In the Matter of:

MISTICK CONSTRUCTION **ARB CASE NO. 02-004**

With Respect to Request for Conformance Of Employee Classifications Under Wage Determination No. PA970013, Modification 2, Applicable to Residential Construction on Crawford Square Rental Phase III in Pittsburgh, PA, No. B-98-MC-42-0103, ARB Case No. 02-004

DATE: June 24, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner Mistick Construction:
Maurice Baskin, Esq., *Venable, LLP, Washington, DC*

For Respondent Administrator, Wage and Hour Division:
Roger W. Wilkinson, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, DC*

FINAL DECISION AND ORDER

This case arises under the Davis-Bacon and Related Acts and implementing regulations at 29 C.F.R. Parts 1, 5 and 7 (2002). The Davis-Bacon Act, as amended, is codified at 40 U.S.C.A. §§ 276a-276a-7 (West 2001). The applicable Related Act is the Housing and Community Development Act of 1974, as amended, 42 U.S.C.A. §§ 5301-5321 (West 2003), which incorporates Davis-Bacon Act standards at 42 U.S.C.A. § 5310. *See Miami Elevator Co. and Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 3 (ARB Apr. 25, 2000) for an explanation of the Davis-Bacon Related Acts.[1]

[1] Briefly, the Davis-Bacon Act applies to construction contracts entered into directly between the Federal government and a contractor. The Davis-Bacon Related Acts incorporate the Davis-Bacon Act prevailing wage requirements into contracts where the Federal government provides

The Davis-Bacon and Related Acts require the Administrator, Wage and Hour Division, Employment Standards Administration, to determine minimum wages, based on locally prevailing wage rates, to be paid to classes of mechanics and laborers employed on federally funded projects. The implementing regulations require that any class of laborer or mechanic, employed on a project, but not listed in a contract wage determination, be classified in conformance with the wage determination.

Mistick Construction (Mistick) petitions for review of the Acting Administrator's denial of Mistick's request to conform a federally funded contract. After thorough consideration of the record and the parties' positions, we conclude that the Administrator's decision denying Mistick's request is within the range of discretion accorded under the Acts and implementing regulations and is not unreasonable. We accordingly deny Mistick's petition for review.

Jurisdiction and Standard of Review

Our review of the Administrator's decision is in the nature of an appellate proceeding. 29 C.F.R. § 7.1(e). We assess the Administrator's decision to determine whether it is consistent with the statutes and regulations and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon and Related Acts. *Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (May 11, 2000) (Davis-Bacon Act conformance proceeding); *Miami Elevator Co. and Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (same); *Dep't of the Army*, ARB Nos. 98-120/121/122, slip op. at 16 (ARB Dec. 22, 1999) (parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. §§ 351-358 (West 1987)), *citing ITT Federal Services Corp. (II)*, ARB No. 95-042A (ARB Jul. 25, 1996), and *Service Employees International Union (I)*, BSCA No. 92-01 (BSCA Aug. 28, 1992).

Regulatory Framework

The Davis-Bacon and Related Acts require that the advertised specifications for construction contracts to which the United States is a party contain a provision stating the minimum wages to be paid the various classifications of mechanics or laborers to be employed under the contract. 40 U.S.C.A. § 276a. The function of issuing minimum wage determinations is delegated under the implementing regulations to the Administrator of the Wage and Hour Division. 29 C.F.R. § 1.1(a). The minimum wage rates contained in the determinations derive from rates prevailing in the geographic

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funding indirectly, and the contract exists between a non-Federal entity, such as a State or local government, and a contractor.

locality where the work is to be performed or from rates applicable under collective bargaining agreements. 29 C.F.R. § 1.3.

Contracting agencies obtain wage determinations for their construction projects under either of two different approaches. When wage patterns for a particular type of construction in a locality are established and when a large volume of procurement is anticipated in the area for the construction, the Administrator may furnish notice in the Federal Register of a "general" wage determination. 29 C.F.R. § 1.5(b). General wage determinations are published in a special Government Printing Office document. Contracting agencies may use general wage determinations without notifying the Administrator. *Id.* Alternatively, contracting agencies may ask the Administrator to issue a wage determination for particular contracts to cover specified employment classifications on an individual construction project. 29 C.F.R. § 1.5(a). These issuances are designated "project" wage determinations. The instant case involves one of the Division's general wage determinations.

Bidders who believe that a wage determination is erroneous may request reconsideration by the Administrator. 29 C.F.R. § 1.8. Modification of a general wage determination normally is "effective with respect to any project to which the determination applies, if notice of [the modification] is published before contract award (or the start of construction where there is no contract award)" except that "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." 29 C.F.R. § 1.6(c)(3) (emphasis added). *Cf.* 29 C.F.R. § 1.6(c)(2)(i)(A) (in instances of competitive bidding, modifications received less than 10 days before the opening of bids shall be effective unless insufficient time remains to notify bidders of the modification).

On occasion, contract performance may require the addition of trade classifications after the period permitted for modification of the wage determination. After a contract has been awarded job classifications are added through a "conformance action," in which the contracting agency, through its contracting officer, "shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination." 29 C.F.R. § 5.5(a)(1)(ii)(A); 29 C.F.R. § 5.5(a)(1)(v)(A) (2000) ("helpers" not included).[2] A contracting officer may approve an additional classification only when (1) the work to be performed by the classification is not performed by another classification in the wage determination, (2) the classification is utilized in the area by the construction industry, and (3) the proposed wage rate bears a

[2] In November 2000 the Wage and Hour Division amended 29 C.F.R. § 5.5(a)(1) which resulted in redesignation of the applicable subsection.

reasonable relationship to the wage rates contained in the wage determination. 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3). Mistick argued that its proposed rates, rather than those approved by the contracting officer, satisfied the "reasonable relationship" criterion.

A conformance action is effected in one of two ways, depending upon whether the contractor, the employees being classified in conformance with the wage determination, and the contracting officer agree or disagree as to the classification and wage rate. If the contractor and the employees, or their representatives, and the contracting officer agree on the additional classification and wage rate, the contracting officer submits a report of the action to the Administrator who then will approve, modify or disapprove the conformance. 29 C.F.R. § 5.5(a)(1)(ii)(B). In the event that the principals disagree, "the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination." 29 C.F.R. § 5.5(a)(1)(ii)(C). Any party who disagrees with the Administrator's determination may appeal the decision to this Board. 29 C.F.R. § 7.1. This dispute arose under 29 C.F.R. § 5.5(a)(1)(ii)(C) as the result of a disagreement between Mistick and the contracting agency over the proposed classifications and wage rates.

Background

On March 4, 1998, Mistick requested that the Urban Redevelopment Authority of Pittsburg (URA), the contracting agency, add classifications and wage rates to a contract in conformance with general Wage Determination No. PA970013 applicable to a residential construction project, namely Crawford Square Rental Phase III, in Allegheny County, Pennsylvania. "Residential" construction projects consist of single-family homes and apartments up to and including four stories. The United States Department of Housing and Urban Development (HUD) funded the Crawford Square project while the URA administered it. Mistick was the general contractor. Maurin Paving and Excavation, a subcontractor, employed the power equipment operators subject to the conformance request. These employees operated backhoes, bobcats, excavators, hi-lifts, rollers, graders, and pavers. Although not included in Wage Determination No. PA970013, these classes of employees appeared as classifications in an earlier Wage Determination (No. PA950013), the corresponding wage rates being grounded in a November 1992 wage survey. A wage survey completed in July 1996 yielded inadequate data for up-dating the rates. The classifications consequently were not included in the later wage determination. Mistick initially requested to compensate the classes of power equipment operators at rates included in the earlier wage determination. These rates ranged from a backhoe rate of $9.50 per hour with fringe benefits of $5.09 to a grader rate of $13.42 per hour with fringe benefits of $3.68. *See* Administrative Record (AR) Tab N.

On April 3, 1998, URA proposed adding the bobcat classification at a rate equivalent to drywall finisher ($9.75 per hour with no fringe benefits) and adding the remaining classifications at rates equivalent to the bulldozer operator ($14.85 per hour with fringe benefits of $7.02). AR Tab E. URA derived these rates from classifications listed in Wage Determination No. PA970013. The bulldozer classification represented the lowest power equipment operator rate included in that wage determination. HUD agreed with the URA proposal and forwarded it to the Labor Department.[3]

On May 29, 1998, Mistick issued a counterproposal premised on classifications and wage rates listed in Wage Determination No. PA970013, namely a rate of $9.75 per hour and no fringe benefits for bobcat and roller operator and $11.50 per hour ($1.86 fringe benefits) for backhoe, excavator, hi-lift, grader and paver. Mystic compared the skills of bobcat and roller operator to those of a drywall finisher and the skills of the remaining operators to those of an ironworker. AR Tab A at 2.

On June 9, 1998, the Labor Department's Branch of Wage Determinations approved the HUD/URA proposal, AR Tab K, and on September 18, 2001, the Administrator reaffirmed that decision. AR Tab A. Mistick petitions the ARB for review.

The Administrator's Decision and Mistick's Position

The Acting Administrator identified the issue in the instant case to be whether the proposed wage rates bore a reasonable relationship to the wage rates contained in the wage determination. AR Tab A at 1. She premised her decision under this criterion on (i) a distinction articulated in *Tower Construction,* WAB No. 94-17, slip op. at 3-5 (WAB Feb. 28, 1995), between skilled and non-skilled classifications and power equipment operators and non-power equipment operators and (ii) agency policy "require[ing] the proposed rate for a skilled classification [to] be equal to or exceed the lowest rate of the

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[3] The URA representative explained its proposed bobcat rate as follows:

> It has become "area practice" for employees who are not classified as an operating engineer to operate a bobcat. I discussed this practice with a representative from the Commonwealth of Pennsylvania Department of Labor and Industry. Because this equipment is so small and does not require a great deal of skill to operate, Labor and Industry takes the position that this is an acceptable practice. After eliminating the [unskilled] landscape worker and laborer classifications included in the applicable wage determination, it was my opinion that the skill involved in the operation of a bobcat could be compared to the drywall finisher classification.

AR Tab B.

skilled classifications already contained in the contract wage determination." *Id.* at 3. The Administrator accordingly reaffirmed the decision of the Branch of Construction Wage Determinations to conform the classifications of backhoe, excavator, hi-lift, roller operator, grader and paver at the bulldozer rate, "the lowest of three rates listed for equipment operators . . . ." AR Tab A at 3. However, she did not reconsider the bobcat rate because Mistick did not request her to do so.

The gravamen of Mistick's challenge on review is that the skill levels for the other six classes of power equipment operators are closer to those of the residential bobcat operator than to the heavy and highway bulldozer classification. *E.g.*, Petitioner's Reply to Opposition of the Administrator at 2. Mistick also contends that the Administrator should have conformed the six classes of operators at the classified bobcat rate "which is now the lowest rate on the Wage Determination [No. PA970013] applicable to skilled equipment operators . . . ." Petition for Review at 3.

Mistick contends alternatively that appropriate comparisons of skill levels exist between the six classes of power equipment operators and the drywall finisher and ironworker classifications in Wage Determination No. PA970013 and that as conformed the equipment operator classifications exceed by more than six dollars per hour every skilled trade other than heavy equipment operators, "a disparity unheard of in the residential construction industry, as demonstrated by reference to [enumerated] published wage determinations . . . ." Petition for Review at 4.

This challenge reflects earlier arguments. In an October 5, 1998, letter to the Administrator, Mistick stated: "The Bulldozer rate applies only to a much heavier and more skilled piece of equipment, not comparable to the six classifications at issue. Indeed, the Bulldozer rate itself appears to have been borrowed from a heavy/highway wage determination, which is where bulldozers are used. Bulldozers are not used on this residential project." AR Tab I. Mistick continued: "The six pieces of equipment which are being added are all light machinery much closer in nature to a Bobcat than a heavy/highway bulldozer. The skill levels involved in operating this light machinery is [sic] much more comparable to the skill level of a Drywall Finisher or, at most, an Ironworker." *Id.*

Mistick had iterated the distinction between heavy/highway commercial land development and residential development even earlier. In an April 30, 1998, letter to the URA representative, Mistick stressed that "[i]n previous wage determinations issued by the URA and HUD, the residential aspects of the excavation process were recognized and they issued a wage determination with the appropriate classifications" (referring to general Wage Determination No. PA950013). AR Tab N. Mistick requested classifications that reflected the required skill levels and corresponding wages.

Discussion

A. The Regulations Distinguish Between the Wage Determination and Conformance Processes.

We begin our evaluation of the Administrator's conformance of the power equipment operators by setting out the fundamental differences between the wage determination process and the conformance process at issue here. This distinction establishes the parameters of our review.

A wage determination dictates the minimum wage rates paid to classifications of employees. It is incorporated into bid packages and ultimately into the contract. "Thus all bidders . . . are provided with the same information concerning the minimum wage rates that must be paid on a federal . . . procurement." *Pizzagalli Construction Co.,* ARB No. 98-090, slip op. at 5 (May 29, 1999). The Administrator typically engages in extensive analysis of statistical data in determining locally prevailing or collectively-bargained rates. Interested parties must challenge wage determinations prior to submission of bids on procurement. This requirement ensures an equitable procurement process in order that "competing contractors know in advance of bidding what rates must be paid so that they bid on an equal basis." *Id., quoting Kapetan, Inc.,* WAB No. 97-33, slip op. at 8 (WAB Sept. 2, 1988).

A conformance, on the other hand, entails adding an employment classification omitted from a wage determination. Conformance occurs after the conclusion of bidding on the contract and assumes "that the wage determination that was included in the bid specifications essentially is correct [with] the limited deficiency . . . that a needed job classification and wage rate are missing." *COBRO Corporation,* ARB No. 97-104 (ARB July 30, 1999), *corrected,* slip op. at 10 (ARB Sept. 13, 1999). The conformance mechanism is designed to facilitate expedited addition of a missing classification and wage rate while simultaneously maintaining the integrity of the bidding procedure. The Administrator must: (i) determine which classification already listed in the wage determination is most comparable in terms of skill to the class of employee performing under the contract but omitted from the wage determination, and (ii) derive a wage rate for the omitted class which is reasonably related to the listed rates. *Raytheon Systems Company,* ARB No. 98-157, slip op. at 17 (ARB Apr. 26, 2000) (parallel Service Contract Act conformance provision). The Administrator is not required to conduct a wage survey or to issue a de novo wage determination in order to effect a conformance.

ARB review of conformances is limited. The Administrator is accorded broad discretion in determining a conformed rate, "and his or her decisions will be reversed

only if inconsistent with the regulations, or if they are 'unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations . . . .'" *Environmental Chemical Corp.*, ARB No. 96-113, slip op. at 3 (ARB Feb. 6, 1998), *quoting Titan IV Mobile Service Tower*, WAB No. 98-14 (WAB May 10, 1991).

The modification of a wage determination (occurring prior to contract award) thus differs from a conformance action (occurring after contract award) in terms of scope and precision. *See Clark Mech. Contractors, Inc.*, WAB No. 95-03, slip op. at 4 (WAB Sept. 29, 1995).

B. Mistick Failed to Demonstrate that the Conformance was Unreasonable.

The Davis-Bacon Act regulations assign the Administrator the responsibility to approve, modify or disapprove proposed classifications and wage rates and to issue a determination after consideration of the interested parties' views. This function is bounded by three criteria. As indicated above, the only criterion at issue here is the criterion requiring that the proposed wage rates bear a reasonable relationship to rates contained in the wage determination. 29 C.F.R. § 5.5(a)(1)(ii)(A)(3). We note that conformance regulations under the Service Contract Act couch the requirement of a reasonable relationship between the proposed classification and the listed classifications in terms of "appropriate level of skill comparison." 29 C.F.R. § 4.6(b)(2)(i)(2002).

"Our review of the Administrator's determination in a conformance action must focus on the *Administrator's* choice, and the rationale that he advances to support it." *COBRO Corporation*, ARB No. 97-104, slip op. at 23 (emphasis in original). A petitioner's burden in challenging the Administrator's determination is to prove that the choice was unreasonable. A mere showing "that other choices were available or perhaps even preferable" will not suffice. *Id.*

Here, the Administrator reaffirmed a decision by the Department's Branch of Wage Determinations that conformed the residential construction classifications of backhoe, excavator, hi-lift, roller operator, grader and paver at the bulldozer wage rate. The bulldozer rate represented the lowest power equipment operator rate included in Wage Determination No. PA970013. The Administrator expressly declined to conform these six power equipment operator classes to non-power equipment classifications as Mistick requested. *See Tower Construction*, WAB No. 94-17, slip op. at 3-7 (power equipment classifications normally are not conformed to non-power equipment classifications). *See also Bryan Elect. Constr.*, WAB No. 94-17 (WAB Dec. 30, 1994); *M. Z. Contractors Co., Inc.*, WAB No. 92-06 (WAB Aug. 25, 1992). In rejecting Mistick's conformance, the Administrator adhered to principles set out in *Tower Construction*, where the Wage Appeals Board stated that power equipment operators

were a "separate and distinct subgroup category of construction worker classifications" having "unique skills and duties sufficiently distinguishable from the skills of mechanics in skilled construction trades." Slip op. at 3. The Administrator also relied on the Division's "longstanding policy . . . to require that the proposed rate for a skilled classification be equal to or exceed the lowest rate of the determination." AR Tab A at 3 (*quoting Tower Construction*, slip op. at 3). We find that in challenging the Administrator's reaffirmance, Mistick has not demonstrated that the conformance was inconsistent with the regulations, unreasonable, or an unexplained departure from precedent. *See Environmental Chemical Corp.*, ARB No. 96-113, slip op. at 3.

The Branch of Wage Determinations also conformed the bobcat class of employee at the rate designated under the wage determination for drywall finisher. In petitioning the Administrator for reconsideration of the decision of the Branch of Wage Determinations, Mistick stated: "Only one classification – Bobcat – has been assigned a reasonable wage rate ($9.75), and Mistick does not challenge that finding." AR Tab J (Mistick 10/5/98 letter at 2). The Administrator accordingly declined to reconsider the bobcat conformance. AR Tab A at 3 ("Had there been a request for reconsideration of the bobcat rate, we would have given further consideration to any evidence that the rate approved did not bear a reasonable relationship with the other power equipment operator rates in the contact wage determination.").

In conforming the six contested power equipment operator classifications, the Administrator acted in accordance with the applicable regulations and well-settled agency policy and practice. She also acted within her discretion in declining to decide the propriety of the bobcat conformance because that issue was not pending before her. Mistick thus has failed to demonstrate that the Administrator's decision was unreasonable.

C. Mistick's Remaining Arguments are Unavailing.

Mistick argues, and argued before the Administrator (AR Tab J (10/5/98 letter)), that the classifications of backhoe, excavator, hi-lift, roller operator, grader and paver should be conformed at the bobcat rate as approved by the Branch of Wage Determinations (analogous to drywall finisher classification). As explained above, the bobcat conformance went unchallenged before the Administrator and thus, according to Mistick, became the lowest rate within the wage determination applicable to power equipment operators. The Administrator did not address the argument, focusing instead on Mistick's analogies to the drywall finisher and ironworker classifications included in Wage Determination No. PA970013.

Contrary to Mistick's characterization, the bobcat conformance in no manner

"amended" the general wage determination. Wage Determination No. PA970013 for residential construction in Allegheny County, Pennsylvania, which applies in this case, continues to list three classifications of power equipment operator: Bulldozer, compactor, and scraper. It simply has been adapted to the instant Crawford Square project to provide for payment of additional power equipment operator classifications at the bulldozer rate and, in the case of the bobcat, at the drywall finisher rate. These rates (bulldozer and drywall finisher) derive from prevailing wage surveys and legitimately are part of the wage determination. *See* 29 C.F.R. § 1.3. Surveys were inconclusive with regard to the bobcat and remaining challenged power equipment operator classes of employees; hence the Department's failure to include them in Wage Determination No. PA970013 in the first place. Conforming the disputed classifications rather than "amending" the existing wage determination is consistent with the language of the applicable regulation. It requires that a class of laborers or mechanics "which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination." 29 C.F.R. § 5.5(a)(1)(ii)(A). Moreover, the wage rate proposed for the classification must "bear[] a reasonable relationship to the wage rates contained in the wage determination." *Id.*

Even assuming that the wage determination effectively is amended in some manner, the March 4, 1998, conformance request presented seven unlisted classes of power equipment operators to be compensated in the performance of the Crawford Square project. We consider Wage Determination No. PA970013 as it existed on the date of the request until all conformance issues associated with the request are resolved.

We consequently agree with the Administrator's position that "the bobcat classification was not a classification and wage rate already contained on the wage determination, as clearly required by the conformance regulations. Rather it was requested through the conformance process at the same time as the six other equipment operator classifications." Statement of the Administrator in Opposition to the Petition for Review at 11.

Mistick argues additionally that the conformed rates for all classifications other than bobcat are grossly disproportionate compared to rates contained in other wage determinations for residential construction within the Commonwealth of Pennsylvania. The record shows that these rates vary widely depending on whether or not they are collectively-bargained.[4] None of these rates bears on prevailing wage rates within

[4] *See* AR Tabs R and S. For example, wage determinations for Luzerne, Lackawana, Monroe and Wyoming Counties reflect collectively-bargained rates for residential power equipment operators (Group 2) of $18.35 per hour in addition to fringe benefits. Wage determinations for Butler and Lawrence Counties (collectively-bargained rates) show compensation of $19.065 per hour and fringe benefits of $8.43 for the power equipment operator classification of loader. In contrast, a wage

Allegheny County, however, which is the locality at issue. The sole indicator of rates within that county is the 1995 predecessor Wage Determination No. PA950013 that reflects a 1992 prevailing wage survey and which contains wage rates for the classifications of backhoe, hi-lift, roller operator, grader and paver. The Department omitted these classifications in Wage Determination No. PA970013 because, as mentioned, a survey conducted in 1996 failed to yield data adequate to update the classifications. The 1996 wage survey thus effectively superceded the 1992 survey and provided a more accurate indication of locally prevailing rates for purposes of the instant conformance.

In any event, the Administrator is not required to survey wage rates to effect a conformance. The Secretary's regulations require that the Administrator choose a wage rate that reasonably relates to those contained in the applicable wage determination. Because the wage rates included in Wage Determination No. PA970013 are themselves based on locally prevailing rates, at least an indirect link exists between the conformed rates and the rates prevailing in the locality.

If Mistick desired consideration of area wage surveys, its remedy was to challenge the wage determination prior to contract award. *See* 29 C.F.R. § 1.3; *Bryan Elect. Constr., Inc.,* WAB No. 94-16, slip op. at 6 ("conformance procedure cannot be used as a substitute for the obligation to timely challenge the correctness of wage determinations"). Further,

> [P]arties who have an interest in projects subject to Davis-Bacon Act wage protections are obligated to familiarize themselves with the particulars of wage determinations and "to challenge the accuracy and completeness of a wage determination at the beginning of the solicitation and procurement process." The timeliness requirement for seeking review of a wage determination is essential to the efficient operation of the procurement process.

Millwright Local 1755, ARB No. 98-015, slip op. at 10-11, *quoting Clark Mech. Contractors, Inc.,* WAB No. 95-03, slip op. at 5. In the *Millwright* case, the Board

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determination for Columbia County (non-union) shows a rate of $6.25 per hour for backhoe, bulldozer and front-end loader and a rate of $6.48 per hour for grader (no fringe benefits for any of these classifications). A wage determination for Greene County (non-union rates) shows compensation of $7.50 per hour for bulldozer and $10.00 per hour for pan (no fringe benefits for either classification). Wage determinations for Montour, Union, Huntingdon, Franklin, Fulton, Juniata, Mifflin and Snyder Counties (non-union) show compensation of $10.00 per hour plus $.38 fringe benefits for backhoe.

declined to take the "unprecedented" action of reversing a conformance and instituting a retroactive modification of a wage determination, as requested by the petitioner, emphasizing that "[t]he potential result of failing to file a timely request for review and reconsideration of a wage determination . . . serves to underscore the fact that interested parties, including contractors and affected 'laborers and mechanics' and their representatives, bear significant responsibility for monitoring wage determinations that may be incorporated into bid solicitations." Slip op. at 11.

Conclusion

The Administrator's decision is reasonable, is within the range of discretion accorded under the Acts and implementing regulations, and is consistent with agency precedent. For these reasons, the petition for review is denied, and the Acting Administrator's final determination issued September 18, 2001, is **AFFIRMED.**

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge