



In the Matter of:

AUDIO-VIDEO CORPORATION,

**ARB Case No. 95-047
(Formerly WAB¹ Case No. 95-10)**

O'NEAL CONSTRUCTION, INC.,

**ARB Case No. 96-117
(Formerly WAB Case No. 96-01)**

**SENSORMATIC ELECTRONICS
CORPORATION,**

**ARB Case No. 96-119
(Formerly WAB Case No. 96-03)**

**EXECUTONE INFORMATION
SYSTEMS, INC.,**

**ARB Case No. 96-120
(Formerly WAB Case No. 96-04)**

**WEBB ELECTRIC CO.,
and**

ARB Case No. 96-149

CO COM CABLING SYSTEMS.

ARB Case No. 96-163

DATE: July 17, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

Audio-Video Corporation (Audio-Video or Petitioner) seeks review of the July 13, 1995, ruling issued by the Administrator, Wage and Hour Division (Administrator) pursuant to the Davis-Bacon Act, as amended (DBA or the Act), 40 U.S.C. §276a *et seq.*; the Davis-Bacon Related Acts (DBRA)(*see* 29 C.F.R. §5.1)(1996); and the regulations at 29 C.F.R. Parts 5, 7 (1996). Under our authority at 29 C.F.R. §7.13, we consolidate five other cases which present similar issues.² These six matters concern the Administrator's denial of

¹ Wage Appeals Board; *see* 29 C.F.R. Part 7 (1995). On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under various statutes and an executive order to the Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

² The regulations at 29 C.F.R. §7.13 titled **Consolidations** provides in pertinent part:

(continued...)

applications for conformed classifications and wage rates for a requested classification, generically referred to as “low voltage installer” (LVI), for workers installing low-voltage wiring and/or systems on Federal or Federally-assisted construction contracts. In each case, the Administrator ruled that each Petitioner’s employees performed various types of LVI construction work which could have been performed by the Electrician classification contained in the applicable Wage Determination (WD). The Administrator ruled that the workers doing LVI work should have been classified as electricians and paid pursuant to the wage rate established for that classification in each of the respective contracts. For the reasons set forth below, the Administrator’s determinations are reversed and the six cases are remanded for reconsideration consistent with this Decision and Order of Remand.

BACKGROUND

Audio-Video seeks review of the July 13, 1995, ruling by the Administrator denying its request for reconsideration of a previous refusal to conform a Sound and Communications Technician classification, which is a low voltage systems installer classification, to Davis-Bacon WD No. TX91-1. The Administrator’s denial was based on a finding that the type of work in question was within the scope of duties performed by the Electrician classification already in the applicable WD.

The chronology of events prior to Petitioner’s request for review is as follows: On April 9, 1992, the U.S. Army Corps of Engineers (Corps) awarded Gilbertson Construction Co. the prime contract for construction of the Central Shipping and Receiving Facility at the Pantex Plant, Amarillo, Texas. The applicable Wage Determination, WD No. TX91-1, was included in the contract. Administrative Record (A.R.), Tab C, part B. A subcontract for the electrical work on the project was awarded to Duke Electric Co., A.R., Tab C, part F, and a second tier subcontract for installation of the communications systems was awarded to Petitioner. *Id.*

On October 13, 1993, the prime contractor submitted Standard Form 1444, Request for Authorization of Additional Classification and Rate for Sound and Communication Technician classification. A.R., Tab C. Petitioner intended to use this classification for the installation of various communications systems including the public address system, intercoms and closed circuit television systems. Each of these systems involves connecting and testing low voltage electrical systems.

²(...continued)

Upon its own initiative . . . the Board may consolidate in any proceeding or concurrently consider two or more appeals which involve . . . issues which are the same or closely related, if it finds that such consolidation or concurrent review will contribute to a proper dispatch of its business and to the ends of justice. . . .

Wage and Hour informed the Corps on September 9, 1994, that its request could not be approved because the applicable WD contained a classification that performed this work, *i.e.*, that of journeyman electrician. A.R., Tab C, part H. The Corps informed the prime contractor of Wage and Hour's disapproval of the requested classification on October 4, 1994. A. R., Tab C, part I. On January 23, 1995, the Corps requested that Wage and Hour reconsider that disapproval on behalf of the prime contractor and the Petitioner, and recommended that the proposed classification be approved because the use of Sound and Communications Technicians for low voltage installations was prevailing in the project area. A.R., Tab B.

The Administrator reaffirmed the September 9, 1994, denial on July 13, 1995, A.R. Tab A, explaining: the Wage Determination reflected collectively bargained rates which required looking to union practice in the area to determine which craft performed the work in question; it is not necessary that the classification in the Wage Determination be the prevailing one, but only that the work in the area be performed by the classification; and Wage and Hour had learned the work in question was within the scope of duties performed by the journeyman electrician classification contained in WD No. TX91-1.

II. DISCUSSION

The Administrator denied Petitioner's request after finding that the work performed by the requested classification was already performed by the journeyman electrician classification in the WD. The Administrator relied on the regulations governing conformance requests set forth at 29 C.F.R. §5. 5(a)(1)(ii)(A)(1) which provide that additional classifications, wage rates and fringe benefits shall be approved only when three requirements are met, the first being that: "the work to be performed by the classification requested is not performed by a classification in the wage determination;. . . ."

The Administrator based the finding that electricians install low voltage systems on a letter from a project subcontractor, Duke Electric Co., which was provided to Wage and Hour by the International Brotherhood of Electrical Workers, Local 602. A.R., Tab C, part K. Duke's letter listed four projects and stated: "all of these projects had sound systems (public address) consisting of conduits, cable and speakers... Wages were paid consistent with the wages paid journeyman-inside-wireman and apprentice electricians." *Id.* In fact, one of the four projects listed had actually been subcontracted out by Duke to the Petitioner. According to a summary provided in the Administrative Record no information on the other three projects cited by the Union/Duke Electric was available. A.R., Tab C, page 2.

We note that additional correspondence from Corps engineering staff to Wage and Hour indicated that another local union electrical company was contacted and its representative stated that LVI work was always subcontracted out because it was so specialized. The correspondence also indicated that a representative from Duke Electric Co., stated that Duke did "very little Sound and Communication work." A.R., Tab C, part G.

The Board finds that the evidence in the record fails to establish that low voltage work is in fact performed by a classification in the wage determination. The evidence relied upon by the Administrator to deny the conformance request must consist of more than a bare assertion by a single party that the classification in question has performed the work. This is especially true where record evidence refutes rather than supports, the assertion of the party with regard to one of the projects.

Once serious doubts were raised about the factual basis for the Administrator's decision, there was an obligation to seek additional information in order to determine whether conformance was appropriate. The failure to do so in this case requires a remand. On remand the Administrator must also consider whether electricians on a regular basis perform low voltage installation work. If the only occasion on which electricians perform this work is when it is incidental to work clearly falling within the electrician classification, then the Board has serious doubts that such a showing would be sufficient to defeat a conformance request. Rare, isolated or merely incidental performance of low voltage work would not establish that the electrician classification, rather than an occasional electrician, performs the work.

This case, along with the consolidated cases, raises a larger issue regarding current Wage and Hour practice in surveying for low voltage installation work. The regulation at 29 C.F.R. §1.3(a), pertaining to obtaining and compiling wage rate information is broadly drawn, requiring the Administrator to encourage a wide variety of interested parties to submit information reflecting not only wage rates, but also the types of employment for which the wage rates were paid. The Wage Appeals Board (WAB), predecessor to this Board, long recognized that Wage Determinations were factual inquiries, and were to reflect the practices and working conditions of a geographic locality as well as the prevailing wage rates in that area. *Tombigbee River Lock and Canals*, Wage Appeals Board (WAB) Case No. 71-02, June 1, 1973, slip op. at 14; *The Griffith Co.*, WAB Case No. 64-03, July 2, 1965, slip op. at 10-11.

We find that the Petitioner raises troubling questions regarding the validity of the Wage Determination process in this case. *See Alarm Control Company*, WAB Case No. 93-24, May 27, 1994, (remand to Administrator to reconsider issues of notice and area practice in establishing Wage Determination).

Although we are not convinced by the documentation provided by Petitioner that low voltage systems are installed solely by Sound and Communications Technicians, we find that significant questions are raised to require the Administrator to resurvey the project area to determine if the applicable WD is an adequate reflection of labor practice in the geographic locality with regard to LVI.

The Administrator is correct in finding that for purposes of the conformance process the use of a classification need not be the prevailing classification doing a specific job. However, for the purposes of the Wage Determination it must be established that the use of electricians to install low voltage systems in the subject

geographic area is the prevailing practice. 29 C.F.R. §1.3. While it may be possible to find instances of electricians doing LVI, such instances may be outliers, and therefore could be statistically misleading if exclusively relied upon in WD process.

Questions relating to the adequacy of the WD process in this case raise additional questions with regard to the adequacy of the underlying Wage Determinations relied upon by the Administrator in denying the conformance requests by the petitioners in the other cases. We note that the *Occupational Compensation Survey: Pay and Benefits - Northwest Texas - April 1994*, used by Wage and Hour in its development of the applicable WD in this case, may not have been appropriate to classify LVI, given the criterion of establishment size of 50 or more workers.³ We have no information concerning the average size of LVI firms in the subject area. We do not know if the *Occupational Compensation Surveys* used by Wage and Hour in developing the other cases' Wage Determinations provided appropriate information.

It is not our intention to reverse the previous case law whereby the WAB affirmed the Administrator's disapproval of conformance requests when the work to be performed by the requested classification was performed by a classification already in the applicable WD. *Sumlin and Sons, Inc.*, WAB Case No. 95-08, Nov. 30, 1995; *J. A. Languet Construction Co.*, WAB Case No. 94-18, Apr. 27, 1995.

Rather, we are troubled by the apparent practice of contracting agencies awarding Federal or Federally-supported contracts knowing that a certain locally prevailing work classification is not included in the applicable WD. In these instances, not only is the selected bidder at risk with regard to the potential labor costs for the project, but it is unfair to other potential competing bidders who conclude that the established classifications are the only ones to be used in structuring their bids.

The WAB recognized that it would establish an unfortunate precedent to permit contractors to ignore Labor Department procedures regarding the establishment of wage predeterminations and to gamble that additional classifications would be added subsequent to the award of a contract, notwithstanding the fact that classifications in the WD could govern the work in question. *Inland Waters Pollution Control, Inc.*, WAB Case No. 94-12, Sep. 30, 1994. Too often this practice is detrimental to the material interests of subcontractors who rely on the assurances of contracting agencies and prime

³ The Occupational Compensation Survey cover sheet was attached to Wage and Hour's response to Petitioner's Freedom of Information Act (FOIA) request concerning the Wage Determination. We note that the date of the Survey is subsequent to the date of the underlying contract with Gilbertson, but assume that since it was sent pursuant to Petitioner's FOIA request that such information was consistent with the materials used by Wage and Hour staff to develop the applicable WD. Administrative Record submitted by Petitioner, Tab 3.

contractors with regard to the probable success of requests to conform these additional classifications.

It is therefore critical for the Board, if it is to affirm the Administrator's disapproval of a request for a conforming classification, that the classifications in the WD are generally complete and supported by the prevailing practice in the area and by evidence in the record. We do not find such evidence in the record before us.

As noted above, *Audio-Video* is one of six cases the Board is considering in this consolidated proceeding involving conformance requests for the additional generic classification of low voltage workers to Wage Determinations. The *O'Neal Construction Co.*, *Sensormatic Electronics Corporation*, *Executone Information Systems, Inc.*, and *Co Com Cabling Systems* cases pertain to requests for conformance procedures regarding low voltage electrical systems installations. The *Webb Electric Company* case pertains to lightning protection installation systems which apparently involves little or no electrical work *per se*, as contrasted to lightning protection systems upgrading work.

The Board finds that Wage and Hour has not shown that wage and area practice surveys were conducted to substantiate a wage determination that electricians perform low-voltage installation or lightning protection system installation as a matter of prevailing practice in the six cases considered in this Decision and Order of Remand. Further, given the WAB's holding in *Alarm Control* and Wage and Hour's subsequent determination to adopt in that case a "non-enforcement" position with regard to the low voltage installer classification, these six rulings may well represent a departure from past determinations such that remands for additional consideration is warranted in each case.

In reaching our conclusions and issuing our Order of Remand in these six cases we do not rely on the regulation at 29 C.F.R. §5.14 which provides for "variations, tolerances, and exemptions from parts 1 and 3 of this subtitle and [Part 5]." Our ruling here is not a variation, tolerance, or exemption within the meaning of 29 C.F.R. §5.14, since we have concluded that these Wage and Hour rulings have not been shown to consider actual area practices or departed from the past practice adopted in the *Alarm Control* case.

We render this Decision and Order of Remand in light of the authority provided at 29 C.F.R. §7.1 which provides that the Administrative Review Board "shall act as fully and finally as might the Secretary of Labor concerning such matters." Our responsibility, derived from the Secretary's statutory authority, requires that:

wages . . . paid [to] various classes of laborers and mechanics . . . shall be based upon the wages . . . determined . . . to be prevailing for the corresponding classes of laborers and mechanics employed on projects

similar to the contract works in the city, town, village, or subdivision ...
of the State in which the work is to be performed. . . .

40 U.S.C. §276a.

This responsibility is likewise found in the pertinent regulations at 29 C.F.R. §1.1. Wage Determinations which are inaccurate or incomplete by failing to reflect the prevailing wages for various jobs because the underlying surveys are no longer current with regard to the established practice within a locality, defeat the purpose of the Act. Workers on Federally funded or Federally-assisted projects are ensured that their wages are to be no less than workers doing the same jobs on other projects. However, workers on projects covered by the DBRA are not entitled to wages that are not reflective of the prevailing local practice for the same job.

This remand is for the purpose of providing Wage and Hour the opportunity to reconsider the requests for conformed classifications; to formulate a coherent policy to address these and other low voltage installer conformance requests in the future; and to establish consistent Wage Determination procedures in order to provide for accurate surveys of low voltage installers' and electricians' construction work in the future.

We recommend that Wage and Hour evaluate the question of the proper division of labor between low-voltage installers and electricians in every Wage Determination for which a contracting agency requests such a classification, or where the nature of a proposed Federal or Federally-assisted construction project indicates that there is a substantial likelihood that such low-voltage system installation work will be performed.

In reconsidering these matters, we recommend that Wage and Hour look to the underlying facts in each case, to determine whether prevailing wage information was sought concerning low voltage installers in each of the areas in the last applicable survey period; whether low voltage installation or supplier/installer companies had requested to be made a part of the Wage Determination processes; and whether there is a need in a subject locality to survey for low voltage installer classifications in order to better effectuate the purpose of the DBRA to be a "mirror" of locally prevailing construction wage rates and employment practices. See, *The Griffith Company, supra*; see also, *Rite Landscape*, WAB Case No. 83-03, Oct. 18, 1983; *Hillside Gardens, Inc., et al.*, WAB Case No. 90-32, June 21, 1991, slip op. at 2.

III. ORDER

These matters are remanded to the Wage and Hour Division for further consideration. The Administrator is directed to complete reconsideration in these cases within 120 days of the date of this Decision and Order of Remand. The Administrator

shall file a report of the action taken and/or a copy of any new ruling with the Board on the date of issuance.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member