



In the Matter of:

**GREATER CINCINNATI BUILDING
& CONSTRUCTION TRADES COUNCIL**

ARB CASE NO. 02-048

DATE: November 28, 2003

**Dispute concerning the applicability of
the wage determination likely to be applied
to laborers and mechanics employed for the
residential renovation of the Alexandra
Apartments, 921 William Howard Taft
Rd., Cincinnati, Ohio**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For Petitioner Greater Cincinnati Building & Construction Trades Council:
Michael A. Ledbetter, Esq., Snyder, Rackay & Spicer, Dayton, Ohio***

***For Respondent Administrator, Wage and Hour Division:
Joan Brenner, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., U.S.
Department of Labor, Washington, D.C.***

***For Intervenors MV Communities, Alexandra Limited Partnership, and Associated
Land Development, Inc. (collectively "Project Developers"):
Maurice Baskin, Esq., Venable LLP, Washington, D.C.***

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (ARB) because of a dispute arising under the Davis-Bacon Act, 40 U.S.C.A. §§ 276a to 276a-5 (West 2001) (the "Act") and the implementing regulations at 29 C.F.R. Parts 1, 5 and 7 (2000).¹ The United States Department of Labor's Wage and Hour Administrator ruled that laborers and mechanics working under a construction contract subject to the Act would be paid "residential" rather than "building" wages. Building wages are, for the most part, higher than the residential wages. The Greater Cincinnati Building & Construction Trades Council (the "Council"), on behalf of the laborers and mechanics, petitions us to reverse

¹ Effective August 21, 2002, the Davis-Bacon Act was recodified at 40 U.S.C.A. § 3141, et seq.

the Administrator's ruling. For the reasons discussed below, we deny the Council's petition.

BACKGROUND

Alexandra Limited Partnership ("Owner") executed contracts with the city of Cincinnati, Ohio ("City") and Associated Land Development ("Contractor") to rehabilitate the Alexandra Apartments to provide housing for low-income elderly residents of Cincinnati. The City, in partnership with the United States Department of Housing and Urban Development, agreed to finance the project. The Contractor agreed to build new efficiency and one and two-bedroom apartments. MV Communities ("MV") coordinated the project.

Wages paid to laborers and mechanics under the Alexandra construction contract had to be in accordance with the Davis-Bacon Act's minimum wage requirements because the project was funded under the Housing and Community Development Act of 1974² and the Cranston-Gonzalez National Affordable Housing Act.³ The Davis-Bacon Act requires that the minimum wages paid to construction workers be based on wage rates that the Secretary of Labor determines to be prevailing for corresponding classes of laborers and mechanics employed on similar projects in the geographic locality where the contract is performed.⁴ The Secretary's function of determining minimum wage rates is delegated to the Administrator of the Wage and Hour Division.⁵

The original renovation plan envisioned a building containing 91 apartments, eight of which were located on the lowest story. The remaining 83 units would be built on the upper four floors. The lowest story would be primarily below ground level after the contractor modified the apartment house's exterior grading. The project architects determined that, according to the Ohio Basic Building Code, the building would therefore consist of four stories. According to United States Department of Labor criteria involving Davis-Bacon projects, apartment buildings of no more than four stories are considered to be "residential construction."⁶ Therefore, the wages to be paid to laborers and mechanics working on the Alexandra project would be in accordance with the applicable "residential" wage determination for Hamilton County, Ohio, where Cincinnati is located. Thus, the owners requested that the City incorporate the applicable

² See 42 U.S.C.A. § 5310, 1440(g) (West 1995).

³ See 42 U.S.C.A. § 12836 (West 1995).

⁴ 42 U.S.C.A. § 276a.

⁵ 29 C.F.R. § 1.1(a).

⁶ The Department of Labor has distinguished four types of construction for purposes of making prevailing wage determinations: building, residential, heavy, and highway. See AR Tab O.

“residential” construction wage rates into its loan agreement contract with the City. Petitioner’s Reply Brief (PB), Ex. A, p. 1. On June 20, 2001, the City committed funds for the project based on the “residential” wage determination. PB, Ex. B, p.2

However, in mid-July someone from the Council called Kathi Ranford, the City’s contract compliance officer, and questioned the decision to use the residential rate for the project. This person, not identified, claimed that the proposed Alexandra building actually consisted of five stories and that, therefore, according to Department of Labor criteria, the “building” construction wage rates applied.⁷ Ranford then contacted William Smith, the government contract specialist at the Department of Labor’s Chicago office, and sent him information about how the project architects had determined that the building was four stories. Ranford requested a ruling on which wage determination should apply.⁸ Smith informed Ranford that according to Departmental regulations, if the lowermost story of the Alexandra project is used for apartments in a substantially similar way as the upper floors, as the plans appeared to indicate, the lower story would be deemed to be a first floor. Thus, concluded Smith, the Alexandra project would be five stories and the “Building Wage Determination would therefore be the correct one to be used in this HUD project as the Residential Wage Determination can only be used for residential buildings (4 stories or Less).”⁹ By a July 19, 2001 “interdepartment correspondence” memo, Ranford advised City officials that based on Smith’s analysis, the building wage rate should be used for the Alexandra project.¹⁰

When the project’s owners learned of the decision to change the wage rates from residential to building, they too contacted the United States Department of Labor. On August 16, 2001, Brandy Angus, the owner’s project coordinator, wrote to the Wage and

⁷ PB, Ex. A, p. 1. “Building” construction wage rates apply to apartment buildings five stories and higher. *See* AR Tab P. Wages and fringe benefits for most laborers and mechanics under the applicable “building” construction wage determination rates are higher than those under the “residential” construction wage determination. For instance, an electrician working on the Alexandra Apartment project is paid \$22.55 per hour and \$6.95 per hour in fringe benefits under the Hamilton County (Cincinnati) “building” rates compared to \$12.50 and \$3.27 per hour under the “residential” wage rate. Similarly, roofers receive \$23.15 and \$6.04 if the “building” rates apply but \$16.85 and \$2.37 under the “residential” wage determination. *See* AR Tab M and N.

⁸ PB, Ex. A, p. 1.

⁹ PB, Ex. A, p. 2.

¹⁰ Ranford’s memo was sent to Peg Moertl, the City’s Director of Neighborhood Services. Copies were sent to six other persons, presumably City employees, whose titles are not specified. Thus, apparently Ranford did not send this memo to anyone at the Building Trades Council. Furthermore, as of July 20 the City’s Supervising Building Plans Examiner was not aware of Ranford’s decision to classify the proposed Alexandra project as a five-story building. *See* AR Tab C.

Hour Division, United States Department of Labor, in Washington, D.C. She requested that Wage and Hour review the Alexandra site plans (and William Smith's opinion) and advise her whether the building should be considered four or five stories. Furthermore, Angus wanted a ruling about whether the building would be deemed four or five stories if the owners changed the original plan by removing the eight apartment units from the lowermost story (thus reducing the total apartment units to eighty three, all of which would be located on the upper 4 floors). AR Tab B.

The Wage and Hour Administrator ("Administrator") responded to Angus with a "final determination" letter dated October 26, 2001. The letter states:

We have reviewed the site plan and all construction drawings that you provided to us and conclude that if the lowermost story would be used for apartment space in a way substantially similar to the upper floors it would be considered a first story without regard to the exterior grade. On the other hand, if the eight apartments on the lowermost story are not included and the grading changes are undertaken the project would be considered to be residential construction.¹¹

Thereafter, on November 1, 2001, the owners and the contractor executed a construction contract to build the Alexandra project according to the revised, eighty-three apartment plan. AR Tab E. Construction began on November 5, 2001.¹² The residential wage determination for Hamilton County was included in the construction contract.¹³ The Council appealed the Administrator's October 26, 2001 final determination to the

¹¹ AR Tab A. William W. Gross, the Department of Labor's Director of the Wage Determination Division, signed the letter. Gross is the authorized representative of the Administrator of the Wage and Hour Division. *See* 29 C.F.R. § 1.2(c). Gross sent the letter to Angus only although it indicates that "any other interested party may consider this letter to be a final determination . . ."

¹² The Council does not dispute the Wage and Hour Administrator's assertion that construction began on November 5, 2001. *See* Administrator's Brief (AB) at 4; Petitioner's Brief (PB) at 5-6.

¹³ According to the contract, "The prevailing wage determination in accordance with the Davis-Bacon Act, if applicable, is attached hereto as Exhibit C." AR Tab E, para. 17. However, the Administrative Record does not contain "Exhibit C." The Administrator claims the residential wage determination for Hamilton County (Cincinnati), AR Tab M, was "included" in the construction contract. AB at 4. The Council does not dispute this.

Administrative Review Board on December 28, 2001.¹⁴ On January 11, 2002, the Council requested that the Wage and Hour Division reconsider its October 26, 2001 final determination.¹⁵

JURISDICTION

The ARB has jurisdiction over this dispute pursuant to the Davis-Bacon Act, 40 U.S.C.A. § 276a; Reorganization Plan No. 14 of 1950, 5 U.S.C.A. Appendix (West 2001) (delegating to the Secretary of Labor responsibility for developing government-wide policies, interpretations and procedures to implement the Davis-Bacon Act and the Related Acts); Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), and 29 C.F.R. §§ 7.1 and 7.9.

STANDARD OF REVIEW

The proceedings before the ARB are in the nature of an appellate proceeding, and the Board will not hear matters de novo except upon a showing of extraordinary circumstances. 29 C.F.R. § 7.1(e). The Board acts as fully and finally as might the Secretary of Labor concerning the matters within its jurisdiction. 29 C.F.R. § 7.1(d). The Board will assess the Administrator's rulings to determine whether they are consistent with the statute and regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act.¹⁶ The Board generally defers to the Administrator as being "in the best position to interpret those rules in the first instance . . . and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside."¹⁷

DISCUSSION

The Administrator ruled that the residential wage rates apply if the Alexandra project is built according to the modified, eighty-three apartment plan. The Council asks

¹⁴ Letter dated December 28, 2001, from Joseph D. Zimmer, Executive Secretary, Greater Cincinnati Building & Construction Trades Council to the Administrative Review Board. The Council characterizes this December 28 letter as a "petition for review."

¹⁵ AR Tab L.

¹⁶ *Miami Elevator Co.*, ARB Nos. 98-086/97-145, slip op. at 16 (Apr. 25, 2000), *citing Department of the Army*, ARB Nos. 98-120/121/122 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351-358).

¹⁷ *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

us to reverse this final ruling and order that the building wage rates be applied. The Administrator contends that her final determination must stand because the Council did not timely challenge that decision. Furthermore, the Administrator argues that even had the Council timely challenged her ruling, the decision should not be reversed because it was reasonable and consistent with departmental policy. We find that the Council's challenges were untimely and that, in any event, the Administrator's final determination that the residential wage determination would apply to the modified Alexandra plan was a reasonable exercise of her discretion and consistent with Department of Labor policy.

The Council's Challenges Were Not Timely

An "interested person"¹⁸ has two opportunities to challenge a general wage determination. The interested person may appeal directly to the Administrator: "Any interested person may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination."¹⁹ If unsuccessful with the Administrator, the interested person may petition the ARB to review the Administrator's final determination: "Any interested person may appeal to the Administrative Review Board for a review of a wage determination or its application made under this part, after reconsideration by the Administrator has been sought pursuant to § 1.8 and denied."²⁰

However, whether by seeking the Administrator's reconsideration or petitioning the ARB, challenges to wage determinations must be timely. The general rule controlling when a wage determination may be challenged is unequivocal:

All actions modifying a general wage determination
shall be effective with respect to any project to which the

¹⁸ "For purposes of this section, the term *interested person* is considered to include . . . any labor organization which represents a laborer or mechanic, who is likely to be employed or to seek employment under a contract containing a particular wage determination . . ." 29 C.F.R. § 7.2 (b)(1). We assume without finding that the Greater Cincinnati Building & Construction Trades Council is an "interested person" in this case.

¹⁹ 29 C.F.R. § 1.8.

²⁰ 29 C.F.R. § 1.9. The rules of practice before the ARB contain a similar provision. See 29 C.F.R. § 7.2(a). We note that the Council's Petition for Review to the ARB is dated December 28, 2001. However, the Council's request to the Administrator for reconsideration of the final determination is dated January 11, 2002. Section 1.9 (and 7.2(a)) requires that, before filing a petition with the ARB, an interested person must first seek reconsideration by the Administrator and be denied. Therefore, the Council's Petition for Review is not properly before us. Nevertheless, to avoid injustice and in the public interest, we will proceed to decide this dispute. See 29 C.F.R. § 7.1(c) ("In exercising its discretion to hear and decide appeals, the Board shall consider, among other things, timeliness, the nature of the relief sought, matters of undue hardship or injustice, or the public interest.").

determination applies, if published before contract award (or the start of construction where there is no contract award) except as follows: [The regulation then lists four exceptions not applicable here.]

....

(vi) A supersedeas wage determination or a modification to an applicable general wage determination, notice of which is published after contract award (or after the beginning of construction where there is no contract award) shall not be effective.²¹

Our predecessor agency, the Wage Appeal Board (WAB), often addressed the timeliness requirement for challenging wage determinations. That Board explained the importance of timely wage determination challenges:

It is vital to ensure that contractors competing for federally-assisted construction contracts know their required labor costs in advance of bidding. Manifest injustice to bidders would result if the successful bidder on a project could challenge his contract's wage determination rates after all other competitors were excluded from participation.

The timeliness requirements are among the Board's longest-standing precedents concerning challenges to wage determinations and the Board has consistently endorsed the restriction against challenges which are untimely. *Gananda Development Corporation*, WAB Case Nos. 73-13 and 73-14 (May 14, 1977); *Jordan & Nobles Construction Company*, WAB Case No. 81-18 (Aug. 19, 1983); *Kapetan Incorporated*, WAB Case No. 87-33 (Sept. 2, 1988); *M.A. Mortenson, supra*, at 6-7.²²

²¹ 29 C.F.R. § 1.6(c)(3). The residential wage determination incorporated into the Alexandra construction contract is a "general" wage determination rather than a "project" wage determination. Therefore, section 1.6(c)(3) applies. See AR Tab M. Section 1.6(c)(3) applies to "actions" taken by the Department of Labor. The Department, not interested persons, actually modifies wage determinations and publishes its actions. Since these governmental activities must occur before the contract award or start of construction in order for a modification to be effective, requests or petitions for this "action" must necessarily occur before contract award or start of construction. See *Modernization of the John F. Kennedy Fed. Bldg., Boston, Mass. ("JFK I")*, WAB No. 94-09, slip op. n.5 (August 19, 1994).

²² *Dairy Dev.*, WAB No. 88-35, slip op. at 18-19 (Aug. 24, 1990).

The Council clearly did not file timely challenges to the Administrator's October 26, 2001 final determination. The contract was awarded on November 1, 2001. Construction began on November 5, 2001. The Council made its challenges to the wage determination on December 28, 2001, and January 11, 2002. And because the exceptions to the general rule do not apply here, we find that the Council's challenges were untimely.²³

The Council urges that applying the timeliness rule here is fundamentally unfair.²⁴ It claims that neither the City nor the owner notified the Council about the October 26, 2001 final determination that residential rather than building rates would apply to the project. The Council argues that, according to WAB precedent, "lack of adequate notice to a petitioner regarding a wage determination decision can overcome the general 'timeliness' rules."²⁵ The Council therefore argues that we should waive the timeliness requirement. We decline to do so.

In *Utilities Services, Inc.*, the petitioner, a utilities subcontractor, filed an untimely challenge to a wage determination. The utility argued that because of "cryptic, imprecise" language on a cover sheet attached to the wage determination contained in the bid solicitation package, it had not been provided notice that only building wage rates, not sewer and water line rates, would apply to all work on the project. The WAB agreed and refused to dismiss the utility's challenge for lack of timeliness because it found that the utility company did not have "adequate notice" that only the building rates applied to the project. The WAB noted the responsibility that contractors have in resolving questions of applicable wage rates before contracts are awarded but stated: "The exercise of that responsibility, however, presupposes that contractors have adequate notice that a question requiring resolution does exist."²⁶

²³ As already indicated, the exceptions listed in section 1.6(c)(3)(i)-(iv) do not apply. Section 1.6(d) (Administrator may correct a wage determination if it contains clerical errors) is not applicable. Section 1.6(f) permits the Administrator to issue a wage determination after contract award or start of construction if: 1) no wage determination was initially included in the contract; 2) a wage determination that clearly does not apply was used; or 3) the wrong wage determination was used because the agency's request for the wage determination was based on an inaccurate description of the project or its location. The Council does not contend that any of the 1.6(f) exceptions apply. Moreover, we agree with the Administrator that these exceptions do not fit the facts of this case. See Administrator's Brief (AB), p. 7-8.

²⁴ PB at p. 3.

²⁵ *Id.* at p. 4.

²⁶ *Utility Services, Inc.*, WAB No. 90-16, slip op. at 5 (July 31, 1991).

Three years later the WAB again took up the timeliness issue. In *Modernization of the John F. Kennedy Fed. Bldg., Boston, Mass. ("JFK I")*, petitioners, three union groups, challenged a wage determination almost three months after construction began. The WAB referenced its "long line" of decisions stressing the importance of timely challenges to wage determinations.²⁷ But the Board also noted that "the critical analysis from a timeliness perspective focuses on the reasonable notice Petitioners had of the allegedly incorrect wage determination."²⁸ The WAB found that it had "insufficient" evidence to determine whether the unions had adequate notice. The Board, therefore, citing *Utility Services*, remanded the case to the Administrator to determine whether the unions had adequate notice prior to construction to challenge the wage determination.

On remand the Administrator found that the unions did have sufficient notice that the wage determination was improper and that, therefore, their request for reconsideration was untimely. However, when the case came back to the WAB on a second appeal, the Board found that "material submitted by Petitioners in support of this appeal adequately demonstrates that they did not have sufficient notice [of the allegedly improper wage determination] prior to the start of construction."²⁹ The WAB particularly relied upon an "unrefuted affidavit" from a union official who "credibly" attested that neither he nor any other representatives of his union were aware before construction began that the wrong wage determination had been incorporated into the contract. Under certain circumstances, therefore, untimely union challenges will be justified:

Unlike a prime contractor or subcontractor, the union would not necessarily be aware of the actual wage determination incorporated into a contract, or in this case the option, prior to the start of construction. Since it is not a party to the contract, the labor union would not necessarily be aware of the specific contractual terms. We conclude that Petitioners' failure to file a challenge to the wage determination prior to the start of construction is excusable under the facts of this case.³⁰

Nevertheless, the WAB observed that it could neither ignore nor excuse the nearly three-month gap between the start of construction, May 17, 1993, and the union's August 9, 1993 request for reconsideration. Therefore, the WAB affirmed the Administrator's

²⁷ *Modernization of the John F. Kennedy Fed. Bldg., Boston, Mass. ("JFK I")*, WAB No. 94-09, slip op. at 9 (Aug. 19, 1994).

²⁸ *Id.* at 11.

²⁹ *Modernization of the John F. Kennedy Fed. Bldg., Boston, Mass. ("JFK II")*, WAB No. 94-09, slip op. at 3 (March 24, 1995).

³⁰ *Id.* at 4.

determination that the petitioners' request for reconsideration was untimely:

Petitioners should reasonably have been aware of the allegedly improper wage determination contained in the [contract] within a short time period after the start of construction. Certainly, they should have been aware of this situation sooner than twelve weeks after the start of construction. Wage determinations, after all, are required to be posted by contractors on the site of construction from the first day of work. 29 C.F.R. § 5.5(a)(1)(i). The record contains no evidence to conclude that this regulation was violated.³¹

We will not excuse the Council's untimely challenges. The Council acknowledges that it was aware that there was a "debate" in the summer of 2001 about whether building or residential rates would apply.³² In fact, in July the Council itself had initiated the process whereby, eventually, the City decided to use the building rates.³³ The Council, therefore, as a "representative of a Labor Organization whose members are likely to be employed or to seek employment on this project,"³⁴ surely should have continued to monitor the contract negotiations to make sure that the awarded construction contract contained the building wage rates. Just as the DBA requires contractors to "resolve questions of applicable wage rates before contract award,"³⁵ we find that the Council, though not a party to the contract but nevertheless an "interested person," had a similar responsibility to keep informed and, if necessary, object before the contract was awarded.³⁶

Furthermore, we find that the Council's reliance on *Utility Services*, *JFK I*, and *JFK II* is unwarranted. As noted, in *Utility Services* the WAB excused the petitioner's untimely challenge because of an attachment to the wage determination which, on its

³¹ *Id.* at 4-5.

³² PB at p. 5.

³³ PB, Ex. A.

³⁴ Petition for Review, p. 1.

³⁵ *Utility Services*, slip op. at 5.

³⁶ The situation here is somewhat analogous to the facts in *JFK II*. There the WAB found that given their participation in earlier phases of the construction project, the unions' very late filing could not be excused because they "certainly were on notice of the need to confirm that the proper wage determination was actually incorporated into the [contract]." See *JFK II*, slip op. at 4.

face, was vague and which, by its imprecision, misled the petitioners about which wage determination applied. Here, on the one hand, the Council had actively participated in the wage rate debate and had initially spurred the City into changing the wage rate. On the other hand, from “July through December [it] heard nothing more about this job.”³⁷ Therefore, unlike the situation in *Utilities*, the Council was not misled but, apparently by its own inertia, did not continue its early efforts to secure the building rates. Hearing “nothing more about the job” demonstrates an irresponsible failure to stay informed about the status of the Alexandra project.

JFK II is distinguishable too. There the WAB based its finding on evidence, particularly the unrefuted affidavit, that demonstrated that the unions did not have adequate notice prior to construction. In contrast, this record contains only unsupported allegations and innuendo about why the Council did not have notice. For instance, the Council has produced no evidence to prove its contention that the City and the owner “excluded” it from the review process by not supplying it with the owner’s August 16, 2001 request for reconsideration letter.³⁸ Similarly, the Council has provided us with no evidence of its contention that, in effect, the City and the contractor colluded to deprive the Council’s laborers and mechanics from receiving the higher building wage.³⁹

Finally, we will not waive the timeliness requirement because the Council filed its Petition for Review on December 28, 2001, and its request for reconsideration on January 11, 2002, forty-three and fifty-seven days, respectively, after the November 5, 2001 start of construction. This delay is unreasonable and cannot be excused. The Council avers

³⁷ PB at p. 5.

³⁸ The Council asserts that because the Administrator indicated that his October 26, 2001 final determination was in accordance with 29 C.F.R. § 5.5(a)(1)(ii)(C), the City, as contracting officer, was required to “serve the Administrator with the views of all interested parties.” PB at n.1. Had the City done so, the Council appears to argue, the Administrator would have sent the October 26, 2001 final determination letter to the Council thus putting it on notice that the residential rates were applicable. However, we agree with counsel that the Administrator’s reference to section 5.5(a)(1)(ii)(C) was inadvertent and obviously incorrect. As this regulation clearly applies to the conformance process, never an issue in this case, the Council cannot rightfully seize upon the Administrator’s inadvertence and claim it was excluded from the review process. *See* AB at n.3.

³⁹ “Both the City of Cincinnati and the developers knew the Petitioner was an interested party, and yet they decided not to inform the Council of the August 16, 2001 letter to Director Gross, or his subsequent October 26, 2001 decision The potential for the abuse of the wage determination process by contractors and municipalities . . . is too great to allow for rigid application of the timeliness rule. Ignoring the potential for abuse would not serve to further the remedial purposes of the Davis-Bacon Act, and would encourage manipulation of the regulations to avoid paying working men and women the wages to which they are entitled.” PB at p. 6.

that the Administrator's October 26 final determination was not "brought to [its] attention" until December 20, 2001. Nevertheless, we find that shortly after construction began the Council should have been aware that its members were receiving residential wages.⁴⁰

The Administrator's Final Determination is Reasonable and Consistent with DOL Policy

We briefly recap the events leading to the Administrator's October 26, 2001 final determination. On August 16, 2001, the project owners requested that the Administrator review the site plans and construction drawings for the proposed 91 apartment renovation of the Alexandra building and, in light of the plans, to determine whether the proposed apartment building would be a four or five-story structure. Furthermore, they inquired whether the project would be considered a four or five-story building if they altered the proposed plan by not building apartments on the lowermost story.⁴¹ Whether a residential apartment building subject to the minimum wage requirements of the Davis-Bacon Act is a four or five-story structure is, of course, critical in determining the proper wages to be paid to laborers and mechanics. Thus, the owners' query to the Wage and Hour Administrator was appropriate.⁴²

William Gross, the Administrator's authorized representative, responded on October 26, 2001. He indicated that his office had reviewed the plans and drawings. He also specifically referenced the criteria that his office considers when replying to such inquiries. Gross then answered the owners' questions about the height of the building.⁴³

⁴⁰ See *JFK II*, slip op. at 4. General Wage Determination Number OHO10004, Modification 2, dated November 16, 2001, for residential construction (AR Tab M), was incorporated into the construction contract. Thus, the Council should have been aware, by November 16 at the latest, that its members working on the Alexandra project were being paid at the residential wage rate. Furthermore, by November 16, this residential wage determination would have been posted "in a prominent and accessible place where it can be easily seen by the workers." See 29 C.F.R. § 5.5(a)(1)(i).

⁴¹ AR Tab B.

⁴² "All questions relating to the application and interpretation of wage determinations . . . shall be referred to the Administrator for appropriate ruling or interpretation." 29 C.F.R. § 5.13.

⁴³ Gross wrote:

Following telephone discussions with various Wage and Hour staff, you were provided a copy of the criteria, published in the Davis-Bacon Construction Wage Determinations Manual of Operations, we consider when making a determination as to whether a structure is more or less than four stories in height. The exterior height of residential buildings in terms of

As we noted above, he concluded that the building would be five stories according to the original plan and thus considered building construction. But the project would be residential construction if the alternative plan were implemented.

The Council asks us to remand this case to the Administrator for reconsideration because the final determination “lacked fundamental fairness” and “does not effectuate the remedial purposes of the Act.”⁴⁴ However, we find that, unlike its argument pertaining to timeliness, the Council’s arguments as to the sufficiency of the Administrator’s final determination are wholly without merit. The final determination clearly and correctly interprets the applicable criteria for determining whether the Alexandra project, under either the original or the modified plan, should be considered building or residential construction. Gross’s reliance on and interpretation of the aforementioned Davis-Bacon manual was thoroughly appropriate, given that this manual contains the department’s guidelines for interpreting wage determination issues.⁴⁵

The Council has not identified anything in this record that demonstrates that Gross’s interpretation exhibits an unexplained departure from past practice or is otherwise unreasonable.⁴⁶ Instead, the Council reiterates its contentions, discussed above, that it did not receive proper notice of the owner’s request for reconsideration and that the City, owners, and the contractor conspired to exclude the Council from the wage determination review process. Thus, argues the Council, the process was “fatally flawed” and did not protect its “due process rights.”⁴⁷ The Council also contends that because Gross’s decision was based on proposed grading changes and a “hypothetical change” in the number of apartment units, the Council is “left at the mercy of the developer which can unilaterally decide which set of plans to follow and change the determination accordingly.”⁴⁸

We, of course, express no opinion about any rights the Council had in

stories is a primary consideration. In this regard, when the structure is more than four stories it is considered to be building construction.

AR Tab A.

⁴⁴ PB at p. 7-10.

⁴⁵ See AR Tab O.

⁴⁶ See *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), citing *Udall v. Tallman*, 380 U. S. 1, 16-17 (1965).

⁴⁷ PB at p. 9.

⁴⁸ *Id.*

determining how the owners should have developed the Alexandra project. But we reject the Council's unsupported arguments that the process was flawed and that therefore the Administrator must reconsider her final decision. Our task is to assess the Administrator's ruling and determine if it was consistent with the Davis-Bacon Act and Department of Labor policy concerning wage determination disputes.⁴⁹ Since we find that the October 26, 2001 ruling does comport with the Act and applicable guidelines, we affirm it.

We find that the Council's challenges to the Administrator's October 26, 2001 final determination were untimely because they were made well after the construction contract was awarded and construction began. Furthermore, the Council has not demonstrated a reasonable basis for us to waive or excuse its untimely challenges. Finally, the Administrator's final ruling comports with the Davis-Bacon Act and departmental policy. For these reasons the Petition for Review is **DENIED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

⁴⁹ *Miami Elevator Co.*, ARB No. 98-086, slip op. at 16 (April 25, 2000).