

The Conformance Process: When a Job Classification Is Missing

When a wage determination included in a solicitation or contract omits one or more categories of service employees that the contractor intends to employ under its contract, the contractor must classify the employees so as to derive appropriate wage rates and fringe benefits to be paid the employees. 29 C.F.R. §4.6(b). The process for deriving such wage rates is not well explained in the regulations and, consequently, not well understood by contractors, contracting agencies, and even Wage & Hour personnel.

The classification chosen must provide a reasonable relationship between the unclassified employees and the classifications listed in the wage determination, based on an appropriate level of skill comparison. The regulations state that “a pay relationship should be maintained between job classifications based on the skill required and the duties performed.” *Id.* §4.6(b)(2)(iv). How this should be done is not explained in the regulations, except for brief references to Federal and other job grading systems.

The regulations state, in this regard, that a contractor may obtain guidance for arriving at conforming rates from the way jobs are rated under the Federal pay system or from other wage determinations issued for the same general locality. In addition, one may rely on standard wage and salary administration practices that rank various job classifications by pay grade pursuant to point schemes or other job factors. *Id.* Year-to-year increases in conformed rates may be established by indexing (adjusting) the prior year’s conformed rate by the average increase or decrease in wages for classifications contained in the contract. Thus, rates may be conformed by looking at similar occupational categories, and increases in the rate may be extrapolated thereafter by looking at average increases under the wage determination.

A contractor must institute its conforming rates procedures before beginning performance of the contract. Within 30 days after that, the contractor must prepare a written report of the proposed action concerning the conforming rates for the unclassified employees for submission of the contracting office. *Id.* §4.6(b)(2)(ii). The contractor must also discuss the proposed conforming rates with the unclassified employees or their representatives, and address any agreement or disagreement in its report. *Id.* A contractor must use Standard Form 1444, “Request for Authorization of Additional Classification and Rate,” in requesting approval of conforming rates. FAR 22.406-3; 53,301-1444.

Next, the contracting officer is required to submit the contractor’s report, along with the agency’s recommendations, to the Wage & Hour Administrator for review. The regulations state that the Administrator then approves, modifies, or disapproves the proposed rates within 30 days, and that decision is transmitted to the contractor, who in turn must give a copy to affected employees. 29 C.F.R. §4.6(b)(2)(iii). The contractor must then pay those employees in accordance with the Administrator’s determination.

Should the contractor disagree with the Administrator’s decision, it may appeal the decision to the ARB. 29 C.F.R. Part 8. ALJs have no jurisdiction to review the correctness of conformed rates or over the conformance procedure. Only the ARB has that power. An ALJ’s sole function when a complaint seeks back wages based on an otherwise valid and unappealed

conformance ruling is to order payment of back wages based on the conformed classifications and wage rates. *Executive Suite Svcs., Inc.*, BSCA No. 92-26 (Mar. 12, 1993).

The difficulty with conforming rates is that a contractor must attempt to second-guess the Administrator because the Administrator could determine that a higher wage rate than the contractor bid is appropriate. If that occurs, the contractor must pay that higher rate without a contract price adjustment. *Sterling Services, Inc.*, ASBCA No. 40475, 91-2 BCA ¶23,714 (absent an agreement between the parties, the contractor was not entitled to a price increase for higher rates required to be paid in the base year of the contract; however, the contractor could obtain a price increase for wage rates payable on an option year). It should also be noted that the Administrator will refuse to conform rates where there is a job classification in the wage determination that DOL believes covers the work under the contract, even though the contractor believes the appropriate classification has been omitted.

In *Andrew Aiken*, ARB No. 08-009 (April 30, 2009), the ARB held that the burden on a petitioner that challenges a conformance is not merely to prove that another choice was available--or even preferable--but to demonstrate affirmatively that the Administrator's choice was unreasonable. Moreover, the conformance process does not require the exactitude that might be achieved in a *de novo* determination of prevailing wage rates. The ARB also held that the Administrator's alleged failure to point out defects in a conformance request did not preclude the Administrator from denying the request since the regulations clearly spell out the conformance process.

The SCA conformance regulation requires, as a first consideration, that the duties of a proposed conformed classification not be performed by a classification already listed in the applicable wage determination. See *Mason & Hanger-Silas Mason Corp.*, BSCA No. 92-28 (May 27, 1993). A predecessor's conformed wage rates are not binding on a successor. *Lear Siegler, Inc. Mgmt. Svcs. Div.*, 85-SCA-WD-1 (Under Sec. Labor, Dec. 18, 1985). The cases have been inconsistent about whether contractors can obtain relief when the government knows that conformances by a prior contractor had been rejected by DOL. For example, where the contracting agency knew that DOL had denied certain conformance requests by the prior contractor but did not inform the contractor, the ASBCA denied the contractor's claim of Government superior knowledge because contractors are on notice that DOL is responsible for administering the SCA. *Johnson Controls World Services, Inc.*, ASBCA No. 40233, 96-2 BCA ¶28,458. However, in *Midland Maint., Inc.*, ENGBCA No. 6080, 96-2 BCA ¶28,302, it was held that the Government withheld superior knowledge because it knew, and did not reveal to the contractor, that pick-up truck drivers had to be paid truck driver rates under the SCA.

If multiple WDs are applicable to a contract which covers several localities, 29 C.F.R. §4.6(b)(2)(ii) requires conformance to the specific contract WD for the locality in which an affected employee works. *Raymond R. Schafer*, BSCA No. 92-30 (Mar. 26, 1993).

In *ERC/Teledyne Brown Eng'g*, ARB No. 05-133 (Jan. 31, 2007), the ARB reaffirmed the basic principles applicable to conformance proceedings. These include that "the [Wage-Hour] Administrator is accorded broad discretion in establishing a conformed rate" and his 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." One of the procedures available to

the Administrator is “slotting” whereby “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.” The ARB’s review of a conformance decision, whether by slotting or otherwise, will be limited to whether the decision was reasonable, not whether other choices were available or even preferable. In *ERC/Teledyne Brown Eng’g*, the petitioners (employees of a subcontractor) attempted to introduce evidence regarding how a purportedly similar job was conformed under a different contract at a different location. The ARB stated that because it reviews only the reasonableness of the Administrator’s decision, such evidence is irrelevant.

In August 1995, DOL published a self-instructional course called the *Service Contract Act Conformances Task Book*. The introduction states:

The objective of this course is to give you practice using flowcharts that will assist in developing conformance requests under the Service Contract Act. The course provides you with a set of 6 simulated conformances that get progressively more difficult and take you through the major paths of the flowchart.

A companion text is the *Service Contract Act Conformances Resource Book* (Aug. 1995). Neither publication is currently available from DOL.