



In the Matter of:

JOE E. WOODS, INC.

ARB Case No. 96-127

With respect to reconsideration of Wage Determination No. 92-OR-0019, issued for application to the construction of 84 units of duplex and triplex housing in Astoria, Clatsop County, Oregon, (U.S. Department of Transportation, Coast Guard Contract No. DTCG50-92-C-643B29)

**(Formerly WAB Case
No. 95-12)**

DATE: November 19, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

This matter is before the Board pursuant to the Davis-Bacon Act, as amended (DBA), 40 U.S.C. § 276a *et seq.*, and 29 C.F.R. Part 7. On May 3, 1996, Petitioner Joe E. Woods, Inc. (Woods) filed a petition seeking review of the April 4, 1996 final ruling issued by the National Office Program Administrator (Administrator), Wage and Hour Division (Wage and Hour). For the following reasons, the Petition for Review is denied and the Administrator's ruling is affirmed.

BACKGROUND

On March 18, 1992, the United States Coast Guard (Coast Guard) requested a wage determination for construction of 84 units of duplex and triplex housing (the Project) in Astoria, Oregon. The request form filed by the Coast Guard described the work as "residential." Wage and Hour responded to the request and issued a wage determination consisting of two parts: (1) an area General wage determination (No. OR91-1) containing heavy and highway rates applicable to site work (*e.g.* streets, utilities, and grading); and (2) a residential wage determination, No. 92-OR-0019. Administrative Record (AR) Tab S, Enclosure 2B. Wage

^{1/} On April 17, 1996, a Secretary's Order was signed re delegating jurisdiction to issue final agency decisions under this statute to the newly created 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.

Determination No. 92-OR-0019 provided for “a residential schedule of hourly wage rates and fringe benefits for twelve classifications ranging from \$5.76 for laborers to \$12.50 (plus fringe benefits) for electricians.” Administrator’s Statement (AS) at 3. Thus, the two-part wage determination indicated that heavy and highway rates as well as residential rates would apply to the Project.

The Coast Guard issued an Invitation For Bids (IFB), DTCG-92-B-64329 on April 13, 1992. The IFB stipulated that “[r]esidential, for the purposes of these wage rates, means for work actually done on the buildings, to include site preparation for the building footprint.” IFB, Subsection L.11(a). On May 28, 1992, the Coast Guard awarded Contract No. DTCG-50-92-C-643B29 for construction of the Project to Woods. Prior to submitting its bid, Woods’s representatives traveled to the Project’s site in Astoria, Oregon, investigated the job site conditions and spoke with potential subcontractors and suppliers for the Project. Letter from Gaona & Haynes to Mr. William Denman, USCG, January 4, 1995. Both the amount of the hourly wage determination and the classification as ‘residential’ played a part in the method in which Woods bid the project. Affidavit of James V. Johnson, P.E.

Woods commenced performance of the contract but began to incur labor costs at rates in excess of the Project’s wage determination rates. On January 31, 1994, nineteen months after the contract was awarded, Woods submitted two Requests for Equitable Adjustment (REAs) of the wage determination to the Coast Guard. Woods claimed that it was influenced during the bidding process by the inaccuracy of the wage determination and that Wage and Hour’s classification of the project should have been based on construction techniques (*i.e.* building or heavy) rather than on end use (*i.e.* residential). The Coast Guard rejected both REAs.

In a letter dated April 27, 1995, the Coast Guard requested a ruling from Wage and Hour on the correctness of the Project wage determination. On August 31, 1995, Wage and Hour issued a final determination letter in response to the Coast Guard’s request for reconsideration of the wage determination, finding that there was no legal basis for rescinding the wage determination. On September 20, 1995, Wage and Hour forwarded the ruling letter to Woods, which timely filed a Petition for Review with the Wage Appeals Board (WAB).^{2/} On November 22, 1995, based on Woods’s request, the WAB remanded this matter to Wage and Hour for consideration of additional information. Wage and Hour issued a new final determination on April 4, 1996. AR Tab A.

In this ruling, the Administrator concluded that Woods’s challenge to the application of the wage determination contained in the Project’s contract was untimely. *Id.* at 3. The Administrator also concluded that the Coast Guard’s description of the Project was sufficient to support application of the residential wage rates to the Project. *Id.* at 3-4. Finally, the Administrator determined that Woods had failed to demonstrate the existence of a locally prevailing practice which would either make application of the wage determination schedule

^{2/} See note 1, *supra*; 29 C.F.R. Part 7 (1995).

wholly (or, in part, to the site preparation work) inapplicable to construction of the Project. *Id.* at 5.

DISCUSSION

There is no indication in the record that Woods disputed the wage determinations or the stipulation in the IFB prior to award of the contract. Given Woods's failure to raise a challenge to the substantive correctness of the applicable wage determinations until well after contract award, the Board concludes that the instant request for application of residential rates to the Project must be regarded as untimely. *See, e.g., Dairy Development, Ltd.*, WAB Case No. 88-35 (Aug. 24, 1990), *aff'd sub nom. Dairy Development v. Pierce*, Civ-86-1353-R (W.D. Okla.); *see also ICA Construction Corp. v. Reich*, 60 F.3d 1495 (11th Cir. 1995). In its *Dairy Development* decision, the WAB, discussing the policy set forth in its case precedent and Departmental regulations regarding the timeliness of substantive challenges to wage determinations, explained that “[m]anifest injustice to bidders would result if the successful bidder on a project could challenge his contract's wage determination rates after all other competitors were excluded from participation.” *Id.*, slip op. at 19. There are, moreover, other equally important considerations mandating timely challenges to wage determinations, such as ensuring certainty in the procurement processes of the government and the protection of wage standards for employees by providing a floor for wages of which all potential bidders are aware. *See Universities Research Association v. Coutu*, 450 U.S. 754, 776 (1981).

The contract award in this case took place on May 28, 1992. Accordingly, an appeal of the wage determination after that date is not timely. 29 C.F.R. § 1.6(c)(ii). Modifications to wage determinations are applicable to a project only if published before the contract award, or start of construction where there is no contract award. 29 C.F.R. § 1.6(c)(2). By providing a challenge procedure prior to the initiation of work, the regulations seek to avoid any unfair surprise to an employer, its employees, or the government, respecting the wage standards governing a particular contract. *See* 29 C.F.R. § 1.6(c)(3). There is an attendant obligation on the part of would-be contractors to familiarize themselves with the governing wage determination and to take advantage of the challenge procedure should the wage determination be deficient. *Sumlin & Sons*, WAB Case No. 95-08 (Nov. 30, 1995).

Woods also claims that the wage determinations incorporated into the contract “were out of date and did not constitute prevailing practice, and that the wage rates in the residential wage determination did not accurately reflect the prevailing wage rates for similar work in the Astoria, Oregon area.” Again, Woods did not raise this issue in a timely fashion. The regulations place on those seeking government contracts an obligation to familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents. Should those wage standards appear to be incomplete or incorrect the would-be contractor or subcontractor is obligated to challenge their accuracy prior to the opening of bids or the award of a contract. *Clark Mechanical Contractors, Inc.*, WAB Case No. 95-03 (Sept. 29, 1995).

We conclude that the Coast Guard properly requested a wage determination for the Project and that, moreover, Wage and Hour issued an appropriate determination in response to the request. As noted above, the Coast Guard described the Project as “New Family Housing;” thus, in our view, Wage and Hour properly issued the residential rates for application to construction of the Project. Wage and Hour’s policy directive concerning categorization of construction work, All Agency Memorandum (AAM) 130 (Mar. 17, 1978), has long delineated four major types of construction: residential, building (or commercial), heavy and highway. Among these categories, only that of residential construction clearly fits the type of construction solicited by the Coast Guard’s IFB for the Astoria housing units. Specifically, AAM 130 describes “residential” construction projects as:

those . . . involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.

Id. Thus, it is our conclusion that the Coast Guard’s request (and Woods’s own description^{3/} of the Project) make it clear that the Project was properly characterized as residential construction.

Woods argues that the Coast Guard’s description of the project “was so woefully inadequate so as to constitute an erroneous project description which justifies imposition of the relief sought by Woods in this matter.” In this regard, Woods contends that the project description was so inaccurate as to require invoking the discretionary regulatory provision at 29 C.F.R. § 1.6(f), which permits the Administrator to:

issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract . . . *[or] when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency’s request for the wage determination.*

Emphasis added. However, for the reasons already specified above, we conclude that the project description submitted by the Coast Guard in this matter was sufficiently clear and unambiguous

^{3/} At one time, Woods’s representative, arguing for only one “residential” wage determination for the Project, stated that the Project “is the construction of duplex housing units;” that “these homes are located on a single site;” and that “the streets and utilities are completely located within the subdivision and incidental to the construction of the homes.” AR Tab T, July 30 1992 letter of Chris G. Evans, General Manager, Joe E. Woods, Inc.

such that this provision -- which is a narrow exception permitting, but not requiring retroactive application^{4/} of a post-award wage determination -- of the regulations does not come into play.

Woods argues in support of its Petition that the Project was not standard residential construction, but that it was more complex given the siting, terrain and location in the Seismic 3 zone. Accordingly, Woods contends that it was forced to pay higher wage rates than those contained in the wage determination in order to obtain the laborers and mechanics needed to construct the project. However, wage determinations issued pursuant to the Davis-Bacon and Related Acts (*see* 29 C.F.R. § 5.1) merely establish the *minimum* wages and fringe benefits required for payment on a particular project and are not a guarantee that the minimum wages contained in a wage determination will, in fact, be the wages required to be actually paid in order to perform the contract. As stated by the Supreme Court in *United States v. Binghamton Const. Co.*, 347 U.S. 171, 178 (1954): “the specified minima presupposes the possibility that the contractor may have to pay higher rates.” Even assuming, *arguendo*, that Woods is correct in asserting that the Project was more “complex” than other residential construction, that fact does not make the wage determination in this case improper nor does it entitle Woods to a retroactive redetermination.^{5/} Woods contention regarding the Project’s complexity is belied by the July 30, 1992 letter from Woods to Brenda LaCroix, Labor Compliance Specialist, in which Woods attempted to have the one residential wage rate applied to the entire project:

The purpose of this letter is to provide information on the above referenced project in order to assist the U.S. Department of Labor in determining that there should be only one residential wage determination for this project, not two wage rates that currently exist . . . As you know, we have been involved with government housing for 16 years and have never had two wage decisions on the same site. There is nothing different on this project that sets it apart from others in terms of the scope of work. That is, we are building houses which have the normal amount of streets, and utilities to serve them. The cost of the streets and

^{4/} Another exception, permitting retroactive wage determination adjustment, is the provision at 29 C.F.R. § 1.6(d), allowing for correction of clerical errors. This provision has no applicability on the facts of this case.

^{5/} Where, due to unanticipated work or oversight, a job classification necessary to complete the work is not included in the wage determination, a contractor may seek additional classifications through the conformance process. The regulations governing the conformance procedure are set published at 29 C.F.R. § 5.5(a)(1). For a conformance request to be approved, it must satisfy the following three criteria: (1) the work to be performed by the classification requested is not performed by a classification in the wage determination; (2) the classification is utilized in the area by the construction industry; and (3) the proposed wage rate, including any *bona fide* fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination. *Clark Mechanical Contractors, Inc.*, *supra*. The Administrator is given broad discretion to accept or reject any given conformance request. However, the conformance procedure is not intended to be a substitute process for challenging wage determinations in a timely manner.

utilities are higher than average because of the hilly terrain and the storm drainage needed for this rainy area. However, I am not sure the cost of the streets and utilities should affect the wage decision as long as the work is incidental to the housing. We would like the wage rates to be limited to the one residential wage decision which is now a part of the contract and eliminate the second Building Heavy Highway wage decision in its entirety. A favorable reply from you and the Department of Labor would be appreciated.

AR Tab T, Enclosure 4. The record indicates that Woods was aware of the nature of the project but incurred unforeseen expenses during construction. Such unforeseen circumstances do not constitute a legal basis for rescinding the application of the wage determination.

For the foregoing reasons, the Petition for Review of Wage Determination No. 92-OR-0019 is **DENIED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member