*, Sept. 13, 1999, slip op. at 26-27 (agency must provide the Board with an appropriate explanation in support of conformance determination).

In their appeal of the conformance Petitioners have focused on two issues: Whether the procedures employed by the Administrator in effecting conformance failed to afford adequate process, which subsumes issues of notice and opportunity for hearing; and whether the Administrator abused his discretion in effecting conformance. We address these issues *seriatim*.

### I. Adequate Process

It is important, first, to articulate what Petitioners are *not* asserting. They are not claiming that the SCA and its implementing regulations violate the due process clause of the Fifth Amendment to the Constitution. Nor do they squarely argue that they were denied rights accorded them under the SCA and its regulations. Rather, Petitioners challenge: (i) representations by the Division about the status of the proceeding; (ii) the Division's asserted

---

<sup>2/</sup> We requested the Administrator to supplement the record by filing an accounting of the methodology applied to conform the AV Specialists. We note that the record is incomplete in other respects. Exhibits are missing, for example, from the Division investigator's narrative report at AR Tab H and from the important May 15, 1996 letter from Cubic counsel Anne Celentino to the Division investigator, which the investigator discussed in his report, and which the Administrator submitted belatedly. See Admin. Motion for Leave to File Memorandum in Response to Petitioner's Reply filed February 18, 2000. We deem the record sufficient for requisite findings, however, and note that Petitioners have not complained about the referenced omissions.

failure to include job descriptions in the conformance; (iii) the Division's omission of information about methodology and its application from the initial conformance and from the Administrator's final determination affirming the conformance; and (iv) the timeliness of the Administrator's final determination. Petitioners argue that these representations and omissions impaired its ability to participate in the conformance procedure and to challenge the conformance result.

Based on our examination of the record in its entirety we are persuaded that Petitioners were afforded adequate opportunity to participate in and challenge the conformance over its protracted course.

### **A. Petitioners' Opportunity to Participate Generally**

In order to evaluate Petitioners' claim that they were denied an opportunity effectively to participate in the conformance determination we provide a detailed history of that process. The AV Specialists whose classification and wage rates are at issue here perform duties in support of a battlefield training mission at Ft. Irwin. In brief, the AV Specialists record footage of battlefield exercises and edit it to incorporate computer displays, maps, overlays, terrain models and narration for use in training military units. Specialists provide support for "Real-time operations," *e.g.*, transmission of battle action and communications to a control center, and record and edit "After Action Reviews" of the battlefield exercises by military personnel. Videotape editing, which comprises a significant portion of the AV Specialist job, is described at AR Tab H at 4, 6-7. The wage determination applicable to the contract did not list an AV Specialist series or contain AV Specialist wage rates.

In late 1994, prime contractor HTSC evidently considered whether to request that the AV Specialist positions be conformed pursuant to the requirements of 29 C.F.R. §4.6(b)(2). According to the Division investigator, HTSC thereafter decided not to request conformance because the SCA Directory of Occupations base statement for the photographer series "'mention[ed]' motion picture and video cameras and equipment," and AV Specialists, in its view, therefore could be subsumed within the Photographer classification. Cubic concurred with the decision not to request conformance because the Photographer classification had a "reasonably related skill level to video production tasks" performed by the AV Specialists. As related by CAI to the Division investigator:

The Photographer I is an untrained, entry level position, typically applicable for the employee's first 90 days, with 1 person so classified. The Photographer II is the company's experienced video technician, one who has been cross-trained on all video tasks, with 16 persons. The Photographer IIIs are the company's shift leaders, numbering 6. The shift leaders are responsible for interpreting standard operating procedures and assuming responsibility for prioritizing the work of other technicians.

AR Tab H at 5-6 (footnotes omitted).

In 1995 affected AV Specialists filed a complaint with the Division arguing that as journeymen AV Specialists they were erroneously classified as Photographers II, and should be classified at the higher Photographer IV level. The Division's investigation of the complaint spanned a two-year period. The record shows frequent interaction during this period among the Division investigator, HTSC/Raytheon, Cubic, CAI and the Navy concerning whether reclassification to Photographer IV -- and later whether conformance -- was appropriate. Considerable discussion centered on job duties performed by the AV Specialists as compared to the Photographer classifications.

The employees' original complaint to the Division requested reclassification rather than conformance. Evidently because the parties were all in agreement that conformance was not necessary, the Division investigator initially examined the possibility of classifying the AV Specialists at a higher wage level within the Photographer classification despite reservations that conformance was necessary. In March 1996, the Division advised CAI that the AV Specialists were misclassified at the Photographer II level and instead should be classified as Photographer IVs. The Division provided CAI with a line-by-line comparison of duties and skill levels between AV Specialists and the SCA definition for Photographer IV. The comparison utilized information provided by AV Specialists. Cubic responded in a May 15, 1996 letter, which discussed the AV Specialist job duties and affirmed the propriety of classification at the Photographer II level.<sup>3/</sup> Cubic provided the Division investigator with a National Training Center-produced videocassette which explained video control center operations and the process for producing battle training films. The investigator elicited comments from AV Specialists, who provided him with information to augment the videocassette. In June 1996, the employees submitted additional argument and information in support of classification at the Photographer IV level.

After examining all proffered materials, the investigator reconsidered his initial conclusion that the AV Specialists simply could be classified at a higher level in the Photographer classification without adding a new job classification through conformance. The definition and occupational base statement for the SCA photographer series referred to video equipment and videotape editing only tangentially,<sup>4/</sup> which led the investigator to conclude that

---

<sup>3/</sup> The Administrator submitted the May 15, 1996 letter from Cubic to the Division investigator with his February 18, 2000 Memorandum in Response to Petitioner's Reply. Appended to that letter were an organizational chart depicting the AV production operation and position descriptions for the AV Specialists which had been incorporated into CAI's subcontract. This document was not included in the Administrative Record filed in September 1998, and the Administrator offers no explanation for its omission. However, the letter is discussed in detail in the investigator's narrative at AR Tab H at 8.

<sup>4/</sup> The Photographer IV description states that "[t]ypical examples of equipment used at this level include ultra-high speed, motion picture production, studio television, animation cameras, specialized  
(continued...)

the intent of the provisions was “to outline the potential scope of the work performed by a “Photographer” and *not* to incorporate other non-photographer occupational classifications within the scope of that definition.” AR Tab H at 9 (emphasis in original).

Therefore, in July 1996 the investigator notified the Navy by letter that the complaint was being referred to the Division’s National Office as a failure to conform.<sup>5/</sup> AR Tab H at 8-9. He requested that the Navy file a report and recommendation concerning conformance pursuant to 29 C.F.R. §4.6(b)(2)(i) through (v) and discussed conformance with the Navy contracting officer by telephone. In November 1996 the Navy declined to submit the conformance report and recommendation requested by the Division. Instead, it adopted Cubic’s position that the AV Specialists properly were included under the Photographer II classification and submitted a summary of its position. AR Tab H at 9; Petition for Review (Pet. for Rev.), Exhibit (Exh.) 6 at 2.

By letter of November 18, 1996, the Division provided the Navy with Federal Grade Equivalency information derived from the SCA Directory of Occupations, and on December 4 the Division investigator met with the Navy contracting officer and a site representative. The ensuing discussions suggested to the investigator that the Navy’s position (classification of AV Specialists as Photographer II) “was dictated less by [an] assessment of skills and responsibilities than by [a] consideration of the cost implications.” AR Tab H at 12. In January 1997, the Division requested that the Navy provide information about the wage determination. The Navy responded in March 1997 with a procurement chronology. AR Tab G.<sup>6/</sup>

By letter dated August 12, 1997, the Navy contracting officer notified the Division that he had been “advised by HTSC that you have had recent discussions with CAI” regarding the classification of the AV Specialists. The officer reiterated that the position advanced by the Navy in November 1996 remained unchanged, *i.e.*, that journeymen AV Specialist job duties were consistent with the SCA definition for the Photographer II classification. AR Tab E. The

---

<sup>4/</sup>(...continued)

still and graphic cameras, electronic timing and triggering devices, etc.” AR Tab B.

<sup>5/</sup> According to the Navy, a similar letter was sent to CAI. Petition for Review (Pet. for Rev.), Exhibit (Exh.) 6 at unnumbered p. 2.

<sup>6/</sup> During this period Petitioners continued to adhere to their position that no conformance was necessary, and that AV Specialists were properly classified at the Photographer I, II and III levels. Thus, for example, the record includes a May 29, 1997 memorandum from CAI to Cubic in which CAI suggested that Cubic and CAI modify their position and instead classify AV Specialists variously at Photographer II, III and IV levels depending on an employee’s individual job duties. Job descriptions would be revised to segregate particular tasks. Few individuals, detailed to perform the most complex tasks almost exclusively, would be compensated as Photographer IVs. Most AV Specialists would be compensated at the Photographer III level. AR Tab F. Nothing in the record indicates that this proposal was ever acted on by Cubic.

letter alluded to “numerous communications” with the Division investigator “regarding the issue . . . during 1996 and early 1997” and affirmed that the Navy “will object to and request headquarters-level resolution of any direction issued to HTSC or CAI which would require reclassification of these employees to a position above the Photographer II level.” *Id.*

On February 25, 1998, two and one half years after the Division had notified the Navy that it was necessary to conform the AV Specialist class of employees and requested that the Navy initiate that process in accord with the requirements of 29 C.F.R. §4.6(b)(2), the Division advised HTSC/Raytheon and Cubic that it intended to conform the AV Specialist class of employees and asked the contractors to provide input. The contractors’ reply, dated March 4, provided no input other than to state that they had attempted to contact the Navy contracting officer but had received no response. *See* AR Tab B.

The Division issued conformed wage rates for the AV Specialist positions on April 24, 1998. AR Tab B. In his letter to Petitioners’ attorney, the Assistant District Director stated: “Ample opportunity has been given for the prime contractor, subcontractor, and Department of Navy to participate in this conformance but none have chosen to [do] so.” HTSC/Raytheon submitted a response dated May 5, 1998, which provided in pertinent part:

Based on [HTSC/Ratheon’s] discussions with both Cubic, and the Contracting Officers, we have been advised that all parties, including our client, object to the wage rates established by the conformance. I am, by copy of this letter to the Contracting Officers, Mr. Rhodes and Ms. Dillon, asking that they confirm for you in writing their intent not to incorporate these new wages rates into the existing contract.

Pet. for Rev., Exh. 3. Hughes/Raytheon also sent a letter dated May 12, 1998, to the Acting Administrator of the Division:

[T]he Wage & Hour Division recently conducted a conformance for the position and set new wage rates. We were advised of these new rates by letter dated April 24, 1998 from the Assistant District Director . . . .

In our subsequent conversations with [the ADD], we understood that the case would be referred back to Washington, D.C. for further proceedings. I have enclosed a copy of my May 5, 1998 letter to Mr. Taverner’s [sic] regarding our client’s position on the conformance and the new wage rates. Let us again reiterate, our client disagrees with the new wage rates established as a result of the conformance. We believe these wage rates reflect compensation for duties and responsibilities that presently *do not* exist at the Ft. Irwin location.

The purpose of our letter is to advise you of our objection to these new wage rates, and to urge you to first attempt conciliation of this matter through an inter-agency discussion. Our office is available to provide assistance in any way possible to facilitate such a conciliation.

*Id.*, Exh. 5 (emphasis in original).

The Administrator issued a final determination affirming the conformance on July 28, 1998. AR Tab A. The Administrator explained that the wage rates had been conformed first, by establishing Federal Grade Equivalencies for the AV Specialist I, II and III classifications under U.S. Office of Personnel Management Standard Classification Methodology and second, by “averaging the rates of the classifications with the same FGEs within the Information and Arts broad occupational category” of the wage determination. On January 14, 2000, pursuant to ARB order, the Administrator supplemented the record with information documenting the methodology employed to achieve the conformed wage rates.

Although the Petitioners argue that they were denied an effective opportunity to participate in the conformance process, the record of this case plainly shows otherwise. First, the SCA regulations direct contractors and contracting officers to *initiate* a conformance action when a needed job classification and wage rate is missing from a wage determination, even before the affected employees begin to work on the contract. 29 C.F.R. §4.6(b)(2)(ii). Thus, the Petitioners were responsible under the SCA for taking the lead in requesting a conformance action and providing the necessary data to the contracting agency and the Wage and Hour Division, but failed to do so.

Second, when the Division concluded (pursuant to 29 C.F.R. §4.6(b)(2)(vi)) that a conformance was necessary and notified the parties, the contracting agency and the Petitioners had ample opportunity during the ensuing 2-year long process to submit a description of the duties performed by the AV Specialists and propose a wage structure for the classifications that would be added to the wage determination. Instead, Petitioners merely asserted in numerous communications that the AV Specialists should be classified at the Photographer I, II and III level, maintaining this position long after the Wage and Hour Division had notified them that this approach had been rejected and that wage rates for the AV Specialist classifications needed to be set.

In sum, it is clear that Petitioners had ample opportunity to participate meaningfully in the conformance process, but elected to limit their participation primarily to denying that the process was necessary at all.<sup>7/</sup> Based upon these facts, we conclude that Petitioners were not

---

<sup>7/</sup> Of course, Petitioners had submitted information to the Division investigator in the course of his investigation. As we discuss below, it is that information that the Division used to conform the (continued...)

denied the opportunity to participate in the conformance process generally. We next address their more specific concerns.

## **B. Representations Regarding Status of the Proceeding**

Petitioners argue that the Division misrepresented the conformance decision issued by the Assistant District Director (ADD) of the Division's Santa Ana, California, Office to be a preliminary finding rather than an actual "determination." As a result, Petitioners argue, they were denied an opportunity formally to request reconsideration, which arguably would have entailed submission of their evidence for consideration by the Administrator prior to making a final determination pursuant to 29 C.F.R. §4.6(b)(2)(vi). Petitioners were correct in understanding that the conformance transmitted to them by the ADD (AR Tab B) would be reviewed by the Administrator; pursuant to their request the conformance *was* reviewed. Nothing associated with this procedure prevented Petitioners from submitting information for the Division's and/or the Administrator's consideration at any stage, however.

The language of the ADD's April 24, 1998 letter notifying Petitioners of the conformance belies their suggestion that the findings were in some manner advisory or submitted merely for purposes of discussion. In the letter, the ADD first referred to an earlier letter in which the Division informed Petitioners that it intended to conform the classifications and wage rates and requested input. The ADD then referred to Petitioners' responding letter "in which you informed me that you had repeatedly attempted to contact the contracting officer but had received no response." AR Tab B at 1. The ADD concluded: "Ample opportunity has been given for the prime contractor, subcontractor, and Department of the Navy to participate in this conformance but none have chosen to [do] so." *Id.* The letter advised that "the Department of Labor has conformed the jobs and [that] the following classifications, and wage determination are applicable to the contract." It then listed the AV Specialist classifications, the corresponding Federal Grade Equivalencies (FGE) and the conformed wage rates. *Id.* at 1-2. That the classifications had been conformed in accordance with the cited FGE schedule was evident under the terms of the letter.

In support of their contention that the ADD conformance letter was ambiguous, Petitioners point to conversations with the ADD following issuance of the letter in which they requested additional information, namely job descriptions and calculations. According to Petitioners' attorney, the ADD advised him that the proceeding would be referred to the Division's National Office. Petitioners' Reply Brief (Pet. Reply Br.), Exh. 8. The record shows that Petitioners' attorney objected to the conformance in a May 5, 1998 letter to the ADD and a May 12, 1998 letter to the Administrator in which he referred to completion of the

---

<sup>2</sup>(...continued)  
positions.

conformance and receipt of the conformed wage rates. Pet. for Rev., Exhs. 3 and 5.<sup>8/</sup> The attorney attested to an understanding that the Division thereafter would engage in final administrative action. These statements are consistent with an understanding that the first conformance letter “is not the Final Determination . . . from which our client is required to appeal.” Pet. for Rev., Exh. 3. Thus, it is clear that Petitioners were aware that the Division had made a conformance determination, and that upon consideration of their objections by the Administrator, final agency action would be forthcoming.

Final action took the form of the Administrator’s July 28, 1998 letter affirming the Division’s conformance. Petitioners assert that they expected to engage in a different procedure. In the May 5 letter to the ADD, their attorney stated:

As I understand it, under the current circumstances, you have no choice but to refer the case back to Washington, D.C. You advised us that there would be an effort to resolve the case informally on an inter-department basis between the Department of Labor and the Department of the Navy at the Washington, D.C. level. Failing that, the matter may have to be litigated and a Request For Review challenging the conformance may need to be filed.

Pet. for Rev., Exh. 3. In the May 12 letter to the Administrator, the attorney stated: “The purpose of our letter is to advise you of our objection to these new wage rates, and to urge you to first attempt conciliation of this matter through an inter-agency discussion.” *Id.*, Exh. 5. The SCA implementing regulations nowhere provide for an “informal . . . inter-departmental” procedure, and to this extent Petitioners’ stated expectations were not founded in any realistic understanding of the conformance process. In any event, regardless of their understanding of the next steps in the conformance process, Petitioners were accorded significant opportunities throughout the proceeding to apprise the Division of their position on appropriate means of conformance. As noted previously, they chose to participate instead by objecting to conformance and asserting the propriety of classifying the AV Specialists at the Photographer I, II and III levels. Under these circumstances Petitioners cannot argue successfully that they were denied adequate process in this respect.

### **C. Lack of Job Descriptions**

Petitioners assert that the ADD’s failure to append AV Specialist job descriptions to the April 24, 1998 conformance “ma[de] it impossible for the sub-contractor and/or contractor to

---

<sup>8/</sup> In the letter to the ADD, Petitioners’ attorney stated: “We are in receipt of your April 24, 1998, letter in which you advised us that the conformance of the Audio-Visual Specialist position had been completed, and provided us with the newly conformed wage rates.” In the letter to the Administrator, he stated: “[T]he Wage and Hour Division recently conducted a conformance for the position and set new wage rates. We were advised of these new rates by letter dated April 24, 1998 . . . .”

understand the precise scope of the duties anticipated in the conformed positions and/or to formulate any informed decision as to the grounds for challenging such findings.” Pet. for Rev. at 2. Even if it were true that without position descriptions for the conformed classifications, Petitioners would have had difficulty determining which of its AV Specialists should be classified as AV Specialist I, II or III,<sup>9/</sup> the lack of those descriptions did not impair Petitioners’ ability to challenge the conformance. As the employer of the AV Specialists, CAI – Cubic’s subsidiary – certainly knew precisely what its employees’ duties were. From the outset of the conformance, Petitioners have had the information necessary to argue that the actual job duties and responsibilities of the AV Specialists working at the Ft. Irwin facility did not comport with the positions to which they were being conformed.

We are not persuaded, on this record, that the Division’s failure to append position descriptions to the conformance denied Petitioners adequate process. Petitioners were aware of the job duties the AV Specialists were actually performing and could have challenged the Federal Grade Equivalencies and wage rates contained in the conformance as incommensurate with those duties. They did not do so.

#### **D. Disclosure of Methodology and Its Application**

Petitioners argue that they have been denied an adequate opportunity to challenge agency action because the Division failed to explain the methodology that it employed to evaluate the AV Specialist positions and derive wage rates. The Administrator’s AR Supplement has remedied the omission for purposes of determining whether the Division’s methodology and its application comported with the law and was reasonable. *See* discussion under Part II, *infra*. The issue of adequate process remains, however. For these purposes the questions are whether the Division denied Petitioners a meaningful opportunity to challenge the conformance before the Administrator by failing to provide a detailed account of the conformance methodology and its application and, if so, whether disclosure at that level of review was essential in order to afford Petitioners adequate process. These are not insubstantial questions because the timing of disclosure bears on the issue of adequate process. The Administrator’s review represents the final determination of the program agency responsible for administering the SCA, and the scope of our review of that determination is limited.<sup>10/</sup> On the other hand, the forum provided by the Administrator’s reconsideration offers Petitioners the potential for more searching review than might be achieved through the Board’s appellate process. If adequate process requires detailed disclosure of the conformance methodology and its application at the program level, then it

---

<sup>9/</sup> In fact, it is by no means clear that it would have been at all difficult; Cubic had already classified the AV Specialists at three different levels within the Photographer classification.

<sup>10/</sup> We review the Administrator’s action in this case to ensure that it comports with the SCA and implementing regulations and is reasonable. *Environmental Chemical Corp.*, ARB Case No. 96-113, Feb. 6, 1998, slip op. at 3.

might be necessary for us to remand the case to the Administrator to afford Petitioners the opportunity to present the Administrator with a fully-informed challenge to the conformance.

However, it is Petitioners who declined to put forth a recommended methodology and apply it to the AV System Specialist positions and therefore declined to avail themselves of their most meaningful opportunity to participate in the conformance procedure. Under these circumstances we conclude that the Administrator's failure – until review before the Board – to articulate the methodology used by the Division once it was required to step in and conform the classifications did not deny Petitioners adequate process.

The SCA regulations provide that: “[the] conforming procedure shall be initiated by the contractor;” the contractor must submit “[a] written report of the proposed conforming action,” including information about employee agreement or disagreement, to the contracting officer; and after reviewing the proposal, the contracting officer must forward the report together with a recommendation to the Division. 29 C.F.R. §4.6(b)(2)(ii). The regulations anticipate that a variety of methodologies appropriately may be employed by the contractor in preparing the conformance proposal. See 29 C.F.R. §4.6(b)(2)(iv)(A) (e.g., “[s]tandard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may . . . be relied on”; considerations include “skill required and duties performed”). Upon receipt of the contractor's proposed conforming action, together with the contracting agency's report and recommendation, the Division “will approve, modify or disapprove the proposed action or render a final determination in the event of disagreement . . .” 29 C.F.R. §4.6(b)(2)(ii).

The conformance procedure in this case took an entirely different course, however, because Petitioners declined to initiate the conformance as directed under the regulations, and the Navy failed to direct the Petitioners to initiate the conformance. Petitioners did not submit a proposed *conformance*, by which they compiled a description of the duties performed by the employee class and proposed a methodology for adding the unlisted class of employees to the wage determination. This failure to initiate the conformance process led to the initiation of that process by the Division pursuant to 29 C.F.R. §4.6(b)(2)(vi). Once that process was underway, and in spite of the Division's invitation to provide information, Petitioners refused to provide evidence which would have assisted the Division in making its section 4.6(b)(2)(vi) determination, and instead continued to insist that the AV Specialists were appropriately classified within the Photographer series at the Photographer I, II, and III levels.

The Section 4.6(b)(2)(i) through (v) conformance procedure contemplates a shared responsibility among parties. Contractors and other interested parties contribute their proposals before the Division issues a conformance. Had Petitioners participated as required by the regulations, by proposing a conforming action and a methodology supporting that action for the Division to approve, modify or disapprove, the methodology ultimately applied would have been

discussed.<sup>11/</sup> Petitioners should not be heard to complain about denial of adequate process when they largely abdicated their role in the procedure.

Petitioners received adequate notice in any event. The conformance issued by the Division was grounded expressly on particular Federal Grade Equivalencies. *See* AR Tab B. The choice of the stated equivalencies, in itself, provided Petitioners with a basis for challenging the conformance before the Administrator. Petitioners could have proposed alternative equivalencies or methodologies which arguably would have achieved a more appropriate result.<sup>12/</sup> They could have done so while maintaining their position that conformance was not the appropriate action to be taken. *See, e.g., COBRO Corporation*, ARB Case No. 97-104, slip op. at 9 (petitioner argued both that conformance was not necessary, and that conformed rate was incorrect). Instead Petitioners chose to advance the barest of objections when requesting review by the Administrator. The Administrator stated in response: “We note your disagreement with the conformance. However, *in the absence of any new information*, we must reaffirm the conformed rates.” AR Tab A at 2 (emphasis supplied). We are unable to divine any legitimate reason for delaying participation in the conformance process until Board review of the conformance, since SCA expertise resides in the program agency, and our review of final agency action is limited. We reject the contention that Petitioners were denied adequate process in this respect.

#### **E. Timeliness**

Petitioners advised the Administrator of their objection to the conformance by letter dated May 12, 1998, and the Administrator affirmed the conformance 47 days later, on July 28, 1998. Petitioners argue that they were prejudiced as the result of the Administrator’s failure to comply with the time limitations appearing at 29 C.F.R. §4.56(a)(2).

The regulatory provision cited by Petitioners applies to wage determinations (not to conformances) and requires the Administrator either to issue a decision within 30 days of receiving a request for reconsideration of a **wage determination** or to notify the requesting party within the 30-day period that additional time is required. In contrast the regulations set no temporal limitation on the Administrator’s reconsideration of a **conformance**. Indeed, they do not provide for any reconsideration whatever. *See* 29 C.F.R. §4.6(b)(2)(i) through (vi). Therefore, we reject Petitioners’ argument that the Administrator’s failure to comply with the time limits for reviewing wage determinations prescribed in 29 C.F.R. §4.56(a)(2) deprived Petitioners of any process to which they were due under the conformance procedures.

---

<sup>11/</sup> Participation prior to issuance of the conformance is prudent given that the regulations are silent as to any procedure for reconsideration of the Division’s determination by the Administrator. Thus, although the Administrator did consider Petitioners’ objection to the conformance, the regulations did not require him to do so.

<sup>12/</sup> Indeed, Petitioners belatedly proposed an alternative methodology in their reply brief filed before the Board. Pet. Reply Br. at 14-22, Exhs. 9 and 10.

## II. Abuse of Discretion

Petitioners do not directly challenge the Administrator's determination that a conformance of the AV Specialist positions was required.<sup>13/</sup> Instead, they argue that the Administrator abused his discretion in effecting conformance by: (1) failing to consider wage rates prevailing in the geographic locality in which the contract was performed; (2) basing the conformance upon job descriptions which did not accurately reflect the work performed by the AV Specialists; and (3) incorrectly applying the classification standards contained in the OPM Audio/Visual Production Series GS-1071.

We begin our evaluation of the Administrator's conformance of the AV Specialist positions by emphasizing the fundamental differences between the wage determination process and the conformance process. Wage determinations dictate the minimum wage rates to be paid to classifications of employees under a service contract and are incorporated into bid packages and eventually into the contract itself. "Thus all bidders . . . are provided with the same information concerning the minimum wage rates that must be paid on a federal . . . procurement." *Pizzagalli Construction Co.*, ARB Case No. 98-090, May 28, 1999, slip op. at 5 (parallel Davis-Bacon Act procedure). The procedures utilized by the Wage and Hour Division for issuing an initial wage determination typically involve extensive analysis of statistical data relating to locally prevailing or collectively-bargained rates. *See* 29 C.F.R. §4.51. Challenges to original wage determination rates **must be made prior** to the date that bids are submitted on a procurement. 29 C.F.R. §4.56 ("In no event shall the Administrator review a wage determination or its applicability after the opening of bids[.]"). This requirement is essential to an equitable 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, slip op. at 8 (Davis-Bacon Act)).

In contrast, a conformance is limited to adding an employment classification which was omitted from a wage determination. It occurs **after** bidding on the contract has concluded and assumes "that the wage determination that was included in the bid specifications essentially is correct [with] the limited deficiency . . . that a needed job classification and wage rate are missing." *COBRO Corporation*, ARB Case No. 97-104, slip op. at 10. The conformance procedure is designed to facilitate expedited addition of a missing classification and wage rate while simultaneously maintaining the integrity of the bidding process. "It is . . . a limited

---

<sup>13/</sup> It is extraordinary that, after having refused to engage in the conformance process, as required by 29 C.F.R. §4.6(b)(2), and instead objecting throughout the process that conformance of the AV Specialist positions was not appropriate, Petitioners have abandoned that argument before us, and argue only that the conformance was not done *properly*. We note that there can be no doubt that conformance of the AV Specialist positions was necessary. The job duties of the Photographer classifications bear little resemblance to the work of the AV Specialist positions. Indeed, this is precisely the type of circumstance for which the conformance process was designed.

process, with limited review by the Board.” *Id.* at 11. The Administrator must (1) determine which classifications already included in the wage determination are most comparable in terms of skill to the class of employee performing under the contract but omitted from the wage determination, and (2) derive a wage rate for the omitted class which is reasonably related to the included rates. The Administrator is accorded broad discretion in establishing a conformed rate, “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). As we discuss below, we reject Petitioners’ challenges to the Administrator’s conformance of the AV Specialist positions.

### **A. Prevailing Wage for the Geographic Locality**

Petitioners argue that in conforming the AV Specialist classifications, the Division was required -- and failed -- to “establish a wage rate for the jobs in question that reflect[ed] the prevailing wage for comparable work performed in the locality of Ft. Irwin.” Pet. for Rev. at 8. Petitioners cite data which they consider relevant to the conformance of the AV Specialist positions:

(a) Within the general Ft. Irwin area, the only other individuals who perform duties comparable to those of Audio Visual Specialists I-III, are individuals working at small local television stations. The jobs at the present wage rates (which are considerably lower than the conformed wage rates) are prime jobs within the Ft. Irwin area and people from the television stations frequently quit their jobs to work in Ft. Irwin because the pay is significantly higher.

(b) The statement of work at Ft. Irwin specifies that the video technicians work quality be equal to the National Association of Broadcasters Standards (“NAB”) for commercial video recordings. The NAB issued a 1995 compensation and fringe benefit report for individuals engaged in commercial television and video work. According to the report (a copy of which was submitted to the DOL) compensation in the Western Region of the United States for an operator technician, technical director, and film tape editor/producer director and floor director ranged from \$26,000 to \$30,500 a year. At or about the same point in time, individuals working as Photographer II’s at the Ft. Irwin facility were earning \$16.43 an hour or \$34,174 a year, well in excess of the NAB guidelines.

Pet. for Rev. at 8-9. It is evident from the Petitioners' submission that they harbor a fundamental misunderstanding of the differing purposes of a wage determination and a conformance. As stated by the Board of Service Contract Appeals in analogous circumstances:

The Petitioner had the opportunity and obligation to seek review of the wage determination prior to the award of the contract. . . . Having not availed itself of the opportunity to challenge the wage determination, Petitioner should not be heard to complain that the conformance process did not provide as precise a comparison between job classifications as it would desire.

*Kord's Metro Services, Inc.*, BSCA Case No. 94-06, Aug. 24, 1994, slip op. at 5. Conformance does not entail a *de novo* wage determination. The Administrator thus is not required to conduct a survey to establish locally prevailing wage rates when conforming classifications. Rather, his responsibility is to establish a wage rate that **reasonably relates to those contained in the applicable wage determination**. See *Clark Mechanical Contractors, Inc.*, WAB Case No. 95-03, Sept. 29, 1995, slip op. at 4 (Davis-Bacon Act). See also *CACI, Inc.*, Case No. 86-SCA-OM-5, Mar. 27, 1990, slip op. at 17 ("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"). Of course, because the wage rates which **were** included in the wage determination were based upon locally prevailing wage rates, as required by the SCA regulations, there is an indirect link between the conformed AV Specialist wage rates and rates prevailing in the locality. That indirect link is all that the SCA regulations require when a job classification and wage rate have not been listed on the wage determination and a conformance of the position is necessary. Therefore, the fact that the Administrator declined to consider locally prevailing wage rates for persons performing audio-visual work in this case does not render the conformance inconsistent with the law or unreasonable.

## **B. AV Specialist Position Descriptions**

Petitioners also assert that the Administrator based his conformance on inaccurate position descriptions for the AV Specialists, and that as a result the AV Specialist positions were conformed at a higher wage rate than was appropriate. The premise of the conformance process is that the conformed rates should bear a "reasonable relationship" to the wage rates for jobs of comparable skill level that were listed in the applicable wage determination. Therefore, the first step in conforming a position to classifications in a wage determination is to determine what the job duties of the position to be conformed *are*. Petitioners complain that the Division failed in that endeavor:

In the end, it is irrelevant what the employer says in its job descriptions, what the employees say in their job descriptions, or even what the job descriptions contained in the Statement Of Work contain. They could all be incorrect. What matters, and what

should be the foundation of the conformance, is what the employees in question are **actually** doing and what skills are required to perform the work in question.

This is the fundamental dispute in the case at hand. The contractor has objected to the conformance, in large part, on the grounds that the job descriptions apparently used in the conformance do not reflect the actual work performed. It is the obligation of the Administrator to insure that the express requirements of the CFR and the Classifiers Handbook are met. It has failed to do so in the present case and the ARB should not enforce the conformance on such grounds and/or should request that an evidentiary hearing be set to establish the actual job duties performed by the employees in question.

Raytheon Systems Company's Opposition to Administrator's Motion for Leave to File Memorandum in response to Petitioner's Reply at 3. This argument again underscores Petitioners' fundamental misapprehension of the conformance process. As we discuss below, Petitioners themselves provided the Division with specific information regarding the job duties of the AV Specialists, and the Administrator relied upon that information exclusively in determining the job duties of the AV Specialist positions.

The record contains several documents which purport to describe the job duties of the AV Specialist positions at Ft. Irwin:

- A May 15, 1996 letter from Cubic counsel Anne Celentino to the Division investigator, which discussed the job duties of the AV Specialists in detail (Cubic Letter). Attachment to Motion for Leave to file Memorandum in Response to Petitioners' Reply, filed February 18, 2000.
- Position descriptions for Photographers I, II, and III, which were attached to the Cubic letter and identified as having been incorporated into CAI's subcontract. *See* Cubic letter, and Exhibit 2.<sup>14/</sup>
- A May 29, 1997 memorandum from Ruth Van Sickle of CAI to Cubic's Celentino which contains a description of the work which CAI was responsible for performing under the contract (CAI Memorandum). The responsibilities listed are identified as being taken directly from the

---

<sup>14/</sup> These position descriptions also appear at AR Tab D, Appendices "Photographer" I, II and III.

Statement Of Work – Addendum III. AR Tab F, Attachment I.

- A position description for “Audio/Visual Systems Specialist” at Ft. Irwin, written by Tom Gibbons (otherwise unidentified), and approved by Jim Wood (otherwise unidentified) dated December 12, 1995. Attached to the CAI Memorandum, AR Tab F, Attachment II.
- A 1996 vacancy announcement for a Photographer I, attached to the CAI Memorandum, AR Tab F, Attachment III.

All of these documents were provided to the Division investigator by Petitioners. And all of them were used to some extent in describing the job duties of the AV Specialist positions at Ft. Irwin in the course of conforming the positions.

First, in his narrative, the Division investigator relied almost exclusively on the description of the AV Specialists’ job duties contained in the May 15, 1996 Cubic Letter. AR Tab H at 6-7. Cubic counsel Celentino devoted the body of that letter (which was written in response to the investigator’s initial determination that the AV Specialists were classified at too low a level in the Photographer classification) to a detailed description of the job duties of the AV Specialists who were then employed at Ft. Irwin. She noted that:

There are currently twenty three audio/video systems specialists (“video technicians”) working at Fort Irwin. Six are classified as Photographer III’s, sixteen are classified as Photographer II’s and one is classified as a Photographer I. As you are aware, once a video technician completes ninety days of employment, he/she is reclassified as a Photographer II. Shift leaders are classified as Photographer III’s.

Cubic letter at 2. Attorney Celentino identified the attached job descriptions as follows: “Position descriptions for Photographers I, II and III were also included in the Hughes proposal and **were incorporated into CAI’s subcontract.** (See Exhibit B).” *Id.* (emphasis supplied).

Although the Cubic letter is far more detailed than the position descriptions which were attached to it, it is in large part consistent with those descriptions. A comparison of the Cubic letter and the Division investigator’s narrative leaves no room to doubt that the Cubic letter was the source of almost the whole of the investigator’s description of the AV Specialist positions.<sup>15/</sup>

---

<sup>15/</sup> The investigator’s narrative contains a more detailed description of the real time operations (continued...)

Second, the 1997 CAI Memorandum (the stated purpose of which was to articulate CAI's "position on the DOL wage determination of the Audio/Video Systems Specialists . . .") relied on, and appended, the Statement of Work ("SOW") in describing the job duties of the AV Specialists:

The Audiovisual and Photographic Support SOW (attached) specifies 13 major tasks that the A/V Specialist may be [illegible] to perform.

\* \* \* \* \*

Upon reexamination of current SOW tasks, we have concluded that items "e" (Special Projects and Non Rotational Events) and "k" (Real-time Operations Support) specify tasks that warrant photographer IV level skill, responsibility and decision making. Item "g" (Support to Any type of Rotation) implies the possibility of the NTC A/V Specialist being required to perform extraordinary tasks in support of "non-standard" rotations. SOW item "c" (Battle Execution Summary Tape) tasks require skills appropriate to a Photographer III. All other technical tasks are commensurate with typical tasks performed in Commercial TV stations and [should] be classified as Photographer II tasks . . . .

CAI Memorandum at 1-2. Also attached to the CAI Memorandum were the December 12, 1995 "Job Description" for AV Specialists I, II, and III, and the 1996 CAI vacancy announcement for a Photographer I (which repeats verbatim the general duties of the AV Specialist I contained in the December 12, 1995 Job Description).

Third, in his July 28, 1998 final ruling on the conformance the Administrator stated that the Division had relied upon "the contractor job descriptions, the contract statement of work, and the Wage and Hour investigative findings regarding the work performed" by the AV Specialists in determining their job duties. AR Tab A. The job descriptions to which the Administrator referred are the position descriptions for Photographer I, II, and III that had been attached to the Cubic Letter, as well as the December 12, 1995 Audio Visual Systems Specialist job description attached to the CAI Memorandum. Therefore, all three of the sources cited by the Administrator

---

<sup>15</sup>(...continued)

duties of the AV Specialists. AR Tab H at 6. No source is specifically listed for this description. However, the investigator does refer to a CAI memorandum dated September 19, 1995, "which outlines the functional aspects of CAI's video effort and includes the video technician's job description within the Photographer series." AR Tab H at 6 n.11. This CAI document was not included in the Administrative Record. See discussion at n.2, *supra*.

are linked to Petitioners' submissions either directly (the contractor position and job descriptions, and the contract statement of work) or indirectly (the investigator's findings based upon the Cubic Letter). Moreover, *all* of the job duties which are specifically cited in the final ruling are derived verbatim from documents originally provided to the Division by Petitioners.<sup>16/</sup>

Fourth, Labor Department personnel management specialist Carolyn L. Alston prepared detailed evaluations for the Federal Grade Equivalency of the AV Specialist I, II, and III positions. Memorandum from Carolyn L. Alston to Nila Stovall, dated January 12, 2000 (Alston Memorandum), submitted in response to Board Order to Supplement Record. The Alston Memorandum listed the job duties for each of the three levels of AV Specialist. *All* of the job duties cited in the Alston Memorandum are derived virtually intact from the Position Descriptions attached to the Cubic Letter and submitted to the Division by Petitioners.<sup>17/</sup>

Therefore, there can be no doubt that the Division based the conformance of the AV Specialist positions exclusively upon documents provided by Petitioners. However, Petitioners

---

<sup>16/</sup> We quote this passage of the Administrator's final ruling in full and identify source documents in brackets:

[T]he Audio-Visual Specialist series operates a variety of audio and video equipment [**12/12/95 Job Description**]; edits and dubs audio/video tape [**same**]; creates computer graphics, duplicates and transfers audio/video products to various formats [**same**]; replays audio/video products for use in mobile and fixed theater presentations and operates real-time computer system and remote camera display systems [**same**]; develops and mounts 35mm film [**Position Description for Photographer I attached to May 15, 1996 Cubic Letter (PD I); SOW item "k"**]; tactically deploys the Mobile Video Units on the battlefield to record key learning points [**PD I**]; locally records video information from locations where transmission is not possible [**PD I**]; performs preventative maintenance and inventory control duties on related equipment [**12/12/95 Job Description**]; ensures that the quality of all products [is] sufficient to clearly record computer displays, maps/overlays, terrain models [**SOW**]; maintains an archive library of video products [**SOW item "f"**] and prepares audio/visual products for shipment [**SOW item "i"**]; writes scripts, treatments, and storyboards for audio/visual products [**12/12/95 Job Description**].

<sup>17/</sup> The Alston evaluation statement of AV Specialist II job duties also includes the following language which derives from the December 12, 1995 job description appended to CAI Memorandum: "[T]he incumbent normally performs duties making routine technical decisions based on their knowledge of equipment specifications, standard operating procedures and customer direction. Consults the shift lead audio/visual systems specialist on clarifications of standard[] procedures and non-routine customer issues." AR Tab F, second attachment at 2.

now seek to disavow the substance of those submissions. Thus, in reply to the Administrator's supplement to the record, Petitioners submitted a declaration of Mike St. John, program manager for the Combat Maneuver Center Instrument Systems at Fort Irwin. The St. John declaration disputes that AV Specialists regularly perform certain duties enumerated in the Alston evaluation. The gravamen of the declaration is that the AV Specialist I is not located physically in the field and has no responsibilities associated with MVUs except for receiving, monitoring and adjusting their transmissions.<sup>18/</sup>

If the St. John declaration is taken at face value, it would appear that some of the job duties of the AV Specialist series listed in the Administrator's final ruling and the Alston Memorandum are not actually performed by the AV Specialists. However, those discrepancies existed in Petitioners' own documents, which Petitioners then provided to the Division.<sup>19/</sup> Because Petitioners declined to initiate a conformance, the Division was required to act: "Upon discovery of failure to comply with paragraphs (b)(2)(i) through (v) of this section, the Wage and Hour Division shall make a final determination of conformed classification, wage rate, and/or fringe benefits which shall be retroactive to the date such class of employees commenced contract work." 29 C.F.R. §4.6(b)(2)(vi). The regulations impose no particular standards for the Administrator to apply in making the Subsection (vi) conformance determination, thereby according the Division considerable latitude when the contractor has abdicated its responsibility to engage in the conformance process. Where, as here, the Division has utilized position descriptions provided by the Petitioner contractors in an attempt to determine the duties performed by the unlisted class of employees, Petitioners cannot complain that the result merely was approximate.

---

<sup>18/</sup> The declaration may be summarized as follows: The AV Specialist I classification provides technical support to Real-time operations by monitoring Mobile Video Unit (MVU) taping from a control room station to ensure that Real-time feed is transmitting to the recorder. The military, rather than the AV Specialist, deploys the MVU cameras. The AV Specialist verifies MVU sites from the control room station. AV Specialists relay information to the military and the contractors rather than direct any of their activities. AV Specialists do not monitor "all" microwave signals. They monitor only the microwave signals from specified MVUs to ensure quality and to assist in adjusting the signal. AV Specialists do not develop and mount 35 millimeter film, or log or label raw video from the field. Nor do they record FM audio traffic. They do not keep a maintenance discrepancy log and merely report inoperative equipment to Raytheon technicians for repair and replacement. AV Specialists are not responsible for collecting battlefield footage and company/platoon After Action Reviews or for transmitting to the Real-time operation for distribution to the theater and to analysts for viewing in Real-time or near Real-time. They similarly are not responsible for video recording at locations inaccessible to MVUs or for maintaining the MVUs.

<sup>19/</sup> It is highly significant that at the time the various position and job descriptions were provided to the Division, AV Specialists were working on the contract at Ft. Irwin. Thus, at the time Petitioners provided those documents to the investigator, the job duties the AV Specialists were actually performing were no secret to them.

Even more perplexing than Petitioners' apparent failure initially to provide accurate position descriptions for the AV Specialists is their failure to submit any information or argument to the Administrator when objecting to the conformed wage rates. Petitioners responded to the conformance by "advis[ing]" the Administrator "of [their] objection to these new wage rates. . ." and stating that, "[w]e believe these wage rates reflect compensation for duties and responsibilities that presently do not exist at the Ft. Irwin location." Pet. for Rev., Ex. 5; *see also* Ex. 3. However, Petitioners submitted nothing to the Administrator to support this contention. Even at that late date in the process, had Petitioners submitted accurate position descriptions for the AV Specialist series, it is reasonable to assume that the Administrator would have taken them into account in reaching his final ruling. We must assume that Petitioners expected that the Board would second guess the Administrator's effort to describe the AV Specialist positions based on the available evidence. They did so at their peril.

In any event, the discrepancies that Petitioners assert exist in the AV Specialist job duty descriptions are not of such a magnitude as to cause us to conclude that the Administrator abused his discretion. The primary functions of the AV Specialists involve recording incoming audio and video communications, editing those transmissions into battle tapes, preparing "video and [communication] cuts," tracking the location of military units as they perform the battle training exercises, performing various maintenance tasks, preparing composite tapes for use in "After Action Reviews," and recording the After Action Reviews onto video. *See, e.g.*, Cubic Letter at 2-5. The Cubic Letter and the CAI Memorandum both indicate that an AV Specialist prepares battle tapes (in conjunction with a Tactical [Feedback] Analyst (TAF)), monitors Real-time operations and produces After Action Reviews. The Cubic Letter likens the TAF to a director and the AV Specialist to an editor. These comparisons find support in the Audiovisual Production Series used by personnel management specialist Alston in conforming the classifications. Under the series descriptions, directors "translate the script into the various audio and visual elements that will communicate the desired message to the audience. They design the sets and lighting, conceive additional visual elements such as graphics and animation, and select music and sound effects . . . ." In contrast, "editors are responsible for all post-production processes . . . *i.e.*, assembling, adjusting, and enhancing the audio and visual elements . . . ." Editors use computerized equipment, monitor and control the technical quality of the product, construct scenes from raw videotape, achieve visual continuity between scenes and blend in audio elements. Editing functions may be done in real time. U.S. Office of Personnel Management (OPM) Audiovisual Production Series GS-1071 at 3-4.

For these reasons we are persuaded that the Administrator's articulation of the job duties of the AV Specialists is, in its essentials, close enough to the actual duties of the AV Specialists to be sustained.

### **C. Determination of comparable classifications and derivation of reasonably related wage rate**

As we have stated previously, the process of conforming an unlisted classification to those listed in the wage determination requires: (1) a determination of which classifications

already included in the wage determination are most comparable in terms of skill to the class of employee performing under the contract but omitted from the wage determination, and (2) a derivation of a wage rate for the omitted class which is reasonably related to the included rates. Petitioners raise two objections to the Administrator's application of these principles to the conformance of AV Specialists, which we conclude are without merit.

First, we can discern little basis for Petitioners' challenge to the Division's use of the Classification Standard for the Audiovisual Production Series to determine the Federal Grade Equivalencies. The series covers positions which "perform[] work in the production of videotaped and live television programs; live and prerecorded radio broadcasts; motion picture films; broadcast type closed circuit teleconferences; and other similar productions, such as slide shows with sound accompaniments." AR Supp., U.S. OPM Audiovisual Production Series GS-1071 at 1. Evaluation of the AV Specialist II and III classifications contemplated that "[t]he work [additionally] requires the ability to plan, organize, and direct" the work of associated technical personnel. *Id.* "Functional" areas covered under the series include the work of producers, directors and editors. The series position description for the editor function, in particular, parallels the AV Specialist job duties. *Id.* at 4. Use of the series finds support in the CAI Memorandum, which advances the position that "the NTC video operation and the duties performed (including complexity and responsibility) by the A/V Specialists equate to the job descriptions recognized by the [National Association of Broadcasting] in a commercial TV station such as producer/director, [illegible] director, floor director, film/tape editor and operator technician." AR Tab F at 2. This comparison is consistent with CAI's obligation under the SOW to "provide television, video, audio, computer graphics and photographic support of the Operations Group at the National Training Center." AR Tab F, first attachment. <sup>20/</sup>

Second, we reject Petitioners' argument that the Division failed to determine correctly a wage rate for the omitted class which was reasonably related to wage rates which were included in the wage determination. Personnel management specialist Alston evaluated the journeyman AV Specialist II and supervisory AV Specialist III classifications using grade-level criteria contained in the Classification Standard for the Audiovisual Production Series exclusively. She employed those criteria in conjunction with criteria contained in the Primary

---

<sup>20/</sup> Given the evident fit of AV Specialists within the audiovisual production series, we consider nonsensical Petitioners' assertion that the Specialists come within the series *exclusion* of "positions that involve such work as carpentry, electrical work, audio recording, and other similar work in a trade or craft in connection with audiovisual productions." U.S. OPM Audiovisual Production Series GS-1071 at 1. This exclusion contemplates labor performed in arranging for taping, rather than taping and editing. Nor do we find compelling Petitioners' distinction between "professional" and "non-professional" series. Pet. Reply to Supp. at 10-11. The Audiovisual Production Series applies to the positions enumerated in the series definition and described in the ensuing information. If, for example, an individual produces, directs or edits television, radio or other audiovisual productions, then his position would be evaluated pursuant to the series. That an individual filling such a position has not "complet[ed] a specified curriculum at a recognized college or university" (*id.* at 11) does not, in itself, render the position a "trade" or "craft" subject to exclusion from the series.

Standard for the Factor Evaluation System (AR Tab J) when evaluating the entry-level AV Specialist I classification. She explained: “The Classification Standard for the GS-1071 Series is written in the Factor Evaluation Format. The GS-09 is the lowest grade listed on the conversion table. As a result, the Primary Standard was used to make a Federal Grade Equivalency for this GS-07 level.” The Classification Standard directs in this regard: “The grade level criteria in this standard cover typical full performance positions at grades GS-9 through GS-13. When a position fails to meet the lowest, or exceeds the highest level provided for a particular factor, evaluate that factor using the [Factor Evaluation System] Primary Standard along with this standard.” U.S. OPM Audiovisual Production Series GS-1071 at 5-6. Use of the Classification Standard for the Audiovisual Production Series was reasonable. The series represents the position classifications within the federal government which most nearly approach the AV Specialist classifications engaged under CAI’s subcontract at Fort Irwin. Use of the Primary Standard for the Factor Evaluation System to evaluate the AV Specialist I classification also was reasonable in light of the fact that the Classification Standard expressly requires it.

Having determined the Federal Grade Equivalency for each AV Specialist classification, specialist Alston identified the other employee classifications within the “Information and Arts” broad category of the wage determination which carried the same grade equivalency. *See* AR Tab K. The wage rate for the AV Specialist I classification entailed averaging the rates of the other GS-7-equivalent classifications, namely Audiovisual Librarian, Exhibits Specialist II, Illustrator II and Photographer III. The AV Specialist II wage rate entailed averaging the GS-9-equivalent classifications of Exhibits Specialist III, Illustrator III and Photographer IV. Alston conformed the AV Specialist III classification at the wage rate accorded the Photographer V classification—the single GS-11-equivalent classification within the Information and Arts broad category.<sup>21/</sup>

The conformance methodology employed in this case, grounded in OPM Standard Classification Methodology, comes within the Administrator’s prerogative to rank classifications “by pay grade pursuant to point schemes or other job factors” and to obtain guidance “from the way different jobs are rated under Federal pay systems,” including “[the] Federal Wage Board Pay System and the General Schedule.” 29 C.F.R. §4.6(b)(2)(iv)(A). It additionally incorporates a concept “[b]asic to the establishment of any conformable wage rate,” *i.e.*, “that

---

<sup>21/</sup> Because the wage rate for one of the four GS-7-equivalent classifications differed significantly from the others in the Information and Arts broad category of the wage determination, Alston conformed the AV Specialist I classification at an average rate slightly lower than that accorded the high-end Photographer III classification. All three GS-9-equivalent classifications were compensated at the same wage rate; the rates for the AV Specialist II and Photographer IV classifications thus were identical. The wage rates for the AV Specialist III and Photographer V classifications also were identical since no averaging was possible. These circumstances explain the identity of wage rates for the AV Specialist II and Photographer IV classifications and for the AV Specialist III and Photographer V classifications, which caused Petitioners to opine that the Division had not applied the stated methodology in achieving the conformance results. *See* Pet. Reply Br. at 17.

a pay relationship should be maintained between job classifications based on the skill required and the duties performed.” *Id.* Finally, the conformed wage rates are tied directly to rates listed in the wage determination as required in order to preserve the integrity of the bidding process. Petitioners have failed to show that the Administrator’s conformance choices were unreasonable or inconsistent with applicable law.

### **CONCLUSION**

For the foregoing reasons, the petition for review is denied, and the Administrator’s final determination issued July 28, 1998, is affirmed.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member