



**In the Matter of:**

**ERC/TELEDYNE BROWN  
ENGINEERING**

**ARB CASE NO. 05-133**

**Dispute concerning job classification  
and wage rates for ERC employees  
working on Contract NNM04AA05C  
at the National Aeronautics and Space  
Administration, George C. Marshall Space  
Flight Center, Alabama.**

**DATE: January 31, 2007**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner:*

**Gordon E. Henry, Huntsville, Alabama**

*For Respondent Administrator, Wage and Hour Division:*

**Carol B. Feinberg, Esq., Ford F. Newman, Esq., William C. Lesser, Esq., Steven  
J. Mandel, Esq., Howard M. Radzely, Esq., United States Department of Labor,  
Washington, D.C.**

### **FINAL DECISION AND ORDER**

This case arises under the McNamara-O'Hara Service Contract Act, 29 U.S.C.A. §§ 351-358 (West 1994) (the SCA), as implemented by the regulations at 29 C.F.R. Parts 4 and 8 (2006). It involves a contract between Teledyne Brown Engineering, Inc. (Teledyne) and the National Aeronautics and Space Administration (NASA) to perform propellant, pressurant and calibration services at the Marshall Space Flight Center in Madison, Alabama. The Petitioners are employees of ERC, Inc. (ERC), Teledyne's subcontractor on the project. They all perform metrology/calibration technician services at Marshall.

The job classification for the calibration work that the Petitioners perform was not included on the wage determination that the Department of Labor's Wage and Hour Division (WHD) issued to cover the ERC contract. With the concurrence of NASA, ERC initiated a conformance action to add new classifications and wage rates for Petitioners' jobs to the applicable wage determination, Wage Determination 1994-2008 (Revision 18) (Rev. 18). The conformance process ensures that any new classifications and wage rates conform to the standard classifications and corresponding wage rates listed on the wage determination. *See* 29 C.F.R. § 4.6(b) (2) (i) – (vi). On December 22, 2004, WHD National Office staff issued a preliminary conformance ruling approving the new job classifications and wage rates proposed by ERC. In response to requests for reconsideration filed by ERC employees Gordon Henry and Ove Jakobsen, the Deputy Administrator issued a final ruling on July 19, 2005, granting ERC's request to pay the calibration workers at the proposed Metrology/Calibration Technician (MCT) I, II, and III rates. ERC's calibration technicians appealed.

We conclude that the Deputy Administrator's determination was consistent with the Act and the regulations, was reasonable and was not an abuse of discretion. We therefore affirm the final ruling for the reasons stated in this final decision and order.

## **BACKGROUND**

On October 29, 2003, NASA awarded a contract to Teledyne to perform propellant, pressurant and calibration services at Marshall. (Administrative Record (AR), Tabs D, I). Teledyne then subcontracted the metrology/calibration services portion of the NASA contract to ERC, a subcontractor that had performed similar services for Teledyne on a prior contract between Teledyne and NASA at Marshall. Because the wage determination applicable to the contract (Rev. 18) did not contain a classification for calibration technicians, ERC paid its calibration technicians at the wage determination rate for Instrument Mechanics, just as it had done on its previous contract with Teledyne. (AR, Tabs B, D, H-K).

ERC employees had complained about being paid as Instrument Mechanics in the past. In July 2000, Gordon Henry, a calibration technician with ERC, informed the WHD District Office in Columbus, Mississippi, that the calibration technicians at Marshall were improperly classified and paid as Instrument Mechanics. Henry contended that the employees' calibration work was technically more complex than Instrument Mechanics' work. (AR, Tabs F, K). After an investigation, the District Office determined that ERC's classification of the calibration technicians as Instrument Mechanics was appropriate. Henry next appealed to the WHD Regional Wage specialist, requesting a conformance proceeding to establish a new wage rate and classification. The WHD wage specialist informed Henry that he would consider his request for the October 1, 2003 contracting year. (AR, Tabs K, S).

On December 8, 2003, the ERC calibration technicians wrote a memo to the calibration laboratory manager, arguing that the Electronic Technician, Maintenance (ETM), levels I, II, and III, be used as the benchmark for the proposed conformance, rather than the Instrument Mechanic (IM) classification. (AR, Tab Q). On February 19, 2004, NASA filed ERC's conformance request with the WHD. (AR, Tab M). At the WHD's request, NASA revised the conformance proposal to include additional information, including the Federal Grade Equivalency for each level of the proposed classification and each employee's agreement or disagreement with the proposed classification. NASA submitted the revised conformance proposal, including a statement from the employees, on March 18, 2004. (AR, Tabs J, L).

ERC used the IM classification rate on Rev. 18 as the benchmark for its conformance request because the *SCA Directory of Occupations* states that one of the duties of the IM is to "calibrate instruments according to established standards." (Exh.1, Att. 1; AR, Tabs J, T). ERC assigned a wage grade (WG) 10 equivalency to the proposed classification and created two additional classifications at higher grades, each level at a 5% higher wage rate than the preceding level, corresponding with increased levels of responsibility and complexity of duties performed by workers at the higher levels. The new classifications that ERC proposed were MCT I (WG 10), MCT II (WG 11), and MCT III (WG 12). ERC described the duties of each classification as follows:

Tests, calibrates, and repairs electrical, mechanical, electromechanical, and electronic measuring, recording, and indicating instruments and equipment for conformance to established standards, and assists in formulating calibration standards: Plans sequence of testing and calibration procedures for instruments and equipment, according to blueprints, schematics, technical manuals, and other specifications. Sets up standard and special purpose laboratory equipment to test, evaluate, and calibrate other instruments and test equipment. Disassembles instruments and equipment, using hand tools, and inspects components for defects. Measures parts for conformity with specifications, using micrometers, calipers, and other precision instruments. Aligns, repairs, replaces, and balances component parts and circuitry. Reassembles and calibrates instruments and equipment. Devises formulas to solve problems in measurements and calibrations. Assists engineers in formulating test, calibration, repair, and evaluation plans and procedures to maintain precision accuracy of measuring, recording, and indicating instruments and equipment.

ERC also divided the new position into three progressively higher skill and wage grade levels, each including the above duties with the following additions for each level:

MCT I: Performs assignments that are not completely standardized or prescribed. Selects or adapts standard procedures or equipment, using fully applicable precedents. Receives initial instructions, equipment requirements, and advice from supervisor or laboratory engineer as needed; performs recurring work independently; work is reviewed for technical adequacy or conformity with instructions.

MCT II: Performs non-routine assignments of substantial variety and complexity, using operational precedents which are not fully applicable. Such assignments, which are typically parts of broader assignments, are screened to eliminate unusual design problems. May also plan such assignments. Receives technical advice from supervisor or laboratory engineer; work is reviewed for technical adequacy. May be assisted by lower level technicians and have frequent contact with professionals and others within the laboratory establishment.

MCT III: Independently plans and accomplishes complete assignments of broad scope and complexity. Exercises independent judgment in performing task. Uses complex test instruments. Complexities of assignments typically require considerable creativity and judgment to devise approaches to accomplish work assignment. May supervise or train lower level technicians and/or be assisted by lower level technicians.

(AR, Tabs J and L).

NASA and the employee to be classified as MCT I concurred with ERC's proposal, but the employees to be classified as MCT II and MCT III did not concur. (AR, Tab J). These employees argued that the Electronics Technician, Maintenance (ETM) classification should be used as a benchmark for conformance instead of the IM classification because the skills required of the employees in the ETM classification have a reasonable relationship to the skills required of the employees in the proposed conformed MCT classification. Specifically, the MCT II and III employees contended that "the complexity of the scientific instrumentation, which [they] repair and calibrate, and the knowledge and skill levels required are much higher than those represented by the job description of the Instrument Mechanic." They also contended that in 1989 NASA and DOL previously used the Electronics Technician classification (later re-titled Electronics Technician, Maintenance) to conform a new Calibration Technician position for service employees at the Army Calibration Laboratory at Redstone Arsenal. (AR, Tab J, Enc. 3, 3/9/04 letter).

The WHD approved ERC's conformance request on December 22, 2004, and advised NASA that the conformed wage rates would be retroactive to the commencement date of the contract. The WHD also asked NASA to submit a conformance request for similar calibration work performed on the predecessor contract between NASA and Teledyne, NAS 8-27256, effective June 1, 1997, through October 31, 2003, because that contract did not contain a job classification for calibration technicians, who were paid as Instrument Mechanics on the predecessor contract. (AR, Tab H).

Henry and Jakobsen filed separate requests for reconsideration with the WHD Deputy Administrator, arguing that the conformance should have been based on the ETM, I, II, and III classifications. (AR, Tabs E, F). On July 19, 2005, the Deputy Administrator issued a final ruling, granting ERC's conformance request to pay calibration workers at the proposed MCT I, II, and III rates. To conform the wage rates of the proposed MCT classification, the Deputy Administrator "slotted" or equated the MCT I (WG 10) position to the wage rate for the IM on Rev. 18 because he found that the duties of the IM classification bear a reasonable relationship to the calibration duties performed on the contract. (AR, Tab A). The *SCA Directory of Occupations* describes the duties of the Instrument Mechanic as follows:

Installs, repairs, maintains, and adjusts indicating, recording, telemetering, and controlling instruments used to measure and control variables, such as pressure, flow, temperature, motion, force, and chemical composition, using hand tools and precision instruments. Disassembles malfunctioning instruments, and examines and tests mechanism and circuitry for defects. Troubleshoots equipment in or out of control system and replaces or repairs defective parts. Reassembles instrument and tests assembly for conformance with specifications, using instruments, such as potentiometer, resistance bridge, manometer, and pressure gauge. Inspects instruments periodically and makes minor calibration adjustments to insure functioning within specified standards. May adjust and repair final control mechanisms, such as automatically controlled valves or positioners. May calibrate instruments according to established standards.

(AR, Tab T, p. 93). The Deputy Administrator then computed the rates for the MCT II (WG 11) and MCT III (WG 12) positions by using the percentage differences between grades 11 and 12 listed in the "Schedule of Percentage of Wage Differences by Grade," found in the *SCA Conformance Guide*. Using the IM wage rate of \$18.79 per hour, he approved the following conformed wage rates for the MCT I, II, and III classifications on Rev. 18:

MCT I (WG-10)	\$18.79
MCT II (WG-11)	\$19.73
MCT III (WG-12)	\$20.72

(AR, Tab A).

The Calibration Laboratory Personnel (13 employees, including Henry and Jakobsen) filed a petition for review of the Deputy Administrator’s decision with this Board.<sup>1</sup>

### **JURISDICTION AND STANDARD OF REVIEW**

Pursuant to 29 C.F.R. § 8.1(b), the Board has jurisdiction to hear and decide “appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative” rendered under the SCA. *See also* Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Board’s review of the Administrator’s final rulings issued pursuant to the SCA is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). The Board is authorized to modify or set aside the Administrator’s findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b). The Board reviews questions of law de novo. *United Gov’t Sec. Officers of America, Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (ARB Sept. 29, 2003); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002). The Board nonetheless defers to the Administrator’s interpretation of the SCA when it is reasonable and consistent with law. *See Department of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 15-16 (ARB Dec. 22, 1999).

### **STATEMENT OF THE ISSUE**

Should the Board affirm the Deputy Administrator’s final ruling classifying calibration technicians as MCT I, II and III, by using the Instrument Mechanic classification rate of pay as a benchmark?

### **DISCUSSION**

#### ***1. Pertinent legal authority***

The conformance regulations at 29 C.F.R. § 4.6(b) (2) (i) – (vi) provide both procedural and substantive guidelines for adding a job classification to the wage

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<sup>1</sup> On December 7, 2005, the Deputy Administrator submitted a Motion to Submit Supplemental Declaration of William W. Gross together with the Supplemental Declaration of William W. Gross, Director of the Wage and Hour Division’s Office of Wage Determinations. We grant that motion.

determination that applies to a particular SCA-covered contract. The job classifications that are listed on the applicable wage determination function as standards for comparison with a proposed classification in two primary ways. First, if the skills and duties required of the proposed classification were encompassed by a classification already listed on the wage determination, the proposal to add the new classification through the conformance process will be denied. *See, e.g., Burnside-Ott*, No. 87-SCA-OM-2, slip op. at 6-10 (Dep. Sec’y Jan. 10, 1989). Second, if a proposed classification is determined to be necessary, the classifications and wage rates listed on the wage determination provide standards for comparison in determining the category into which the job falls and setting the proper wage rate for the new classifications. 29 C.F.R. § 4.6(b)(2)(i), (vi)(A); *see COBRO Corp.*, No. 97-104, slip op. at 10 (ARB July 30, 1999); *Russian & East European P’ships., Inc.*, No. 99-020, slip op. at 15-17 (ARB Oct. 15, 2001); *Rural/Metro Corp.*, No. 92-27, slip op. at 7-10 (Bd. of Serv. Contract Apps., Mar. 26, 1993). The conformance regulations require that a proposed position be categorized and paid a wage that reflects an “appropriate level of skill comparison” between the position proposed for addition to the wage determination and those classifications already listed on the wage determination. 29 C.F.R. § 4.6(b) (2) (i); *see* 29 C.F.R. § 4.6(b) (2) (i); *see* 29 C.F.R. § 4.6(b) (2) (iv); *COBRO Corp.*, slip op. at 22-23.

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 Chem. Corp.*, No. 96-113, slip op. at 3 (ARB Feb. 6, 1998) (quoting *Titan IV Mobile Serv. Tower*, No. 98-14 (WAB May 10, 1991).

## ***2. Deputy Administrator’s use of IM classification as a benchmark***

The parties agree that a classification must be conformed to cover the work performed by the Petitioners at Marshall. In conforming the proposed MCT classification to the IM classification on Rev. 18, the Deputy Administrator used the “slotting” procedure. Slotting is a well established conformance procedure approved by the Board and its predecessors. *See, e.g., COBRO*, slip op. at 10; *Biospherics, Inc.*, Nos. 98-141, 97-086, slip op. at 3 (ARB May 28, 1999); *Burnside-Ott*, slip op. at 6-10. Under the slotting procedure, “wage rates are derived for a classification based on a comparison of equivalent or similar job duty and skill characteristics between the classifications studied and those for which no survey data is available.” 29 C.F.R. § 4.51(c). Here, the Deputy Administrator selected the IM classification as a benchmark classification.

The Petitioners contend that there is no reasonable relationship between the IM benchmark classification and the proposed MCT classification because the two jobs are “very different.” According to the Petitioners, (1) the IM uses less complex equipment than the MCT uses, (2) the IM position requires a lower level of skill than the MCT classification, and (3) the two classifications have different primary duties.

Our review of the Deputy Administrator’s determination in a conformance action must focus on the Deputy Administrator’s choice, and the rationale that he advanced to support it. In challenging the Deputy Administrator’s conformance, the burden on a petitioner is not merely to prove that other choices were available – or perhaps even preferable – but to demonstrate affirmatively that the Deputy Administrator’s choice was unreasonable. *COBRO*, slip op. at 22.

Here, the Petitioners have presented no convincing argument or factual support that would demonstrate that the levels of skill, experience, education, and training required of the IM are so dissimilar from those of the MCT that the Deputy Administrator’s choice of benchmark classification was unreasonable. Therefore, we conclude that the Deputy Administrator’s use of the IM as a benchmark for this conformance was reasonable. A comparison of the IM classification described in the *SCA Directory* and the proposed MCT classification described in ERC’s conformance request reveals that both the IM and MCT perform calibration work and other work that involves the use of tools and precision instruments to repair, test, disassemble, reassemble, and inspect technical equipment. Contrary to the Petitioners’ argument, the fact that the IM description states that the IM “may” calibrate does not render the choice of that classification unreasonable because the skills and duties of the IM and MCT need not be exactly the same for the IM to be used as a benchmark for the conformance. “[T]he conformance process does not require the exactitude that might be achieved in a de novo determination of prevailing wage rates.” *Biospherics*, slip op. at 19.

The Petitioners contend that the ETM classification is a more appropriate benchmark for this conformance for several reasons. In this regard, the Petitioners rely on evidence that the Redstone Army Calibration Laboratory uses the ETM II classification for its calibration personnel and that a predecessor contractor at Marshall conformed its calibration workers to the Engineering Technician classification (ET I-II-III), a precursor to the ETM classification. The Petitioners also contend that other precision measurement equipment laboratories (PMEL) use the ETM classification for work similar to the Petitioners’ work.

Evidence regarding wage determination actions in different locations, or actions involving other job titles in the same location, often has little relevance to our evaluation of the reasonableness of the Deputy Administrator’s determination in an individual case. *COBRO*, slip op. at 22. In view of the narrow scope of the Board’s review, the possibility that another classification might also be an appropriate benchmark is not grounds for reversal. Here again, we emphasize that it is the Petitioners’ burden to demonstrate affirmatively that the Deputy Administrator’s choice was unreasonable. *Dyncorp*; *COBRO*. It is therefore irrelevant that another choice might be available, or even preferable, as long as the Deputy Administrator’s choice here is reasonable.



Accordingly, use of the ETM classification on other contracts does not negate the reasonableness of the Deputy Administrator's determination on **this** contract.<sup>2</sup>

## ***2. Deputy Administrator's use of federal wage grade equivalencies***

Because the wage rate for the IM classification on Rev. 18 had a federal WG 10 equivalency, the Deputy Administrator assigned a WG 10 equivalency to the new ETM I classification. The Deputy Administrator then had to establish an appropriate pay relationship between the MCT I, II and III classifications. Using the Conformance Guide's "Schedule of Percentage of Wage Rate Differences by Grade," the Deputy Administrator created two new classes of ETM (ETM II and ETM III) at higher wage grades than the ETM I, to correspond with the higher levels of responsibility and complexity of duties performed by workers at this level. (AR, Tab J). In setting the rates of wage increase for the MCT II (WG 11) and MCT III (WG 12), the Deputy Administrator used the *SCA Conformance Guide's* schedule percentage rate of 5% for the increase between WG 10 and WG 11. But for the increase between WG 11 and WG 12 he used the higher rate (5%) proposed by ERC rather than the 4% increase used in the schedule.

The conformance methodology employed in this case comes within the Deputy 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); *see also Biospherics*, slip op. at 18. It additionally incorporates a concept "[b]asic to the establishment of any conformable wage rate," i.e., "that a pay relationship should be maintained between job classifications based on the skill required and the duties performed." *Id.* Here, the skills and duties of the proposed MCT II and MCT III positions are at progressively higher levels than the MCT I; therefore, the MCT II is paid more than the MCT I, and the MCT III is paid more than the MCT II. Finally, the conformed wage rates are tied directly to rates listed in the wage determination. The Petitioners have failed to show that the Deputy Administrator's conformance choices were unreasonable or inconsistent with applicable law. *Raytheon Sys. Co.*, No. 98-157, slip op. at 20 (ARB Apr. 26, 2000).

The Petitioners also challenge the Deputy Administrator's adoption of the IM hourly rate of \$18.79 on Rev. 18 for the MCT I hourly rate. Because the WHD did not have direct survey data for the IM classification, the Deputy Administrator based the

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<sup>2</sup> The Deputy Administrator retroactively conformed wage rates for Metrology/Calibration Technician services on Teledyne's prior contract with NASA (NAS8-97256). (AR, Tab D). NASA, however, refused to apply the retroactive conformance because the contract is in closeout. (AR, Tab C). The Board disagrees with NASA's decision, but lacks jurisdiction to compel NASA's compliance with the Deputy Administrator's request.

hourly rate on an average of survey data for all WG 10 occupations in the “Mechanics and Maintenance and Repair Occupations,” except for the ETM III occupation, which was the highest paid WG 10 classification. The Petitioners contend that the WHD erred in setting the IM wage rate by using an average excluding the highest paid position because this methodology is not mentioned in the *SCA Conformance Guide*.

To the extent that his argument is, in effect, a challenge to the substantive correctness of the wage determination itself, it must fail as untimely. The regulation at 29 C.F.R. § 4.55(a)(1) precludes review of a wage determination after opening of bids, in the case of a competitively advertised procurement, or later than 10 days before commencement of a contract in the case of a negotiated procurement. Here, the issue is whether the disputed classifications are conformable and properly conformed, not whether the preexisting prevailing wage determination was correct. *See CACI, Inc.*, No. 86-SCA-OM-5, slip op. at 17 (Dep. Sec’y Mar. 27, 1990).

Even if we were to accept this challenge to the IM wage rate, the WHD has offered a reasonable explanation for the exclusion of the ETM classification in computing the average of WG 10 pay rates. In determining the pay rate of the WG 10s on Rev. 18, the WHD used the 2002 Occupational Employment Statistics survey data for Huntsville, Alabama, which did not include any data for the ETM occupation. The ETM rates on Rev. 18 are an estimate of the median and mean rates for all levels within the ETM occupation, ETM I (WG 8), ETM II (WG 9) and ETM III (WG10). Supplemental Declaration of William W. Gross, Director, WHD Office of Wage Determinations. It was clearly within the Deputy Administrator’s discretion to omit the ETM rates for the reason stated in the Supplemental Declaration.

#### CONCLUSION

The ERC employees’ petition for review is **DENIED**, and the Deputy Administrator’s final conformance ruling of July 19, 2005, is **AFFIRMED** because the decision is reasonable, consistent with the regulations and not an unexplained departure from past determinations.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**DAVID G. DYE**  
**Administrative Appeals Judge**