



In the Matter of:

**WASHINGTON, D.C., NATIONAL  
ELECTRICAL CONTRACTORS  
ASSOCIATION**

**ARB CASE NO. 98-054**

**DATE: June 30, 1999**

**With respect to request for review and  
reconsideration of General Wage  
Decision DC970003**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**Appearances:**

*For the Petitioner:*

Gary L. Lieber, Esq., *Schmeltzer, Aptaker & Shepard, Washington, D.C.*

*For the Respondent:*

Steven J. Mandel, Esq., Douglas J. Davidson, Esq., Ellen R. Edmond, Esq.  
*U.S. Department of Labor, Washington, D.C.*

**FINAL DECISION AND ORDER**

This case is before the Board on the petition of the Washington, D.C., chapter of the National Electrical Contractors Association (DC NECA) pursuant to the Davis-Bacon Act, 40 U.S.C. §276a *et seq.* (DBA), and its implementing regulations. *See* 29 C.F.R. Parts 1 and 7 (1998). DC NECA seeks review of the November 18, 1997 final ruling issued by the designee of the Acting Administrator, Wage and Hour Division, (the Acting Administrator) denying its request for reconsideration of General Wage Determination DC970003, the Davis-Bacon general wage determination covering building construction in the metropolitan Washington, D.C., area.

The general wage determination challenged by DC NECA includes Davis-Bacon wage and fringe benefit rates for a wide variety of construction trades. However, it does not include rates for Communications/Telephone Interconnect (CTI) workers. DC NECA specifically argues that the Acting Administrator's issuance of General Wage Determination DC970003 without classifications for workers in the CTI category constitutes an abuse of discretion. As relief, DC NECA seeks modification of the general wage determination to include classifications of CTI workers, with wage determination rates based on wage rates negotiated for such workers under a collective bargaining agreement between Local 26 of the International Brotherhood of

Electrical Workers (IBEW) and DC NECA.<sup>1/</sup> In the alternative, DC NECA requests that we direct the Acting Administrator to conduct a new wage survey to ascertain the prevailing wage rate for CTI workers in the Washington, D.C., metropolitan area.

For the reasons set forth below, we deny DC NECA's petition.

## BACKGROUND

Between 1995 and 1997, the Wage and Hour Division's general wage determinations for building construction in the Washington, D.C., area included wage rates for CTI workers. However, a new wage determination series for the same locality, first published in 1997 and subsequently modified, did not include the CTI worker category. This change in the wage determination (*i.e.*, the deletion of wage and fringe benefit rates for CTI workers) was the result of new survey data. The Wage and Hour Division's decision not to publish wage and fringe benefit rates for CTI workers in the 1997 general wage determination prompted this appeal.

Beginning sometime in Fiscal Year 1994 and continuing through early 1995, the Acting Administrator conducted surveys of the wages paid employees working on construction projects in Washington, D.C., and surrounding counties. Administrative Record (AR), Tabs J-O.<sup>2/</sup> These wage surveys solicited input regarding wage rates for the various classifications of construction employees from hundreds of entities in the following categories: unions representing employees in the building trades; associations representing construction contractors; and individual contracting firms or businesses that could be expected to employ construction personnel. AR, Tabs A, H; *see* 29 C.F.R. §1.3(a) (1998). The Wage and Hour Division contacted NECA national headquarters, the national and Local 26 offices of the IBEW, and several contractors who are signatories to the CTI bargaining agreement. AR, Tabs A, H, I. Significantly, *none* of the project data provided by the respondents for the wage surveys for Washington, D.C., and the surrounding counties included wage data for CTI workers. AR, Tabs A, C, J-O. The Administrative Record indicates that data was submitted in response to the aforementioned wage surveys at least as late as January 31, 1995. AR, Tab I; *see also* Statement on Behalf of the

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<sup>1/</sup> Specifically, DC NECA submitted a recently negotiated Teledata Agreement, effective from December 1, 1997 through August 31, 2000. Also in connection with its challenge to the wage determination, DC NECA submitted excerpts from a Communications/Telephone Interconnect Agreement, which DC NECA indicates was in effect from October 1, 1993 through September 30, 1997. *See* AR, Tabs Q - S.

<sup>2/</sup> The Administrative Record contains information regarding the following wage surveys: Survey 94-DC-021, for building construction in Washington, D.C. (Tab J); Survey 94-MD-022, for building construction in Montgomery County, Maryland (Tab K); Survey 94-MD-122, for building construction in Prince George's County, Maryland (Tab L); Survey 94-VA-023, for building construction in Fairfax County, Virginia (Tab M); Survey 94-VA-123, for building construction in Arlington County, Virginia (Tab N); Survey 94-VA-223, for building construction in Alexandria County, Virginia (Tab O).

Acting Administrator at 3 (stating that cut-off date for survey responses was Jan. 31, 1995). The data provided by respondents to these wage surveys includes data for projects already in progress in 1994 and for projects scheduled to begin in 1995 and 1996.<sup>3/</sup> AR, Tab J.

On February 10, 1995, and before the wage data collected through the 1994-95 survey was analyzed and translated into general wage decisions under the Davis-Bacon Act, the Wage and Hour Division issued general wage determination (GWD) DC950001, Modification 0, applicable to building-type construction in Washington, D.C. AR, Tab G. Over the next several months, the Wage and Hour Division issued ten modifications to DC950001. *Id.* GWD DC950001, as originally published and in all its modifications, contained classifications and wage rates for employees working under the CTI category. *Id.*; see Pet. for Review at 3; Statement on Behalf of the Acting Administrator at 2.

On February 14, 1997, a new general wage determination, GWD DC970003, Modification 0, was issued by the Wage and Hour Division. AR, Tab F. Neither this initial version of GWD DC970003 nor any of the ten modified versions issued during the subsequent months contained classifications for workers under the CTI category. *Id.* By letter dated July 3, 1997, DC NECA formalized a previous oral request for reconsideration of GWD DC 970003, based on its concern that the CTI classifications had been improperly omitted. AR, Tab E. DC NECA received a response from Northeast Regional Wage Specialist George Durbin, who indicated that no data regarding the CTI worker classifications had been received by the Wage and Hour Division as part of the surveys that formed the basis for the challenged general wage determination. AR, Tab C. DC NECA appealed its challenge to the Wage and Hour Division's national office. AR, Tab B.

On November 18, 1997 a final determination was issued by the Acting Administrator. AR, Tab A. The Acting Administrator's final determination reiterated that no wage or fringe benefit data for CTI workers had been received in the wage surveys which resulted in the publication of general wage determination DC970003. *Id.* The November 18 determination also explained that the wage surveys had been conducted in accordance with guidelines provided by the Construction Wage Determinations Manual of Operations, which is used by the Wage and Hour Division in the issuance of Davis-Bacon wage decisions, and that "[e]very effort was made to obtain wage payment information from all interested parties . . . ." *Id.* Further, the determination stated that the general wage determination could not be modified to add CTI worker classifications at collectively bargained rates based on the assumption that such rates would prevail for CTI workers simply because the wage surveys had shown that collectively bargained rates prevailed for other classifications of workers performing electrical work. *Id.* The November 18 ruling concluded by stating that, although it was too late to schedule a new

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<sup>3/</sup> The Administrator states that the data submitted by DC NECA regarding CTI workers employed in construction work covers "a different period than that covered by the survey." Statement on Behalf of the Acting Administrator at 10. Neither the Administrative Record nor the Administrator's brief, however, specifies the period of time that was covered by the wage survey.

wage survey in Fiscal Year 1998, the scheduling of such survey for the Washington, D.C., metropolitan area would be considered for Fiscal Year 1999. *Id.* This appeal followed.

## DISCUSSION

On appeal, DC NECA argues that deficiencies in the wage survey process contributed to the lack of data provided by survey respondents regarding CTI workers, thus leading to the omission of CTI classifications from GWD DC970003. DC NECA urges that the Acting Administrator's refusal to modify the general wage determination to include CTI classifications, in these circumstances, constitutes an abuse of discretion. In response, the Acting Administrator counters that DC NECA has not demonstrated that his action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Specifically, the Acting Administrator defends the wage survey underlying the general wage determination as consistent with established practice, and with pertinent regulatory and decisional authority. The Acting Administrator urges that the omission of the CTI classifications from the general wage determination can be remedied -- as necessary, on a project-by-project basis -- by the addition of such classifications through the "conformance" process delineated at 29 C.F.R. §5.5(a)(1)(v) (1998).<sup>4/</sup>

We initially address DC NECA's argument regarding the adequacy of the wage survey underlying GWD DC970003. Questions concerning errors in the wage survey and wage determination process have frequently been presented to this Board and its predecessor, the Wage Appeals Board. Only in limited circumstances has either Board determined that the reopening of a wage determination or the conducting of a new wage survey was required. For example, the petitioner in *Laborers' District Council*, WAB Case No. 92-11, Oct. 21, 1992, *aff'd on reh'g*, Apr. 29, 1993, successfully challenged a general wage determination containing an "unfairly low" wage rate for laborers. In that case, the Wage Appeals Board overturned the general wage determination because the Wage and Hour Division failed to comply with regulatory requirements restricting the use of wage data from surrounding counties to those instances in which data for a particular county is found to be inadequate. *Laborers' District Council*, slip op. at 5-7. Similarly, the petitioner in the matter of *St. Mary's Hosp.*, WAB Case No. 75-04, July 11, 1975, successfully challenged a general wage determination modification that resulted in an approximate 25% hourly wage increase for electricians. In *St. Mary's*, the Wage Appeals Board overturned the modification of a general wage determination because it

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<sup>4/</sup> The pertinent DBA conformance regulation, found at 29 C.F.R. §5.5(a)(1)(v), is a former regulation that was reinstated in November 1993 to replace the conformance regulation found at Section 5.5(a)(1)(ii). 58 Fed. Reg. 58954 (Nov. 5, 1993). At that time, Section 5.5(a)(1)(ii), which contains language regarding conformance of "helpers," was suspended indefinitely based on appropriations legislation prohibiting the expenditure of DOL funds to administer "helper" regulations. *Id.*; see 59 Fed. Reg. 1029 (Jan. 7, 1994). A final rule continuing the suspension of Section 5.5(a)(1)(ii) was published on December 30, 1996. 61 Fed. Reg. 68641 (Dec. 30, 1996); see 63 Fed. Reg. 61284 (Nov. 9, 1998).

was issued on the basis of data submitted by a union local before the contractor was notified and provided an opportunity to respond. *St. Mary's Hosp.*, slip op. at 7-8.

These cases, in which improper wage rates were published as the result of error in applying the regulations governing wage determinations or as the result of a patently prejudicial error in the wage survey process, are clearly distinguishable from the case that is before us. In the instant case, *no wage rate* has been set for the CTI workers: the CTI classifications were not published as part of the general wage determination because no wage or fringe benefit data for the classification was submitted to the Wage and Hour Division as part of its Washington, D.C., area wage survey. The omission of a classification, as discussed *infra*, may be remedied through the conformance process; there is no procedure for challenging a wage rate contained in the wage determination other than through a challenge to the wage determination, as provided for at 29 C.F.R. §1.8 (1998). Furthermore, on the following basis, we conclude that DC NECA has not demonstrated reversible error in the 1994 wage survey underlying the general wage determination that is at issue.

DC NECA points out that DC NECA did not receive direct notice of the wage survey and notes that the Acting Administrator's brief ignores the distinction between notifying NECA's national office regarding the wage survey and notifying the local DC NECA office. Despite the lack of direct notice to the DC NECA office,<sup>5/</sup> the record demonstrates that wage survey data was solicited from a number of interested parties in both the labor and industry sectors of the CTI construction field. AR, Tabs H, I. For example, the November 18, 1997 final ruling indicates that sixteen contractors who were signatories to the CTI workers' collective bargaining agreement participated in the wage survey. AR, Tab A at 2. It therefore is clear that the local employer community represented by DC NECA had actual knowledge of the Wage and Hour Division's wage survey during the relevant time period.

Furthermore, a comparison of the list of contractors included in the documentation submitted by DC NECA in support of its reconsideration request with the list of contractors contacted by the Wage and Hour Division in the course of the wage survey provides further support for the conclusion that the wage survey was not deficient. Of the twenty-three contractors from which DC NECA obtained information attesting to the 1997 employment of CTI workers, ten had been asked directly by Wage and Hour to participate in the 1994 wage survey. AR, Tabs E, H. This comparison indicates that a meaningful segment of the employers in the CTI construction industry participated in the wage survey, and did not choose to submit wage data documenting the employment of CTI workers. We conclude that contractors in the CTI construction field were given adequate opportunity to provide wage data regarding the employment of CTI workers in the course of the 1994 wage survey. *Cf. In re Alarm Control*

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<sup>5/</sup> Both the Administrator's ruling of November 18, 1997, and the DBA Construction Wage Determinations Manual of Operations note the significance of notifying organizations such as trade associations and unions at both the national and the local levels. AR, Tab A at 1-2; Manual of Operations (1986) at 50.

Co., WAB Case No. 93-24, May 27, 1994, slip op. at 5-8 (concluding that neither contractors nor their trade association had received adequate notice of wage survey). We therefore decline to direct the Acting Administrator to revise GWD DC970003.

The Acting Administrator points out that individual contractors may request the addition of the CTI worker classifications, post-award, to any particular construction contract for which the contractor considers CTI workers necessary, using the conformance process. Statement on Behalf of the Acting Administrator at 8; *see* 29 C.F.R. §5.5(a)(1)(v) (1998). In opposition, DC NECA urges that a blanket modification of the GWD is preferable to use of the *ad hoc* conformance process. Pet. for Review at 9 n.2; Reply Brief at 7; *see* 29 C.F.R. §1.6 (1998).

We agree that, as a general proposition, pre-contract award clarifications and modifications of wage determinations are favored in the interest of maintaining the integrity of the competitive bidding process. *See, e.g., Joe E. Woods, Inc.*, ARB Case No. 96-127, Nov. 19, 1996, slip op. at 3-4 and authorities there cited. However, there is an important countervailing consideration at issue in this case: the need for finality in the Division's wage survey process.

Undoubtedly, it would be preferable for the Department's general wage determination to include a job classification covering CTI work. The ability of contractors to seek post-award approval of a conformed wage rate for CTI workers on a project-by-project basis plainly is *not* equivalent to the generalized modification of the general wage determination that DC NECA seeks, for at least three reasons. First, the addition of the CTI classification to the general wage determination has the virtue of placing all bidders on notice of the prevailing wage rate for CTI workers *during the bidding process*, thereby eliminating any ambiguity concerning a contractor's Davis-Bacon wage payment obligations and helping insure a "level playing field" among bidders. *Pizzagalli Construction Co.*, ARB Case No. 98-090, May 28, 1999, slip op. at 5. Second, although the Davis-Bacon regulations require that the conformed wage and fringe benefit rates proposed by the contractor must "bear[ ] a reasonable relationship to the wage rates contained in the wage determination," 29 C.F.R. §5.5(a)(1)(ii)(A)(3), there is no assurance that the *same* conformed wage and fringe benefit rates for CTI workers uniformly will be proposed by contractors and approved by the Acting Administrator on each and every project, posing the possibility of inconsistent conformed rate determinations and inequities in the competitive process. Third, reliance on the conformance process to add the CTI wage and fringe benefit rates on a project-by-project basis results in an additional administrative burden on contractors and contracting agencies.

For these reasons, we encourage the Acting Administrator to consider all available options that would add the CTI classification to the general wage determination at an early date. We decline, however, to grant DC NECA's petition and direct the Acting Administrator to modify the general wage determination, or to order the Acting Administrator to conduct a new wage survey. In this case, the Acting Administrator has determined that in the absence of survey data on which CTI classifications and wage rates may be developed for inclusion in the wage determination, the preferred course of action is to add the CTI worker classifications, as needed,

on a project-by-project basis through the conformance process.<sup>6/</sup> Although a limited survey of the CTI segment of the construction industry could be undertaken to provide the needed data, this is not a case in which the Administrator has failed to conduct an adequate wage survey. *Cf. Audio-Video Corp.*, ARB Case Nos. 95-047, 96-117, 96-119, 96-120, 96-149, July 17, 1997 (concluding that adequate wage surveys were not conducted and therefore remanding six conformance cases to the Administrator for further proceedings).

Although the Acting Administrator's reliance on the project-by-project conformance requests may not be the sole vehicle for addressing the concerns raised by DC NECA in this case, this approach is a reasonable exercise of the Acting Administrator's discretion in administering the wage determination program, and is consistent with the applicable regulations and agency practice. Where an adequate wage survey has been conducted, and no wage data has been submitted documenting wage and fringe benefit rates paid to a classification of worker, it is within the Acting Administrator's discretion to omit the classification from a general wage determination. We therefore decline to order the Acting Administrator to modify the wage determination to add the CTI worker classification, or to direct that a new wage survey be conducted.

### **ORDER**

Accordingly, DC NECA's petition is **DENIED**, and the Acting Administrator's November 18, 1997 ruling is **AFFIRMED**.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member

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<sup>6/</sup> The Acting Administrator's position regarding reliance on the conformance process to facilitate addition of CTI worker classifications to contracts to be performed under GWD DC970003 implies that the Wage and Hour Division considers the CTI worker classifications at issue to meet the Section 5.5(a)(1)(v)(A)(1) and (2) requirements that "the work to be performed by the classification requested is not performed by a classification in the wage determination" and "[t]he classification is utilized in the area by the construction industry." *Cf. Alarm Control Co.*, slip op. at 4-5 (emphasizing importance of notice to affected parties regarding change in Wage and Hour practice of approving certain classifications under the conformance procedure).