



In the Matter of:

**ENVIRONMENTAL CHEMICAL
CORPORATION**

ARB CASE NO. 96-113

(Formerly BSCA^{1/} CASE NO. 96-02)

**With respect to review and
reconsideration of classification
conformance ruling under the Service
Contract Act as applied to Contract
No. DACA87-92-D-0126, Camp Elliott,
San Diego, California**

DATE: February 6, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This matter is before the Board pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA) 41 U.S.C. §§351-358 (1988), and the regulations at 29 C.F.R. Parts 4 and 8 (1996). The case involves workers employed on a project to remove unexploded ordinance under a federal service contract (No. DACA87-92-D-0126) issued on June 17, 1992 by the United States Army Corps of Engineers (Corps).

In accordance with 29 C.F.R. §8.7, Environmental Chemical Corporation (ECC) filed a Petition for Review of the January 17, 1996 ruling of the Wage and Hour Division's National Office Program Administrator (Administrator) issued on March 14, 1996. *See*, Tab A of the Administrative Record (AR). The Administrator's final ruling (AFR) denied review and reconsideration of Wage and Hour's June 7, 1993, approval of ECC's request for the addition of various classifications and wage rates to the wage determinations applicable to the aforementioned contract. In addition, the AFR rejected ECC's contention that brush clearing work, for which the Swamper (Slash Piler), Sawyer (Brush/Pre-Commercial Thinner) and Team Leader (Brush Crew) classifications were initially requested, could be performed by the laborer classification already included in the existing wage determinations.

^{1/} Board of Service Contract Appeals; *see* 29 C.F.R. Part 8 (1995). On May 3, 1996 the appellate responsibilities previously performed by the BSCA were delegated to the Administrative Review Board pursuant to Secretary's Order 2-96.

Finally, the Administrator denied ECC's request for the modification of rates for four of the recently conformed classifications. The Administrator found that one of the four proposed rates did not show a "reasonable relationship" to others of a similar grade, performing equivalent job duties. Regarding the remaining three the Administrator found, that the information submitted by ECC was "insufficient since input from the employees who signed the initial conformance request was not provided." AFR at 4. For the reasons stated below, the Administrator's ruling is affirmed in part and reversed in part.

The March 14, 1996 Petition for Review was answered by counsel for the Administrator on May 3, 1996. In addition to the parties' other pleadings before this Board, we have received a request from two International unions, the Laborers' International Union of North America and the International Brotherhood of Teamsters, to intervene in the case. The unions' intervention, opposed by the ECC in a motion dated May 3, 1996, was approved by Order of the Board dated October 7, 1996, and the unions have submitted statements which we have considered in our deliberations concerning this matter. 29 C.F.R. §8.12.

BACKGROUND

Petitioner is a minority owned small business. Work on this contract began on July 27, 1992 and is now completed. ECC initially sought review of the three blanket wage determinations^{2/} applicable to the Camp Elliott Ordinance Removal project through its February 1, 1994 letter requesting review and reconsideration. Previously, in January of 1993, ECC had requested the addition of eighteen classifications not included in the applicable wage determinations. By notice dated June 7, 1993, Wage and Hour's Director of the Division of Wage Determinations approved the addition of all eighteen classifications and corresponding wage rates.^{3/} The February 1, 1994 request for reconsideration of the June, 1993 modifications made three separate and specific claims for relief:

- (1) Permission to withdraw the requests for conformance with respect to seven classifications, claimed to fall within the executive or

^{2/} The wage determinations applied to Imperial County, California where Camp Elliott is located. The applicable wage determinations were: WD88-0209 (Rev. 6) that set the prevailing wage rates for administrative support and clerical occupations; WD88-0213 (Rev. 5) that set forth the rates for "blue collar" occupations, and WD88-0221 (Rev. 5) that listed rates for protective service occupations such as security guards and firefighters.

^{3/} At approximately the same time, the Corps requested that ECC provide immediate restitution to those employees affected by the classification modifications and warned that ". . . if ECC did not give adequate indications of compliance, the Corps would withhold more contract funds in addition to the \$50,000 already withheld." By the time the work on this contract was completed in 1995, approximately 1 million dollars in contract funds had been withheld from Petitioner. Statement of the Administrator at 4, fn. 4.

professional exemptions as defined in the Department's Regulations at 29 C.F.R. Part 541;

- (2) Approval of the application of unskilled laborer's wage rates to the work performed under the "Swamper," "Sawyer," and "Team Leader" classifications, which were conformed by Wage and Hour; and
- (3) Modification of the wage rates issued for four of the conformed classifications based on updated wage rate information submitted by ECC to the contracting agency.

As noted above, the Administrator denied all three of these requests.

DISCUSSION

The conformance procedure is the method by which an employee classification not listed on the wage determination can be added. The regulations which outline this procedure are found at 29 C.F.R. §§4.6 and 4.152.

The conformance process is not a *de novo* proceeding to retroactively determine the prevailing wage for a particular classification -- rather it is a procedure by which the Administrator may establish a wage rate for a classification missing from the wage determination, but necessary to perform the contract. *Childress Painting and Associates, Inc.*, ARB Case No. 96-121, Fin. Dec. and Ord., Aug. 23, 1996. Dec.^{4/} In establishing a conformed rate, the Administrator is given broad discretion and his or her decisions will be reversed only if inconsistent with the regulations, or if they are "unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations. . . ." *Titan IV Mobile Service Tower*, WAB^{5/} Case No. 89-14, May 10, 1991.

Moreover, the SCA's primary purpose is to ensure that employees under a given service contract are compensated in accordance with prevailing industry standards. 41 U.S.C. §351(a)(1), (2). Central to the statutory enforcement scheme of this statute is the proposition

^{4/} See e.g. *Charles Randall, An Individual D/B/A Rut's Moving and Delivery Service*, Case No. 87-SCA-32, Dep. Sec. Dec., Dec. 9, 1991.

^{5/} Wage Appeals Board; see 29 C.F.R. Part 7 (1995). Prior to Secretary's Order 2-96, The Wage Appeals Board issued final agency decisions concerning the Davis-Bacon (40 U.S.C. §276a *et seq.*) and its related Acts (see 29 C.F.R. §5.1 (1995)), prevailing wage statutes concerning federal and federally-assisted construction which are analogous to the SCA.

that the primary and authoritative interpreter of the contract labor standards and implementing regulations is the office of the Wage and Hour Administrator.

Applicable Exemption

ECC's first claim regarding the applicable exemptions is denied because, in essence, it is premature. Under the SCA it is axiomatic that service employees are to be paid on the basis of work which is actually performed under the contract. ECC on the other hand would seek to turn the process on its head and have exemptions granted at the beginning of the work and on the basis of job titles and/or proposed duties. The Administrator's ruling was that an individual employee's entitlement to an exemption from wage determination rates "is a determination that must be based on the pertinent facts related to the individual's employment." AFR at 2.

The thrust of ECC's argument is that the SCA's conformance regulations do not apply to the exempt classes of employees. Thus, the "Administrator [has] no authority to conform wage rates for that class of employees." ECC's Statement at 2. While it is true that executive, administrative and professional employees are not covered by the SCA, the determination of whether an individual employee meets the requirements for a "specific exemption" (*see* §§4.115 *et seq.*) must be based on the pertinent facts related to that individual's particular employment. We agree with the Administrator that the conformed classifications with their wage rates and fringe benefits remain applicable to any employees who are not properly exempt. AFR at 2.

Unskilled Laborer Classification

ECC previously sought approval of conformed classifications for Sawyer, Swamper and Team Leader. The Administrator granted those requests, implicitly finding that the work to be performed pursuant to those classifications was not already performed by any job classification in the original wage determination. *See* 29 C.F.R. §4.6(b)(2)(i). The Administrator noted that the "prior approval of ECC's conformance of the Swamper, Sawyer and Team Leader classifications was based on the representation that employees working in these occupations were engaged primarily in brush clearing activities." AFR at 3. Our predecessor, the Board of Service Contract Appeals, examined the job duties of the laborer classification in a prior case and agreed with the Administrator's argument in that case that laborers "cut trees and brush." *In the Matter of Rural/Metro Corp.*, BSCA Case No. 92-27, Mar. 26, 1993, slip op. at 8, quoting the Wage and Hour Division's SCA Directory of Occupations, 2 Ed., July 1, 1986. Thus, the conformance requests for these three classifications should not have been granted in the first place because there was already a job classification in the wage determination, laborer, that performed brush clearing work.^{6/} The granting of the conformance requests for Swamper,

^{6/} We note that the Wage and Hour Division's current SCA *Directory of Occupations* lists four separate categories of laborer. We conclude, however, that the laborer classification most closely related to the duties in this matter is the same as that in issue in *Rural Metro*, that is Classification No.

(continued...)

Sawyer and Team Leader were not consistent with the requirements of 29 C.F.R. §4.6(b)(2)(i) and was an unexplained departure from the Administrator’s ruling in the *Rural/Metro* matter, as affirmed by the BSCA.

In the AFR, the Administrator explained that even though the laborer classification “does include some incidental tree and brush cutting work, this classification was not intended to include employees engaged almost exclusively in such activities.” AFR at p. 3. We find this argument unpersuasive. The general “laborer” classification in the wage determination is intentionally broad to cover workers who perform a wide range of unskilled physical labor. On any given contract a laborer may perform exclusively one or more of the tasks set out in the classification. In light of the inclusion of the general “laborer” classification in the wage determination and cognizant of the fact that the *SCA Directory of Occupations* lists the disputed duties under the “laborer” category of jobs, the Board finds the requirements of 29 C.F.R. §4.6(b)(2)(i) to preclude the granting of these three conformance requests in this case.

We therefore reverse the AFR to the extent that the Administrator has refused to remove the Swamper, Sawyer and Team Leader conformed classifications from the wage determination. ECC’s request that the brush clearing work be compensated at the laborer rate is granted.

Updated Wage Information

With respect to ECC’s request to further modify previously conformed rates, the Administrator held that the proposed rate for the Motor Vehicle Mechanic classification (\$14.23 per hour for a wage grade-10 position) did not bear a reasonable relationship to the wage grade 10’s performing equivalent job duties at \$15.41 per hour under WD88-0213 (Rev. 5). AFR at 4. We agree. The straightforward ruling with respect to the “unexploded ordinance”

^{6/}(...continued)
23470, “LABORER:”

Performs tasks which require mainly physical abilities and effort involving little or no specialized skill or prior work experience. The following tasks are typical of this occupation: Loads and unloads trucks, and other conveyances; moves supplies and materials to proper location by wheelbarrows or handtrucks; stacks materials for storage or binning; collects refuse and salvageable materials. *Digs, fills, and tamps earth excavations; levels ground using pick, shovel, tamper and rake;* shovels concrete and snow; cleans culverts and ditches; *cuts tree and brush;* operates power lawnmowers. Moves and arranges heavy pieces of office and household furniture, equipment, and appliances; moves heavy pieces of automotive, medical engineering, and other types of machinery and equipment. Spreads sand and salt on icy roads and walk-ways; picks up leaves and trash. [Emphases added.]

The applicable wage determinations listed only the classification “Laborer.”

classifications was that ECC failed to submit information sufficient to support its request for review and reconsideration. *Id.*; 29 C.F.R. §4.6(b)(2)(i). In both of these rulings, we conclude that the Administrator has reviewed the evidence before the Wage and Hour Division and properly applied the regulatory requirements and the applicable case law.^{2/}

Accordingly, the Administrator's decision **IS AFFIRMED IN PART AND REVERSED IN PART** as set out above.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

^{2/} See, e.g. the ruling of the Deputy Secretary in the case of *Systems Engineering Associates Corporation*, Case No. 86-SCA-OM-2, Jan. 12, 1988 (“[w]hen a wage determination does not include a class of service employee which is to be employed under the contract *i.e.* the work to be performed is not performed by any classification listed in the wage determination), the contracting officer shall require that such an employee classified by the contractor so as to provide a reasonable relationship (*i.e.* appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determinations. 29 C.F.R. §4.6(b)(2)(i). In addition, section 4.152(c) of 29 C.F.R. provides that ‘conformance may not be used to artificially split or subdivide classifications listed in the wage determination.’”) *Id.* at slip op. 4-5.