2022 Annual Review
Labor & Employment Panel

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Executive Order 14026 of April 27, 2021

Increasing the Minimum Wage for Federal Contractors

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers, it is hereby ordered as follows:

Section 1. *Policy.* This order promotes economy and efficiency in Federal procurement by increasing the hourly minimum wage paid by the parties that contract with the Federal Government to $15.00 for those workers working on or in connection with a Federal Government contract as described in section 8 of this order. Raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs. Accordingly, ensuring that Federal contractors pay their workers an hourly wage of at least $15.00 will bolster economy and efficiency in Federal procurement.

Sec. 2. *Increasing the Minimum Wage for Federal Contractors and Subcontractors.* (a) Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), (5) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (as defined in regulations issued pursuant to section 4(a) of this order and as described in section 8(a) of this order) include a clause that the contractor and any covered subcontractors (as defined in regulations issued pursuant to section 4(a) of this order) shall incorporate into lower-tier subcontracts. This clause shall specify that, as a condition of payment, the minimum wage to be paid to workers employed in the performance of the contract or any covered subcontract thereunder, including workers whose wages are calculated pursuant to special certificates issued under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), shall be at least:

(i) $15.00 per hour, beginning January 30, 2022; and

(ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary of Labor (Secretary). The amount shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be:

(A) not less than the amount in effect on the date of such determination;

(B) increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(C) rounded to the nearest multiple of $0.05.

(b) In calculating the annual percentage increase in the Consumer Price Index for purposes of subsection (a)(ii)(B) of this section, the Secretary shall compare such Consumer Price Index for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage is in effect pursuant to subsection (a)(ii)(B) of this section) with the Consumer Price Index for the same month in the

preceding year, the same quarter in the preceding year, or the preceding year, respectively.

(c) Nothing in this order shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this order.

Sec. 3. *Application to Tipped Workers.* (a) For workers covered under section 2 of this order who are tipped employees pursuant to section 3(t) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(t)), the cash wage that must be paid by an employer to such workers shall be at least:

(i) $10.50 per hour, beginning January 30, 2022;

(ii) beginning January 1, 2023, 85 percent of the wage in effect under section 2 of this order, rounded to the nearest multiple of $0.05; and

(iii) beginning January 1, 2024, and for each subsequent year, 100 percent of the wage in effect under section 2 of this order.

(b) Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of this order, the cash wage paid by the employer, as set forth in this section for those workers, shall be increased such that their wages equal the minimum wage under section 2 of this order. Consistent with applicable law, if the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 *et seq.*, or any other applicable law or regulation is higher than the wage required under section 2 of this order, the employer shall pay additional cash wages sufficient to meet the highest wage required to be paid.

Sec. 4. *Regulations and Implementation.* (a) The Secretary shall, consistent with applicable law, issue regulations by November 24, 2021, to implement the requirements of this order. Such regulations shall include both definitions of relevant terms and, as appropriate, exclusions from the requirements of this order. Within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council, to the extent permitted by law, shall amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations, contracts, and contract-like instruments subject to this order the clause described in section 2(a) of this order.

(b) Within 60 days of the Secretary issuing regulations pursuant to subsection (a) of this section, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts and contract-like instruments as described in sections 8(a)(i)(C) and (D) of this order, entered into on or after January 30, 2022, consistent with the effective date of such agency action, comply with the requirements set forth in sections 2 and 3 of this order.

(c) Any regulations issued pursuant to this section should, to the extent practicable, incorporate existing definitions, principles, procedures, remedies, and enforcement processes under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*; the Service Contract Act, 41 U.S.C. 6701 *et seq.*; the Davis-Bacon Act, 40 U.S.C. 3141 *et seq.*; Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); and regulations issued to implement that order.

Sec. 5. *Enforcement.* (a) The Secretary shall have the authority for investigating potential violations of and obtaining compliance with this order.

(b) This order creates no rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, and disputes regarding whether a contractor has paid the wages prescribed by this order, as appropriate and consistent with applicable law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to this order.

Sec. 6. *Revocation of Certain Presidential Actions.* Executive Order 13838 of May 25, 2018 (Exemption From Executive Order 13658 for Recreational Services on Federal Lands), is revoked as of January 30, 2022. Executive

Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors), is superseded, as of January 30, 2022, to the extent it is inconsistent with this order.

Sec. 7. *Severability.* If any provision of this order, or the application of any provision of this order to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

Sec. 8. *Applicability.* (a) This order shall apply to any new contract; new contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if (i):

(A) it is a procurement contract or contract-like instrument for services or construction;

(B) it is a contract or contract-like instrument for services covered by the Service Contract Act;

(C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR 4.133(b); or

(D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(b) For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, this order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. Where workers' wages are governed by the Fair Labor Standards Act of 1938, this order shall apply only to procurement contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to this order pursuant to regulations or actions taken under section 4 of this order.

(c) This order shall not apply to grants; contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 4(a) of this order.

Sec. 9. *Effective Date.* (a) This order is effective immediately and shall apply to new contracts; new contract-like instruments; new solicitations; extensions or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments, as described in section 8(a) in this order, where the relevant contract or contract-like instrument will be entered into, the relevant contract or contract-like instrument will be extended or renewed, or the relevant option will be exercised, on or after:

(i) January 30, 2022, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 4(a) of this order; or

(ii) for contracts where an agency action is taken pursuant to section 4(b) of this order, January 30, 2022, consistent with the effective date for such action.

(b) As an exception to subsection (a) of this section, where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 4 of this order and entered into a new contract or contract-like instrument resulting from such solicitation within 60 days of such effective date, such agencies are strongly encouraged but not required to ensure that the minimum wages specified in sections 2 and 3 of this

order are paid in the new contract or contract-like instrument. But if that contract or contract-like instrument is subsequently extended or renewed, or an option is subsequently exercised under that contract or contract-like instrument, the minimum wages specified in sections 2 and 3 of this order shall apply to that extension, renewal, or option.

(c) For all existing contracts and contract-like instruments, solicitations issued between the date of this order and the effective dates set forth in this section, and contracts and contract-like instruments entered into between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the hourly wages paid under such contracts or contract-like instruments are consistent with the minimum wages specified in sections 2 and 3 of this order.

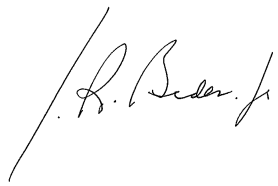
Sec. 10. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
April 27, 2021.

[FR Doc. 2021–09263
Filed 4–29–21; 8:45 am]
Billing code 3295–F1–P

Federal Register
Vol. 86, No. 223
Tuesday, November 23, 2021

Presidential Documents

Title 3—

The President

Executive Order 14055 of November 18, 2021

Nondisplacement of Qualified Workers Under Service Contracts

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.,* and in order to promote economy and efficiency in procurement, it is hereby ordered as follows:

Section 1. *Policy.* When a service contract expires, and a follow-on contract is awarded for the same or similar services, the Federal Government's procurement interests in economy and efficiency are best served when the successor contractor or subcontractor hires the predecessor's employees, thus avoiding displacement of these employees. Using a carryover work force reduces disruption in the delivery of services during the period of transition between contractors, maintains physical and information security, and provides the Federal Government with the benefits of an experienced and well-trained work force that is familiar with the Federal Government's personnel, facilities, and requirements. These same benefits are also often realized when a successor contractor or subcontractor performs the same or similar contract work at the same location where the predecessor contract was performed.

Sec. 2. *Definitions.*

(a) ''Service contract'' or ''contract'' means any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.,* and its implementing regulations.

(b) ''Employee'' means a service employee as defined in the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3).

(c) ''Agency'' means an executive department or agency, including an independent establishment subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A).

Sec. 3. *Nondisplacement of Qualified Workers.* (a) Each agency shall, to the extent permitted by law, ensure that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, include the following clause:

''Nondisplacement of Qualified Workers: (a) The contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer service employees (as defined in the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3)) employed under the predecessor contract and its subcontracts whose employment would be terminated as a result of the award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which those employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ more or fewer employees than the predecessor contractor employed in connection with performance of the work solely on the basis of that determination. Except as provided in paragraph (b), there shall be no employment opening under this contract or subcontract, and the contractor and any subcontractors shall not offer employment under this contract to any person prior to having complied fully with the obligations described in this clause. The contractor and its subcontractors shall make an express offer of employment to each

employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 business days.

''(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3), and (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employees' past performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors.

''(c) The contractor shall, not less than 10 business days before the earlier of the completion of this contract or of its work on this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer shall provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives, consistent with the Privacy Act, 5 U.S.C. 552a, and other applicable law.

''(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, the Secretary may impose appropriate sanctions against the contractor or its subcontractors, as provided in Executive Order (No.) _____, the regulations implementing that order, and relevant orders of the Secretary, or as otherwise provided by law.

''(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) and (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph (c) of this clause. The contractor shall take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for noncompliance: provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.''

(b) Nothing in this order shall be construed to require or recommend that agencies, contractors, or subcontractors pay the relocation costs of employees who exercise their right to work for a successor contractor or subcontractor pursuant to this order.

Sec. 4. *Location Continuity.* (a) When an agency prepares a solicitation for a service contract that succeeds a contract for performance of the same or similar work, the agency shall consider whether performance of the work in the same locality or localities in which the contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services.

(b) If an agency determines that performance of the contract in the same locality or localities is reasonably necessary to ensure economical and efficient provision of services, then the agency shall, to the extent consistent with law, include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality or localities.

Sec. 5. *Exclusions.* This order shall not apply to:

(a) contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134; or

(b) employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

Sec. 6. *Exceptions Authorized by Agencies.* (a) A senior official within an agency may grant an exception from the requirements of section 3 of this order for a particular contract by, no later than the solicitation date, providing a specific written explanation of why at least one of the following circumstances exists with respect to that contract:

(i) Adhering to the requirements of section 3 of this order would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement;

(ii) Based on a market analysis, adhering to the requirements of section 3 of this order would:

(A) substantially reduce the number of potential bidders so as to frustrate full and open competition; and

(B) not be reasonably tailored to the agency's needs for the contract; or

(iii) Adhering to the requirements of section 3 of this order would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

(b) To the extent permitted by law and consistent with national security and executive branch confidentiality interests, each agency shall publish, on a centralized public website, descriptions of the exceptions it has granted under this section, and ensure that the contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency's determination to grant an exception.

(c) On a quarterly basis, each agency shall report to the Office of Management and Budget descriptions of the exceptions granted under this section.

Sec. 7. *Regulations and Implementation.* (a) The Secretary of Labor (Secretary) shall, to the extent consistent with law, issue final regulations within 180 days of the date of this order to implement the requirements of this order, other than those specified in sections 6(b) and (c) of this order.

(b) Within 60 days of the Secretary issuing final regulations, the Federal Acquisition Regulatory Council (FAR Council), to the extent consistent with law, shall amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order the clause described in section 3 of this order.

(c) The Director of the Office of Management and Budget shall, to the extent consistent with law, issue guidance to implement section 6(c) of this order.

Sec. 8. *Enforcement.* (a) The Secretary shall have the authority to investigate potential violations of, and obtain compliance with, this order. In such proceedings, the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary may also provide that, if a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor

or subcontractor has a substantial interest, may be ineligible to be awarded any contract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further Federal Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity to present information and argument in opposition to the proposed debarment or inclusion on the list.

(b) This order creates no rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.,* and disputes regarding the requirements of the contract clause prescribed by section 3 of this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under this order.

Sec. 9. *Revocation.* Executive Order 13897 of October 31, 2019 (Improving Federal Contractor Operations by Revoking Executive Order 13495), is revoked. Executive Order 13495 of January 30, 2009 (Nondisplacement of Qualified Workers Under Service Contracts), remains revoked.

Sec. 10. *Severability.* If any provision of this order, or the application of any provision of this order to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

Sec. 11. *Effective Date.* This order shall become effective immediately and shall apply to solicitations issued on or after the effective date of the final regulations issued by the FAR Council under section 7 of this order. For solicitations issued between the date of this order and the date of the action taken by the FAR Council under section 7 of this order, or solicitations that have already been issued and are outstanding as of the date of this order, agencies are strongly encouraged, to the extent permitted by law, to include in the relevant solicitation the contract clause described in section 3 of this order.

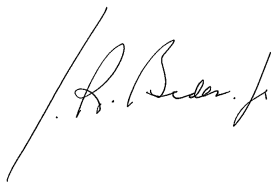
Sec. 12. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
November 18, 2021.

[FR Doc. 2021–25715
Filed 11–22–21; 8:45 am]
Billing code 3395–F2–P

The Administrator further proposes that aggregate production quotas for all other schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 remain at zero. In accordance with 21 CFR 1303.13 and 21 CFR 1315.13, upon consideration of the relevant factors, the Administrator may adjust the 2021 aggregate production quotas and assessment of annual needs as needed.

Conclusion

After consideration of any comments or objections, or after a hearing, if one is held, the Administrator will issue and publish in the **Federal Register** a final order establishing any adjustment of 2021 aggregate production quota for each basic class of controlled substances in schedules I and II and the assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. 21 CFR 1303.13(c) and 1315.13(f).

Anne Milgram,

Administrator.

[FR Doc. 2021–18935 Filed 9–1–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Rescission of Notice of Intention Not To Request, Accept or Use Employer Information Report (EEO–1) Component 2 Data, November 25, 2019

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice.

SUMMARY: The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) collect workforce data through the Employer Information Report (EEO–1) under their Joint Reporting Committee. OFCCP is rescinding its previously issued notice, which stated that OFCCP did not intend to request, accept, or use EEO–1 Component 2 data. The agency has determined that it was premature to issue a notice stating OFCCP did not expect to find significant utility in the data.

DATES: This action is effective immediately.

FOR FURTHER INFORMATION CONTACT: Tina T. Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

Background

OFCCP administers and enforces Executive Order 11246, as amended (E.O. 11246), which applies to Federal contractors and subcontractors. E.O. 11246 prohibits employment discrimination and requires affirmative action to ensure equal employment opportunity regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin. It also prohibits Federal contractors and subcontractors from discriminating against applicants and employees for inquiring about, discussing, or disclosing information about their pay or the pay of their co-workers, subject to certain limitations.

OFCCP and the EEOC have separate legal authority to collect EEO–1 data, and they coordinate collection to promote efficiency through their Joint Reporting Committee. The EEOC's legal authority to collect EEO–1 data from private employers derives from Title VII of the Civil Rights Act, and OFCCP's authority to collect data from certain Federal contractors derives from E.O. 11246 and its implementing regulations.[1] The EEO–1 data collection is a mandatory annual data collection that requires all private sector employers that are covered by Title VII and have 100 or more employees, and Federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by sex, race, ethnicity, and job categories (Component 1) (Office of Management and Budget (OMB) Control No. 3046–0049). The EEO–1 Component 1 data has been shared between the two agencies for decades to avoid duplicative information collections and to minimize the burden on employers.

OFCCP had previously expressed interest in collecting summary compensation data for the purpose of informing its compliance and enforcement efforts. On August 8, 2014, OFCCP published a notice of proposed rulemaking in the **Federal Register** to amend the regulations that implement E.O. 11246 by adding a requirement that certain Federal contractors and subcontractors supplement their EEO–1 Report with summary information on compensation paid to employees, as contained in the Form W–2, Wage and Tax Statement, by sex, race, ethnicity, and specified job categories, as well as other relevant data points such as hours worked and the number of employees.[2] The purpose of the proposed collection was to enable OFCCP to more effectively focus its enforcement resources to better identify potential pay inequities for further evaluations. Public comments submitted to OFCCP on the proposal argued for, among other things, improving interagency coordination and decreasing employer burden for reporting compensation data by using the EEO–1 data collection, rather than conducting a new OFCCP data collection. Ultimately, OFCCP determined that it would collaborate with the EEOC to collect compensation data as part of the EEO–1 filing rather than proceed with publishing a final rule.

On July 14, 2016, the EEOC published a 30-day notice in the **Federal Register** to obtain a three-year approval from OMB for the continued collection of Component 1 demographic data, as well as a new collection of summary compensation data, referred to as ''Component 2'' EEO–1 data.[3] The notice stated that, although the EEOC is responsible for compliance with the Paperwork Reduction Act of 1995, the EEO–1 report is a joint data collection to meet the enforcement needs of both the EEOC and OFCCP while avoiding duplication. The Component 2 collection included aggregated data on employee pay and hours worked. On September 29, 2016, OMB approved the EEO–1 Components 1 and 2 information collection for calendar years 2017 and 2018.

On August 29, 2017, OMB stayed the EEOC's collection of Component 2 data, and the EEOC proceeded to collect only Component 1 data. Subsequently, the EEOC issued a **Federal Register** notice on September 15, 2017, suspending the Component 2 data collection.[4] In response to a lawsuit challenging OMB and the EEOC's actions, on March 4, 2019, the United States District Court for the District of Columbia vacated OMB's stay of the Component 2 data collection and ordered that the previous approval of the EEO–1 Component 2 collection was in effect.[5] The court further ordered the EEOC to collect the Component 2 data for calendar years 2017 and 2018 by September 30, 2019. On May 3, 2019, the EEOC published a **Federal Register** notice announcing the

[1] *See* 42 U.S.C. 2000e–8(c); 29 CFR 1602.7; 41 CFR 60–1.7.

[2] *See* 79 FR 46561 (Aug. 8, 2014).

[3] *See* 81 FR 45479 (July 14, 2016).

[4] *See* 82 FR 43362 (Sept. 15, 2017).

[5] *National Women's Law Center, et al.* v. *Office of Management and Budget, et al.,* 358 F. Supp. 3d 66 (D.D.C. 2019).

immediate reinstatement of the collection of 2017 and 2018 Component 2 data from EEO–1 filers.[6] A February 6, 2020 Joint Status Report to the court stated that more than 89% of all eligible employers had submitted Component 2 data, and on February 10, 2020, the United States District Court for the District of Columbia deemed the collection complete.

On September 12, 2019, the EEOC published a 60-day notice in the **Federal Register** announcing its intention not to seek renewal of the OMB approval for the collection of Component 2 data.[7] The EEOC concluded that, it should consider information from the Component 2 data collection before deciding whether to pursue another pay data collection consistent with the Paperwork Reduction Act.

Subsequently, on November 25, 2019, OFCCP published a notice in the **Federal Register** indicating that the agency would not ''request, accept, or use Component 2 data, as it does not expect to find significant utility in the data given limited resources and [the data's] aggregated nature.'' [8] While the notice conceded that ''the data could potentially inform OFCCP's scheduling process for compliance evaluations,'' OFCCP concluded that the Component 2 data was too broad and not collected at a level of detail that would enable the agency to make comparisons among similarly situated employees as required by the ''Title VII standards that OFCCP applies in administering and enforcing [E.O.] 11246'' without conducting additional analysis that would put an unnecessary financial burden on the agency.[9]

On March 23, 2020, the EEOC published the 30-day notice indicating that it would not seek an extension to continue Component 2 data collection.[10]

Accepting Aggregated Component 2 Data from the EEOC

OFCCP issued its November 2019 notice stating the agency would not request, accept, or use Component 2 data even before the United States District Court for the District of Columbia deemed the collection of 2017 and 2018 Component 2 data complete in February 2020. At that time, OFCCP had little information about the response rate of the collection, how the data was submitted and assembled, or the completeness of the data. Nor did the agency have the opportunity to review and analyze the data.

Upon further consideration, OFCCP believes the position taken by the agency in the November 2019 notice was premature and counter to the agency's interests in ensuring pay equity. As detailed below, there are substantial reasons to believe that the Component 2 data could be useful to OFCCP's enforcement. Given the effort expended by employers to submit the data and resources devoted by the EEOC and OFCCP in the development of the collection, OFCCP believes it would be valuable to analyze this data to assess its utility for OFCCP's enforcement efforts.

OFCCP intends to devote further agency resources to evaluate the data's utility because the joint collection and analysis of compensation data could improve OFCCP's ability to efficiently and effectively investigate potential pay discrimination.[11] Also, analyzing compensation data in conjunction with other available information, such as labor market survey data, could help OFCCP identify neutral criteria to select contractors for compliance evaluations. Thus, OFCCP is rescinding its November 25, 2019 notice. OFCCP plans to analyze the Component 2 data collection to assess its utility for providing insight into pay disparities across industries and occupations and strengthen Federal efforts to combat pay discrimination.

Tina T. Williams,

Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs.

[FR Doc. 2021–18924 Filed 9–1–21; 8:45 am]

BILLING CODE 4510–CM–P

[6] *See* 84 FR 18974 (May 3, 2019).

[7] *See* 84 FR 48138 (Sept. 12, 2019).

[8] *See* 84 FR 64932 (Nov. 25, 2019).

[9] 84 FR 64993.

[10] *See* 85 FR 16340 (March 23, 2020).

[11] As stated in the EEOC's July 14, 2016, 30-day notice, EEOC concluded that ''implementing the proposed EEO–1 pay data collection will improve the EEOC's ability to efficiently and effectively structure its investigation of pay discrimination charges.'' *See* 81 FR 45479, 45483 (July 14, 2016). OFCCP, too, believes the compensation data collection may be useful for its enforcement efforts.

NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: 2022–2024 IMLS Native American Library Services Enhancement Grants Notice of Funding Opportunity (3137–0110)

AGENCY: Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning a plan to modify the eligibility criteria and to update performance measurement requirements for Native American Library Services Enhancement Grants. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before October 31, 2021.

ADDRESSES: Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone: 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

FOR FURTHER INFORMATION CONTACT: Anthony D. Smith, Associate Deputy Director, Office of Library Services, Discretionary Programs, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Mr. Smith can be reached by telephone at 202–653–4716, or by email at *asmith@imls.gov.*

SUPPLEMENTARY INFORMATION: IMLS is particularly interested in public comment that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the

Presidential Documents

Executive Order 13985 of January 20, 2021

Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. *Policy.* Equal opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths. But for too many, the American Dream remains out of reach. Entrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities. Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism. Our Nation deserves an ambitious whole-of-government equity agenda that matches the scale of the opportunities and challenges that we face.

It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.

By advancing equity across the Federal Government, we can create opportunities for the improvement of communities that have been historically underserved, which benefits everyone. For example, an analysis shows that closing racial gaps in wages, housing credit, lending opportunities, and access to higher education would amount to an additional $5 trillion in gross domestic product in the American economy over the next 5 years. The Federal Government's goal in advancing equity is to provide everyone with the opportunity to reach their full potential. Consistent with these aims, each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups. Such assessments will better equip agencies to develop policies and programs that deliver resources and benefits equitably to all.

Sec. 2. *Definitions.* For purposes of this order: (a) The term ''equity'' means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

(b) The term ''underserved communities'' refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the preceding definition of ''equity.''

Sec. 3. *Role of the Domestic Policy Council.* The role of the White House Domestic Policy Council (DPC) is to coordinate the formulation and implementation of my Administration's domestic policy objectives. Consistent with this role, the DPC will coordinate efforts to embed equity principles, policies, and approaches across the Federal Government. This will include efforts to remove systemic barriers to and provide equal access to opportunities and benefits, identify communities the Federal Government has underserved, and develop policies designed to advance equity for those communities. The DPC-led interagency process will ensure that these efforts are made in coordination with the directors of the National Security Council and the National Economic Council.

Sec. 4. *Identifying Methods to Assess Equity.* (a) The Director of the Office of Management and Budget (OMB) shall, in partnership with the heads of agencies, study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals. The study should aim to identify the best methods, consistent with applicable law, to assist agencies in assessing equity with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability.

(b) As part of this study, the Director of OMB shall consider whether to recommend that agencies employ pilot programs to test model assessment tools and assist agencies in doing so.

(c) Within 6 months of the date of this order, the Director of OMB shall deliver a report to the President describing the best practices identified by the study and, as appropriate, recommending approaches to expand use of those methods across the Federal Government.

Sec. 5. *Conducting an Equity Assessment in Federal Agencies.* The head of each agency, or designee, shall, in consultation with the Director of OMB, select certain of the agency's programs and policies for a review that will assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs. The head of each agency, or designee, shall conduct such review and within 200 days of the date of this order provide a report to the Assistant to the President for Domestic Policy (APDP) reflecting findings on the following:

(a) Potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs;

(b) Potential barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities;

(c) Whether new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs; and

(d) The operational status and level of institutional resources available to offices or divisions within the agency that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.

Sec. 6. *Allocating Federal Resources to Advance Fairness and Opportunity.* The Federal Government should, consistent with applicable law, allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals from those communities. To this end:

(a) The Director of OMB shall identify opportunities to promote equity in the budget that the President submits to the Congress.

(b) The Director of OMB shall, in coordination with the heads of agencies, study strategies, consistent with applicable law, for allocating Federal resources in a manner that increases investment in underserved communities, as well as individuals from those communities. The Director of OMB shall report the findings of this study to the President.

Sec. 7. *Promoting Equitable Delivery of Government Benefits and Equitable Opportunities.* Government programs are designed to serve all eligible individuals. And Government contracting and procurement opportunities should be available on an equal basis to all eligible providers of goods and services. To meet these objectives and to enhance compliance with existing civil rights laws:

(a) Within 1 year of the date of this order, the head of each agency shall consult with the APDP and the Director of OMB to produce a plan for addressing:

(i) any barriers to full and equal participation in programs identified pursuant to section 5(a) of this order; and

(ii) any barriers to full and equal participation in agency procurement and contracting opportunities identified pursuant to section 5(b) of this order.

(b) The Administrator of the U.S. Digital Service, the United States Chief Technology Officer, the Chief Information Officer of the United States, and the heads of other agencies, or their designees, shall take necessary actions, consistent with applicable law, to support agencies in developing such plans.

Sec. 8. *Engagement with Members of Underserved Communities.* In carrying out this order, agencies shall consult with members of communities that have been historically underrepresented in the Federal Government and underserved by, or subject to discrimination in, Federal policies and programs. The head of each agency shall evaluate opportunities, consistent with applicable law, to increase coordination, communication, and engagement with community-based organizations and civil rights organizations.

Sec. 9. *Establishing an Equitable Data Working Group.* Many Federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables. This lack of data has cascading effects and impedes efforts to measure and advance equity. A first step to promoting equity in Government action is to gather the data necessary to inform that effort.

(a) *Establishment.* There is hereby established an Interagency Working Group on Equitable Data (Data Working Group).

(b) *Membership.*

(i) The Chief Statistician of the United States and the United States Chief Technology Officer shall serve as Co-Chairs of the Data Working Group and coordinate its work. The Data Working Group shall include representatives of agencies as determined by the Co-Chairs to be necessary to complete the work of the Data Working Group, but at a minimum shall include the following officials, or their designees:

(A) the Director of OMB;

(B) the Secretary of Commerce, through the Director of the U.S. Census Bureau;

(C) the Chair of the Council of Economic Advisers;

(D) the Chief Information Officer of the United States;

(E) the Secretary of the Treasury, through the Assistant Secretary of the Treasury for Tax Policy;

(F) the Chief Data Scientist of the United States; and

(G) the Administrator of the U.S. Digital Service.

(ii) The DPC shall work closely with the Co-Chairs of the Data Working Group and assist in the Data Working Group's interagency coordination functions.

(iii) The Data Working Group shall consult with agencies to facilitate the sharing of information and best practices, consistent with applicable law.

(c) *Functions.* The Data Working Group shall:

(i) through consultation with agencies, study and provide recommendations to the APDP identifying inadequacies in existing Federal data collection programs, policies, and infrastructure across agencies, and strategies for addressing any deficiencies identified; and

(ii) support agencies in implementing actions, consistent with applicable law and privacy interests, that expand and refine the data available to the Federal Government to measure equity and capture the diversity of the American people.

(d) OMB shall provide administrative support for the Data Working Group, consistent with applicable law.

Sec. 10. *Revocation.* (a) Executive Order 13950 of September 22, 2020 (Combating Race and Sex Stereotyping), is hereby revoked.

(b) The heads of agencies covered by Executive Order 13950 shall review and identify proposed and existing agency actions related to or arising from Executive Order 13950. The head of each agency shall, within 60 days of the date of this order, consider suspending, revising, or rescinding any such actions, including all agency actions to terminate or restrict contracts or grants pursuant to Executive Order 13950, as appropriate and consistent with applicable law.

(c) Executive Order 13958 of November 2, 2020 (Establishing the President's Advisory 1776 Commission), is hereby revoked.

Sec. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

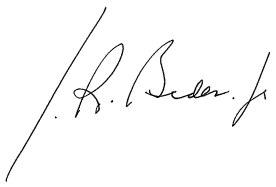
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Independent agencies are strongly encouraged to comply with the provisions of this order.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 20, 2021.

[FR Doc. 2021–01753
Filed 1–22–21; 11:15 am]
Billing code 3295–F1–P

U.S. DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Directive (DIR) 2018-07

U.S. DEPARTMENT OF LABOR
Office of Federal Contract Compliance Programs

A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.

Effective Date: August 24 , 2018

1. **SUBJECT:** Affirmative Action Program Verification Initiative

2. **PURPOSE:** To implement a verification process with the objective of ensuring that all covered federal contractors are meeting the most basic equal employment opportunity (EEO) regulatory requirement, namely, the preparation of a written affirmative action program (AAP) and annual updates to that program This will help American workers by ensuring that all covered federal contractors have AAPs, which will result in enhanced equal employment opportunity, more contractor outreach to available workers, and a more diverse workforce.

3. **REFERENCES:**
   A. Executive Order (EO) 11246, Sept. 24, 1965, as amended.
   B. Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503).
   C. Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA).
   D. 41 CFR 60-1.40 and 41 CFR 60-2.1 through 60-2.17 (Executive Order Affirmative Action Program).
   E. 41 CFR 60-741.40 through 60-741.47 (Section 503 Affirmative Action Program).
   F. 41 CFR 60-300.40 through 60-300.45 (VEVRAA Affirmative Action Program).

4. **AFFECTED POLICY**: None

5. **BACKGROUND**: OFCCP enforces EO 11246, Section 503, and VEVRAA. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability or status as a protected veteran.[1] They also require federal contractors to take affirmative steps to ensure equal employment opportunity in their employment processes. Contractors also are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

   OFCCP currently has jurisdiction over an estimated 120,000 contractor establishments and approximately 24,000 firms or parent companies. Based on the size of the contractor population and other factors, OFCCP schedules only a portion of these establishments annually for compliance evaluations. Therefore, OFCCP must seek more ways to expand its compliance reach.

OFCCP is concerned that many federal contractors are not fulfilling their legal duty to develop and maintain AAPs and update them on an annual basis. The U.S. Government Accountability Office (GAO) in its report, *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance* (GAO-16-750), expressed concern that "OFCCP has no process for ensuring that the tens of thousands of establishments that have signed a qualifying federal contract have developed an AAP within 120 days of the commencement of the contract, or updated it annually." [2] The report further found that "close to 85 percent of contractor establishments did not submit a written AAP within 30 days of receiving a scheduling letter."[3] Based on these findings, GAO recommended that OFCCP "[d]evelop a mechanism to monitor AAPs from covered federal contractors on a regular basis. Such a mechanism could include electronically collecting AAPs and contractor certification of annual updates."

Under OFCCP's current compliance review processes, federal contractor establishments have a small likelihood of discovery if they decide not to develop and update an AAP. This initiative squarely addresses this barrier to achieving comprehensive compliance by establishing a program for verification of compliance by all contractors with AAP obligations.[4] This verification would initially take the form of OFCCP review of a certification, followed by potential compliance checks, and could later take the form of annual submission of AAPs to OFCCP for review.

In addition, this initiative will allow OFCCP to incorporate AAP certification information as a criterion in its methodology for neutrally scheduling compliance evaluations so that entities that have not developed and maintained AAPs are more likely to be scheduled. The failure to develop and update an AAP violates threshold contractual and legal obligations, and indicates a lack of commitment to comply with equal employment opportunity and anti-discrimination obligations.[5] Accordingly, in situations where contractor establishments fail to comply with the AAP requirement, the likelihood of other violations, including discrimination, may be higher. Thus, OFCCP believes that this new criterion could be effective at identifying potential violators of the authorities OFCCP enforces.

This initiative will also help ensure there are no "free riders" that benefit from participating in the federal procurement process while not bearing the corresponding costs of AAP compliance based on the current high likelihood they will not be listed (and potentially receiving an inequitable advantage over law abiding contractors).

Finally, this initiative will also help federal contractors by emphasizing the importance of EEO requirements and encouraging these departments to contact OFCCP to seek compliance assistance in developing AAPs.

6. **DEFINITIONS**: For definitions of the terms "government contract," "subcontract," "prime contractor," and "subcontractor" *see* 41 CFR § 60-1.3 (EO 11246); 41 CFR § 60-300.2 (VEVRAA); and 41 CFR § 60-741.2 (Section 503).

7. **POLICY**: OFCCP will develop a comprehensive program to verify that federal contractors are complying with AAP obligations on a yearly basis.

   This program includes:

   - Development of a process whereby contractors would certify on a yearly basis compliance with AAP requirements. [6]
   - Inclusion of a criterion in the neutral scheduling methodology increasing the likelihood of compliance reviews for contractors that have not certified compliance with the AAP requirements.
   - Compliance checks to verify contractor compliance with AAP requirements.
   - Requesting proffer of the AAP by contractors when requesting extensions of time to provide support data in response to a scheduling letter.
   - Development of information technology to collect and facilitate review of AAPs provided by federal contractors.

   OFCCP will prepare a public outreach and education campaign on this initiative. The campaign would encourage contractors to contact the agency for compliance assistance regarding AAPs.

8. **ATTACHMENTS**: None.

/S/
Craig E. Leen
Acting Director

Office of Federal Contract Compliance Programs

[1] Hereafter, the terms "contractor" and "federal contractor" are used to refer to contractors and subcontractors unless otherwise expressly stated.

[2] Government Accountability Office, Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance, p. 18, GAO-16-750, Sept. 22, 2016 at https://www.gao.gov/products/GAO-16-750 (last accessed Aug. 23, 2017).

[3] Id.

[4] OFCCP is reviewing whether there is an existing certification made as part of the procurement process that would be sufficient to allow OFCCP to implement the program without requiring a separate certification directly to OFCCP.

[5] Developing and updating a written AAP is the most basic part of compliance with OFCCP regulations. The AAP is the starting point in OFCCP compliance reviews to determine whether a contractor is compliant with EEO and anti-discrimination regulations. It also helps ensure that a federal contractor is engaging in outreach to protected individuals.

[6] See n.4.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Last updated on August 24, 2018

Office of Federal Contract Compliance Programs

An agency within the U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210
1-866-4-USA-DOL
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www.dol.gov

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

PLAINTIFF,

v.

WMS SOLUTIONS, LLC,

DEFENDANT.

ARB CASE NO. 2020-0057

ALJ CASE NO. 2015-OFC-00009

DATE: November 18, 2021

Appearances:

For the Plaintiff:
Elena S. Goldstein, Esq; Kate S. O'Scannlain, Esq.; Beverly I. Dankowitz, Esq.; Jeffrey Lupardo, Esq.; Anna Laura Bennett, Esq.; Samuel Y. DePrimio, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

For the Defendant:
Eric Hemmendinger, Esq.; *Shawe Rosenthal LLP*; Baltimore, Maryland

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This matter arises under the nondiscrimination requirements of Executive Order ("EO") 11246 (30 Fed. Reg. 12319), as amended, and its implementing regulations at 41 C.F.R. Chapter 60. WMS Solutions, LLC ("WMS") appeals a Department of Labor Administrative Law Judge's ("ALJ") Recommended

Decision and Order ("Recommended D. & O.") issued on May 12, 2020.[1] Specifically, WMS appeals the ALJ's finding that it is liable under Executive Order 11246 for intentional and unlawful discrimination against non-Hispanic applicants with respect to hiring and female and non-Hispanic employees regarding wage rates and hour assignments.[2] After thoroughly examining the parties' arguments and the record, we **AFFIRM** the ALJ's Recommended D. & O.

BACKGROUND

WMS is a construction contractor based out of Baltimore, Maryland. WMS provides demolition, lead, and asbestos mitigation staffing to construction sites throughout the greater Baltimore-Washington area. This case arose out of a modernization project for the federal government's General Services Administration building in Washington, D.C. (hereinafter the "GSA modernization project"). WMS was hired to provide staff for the GSA modernization project by Asbestos Specialists, Incorporated ("ASI"). ASI was a subcontractor on the GSA modernization project. ASI was hired by Interior Specialists, who was hired by the prime contractor for the project. The Office of Federal Contract Compliance Programs, U.S. Department of Labor ("OFCCP") received a complaint about the working conditions at the GSA modernization project site, which led to an investigation and eventually a compliance review of WMS. The compliance review period was from February 1, 2011, to January 31, 2012. Upon completion of the review, OFCCP engaged in the conciliation process and eventually filed an administrative complaint on June 15, 2015, with the Office of Administrative Law Judges ("OALJ") for violations of equal employment opportunity under Executive Order 11246.[3] After a hearing in July of 2016, the ALJ issued a Recommended Decision and Order on May 12, 2020. After a motion for clarification from OFCCP, the ALJ issued a Supplemental Recommended Decision and Order Granting in Part and Denying in Part Plaintiff's Motion for Clarification on July 21, 2020.

WMS has a sister company, Princeton Industrial Training (PIT), that provides the necessary training course to earn an asbestos mitigation license in

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[1] 41 C.F.R. § 60-30.28 (2015) (providing for the filing of exceptions and responses with the Administrative Review Board (ARB or the Board)).

[2] OFCCP is authorized to enforce EO 11246 to ensure that Federal contractors and subcontractors doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and equal opportunity in employment, as implemented through 41 C.F.R. Part 60-30.

[3] Executive Order 11246 (EO 11246), 30 Fed. Reg. 12,319 (Sept. 24, 1965), was amended by Executive Order 11375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding gender to list of protected characteristics), and Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement functions in the Department of Labor). All references herein to "Executive Order 11246" or "Executive Order" include such amendments.

Maryland. Both companies are housed in the same office building and owned by the same person, Edward Woodings. Paulo Fernandes is WMS's Chief Operating Officer and manages much of the business. Wesley Black handles finance and payroll. Two project managers,[4] Hugo Rivera and Harold Ortega, handle recruitment and staffing in addition to their project manager duties. A former project manager, Hector Ortiz, was an employee during the review period (referred to in the testimony). Aside from support staff that are not relevant to this case, the remainder of WMS's staff are asbestos, lead abatement, and demolition workers. The number of people on payroll depends on the volume of projects that WMS works on at any given time, with summer being the busiest season of the year.[5]

WMS does not typically have written contracts with its clients and relies on purchase orders for recordkeeping.[6] WMS provided copies of all purchase orders at issue and Wesley Black provided the payroll data to OFCCP.

To begin a project, clients contact WMS and provide information about the duration and nature of the work and how many employees are needed. Clients communicate their preferences to WMS, including requesting specific workers and specifying how many women to send to a job site.[7] WMS then allocates existing staff or hires new staff to meet the needs of the project.

WMS pays its construction employees on an hourly basis. Pay is set according to whether a project is federal or non-federal, and whether there is asbestos mitigation involved.[8] WMS helps new hires and rehires become licensed or renew their licenses in asbestos mitigation by sending them to PIT.[9] Tuition for the license education is deducted out of WMS employee paychecks or is paid by WMS.[10] The project managers conducted most of the hiring for WMS.

Ortega described his hiring process at the hearing. He does not require experience or licensure and will hire applicants with no experience, as well as applicants with certifications who have not yet worked in asbestos or lead

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4 The project managers were referred to by different titles throughout the proceedings, but all witnesses consistently described their job duties.

5 Recommended D. & O. at 26 (Sensenig testimony).

6 *Id*.

7 *Id*. at 15 (Gonzalez testimony).

8 *Id*. at 29 (Sensenig testimony).

9 *Id*. at 62, 65 (Hugo Rivera Deposition).

10 There is some conflict in the record about whether WMS or the employee pays for the asbestos licensing training. All witnesses agreed that WMS helped employees become licensed through its sister company, PIT.

removal.[11] When OFCCP interviewed Ortega, he stated that he never told anyone they would not be able to work. To determine which employees will work on a project, he reviews the WMS system that stores employee information, as well as the notebook he uses to track applicants and employees. If there are more employees than projects, then he considers factors such as the length of time with specific companies and supervisor feedback. He tries to find as much work for the laborers as he can, and he spreads the work around. Ortega also considers how many hours each laborer is going to receive when making assignments.

At the hearing, testimony was provided by WMS workers, eligible workers who were not hired by WMS during the review period, and two expert witnesses. The expert witness testimony is discussed in more detail below.

Procedural History

OFCCP received a complaint about the working conditions at the GSA modernization project. It subsequently initiated a compliance review of WMS, covering the period of February 1, 2011, to January 31, 2012. OFCCP typically requests extensive documentation during a review. This documentation includes "all records of [a contractor's] applicants, potential workers, hiring, promotion, termination, compensation or, in this case, payroll records; also evidence that they followed the equal opportunity and affirmative action laws and regulations; that they conducted the appropriate outreach and recruitment; notified the agencies of any subcontracts they may have in general."[12]

OFCCP claimed that WMS's record keeping was not thorough enough to provide OFCCP with a complete list of requested records.[13] The data that WMS was able to provide had gaps in it. WMS was able to provide payroll data and a list of its current employees. WMS did not provide records about applicants, the compensation process, or employee transportation. WMS was able to provide information about the ethnicity of employees. WMS did not have a harassment or Equal Employment Opportunity policy.[14]

OFCCP concluded that WMS kept incomplete records of worker candidate profiles and did not have a system to track applicants. In total, WMS provided OFCCP with 182 worker candidate profiles, only 49 of which were complete with

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11 *Id*. at 10 (Ortega testimony).

12 *Id*. at 27 (Sensenig testimony).

13 *Id*. (Sensenig testimony).

14 *Id*. at 29 (Sensenig testimony).

information like work history and licensure.[15] WMS kept no written employment policies of any kind.[16]

OFCCP also determined that WMS lacked policies to prevent harassment and that employees were regularly harassed:

> [T]hrough our interviews with employees of WMS, we learned of allegations of lack of water or water breaks, meaning no water breaks; sometimes daily racial and ethnic slurs by supervisors on the worksites. Employees reported to us that they felt that it was a hostile work environment, meaning they could not speak up about any conditions or the lack of safety equipment for the asbestos work that they were doing. They told OFCCP of a supervisor who would show them a video of Hispanic people being rounded up and deported and that they felt fearful to complain about conditions for fear that they would be deported; and also actual physical violence against workers on the worksites.[17]

OFCCP issued a Notice of Violations on November 12, 2012, and eventually filed an administrative complaint on June 15, 2015. The complaint alleged that WMS violated Executive Order 11246 because it engaged in systematic discrimination: "(1) on the basis of national origin in hiring; (2) on the basis of sex in rates of compensation and assignment of hours worked; (3) on the basis of national origin in assignment of hours worked; and (4) by permitting Hispanic workers to be subjected to harassment on the basis of national origin."[18] OFCCP requested extensive damages, as well as hiring and policy changes at WMS.

The hearing was held from July 26-28, 2016. The ALJ issued his Recommended Decision and Order on May 12, 2020. Following issuance, OFCCP moved for clarification under Federal Rule of Civil Procedure 60(a).[19] The ALJ issued a Supplemental Recommended Decision and Order on July 21, 2020, granting in part and denying in part OFCCP's order.

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15 *Id*. at 28 (Sensenig testimony).

16 *Id*. (Sensenig testimony).

17 *Id*. at 29 (Sensenig testimony).

18 OFCCP exceptions at 6.

19 Under Federal Rule of Civil Procedure 60(a), "[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." The OFCCP Rules of Practice provide that, in the absence of a specific provision, proceedings shall be in accordance with the Federal Rules of Civil Procedure. 41 C.F.R. 60-30.1.

In his Recommended Decision and Order, the ALJ found that:

1) WMS Solutions, LLC is a contractor pursuant to EO 11246.
2) WMS Solutions, LLC violated EO 11246 when it discriminated against White, Black, Asian, and American Indian/Alaskan Native laborers in favor of hiring Hispanic laborers.
3) WMS Solutions, LLC violated EO 11246 when it discriminated against female laborers based on their gender and Black and White laborers based on their race/ national origin in hours and compensation.
4) WMS Solutions, LLC violated EO 11246 when it failed to ensure and maintain a working environment free of harassment, intimidation, and coercion at construction sites where WMS employees worked.
5) WMS Solutions, LLC did not violate EO 11246 by failing to preserve and maintain all personnel and employment records for a period of two years from the date of the record or the relevant personnel action.[20]

The ALJ awarded the following damages:

1) An award of $780,998 in back pay damages and interest to be paid to the non-hired workers who were injured by WMS Solutions, LLC's discriminatory hiring practices.

2) An award of $179,907 in back pay damages and interest to be paid to the female laborers and non-Hispanic workers who were injured by WMS Solutions, LLC's discriminatory compensation practices.[21]

The ALJ also awarded the following affirmative relief, to take effect within 90 days of the Recommended Decision and Order:

1) Develop a corporate-wide, zero-tolerance policy prohibiting harassment, intimidation, threats, retaliation, and coercion against any employee at any worksite. WMS's zero tolerance policy should be in writing and should list the name, job title, and telephone number of the management official who is responsible and accountable for the company's compliance with EEO and affirmative action obligations and include a detailed description of the process for employees to make complaints concerning allegations of harassment, intimidation, retaliation, and coercion

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20 Recommended D. & O. at 88.

21 *Id*. at 89.

based on race, color, religion, gender, national origin, disability, or veteran's status. Additionally, WMS shall distribute such policy in English and Spanish to all its employees and post and display the policy in both English and Spanish in a prominent place at each and every worksite where there are employees of WMS;

2) Provide to all of WMS's managers and supervisors, and separately, to all of WMS's other employees, training on equal employment opportunity and on the identification and prevention of harassment based on race, color, religion, sex, national origin, disability, or veteran's status. Such training must be provided annually;
3) In no way retaliate, harass, or engage in any form of reprisal against any of its employees for opposing harassment or other forms of discrimination or participating in any investigation or inquiry into allegations of harassment or discrimination; and
4) Identify and inform employees of the name, job title, and telephone number of the WMS official for employees to contact to report and/or secure relief from such harassment.[22]

In the Supplemental Recommended Decision and Order, the ALJ denied several of OFCCP's requests, but changed references to the "Administrator" to "OFCCP Director" for the purposes of damages calculations.[23] WMS timely appealed to the Board.

JURISDICTION AND STANDARD OF REVIEW

In OFCCP cases such as this, the ALJ issues a recommended decision and "[t]he recommendations shall be certified, together with the record, to the Administrative Review Board, . . . for a final Administrative order."[24] The Board has jurisdiction to review the exceptions filed by the parties to the ALJ's Recommended D. & O. and to issue the final administrative order.[25] For cases arising under Executive Order 11246, the Board reviews ALJ decisions *de novo* in accordance with the Administrative Procedure Act.[26] "Even under a de novo review, nothing prohibits us from accepting as our own the ALJ's material findings that let up to the

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22 *Id*. at 89-90.

23 Supplemental Recommended Decision and Order Granting in Part and Denying in Part Plaintiff's Motion for Clarification at 4.

24 41 C.F.R. § 60-30.35.

25 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); 41 C.F.R. § 60-30.30.

26 *OFCCP v. Bank of Am.* (hereinafter "BOA"), ARB No. 2013-0099, ALJ No. 1997-OFC-00016, slip op. at 8 (ARB Apr. 21, 2016).

ALJ's ultimate findings of fact (i.e., intentional discrimination if those findings are supported by substantial evidence)."[27] The standard of proof is preponderance of the evidence.[28]

DISCUSSION

On appeal, WMS raises several objections to the Recommended D. & O. Specifically, WMS made several constitutional and procedural challenges including arguing that the ALJ was improperly appointed, that OFCCP lacked authority to initiate the enforcement proceeding, that WMS is not subject to EO 11246, and that the enforcement proceeding was untimely. WMS further challenged the ALJ's finding that OFCCP proved its case of discrimination, arguing that the ALJ applied the wrong legal standard, and challenged the ALJ's damages award.

OFCCP also raised exceptions to the Recommended D. & O., all of which focused on the appropriate remedies and damages, including requiring WMS to make job offers and more interest on the damages award.

1. Appointments Clause

WMS argues that the ALJ was improperly appointed under the Appointments Clause of the Constitution and, thus, the ARB should remand the case to be assigned to a new ALJ, consistent with the Supreme Court's June 21, 2018 decision in *Lucia v. Securities and Exchange Commission* ("SEC").[29] In *Lucia*, the Court held that SEC ALJ appointments were invalid because the ALJs were "Officers of the United States" under the Constitution, which requires appointment by the President, "Courts of Law" or "Heads of Department." The Court held that because the ALJs had not been properly appointed, the appropriate remedy was for the case to be reassigned to a new, properly appointed ALJ. In light of the Appointments Clause issue working its way through the courts, many Secretaries of federal agencies that followed similar ALJ appointment schemes, including the Secretary of Labor, ratified the appointments of the agency's ALJs. The Department of Labor's ALJ appointments were ratified in December of 2017, before the Court issued *Lucia*.

OFCCP counters that *Lucia* requires a party to make a timely objection to the ALJ's appointment, which did not happen in this case. According to OFCCP, WMS was under an obligation to raise an Appointments Clause challenge to the ALJ before the case was on appeal to the Board and failed to do so, and, thus, the

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[27] *Id*. at 9.

[28] *Id.*

[29] *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

objection was not timely. The Board has adopted OFCCP's argument on timely raising Appointments Clause objections in several prior cases, including recently in *Riddell v. CSX Transportation, Inc.*[30] In that case, the Board held that CSX's Appointments Clause argument was forfeited or waived when it failed to raise the issue before the ALJ.

However, the Supreme Court's issuance of *Carr v. Saul* in early 2021, which resolved a circuit split as to whether claimants at the Social Security Administration ("SSA") are required to raise Appointments Clause challenges before an ALJ, requires us to re-examine our approach to Appointments Clause challenges.[31] In *Lucia*, the Court afforded relief to "one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case."[32] *Carr* expanded upon this holding in the context of SSA proceedings. At the crux of the timeliness dispute is whether a party is required to exhaust the issue at the agency level in order to preserve the issue for appeal. Put another way, if the party is required to exhaust the issue at the agency, then an initial objection to the appointment at a later stage is untimely. The *Carr* Court explained:

> Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question. The source of this requirement (known as issue exhaustion) varies by agency. Typically, issue-exhaustion rules are creatures of statute or regulation. Where statutes and regulations are silent, however, courts decide whether to require [judicial] issue exhaustion based on "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts."[33]

In *Carr*, the Court held that the plaintiffs were not required to exhaust the Appointments Clause issue in front of the agency and could raise it for the first time in federal court. The Court found there was no statutory or regulatory requirement to exhaust, and the Court declined to impose a judicial exhaustion requirement based on facts specific to the SSA context. The Court cited the nature of SSA cases, focusing its analysis on how dissimilar an SSA hearing is to a traditional judicial proceeding where judicial exhaustion might be appropriate. SSA proceedings are

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[30] ARB No. 2019-0016, ALJ No. 2014-FRS-00054 (ARB May 19, 2020). *See also Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043 (ARB Sept. 24, 2020).

[31] *Carr v. Saul*, 141 S. Ct. 1352 (2021).

[32] *Lucia*, 138 S. Ct. at 2055 (*quoting Ryder v. United States,* 515 U.S. 177, 182-83 (1995) (emphasis added).

[33] *Carr*, 141 S. Ct. at 1358 (*citing Sims v. Apfel*, 530 U. S. 103, 107-08 (2000); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 36 n.6 (1952)).

non-adversarial. In SSA proceedings, the ALJ can hold a hearing with no one present, the claimant is not making a case for herself, and no one from the government is arguing against the claimant. The ALJ decides the issues and can raise new issues at any time, and claimants are not prompted to raise issues.

The Court further stated that in addition to the non-adversarial nature of the proceedings, two factors weighed against requiring judicial issue exhaustion. First, agency adjudications can be ill-suited to structural challenges, like constitutional challenges. In prior cases involving the SSA, courts have not required the claimant to raise constitutional issues. Second, the Court generally does not require issue exhaustion before administrative agencies when it is futile. An SSA ALJ lacks authority to address the Appointments Clause issue and it "makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested."[34] For these reasons, the Court refused to apply judicial exhaustion requirements. Because there were no statutory, regulatory, or judicial exhaustion requirements, the Appointments Clause issue raised for the first time on appeal in federal court was timely.

Based on the reasoning in *Carr*, the Board invited the parties in this case to submit supplementary briefing on the Appointments Clause challenge. The Solicitor's Office argues in its briefing that OFCCP regulations require issue exhaustion, and, thus, *Carr* is inapplicable to this case because it establishes the requirements for judicial issue exhaustion when the statute or regulations are silent. The Solicitor's Office further argues that, even if *Carr* were to apply to this case, the factors the Supreme Court applied in *Carr* would weigh in favor of requiring the parties to raise the Appointments Clause issue before the ALJ. WMS, on the other hand, argues that *Carr* requires remand and assignment to a new ALJ.

For the reasons set forth below, we hold that the OFCCP regulations require issue exhaustion, which WMS did not do in this case. Because WMS failed to exhaust the issue by not raising an Appointments Clause challenge at any point during the ALJ proceedings, its Appointments Clause challenge is waived.

To start, we address whether the regulations governing OFCCP cases require administrative issue exhaustion. The Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246, located at 41 C.F.R. part 60-30 ("OFCCP Rules"), govern these proceedings. The Secretary of Labor is authorized to initiate enforcement proceedings by filing an administrative complaint, in which the contractor—in this case WMS—is called a defendant.[35] The defendant then must answer the administrative complaint, each allegation of which

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[34] *Carr*, 141 S. Ct. at 1361.

[35] 41 C.F.R. § 60-30.5(a).

it "shall specifically admit, explain, or deny."[36] Each party then bears the responsibility to develop its case under procedures prescribed for motions, discovery, and hearings.[37] The proceedings are adversarial.[38] In addition to granting the ALJ all the powers necessary "to conduct a fair hearing," the OFCCP Rules authorize the ALJ to "[h]old conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding by consent of the parties or upon his own motion."[39] The regulations further allow the ALJ to "[r]equire parties to state their position with respect to the various issues in the proceeding."[40] Once a Recommended Decision and Order is issued by the ALJ, the parties may file exceptions with the ARB.[41] The ARB then issues a final order, relying on the record developed before the ALJ, and taking into account the parties' exceptions.

Taken together, the OFCCP Rules outline an adversarial process where the record is developed in front of an ALJ and the ARB operates as a reviewing body. The process overall is very similar to the process in an Article III court, where the district court is the trial court and the appellate court reviews the record developed at the trial court. The OFCCP Rules empower the ALJ to fully develop the record by setting the issues. The parties each are responsible for presenting their own case, and there is an opportunity for discovery and cross-examination. Importantly, once the Recommended Decision and Order arrives at the ARB, the OFCCP Rules presume that the entire record has been developed. The ARB issues a final order on the record developed before the ALJ. The parties are permitted to file exceptions with the ARB, but those exceptions are to the Recommended Decision and Order. Examining the OFCCP Rules in their entirety, we find that they require issue exhaustion.

Even if the OFCCP Rules do not require exhaustion, the Court's reasoning in *Carr* supports requiring issue exhaustion at the administrative level in OFCCP cases like this one. As described above, the procedures of these cases are very similar to those in Article III courts. Unlike the SSA proceedings discussed in *Carr*, OFCCP proceedings involve both parties fully developing the record and ample issue development. WMS argues that ALJs do not have expertise in constitutional matters. The ALJs in OFCCP proceedings regularly address as-applied constitutional issues, including Fourth Amendment issues. On this point, ALJs can

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36 *Id.* § 60-30.6(b).

37 *See generally id.* §§ 60-30.7–.24.

38 *See, e.g., id.* §§ 60-30.9 (service on "an opposing party"), 60-30.17(a) (witnesses of "the opposing parties").

39 *Id.* § 60-30.15(a).

40 *Id.* § 60-30.15(b).

41 *Id.* § 60-30.36.

and have in the past awarded remedies for Appointments Clause claims, a factor in favor of issue exhaustion. In the aftermath of *Lucia*, multiple Department of Labor ALJs reassigned OFCCP cases to new ALJs when the parties requested a reassignment due to Appointments Clause concerns.[42] The ALJs in these cases not only have the authority to address this issue—they have a prior history of doing so.

Requiring issue exhaustion at the agency level is appropriate in OFCCP cases, even if the OFCCP Rules do not require it. The harm to judicial integrity and efficiency caused by permitting a party to undertake a lengthy proceeding before an ALJ only to challenge the ALJ's authority on appeal, perhaps after an unfavorable decision, is not insignificant.[43]

Turning to the specifics of this case, we observe that the ALJ gave WMS ample opportunity to raise the issue and also warned WMS of the consequences for failing to raise an issue with the ALJ. In his "Notice of Hearing and Pre-Hearing Order," the ALJ specifically directed the parties to exchange, and file with the court, "pre-hearing statements setting forth the issues and any defenses that may be raised at hearing . . . and a simple statement of the issues to be decided and the relief or remedies sought."[44] The ALJ also required the parties to file post-hearing briefs and warned the parties that issues would be considered abandoned if they were not briefed:

> (a) Each party is to file a post-hearing brief unless otherwise directed at the hearing. Failure to file a brief by any party may be construed as a waiver of all arguments concerning the issues presented. Briefs shall address each of the contested issues identified either at the hearing or by Order. Any ISSUE not specifically addressed on brief will be considered abandoned by that party for decisional purposes.
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> (b) Each party will make specific, all-inclusive FINDINGS OF FACT with respect to each issue being briefed. The absence of factual findings or arguments concerning record evidence will constitute an

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[42] *OFCCP v. Oracle Am., Inc.*, No. 2017-OFC-00006, Order Granting Motion to Reassign (ALJ Oct. 15, 2018); *OFCCP v. JPMorgan Chase & Co.*, No. 2017-OFC-00007, Order Granting Plaintiff's Motion to Reassign (ALJ Sept. 25, 2018) (each of these ALJ orders are available at https://www.oalj.dol.gov, "Search Tools," > "Keyword Search/Case Number Search," > "Search by Case Number").

[43] *Forrester Trucking v. Dir., Off. of Workers' Comp. Programs*, 987 F.3d 581, 592 (6th Cir. 2021) ("While we do not see evidence that the operators acted with a nefarious motive, we are nonetheless mindful not to invite 'sandbagging' or 'judge-shopping' in future black lung proceedings.").

[44] Notice of Hearing and Pre-Hearing Order at 2.

> admission that they are of no importance in the disposition of the issue and that the party has abandoned any contention concerning the applicability of the ignored evidence to the pertinent issue.[45]

WMS has vigorously contested these charges since OFCCP commenced its review and continued to do so at the hearing. There is no indication in the record that WMS did not have an opportunity to raise the Appointments Clause, or any other relevant issue. The record shows that WMS raised other threshold issues—for example, whether it is a "subcontractor" pursuant to EO 11246—during the proceedings in front of the ALJ. WMS also had ample opportunity to raise the issue once it came to the forefront in the lead up and aftermath to the Supreme Court's *Lucia* decision. In the time between the conclusion of the hearing in 2016, and the date of the decision in 2020, the Secretary of Labor ratified all ALJ appointments and the *Lucia* decision was issued. WMS could have, at any time, raised the Appointments Clause issue before the ALJ, but did not. We conclude that because WMS failed to raise the issue before the ALJ, raising it now in the proceeding before the Board is untimely.

2. WMS is Subject to EO 11246

WMS raised several arguments on appeal alleging that OFCCP lacks the authority to initiate this enforcement proceeding: EO 11246 is invalid, WMS is not subject to EO 11246, OFCCP brought the complaint too late, and only WMS's *federal* contracts should be bound by the nondiscrimination clauses of the EO. For the reasons set forth below, we find that WMS is subject to EO 11246 and that OFCCP had the power to bring this enforcement action.

A. Validity of EO 11246

WMS argues that EO 11246 is an invalid exercise of power. This is an issue that has been extensively litigated in the Federal courts.[46] The Department of Labor is bound by its own regulations, and the Secretary of Labor—and in this case, his designee, the Board—acting in an adjudicatory capacity has no authority to review the validity of those regulations.[47] There is ample precedent holding that the

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45 *Id*.

46 *See generally Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971); *Liberty Mut. Ins. Co. v. Freidman*, 639 F.2d 164 (4th Cir. 1981); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

47 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186, 13187 (Mar. 6, 2020) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof. . ."); *Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3,

validity of EO 11246 and the regulations promulgated pursuant to it are not proper subjects for an administrative proceeding.[48] Thus, the Board declines to address WMS's challenges to Executive Order 11246 in this proceeding.[49]

B. Whether WMS is Subject to EO 11246

WMS argues that it is not subject to EO 11246 because it had no written agreements with ASI, and WMS's role was simply to supply labor to projects. The ALJ concluded that WMS was a contractor within the meaning of EO 11246. The ALJ determined that WMS provided workers to ASI as a client. Those workers worked at the GSA site. In addition, the ALJ found that WMS billed an agreed upon wage rate per laborer and that WMS submitted weekly invoices. Therefore, the ALJ concluded there was a subcontract between the two entities even though there was no written agreement.

We agree with the ALJ. The word "contract" in the context of Federal government contracting is broadly construed. Under the regulations, a "contract" is defined as any "Government contract or subcontract."[50] A "Government contract" is any "agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services," and the term "Contractor" could mean either "a prime contractor or subcontractor."[51] 41 C.F.R. § 60-1.3 defines a subcontract, in relevant part, as:

> (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

1990 WL 58502, * 1 (D. S. C. Jan. 23, 1990) (citations omitted) ("Defendant's [Department of Labor] administrative law judges are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity.").

[48] The ALJ and Assistant Secretary have the power to decide if an employer has committed a violation, but may not determine the underlying validity of the regulations. *OFCCP v. W. Elec. Co.*, Case No. 1980-OFC-00029, slip op. at 12-13 (Dep'y Under Sec'y Apr. 24, 1985) (Remand Decision and Order). In *OFCCP v. Goya De Puerto Rico, Inc.*, ARB No. 1999-0104, ALJ No. 1998-OFC-00008, slip op. at 6 (ARB Mar. 21, 2002), the ARB held that the ALJ was without authority to rule on the validity of the Executive Order or its implementing regulations. *See Stouffer Foods Corp. v. Dole*, 1990 WL 58502, *1 (D. S.C. Jan. 23, 1990) (*citing Oesterich v. Selective Serv. Sys.*, 393 U.S. 233, 241-42 (1968) (concurring opinion)).

[49] Any contractor with standing may challenge EO 11246 and the implementing regulations in Federal court.

[50] 41 C.F.R. § 60-1.3.

[51] *Id*.

> (i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or
>
> (ii) [W]hich any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

Other parts of the regulation define nonpersonal services to include construction services.[52]

The arrangement between WMS and ASI falls within this definition because there was an arrangement for the use of nonpersonal services that was necessary to the performance of a contract. WMS assumed a portion of the contractor's obligations, namely providing labor that could engage in construction demolition and asbestos and lead abatement. Accordingly, we affirm the ALJ's finding that WMS had a subcontract with ASI.

We also agree with the ALJ that WMS's subcontract with ASI is subject to the terms of EO 11246.[53] WMS argues, in essence, that it only provided labor and that there was no contract specifying the terms of EO 11246. While WMS did provide staff, that staff executed construction work, which is covered by the regulation. It is also well established that contracts subject to EO 11246 incorporate the equal employment provisions of EO 11246 regardless of whether those provisions are actually contained in a written contract.[54] For all of these reasons, we affirm the ALJ's conclusion that WMS is a "subcontractor" with a subcontract and, therefore, is bound by EO 11246.

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[52] "The term 'nonpersonal services' as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository." 41 C.F.R. § 60-1.3.

[53] 41 C.F.R. §60-1.3 ("any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the order").

[54] 41 C.F.R. § 60-1.4(e) ("Incorporation by operation of the order. By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.").

C. *OFCCP Was Not Required to Bring This Proceeding within 180 Days of Receiving a Complaint*

WMS argues that because OFCCP received a complaint about working conditions at the GSA modernization project, OFCCP must bring an enforcement proceeding within 180 days pursuant to the regulation governing complaints.[55]

A close reading of the regulations indicates that the regulation WMS cites to applies to individuals bringing a complaint, not to OFCCP. Section 41 C.F.R. 60-1.21 provides that "[c]omplaints shall be filed within 180 days of the alleged violation." Subsequent regulations, located at §§ 60-1.22 to 1.24, specify that complaints are filed by "complainants." Section 60-1.24 further provides that OFCCP must conduct a thorough investigation when a complaint is received. When the investigation indicates a potential violation, "the Director shall proceed in accordance with § 60-1.26."[56] In turn, Section 60-1.26 outlines, in relevant part, the procedures for administrative enforcement matters:

> OFCCP may refer matters to the Solicitor of Labor with a recommendation for the institution of administrative enforcement proceedings, which may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions. The referral may be made when violations have not been corrected in accordance with the conciliation procedures in this chapter, or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate.[57]

When read together, the regulations provide that individuals can bring complaints and must do so within 180 days of the incident giving rise to the complaint. Upon receiving a complaint, OFCCP has an obligation to thoroughly investigate the complaint. However, the regulations do not require OFCCP to begin enforcement within 180 days. In this case, OFCCP received a complaint, commenced an investigation, and conducted a compliance review of WMS's practices. At the end of its compliance review, OFCCP engaged in conciliation and eventually decided to initiate an enforcement proceeding. The record shows that OFCCP appropriately followed the process outlined in the regulations. Therefore, the OFCCP's enforcement proceeding against WMS was not untimely and did not violate the cited regulations.

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55 41 C.F.R. § 60-1.21.

56 41 C.F.R. § 60-1.24(c)(3).

57 *Id*. § 60-1.26(b)(1).

D. All of WMS's Contracts During The Review Period Are Subject to EO 11246

WMS next argues that only its federal contracts should be subject to EO 11246. The plain language of EO 11246 indicates, however, that EO 11246 applies to the contractor, rather than to individual contracts. Specifically, Section 202 states that "[t]he contractor will not discriminate against any employee or applicant for employment."[58] The plain language of the implementing regulations further support the conclusion that EO 11246 applies to a contractor, and not to individual contracts, stating, in part, "[t]he regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts."[59] WMS is a subcontractor under EO 11246, and thus, the executive order and regulations promulgated thereunder apply to WMS. Accordingly, we find that OFCCP's review of all of WMS's contracts during the review period was appropriate.

3. WMS Violated Executive Order 11246

OFCCP alleged that WMS violated EO 11246 when it discriminated against non-Hispanic applicants in its hiring and discriminated against women and non-Hispanics in assigning hours and setting pay during the review period of February 1, 2011, through January 31, 2012. OFCCP relied upon a theory of intentional disparate treatment at the hearing to prove that WMS used race and ethnicity as main factors during hiring. OFCCP also relied on intentional disparate treatment to prove that WMS discriminated against women and non-Hispanics in assigning hours and pay.

In addition to relevant provisions of EO 11246, the implementing regulations, and Department precedent, the Board looks to federal appellate court decisions addressing similar pattern or practice claims of intentional discrimination adjudicated under Title VII of the Civil Rights Act of 1964.[60]

To prevail on a claim of a pattern or practice of intentional disparate treatment, OFCCP must show that unlawful discrimination was WMS's regular procedure or policy.[61] OFCCP bears the burden to produce sufficient evidence that there was a disparity and that being a member of a protected class was the cause. A

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58 EO 11246, § 202.

59 41 C.F.R. § 60-1.1.

60 *OFCCP v. Greenwood Mills, Inc.* ARB Nos. 2000-0044, 2001-0089, ALJ No. 1989-OFC-00039, slip op. at 5 (ARB Dec. 20, 2002); *BOA*, ARB No. 2013-0099, slip op. at 11.

61 *OFCCP v. Enterprise RAC Co. of Baltimore, LLC*, ARB 2019-0072, ALJ No. 2016-OFC-00006, slip op. at 5 (ARB Nov. 3, 2021).

pattern or practice claim requires that "discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice."[62]

OFCCP's threshold burden is to make a prima facie showing that a pattern or practice of intentional discrimination on the part of the employer existed.[63] A prima facie case of a pattern or practice of discrimination can be proven by both statistical and anecdotal evidence.[64] Courts have held that a statistical analysis that demonstrates a disparity in selection rates of job applicants of two to three standard deviations (*i.e.*, a likelihood of less than five percent) is not likely due to chance or random variations and, therefore, may be sufficient evidence to meet the initial burden and establish a prima facie case of discrimination.[65] In other words, the probability of an event occurring by chance alone becomes less and less likely at higher standard deviations.

In analyzing these type of cases, the Board may apply a burden-shifting framework, just as the ALJ properly did at the hearing in this case.[66] If OFCCP establishes a prima facie showing of discrimination, the burden shifts to the employer to rebut the presumption by either offering legitimate, non-discriminatory reasons for its actions, or by showing that the statistical proof was unsound.[67] This is a "burden of production, of 'going forward' with evidence of 'some legitimate, nondiscriminatory reason for the [action].'"[68] The employer's burden is "to defeat the prima facie showing of a pattern or practice by demonstrating that the proof is

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62 *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977).

63 *Id.* at 360.

64 *See Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 307 (1977).

65 *Palmer v. Schulz*, 815 F.2d 84, 94 (D.C. Cir. 1987).

66 Recommended D. & O. at 59-60. Cases such as this involve complicated fact-finding, and the burden-shifting framework assists all parties, including the fact finder, in ascertaining whether the plaintiff met their ultimate burden of proving discrimination by a preponderance of the evidence. *See U.S. v. City of New York*, 717 F.3d 72, 84-87 (2d Cir. 2013) (discussing plaintiff's initial burden and the broad evidence that a defendant may produce to rebut the prima facie case).

67 *Palmer*, 815 F.2d at 99; *BOA*, ARB No. 2013-0099, slip op. at 11.

68 *Wright v. Nat'l Archives and Recs. Serv.*, 609 F.2d 702, 713-14 (4th Cir. 1979) (quoting *Furnco Constrs. Corp. v. Waters*, 438 U.S. 567, 578) (1978)).

either inaccurate or insignificant."[69] The burden can be met by "provid[ing] a nondiscriminatory explanation for the apparently discriminatory result."[70]

However, an employer's purported, legitimate nondiscriminatory reasons must be articulated with some specificity to avoid "conceal[ing] the target" at which employees must aim pretext arguments.[71] Although there is a risk that a nefarious employer may attempt to use subjective standards as "cover" for unlawful discrimination, subjective evaluation criteria "can constitute legally sufficient, legitimate, nondiscriminatory reason[s]" for an employer's business decisions.[72] In fact, "subjective evaluations of a job candidate are often critical to the decision-making process."[73] The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff.[74]

If the employer satisfies its burden of production, the presumption arising from plaintiff's prima facie case drops out. The trier of fact must then determine whether the plaintiff has sustained its burden of proving by a preponderance of the evidence the ultimate facts at issue.[75] In other words, if the employer meets the burden to produce a legitimate, nondiscriminatory reason, the plaintiff must demonstrate that the proffered reason was not its true reason but was a pretext for unlawful discrimination.[76] If, however, the employer "fails to rebut the plaintiff's prima facie case, the presumption arising from an unrebutted prima facie case

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[69] *Teamsters*, 431 U.S. at 360. As "*Teamsters* sets a high bar for the prima facie case the Government or a class must present in a pattern-or-practice case: evidence supporting a rebuttable presumption that an employer acted with the deliberate purpose and intent of discrimination against an entire class . . . An employer facing that serious accusation must have a broad opportunity to present in rebuttal any relevant evidence that shows that it lacked such an intent." *City of N.Y.*, 717 F.3d at 87 (*citing Teamsters*, 431 U.S. at 358).

[70] *Teamsters*, 431 U.S. at 360 n.46.

[71] *Figueroa v. Pompeo*, 923 F.3d 1078, 1088 (D.C. Cir. 2019) (*citing Lanphear v. Prokop*, 703 F.2d 1311, 1316 (D.C. Cir. 1983)).

[72] *Denney v. City of Albany*, 247 F.3d 1172, 1185 (11th Cir. 2001); *Figueroa*, 923 F.3d at 1088.

[73] *Denney*, 247 F.3d at 1185-86 (internal quotations omitted). For example, use of race-neutral subjective negative interview comments, when "similar comments are made of white and non-black applicants, negating any possible inference that the comments were codes for race . . . do not create an inference of pretext, but instead merely indicate that the candidates were lacking traits needed for the job." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir. 2002).

[74] *Tex. Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

[75] *See Teamsters*, 431 U.S. at 336 (the government in pattern or practice cases must prove that intentional discrimination was the defendant's "standard operating procedure.").

[76] *Burdine*, 450 U.S. at 253.

entitles the plaintiff to prevail on the issue of liability and proceed directly to the issue of appropriate relief."[77]

A. Discrimination Against Non-Hispanic Applicants

i. OFCCP's Prima Facie Case of Intentional Disparate Treatment

To prove its case, OFCCP relied on both statistical and anecdotal evidence. For the statistics, Dr. Madden was hired to examine 1) racial and ethnic differences in hiring, 2) gender, racial, and ethnic differences in hours worked, and 3) gender differences in hourly pay. Dr. Madden approximated the applicant pool using U.S. Census data for the construction laborer occupation in the Washington, D.C. metropolitan area. Dr. Madden did not use WMS data because WMS only provided 180 incomplete Worker Candidate Profile forms. These forms were used by WMS to track potential hires for a workforce of over 700. The Worker Candidate Profile Forms were deficient and lacked the worker's race, gender, and other demographic information. WMS was unable to provide a complete list of applicants or other information that would have allowed Dr. Madden to use their actual applicant pool. The ALJ noted that "[c]ourts allow the production of evidence of other statistical measures to establish discrimination when applicant flow figures are either flawed or otherwise unavailable, as they are here."[78]

Dr. Madden's first finding was that non-Hispanic persons were less likely to be hired by WMS during the review period.[79] According to the U.S. Census data, 41.1% of the construction labor pool in the Washington, D.C. metro area is non-Hispanic, while 7.5% of WMS's employees were non-Hispanic. Dr. Madden's analysis determined that the likelihood of this discrepancy occurring by chance was 1 in 781 trillion (781,000,000,000).[80] Put another way, the proportion of non-Hispanic workers that WMS hired is 19.36 standard deviations below the census proportion.

Using this data and other testimony, the ALJ determined that OFCCP met its burden to establish by a preponderance of the evidence a prima facie case of intentional discrimination against non-Hispanic applicants in hiring. A thorough review of the record and the ALJ's decision supports this finding.

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77 *City of N.Y.*, 717 F.3d at 87.

78 Recommended D. & O. at 61.

79 *Id.* at 33.

80 *Id.* at 33-34.

ii. WMS's Rebuttal of Hiring Discrimination

The ALJ found that WMS's rebuttal centered on three factors: 1) Hispanic construction laborers have more of an interest in asbestos removal work than non-Hispanic construction laborers; 2) WMS hired more Hispanic workers because Hispanic workers were more likely to have an asbestos license when hired; and 3) WMS required applicants to have an asbestos license before considering them for employment.[81]

To support this argument, WMS relied on its own expert analysis by Dr. White, who is also a statistician. Dr. White developed an alternative labor pool and argued that the U.S. Census data that Dr. Madden used was unreliable because those benchmarks did not "account for individuals' interest or qualifications for working in asbestos abatement at WMS."[82] Dr. White further argued that OFCCP's analysis was flawed because the U.S. Census data that defines the general construction labor pool is overly broad. He then speculated that because of the uniquely dangerous work WMS engages in, its workforce is more likely to be recent immigrants of Hispanic background. In his initial report, Dr. White created a labor pool using asbestos licensure data from parts of Virginia that are in the Baltimore-Washington metropolitan area. Because this data lacked complete ethnicity or race data, he presumed anyone with a Latino or Hispanic surname to be Hispanic. Based on this data, Dr. White concluded that 12% of the labor pool was non-Hispanic. However, this figure included only 261 workers, which is far less than WMS's employee total of over 700 during the review period. In his rebuttal report, Dr. White also included data from Maryland, but it also did not contain ethnicity or race data. It did, however, contain data on the language in which the licensure exam was taken, and 86% took the exam in Spanish. Data from the District of Columbia was never obtained.

Dr. White also took issue with Dr. Madden's approach to the data. First, he argued that Dr. Madden's hiring analysis did not accurately account for rehires because she chose to use the January 29, 2011 pay period as her starting point for rehires. In all proposed measures of the number of new hires, the percentage of the WMS's workforce that is non-Hispanic remains consistent. Dr. White's second concern was that Dr. Madden's analysis did not consider the types of jobs that laborers were hired to perform during the review period. Asbestos work accounted for the largest projects during the review. Across all projects, 73.1% of WMS's workforce was working on asbestos abatement projects, and 26.9% was working on demolition projects.[83]

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81 *Id*. at 64.

82 *Id*. at 45.

83 *Id*. at 45.

WMS's attempts to rebut OFCCP's case do not actually rebut the case. Importantly, many of its theories are not supported. For example, WMS says it only hired licensed asbestos workers, but the record evidence directly contradicts WMS's assertions.[84] Indeed, WMS's own managers testified that they hired anyone "able to work" and with no experience.[85] Further, WMS was affiliated with a training school and provided employees with the opportunity for asbestos certification. With regard to its assertion that Hispanic workers are more interested in asbestos removal than workers in the general population, WMS failed to provide evidence to support this conclusion, other than the incomplete licensure data that did not include race. WMS similarly only provided incomplete data to show that Hispanics are more likely to be licensed upon hire.[86] In short, WMS's arguments center on data that is incomplete (the asbestos licensure data) and data that is not available (client preferences, worker preferences, worker experience, and credentials).

WMS also argues that the ALJ required it to sustain the burden of proof to show that it did not discriminate, rather than requiring OFCCP to carry the burden. According to WMS, "the [ALJ] subjected the statistical evidence to a burden shifting analysis which imposed the ultimate burden of persuasion on WMS[.]"'[87] WMS continued, "The [ALJ] subjects the OFCCP's statistics to the minimal burden of raising an inference of discrimination. It then intensely challenges every aspect of WMS's response […], before ultimately concluding that 'WMS failed to rebut the OFCCP prima facie case.'"[88]

WMS misunderstands both the burden-shifting framework and the ALJ's application of it. WMS is correct in asserting that OFCCP always has the burden of proof. Decades of legal precedent consistently demonstrate that OFCCP carries the burden throughout the entire proceeding. WMS's job is to rebut the evidence OFCCP puts on—as in any typical civil case. Rebuttal in a case relying on statistical evidence is not as simple as articulating possible reasons OFCCP's statistical analysis may be flawed. WMS needed to show that curing the flaws in the analysis would change the resulting disparity.[89] Here, it failed to do so. Instead, WMS merely offered piecemeal explanations that either lacked evidence or were directly contradicted by uncontested evidence in the record.

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84 *Id.* at 65.

85 *Id.* at 4, 65.

86 *Id.* at 45 (stating that Dr. White was only able to obtain data from Virginia and Maryland); *id.* at 67 (discussing that WMS's data had inaccuracies and missing data).

87 WMS Br. at 3 (citations omitted).

88 *Id.*

89 Recommended D. & O. at 71; *see also EEOC v. Gen. Tele. Co. of Northwest, Inc.,* 885 F.2d 575, 579 (9th Cir. 1989); *Hemmings v. Tidyman's,* 285 F.3d 1174, 1188 (9th Cir. 2004).

On the other hand, the ALJ specifically found that OFCCP provided sufficient evidence to sustain its burden and that WMS failed to provide evidence to rebut it. Simply put, OFCCP's evidence met the preponderance of the evidence burden, and WMS failed to show how that evidence was flawed, unreliable or otherwise undermined OFCCP's case. We note in particular that WMS never proffered legitimate, nondiscriminatory reasons for its hiring practices. After a thorough review of the record and available evidence, we conclude that the ALJ's holding is supported by the record and consistent with the law.

B. Discrimination Against Female and Non-Hispanic Employees

i. OFCCP's Prima Facie Case of Intentional Disparate Treatment

Dr. Madden's second finding was that women and non-Hispanics of both genders were assigned fewer weekly hours than male and Hispanic workers during the review period.[90] According to her analysis, a gender neutral assignment process would give women 13.9% more hours each week than they were assigned. This difference is 7.98 standard deviations. When reviewing the data on a project basis, it was clear "that most of these differences are being generated by Hispanics and men being assigned to the projects that offer more hours."[91] Among non-Hispanic employees as a whole, the total discrepancy was 9.6% and 3.10 standard deviations.

Dr. Madden's third finding was that female laborers at WMS received lower hourly wages than male laborers during the review period.[92] A gender neutral wage assignment process would result in women being paid 14.1% more per hour. This difference is 18.68 standard deviations. She assumed that "men and women in the same job category for the same company, working at the same time period, should . . . have the capacities to be paid the same wages."[93]

In addition to Dr. Madden's analysis, OFCCP offered testimony to support her findings. The ALJ noted that Ortega confirmed that clients asked for men instead of women at job sites because the work is "too heavy, too hard" for women.[94] There was also testimony that clients requested more men than women.[95] Women would not be assigned to the job sites because "a woman would go to the bathroom

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90 Recommended D. & O. at 35.

91 *Id.* at 37.

92 *Id.* at 38.

93 *Id.* at 38.

94 *Id.* at 69.

95 *Id.* at 15-16 (testimony of Gonzales).

two or three times a day and that that was a loss of time, time and money, because every time you went in, you had to take suit off and then put on a new one to go back to the job."[96] Using this data and testimony, the ALJ determined that OFCCP met its burden to establish a prima facie case by a preponderance of the evidence that WMS discriminated against non-Hispanic workers in hours and women in pay and hours. A thorough review of the record and the ALJ's decision supports this finding.

ii. WMS's Rebuttal of Pay and Hour Discrimination

WMS's rebuttal case again focuses on Dr. Madden's analysis and argues that women and other workers were not interested in working as many hours. The ALJ rejected WMS's assertions because it failed to: 1) call into question the validity of Dr. Madden's statistical conclusions about its discriminatory compensation practices; and 2) provide any reasonable supporting evidence that would result in a different conclusion. WMS also failed to articulate how client preferences factor into rebutting a prima facie showing of discrimination. After a thorough review of the record and available evidence, we find that the ALJ's findings are supported by the record and consistent with the law.

4. Damages

A. Standard of Review of Damages

The ARB generally adopts the ALJ's methodology for awarding damages if the ALJ exercised reasonable discretion given the complexity of determining back pay compensation.[97]

B. Damages Calculations

After a finding of discrimination, the remedy is damages "to make persons whole for injuries suffered on account of unlawful employment discrimination."[98] Back pay is one element of the "make whole" relief analysis, which may be awarded to an individual or to a class of individuals affected by the unlawful discrimination.[99] Rather than individual assessments of the loss of each victim,

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96 *Id.*

97 *BOA*, ARB No. 2013-0099, slip op. at 21.

98 *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

99 41 C.F.R. § 60-1.26 (a)(2); *OFCCP v. Greenwood Mills, Inc.*, ARB Nos. 2000-0044, 2001-0089, slip op. at 5.

class-wide procedures may be used in calculating back pay.[100] If the case is complex, the class is large, or the illegal practices continued over an extended period of time, a class-wide approach to measure back pay may be necessary.[101]

In *Greenwood Mills*, the Board discussed back pay awards. While recognizing they are imprecise and may not fully compensate the aggrieved, the Board highlighted federal case law that outlined three basic principles of back pay awards: "(1) [U]nrealistic exactitude is not required; (2) [A]mbiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; and (3) [T]he [trier of fact] . . . must be granted wide discretion in resolving ambiguities."[102] Interest is paid on back pay awards to compensate the discriminatee for the loss of the use of her money.[103]

On appeal, OFCCP argues that the ALJ erred in his damages calculations by failing to order offers of employment, back pay that extended to the date of the trial due to ongoing discrimination, and interest on back pay until the date of the decision. WMS argues against damages altogether, and specifically objects to the issuance of class-based damages.

Dr. Madden concluded that the racially discriminatory hiring process resulted in damages in the amount of $926,298. Including interest until the date of the hearing, that totaled $1,081,473. She determined the amount of lost wages by calculating the average actual WMS earnings of the group multiplied by the group's hiring shortfall. The ALJ altered this total to $780,998, to account for the difference between Dr. Madden's rehire number and WMS's rehire number.

Dr. Madden concluded that women were underpaid by $74,875, due to their lower hourly pay rate. Adding interest yields total damages of $87,418.[104] She calculated the damages by taking the average actual hours worked by women, the shortfall in hours, their average hourly wage, and the shortfall in their hourly wage. She calculated the damages for non-Hispanic workers assigned fewer hours and determined that total to be $16,900. For women assigned fewer hours, the total was

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100 *Greenwood Mills, Inc.*, ARB Nos. 2000-0044, 2001-0089, slip op. at 5. *See Segar v. Smith*, 738 F. 2d 1249 (D.C. Cir. 1984).

101 *McClain v. Lufkin Indus.*, 519 F.3d 264, 280-81 (5th Cir. 2008); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974).

102 *Greenwood Mills, Inc.*, ARB Nos. 2000-0044, 2001-0089, slip op. at 6 (*citing Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (citations omitted).

103 OFCCP Compliance Manual, § 7F07(e) (1998).

104 Recommended D. & O. at 86.

$75,985. The ALJ adopted Dr. Madden's findings. In total, the ALJ awarded $179,907 in damages due to compensation disparities.[105]

We find that the ALJ's award of damages is reasonable. The ALJ damages award is appropriately designed to make the class of discrimination victims whole. The ALJ carefully outlined the eligible class of workers in his decision. WMS fails to offer a credible reason to disrupt this award, other than WMS's belief that it should not be liable at all. OFCCP's arguments against the ALJ's damages award are also flawed. While OFCCP is correct to emphasize that in EO 11246 and Title VII cases, the courts have substantial remedial powers, including equitable remedies, such remedies must be practical and possible. Here, the ALJ's reasoning is thorough and sensible—that the appropriate remedy for the class of non-Hispanic workers is back pay calculated on a class-wide basis. We have previously held that "'exactitude' is not required in calculating the amount of back wage damages."[106] We find that the ALJ neither abused his discretion, nor clearly erred in determining the amount of the back pay award. As WMS does not contest them, we also find that the ALJ did not abuse his discretion or clearly err in ordering additional affirmative remedies.

After the ALJ issued his decision, OFCCP asked the ALJ to clarify several points, including asking the ALJ to award interest to the date of the decision as opposed to the ALJ's award of interest to the hearing date. The ALJ denied this motion in a supplemental order.[107] OFCCP filed a petition for review asking us to reverse the ALJ. We defer to the ALJ's discretion on this matter.[108]

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105 *Id.* The parties do not challenge these calculations.

106 *BOA*, ARB No. 2013-0099, slip op. at 21.

107 Supplemental Recommended Decision and Order Granting in Part and Denying in Part Plaintiff's Motion for Clarification (ALJ July 21, 2020).

108 *See U.S. v. Brennan*, 650 F.3d 65, 138 (2d Cir. 2011) ("Our function is not to exercise our own discretion, but to determine . . . whether the [] judge has abused his") (internal citations omitted). In *Brennan* the Court stated: "In any event, we need not and do not decide exactly what remedy the district court should impose (or to what extent the district court should find the liability on which any remedy would necessarily be premised). It is for the district court to decide what, if any, is the scope of the City Defendants' liability, and then to exercise appropriate equitable discretion in imposing a remedy. In doing so, the district court should explain why it exercised its discretion in the way that it did, so that a reviewing court can determine whether that discretion has been abused." *Id.* at 139-140.

CONCLUSION

We conclude the ALJ's findings that WMS engaged in a pattern or practice of intentional discrimination against non-Hispanic applicants, non-Hispanics, and women in determining hours, and women in hourly wages are supported by the record and are **AFFIRMED**.

In addition, we conclude that the ALJ's damages award and other affirmative relief is reasonable. Therefore, the ALJ awards of $780,998 in back pay damages to the defined class of non-Hispanic workers, $179,907 in back wages for women and non-Hispanic workers who were assigned less hours and paid lower wages, and other affirmative relief are **AFFIRMED**.

SO ORDERED.

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v.

ENTERPRISE RAC COMPANY OF BALTIMORE, LLC,

DEFENDANT.

ARB CASE NO. 2019-0072

ALJ CASE NO. 2016-OFC-00006

DATE: November 3, 2021

Appearances:

For the Plaintiff:
Kate S. O'Scannlain, Esq.; Beverly I. Dankowitz, Esq.; Radine Legum, Esq.; Jeffrey M. Lupardo, Esq.; Jennifer B. Frey, Esq.; Kevin J. Koll, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

For the Defendant:
John C. Fox, Esq.; Alexa L. Morgan, Esq.; Jay J. Wang, Esq.; *Fox, Wang, & Morgan P.C.*; Los Gatos, California

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*; Judge Johnson, *concurring*

ORDER OF REMAND

PER CURIAM. This matter arises under the nondiscrimination requirements of Executive Order 11246 (30 Fed. Reg. 12319), as amended, and its implementing regulations at 41 C.F.R. Chapter 60. Enterprise RAC Company of Baltimore, LLC

(Defendant) appeals a Department of Labor Administrative Law Judge's (ALJ) Recommended Decision and Order (Recommended D. & O.) issued on July 17, 2019.[1] Specifically, Defendant appeals the ALJ's finding that it is liable under Executive Order (EO) 11246 for intentional and unlawful discrimination against African-American job applicants between 2007-2012 and 2014-2017.[2] After fully considering the parties' arguments and the record, we remand the Recommended D. & O. to the ALJ for further consideration consistent with this Order of Remand.

BACKGROUND[3]

Defendant is a rental car company with a business office in Baltimore, Maryland, and is a wholly owned subsidiary of Enterprise Holdings, Inc. Defendant, through an ongoing government contract that began on October 1, 2002, provides rental cars to the U.S. Department of Defense Military Traffic Management Program Command. Defendant is a government subcontractor within the meaning of EO 11246.

Defendant's management trainee position is an entry-level position that may lead to promotion to higher paying positions within the company. The hiring process for the management trainee position is multi-stepped, consisting of a review of the applicant's online application and resume, a phone screening, and up to three in-person interviews with varying members of Defendant's managerial staff. If an offer of employment is considered after the interviews, a background check is performed. Each step of the hiring process aims to examine candidates further, and only those applicants who successfully pass one step move forward to the next step of the hiring process.

Throughout the hiring steps, applicants may be rejected by use of an "S" or "I" labeled disposition code that explains the reason for the rejection. Prior to in-person interviews, Defendant's hiring recruiters conduct an initial application review, and on occasion, a follow-up phone screening, to determine whether an applicant meets the minimum qualifications for the management trainee position.

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[1] 41 C.F.R. § 60-30.28.

[2] EO 11246 authorizes the OFCCP to ensure that Federal contractors and subcontractors doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and equal opportunity in employment, as implemented through 41 C.F.R. Part 60-30.

[3] As neither party disputes the general background facts, this background follows the Recommended D. & O. and undisputed facts.

Until 2008, all initial application reviews were performed by hiring recruiters. In November of 2008, Defendant began using software services which automatically rejected applicants who did not meet the minimum qualifications. Recruiters did not review any automatically rejected applications. Rather, recruiters only reviewed applications accepted by the software to determine whether they should schedule a phone screening.

If an applicant was rejected during the initial application review or phone screening steps, he or she was assigned one or more "S" labeled disposition codes. The "S" labeled disposition codes examined whether an applicant possessed the Basic Qualifications required by Defendant to perform the management trainee position.[4] To measure the Basic Qualifications against each applicant during the phone screening step, hiring recruiters used a prepared script designed as a questionnaire to obtain and record information from the applicant.[5]

The phone screening was also used as a tool to ensure that the applicant had an interest in a sales and customer service career, the ability to engage in polite conversation, and would be willing to accept the management trainee's responsibilities, hours, and location of the position.[6] To determine whether an applicant possessed the required sales and/or customer service experience, the hiring recruiters looked beyond the applicant's resume in order to measure how the applicant articulated their experience. If the hiring recruiter rejected an applicant after the phone screening, the recruiter entered a disposition code and had the option to write any notes in the space provided on the questionnaire.[7]

Throughout the relevant time period, Defendant offered two to three in-person interviews to potential hires. The first interview was performed by a Recruiting Specialist or Recruiting Manager to make a preliminary assessment of the applicant's Core Competencies, including whether the applicant had the customer service skills required for the position. When applicants were brought in for an interview, the hiring recruiter used an interview evaluation form that

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[4] Defendant's Basic Qualifications include Education, Sales and/or Customer Service Experience, Job Stability, Work Eligibility, Driving Record, Criminal Convictions, and Age. Recommended D. & O. at 13, 14.

[5] *Id.* at 16.

[6] *Id.*

[7] *Id.*

corresponded with Defendant's core competencies, and included a space for comments at the end.[8] If an applicant was rejected during one of the interview steps, Defendant would assign one or more "I" labeled disposition codes to the applicant.

Defendant categorized the "I" labeled disposition codes to reflect what it considered the Core Competencies and qualifications for the management trainee position.[9] Defendant provided a standard list of behavioral-based questions to all of the interviewers, and interviewers recorded the applicant's answers or any relevant comments they had on the interview evaluation form. This standard evaluation form was used by each subsequent interviewer in the next interview steps.

The second interview was performed by a local rental Area and/or Branch Manager and included a tour with an Assistant Manager who performed a Branch Observation Checklist to provide feedback about the applicant to the Area and/or Branch Manager. Until November of 2014, applicants who successfully completed the second interview advanced to the third and final in-person interview with a senior Group Rental Manager.

Defendant's records included an "application packet" for applicants of the management trainee position. Due to the nature of Defendant's hiring process, an applicant's packet contained the application for the position, the applicant's resume, interview notes, and/or a disposition code(s) if the applicant was rejected for the position.

The Office of Federal Contract Compliance Programs (OFCCP) periodically conducts compliance reviews to determine whether covered government contractors are complying with the affirmative-action and nondiscrimination requirements of the EO laws and their implementing regulations.[10] Pursuant to Section 202 of EO 11246 and Title 41, Section 60-1.4(a)(1), Defendant agreed not to discriminate against any applicant for employment because of race.

On May 1, 2008, OFCCP's Regional Manager notified Defendant by letter that OFCCP had scheduled an EO legal compliance review of Defendant's

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8 *Id.*

9 Defendant's Core Competencies include Customer Service, Persuasiveness/Sales Orientation, Flexibility, Results Driven, Leadership, and Communication. *Id.* at 27-28.

10 *See* 41 C.F.R. Part 60-1 (2015).

Linthicum, Maryland, car-leasing facility. After auditing Defendant's hiring practices for the management trainee position, OFCCP issued a Notice of Violation on March 13, 2013. After six conciliation meetings failed to resolve the dispute, OFCCP filed a complaint alleging that Defendant engaged in discrimination violations from August 1, 2006, through July 31, 2008, and that these discrimination violations were continuing.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority and assigned responsibility to this Board to review decisions by ALJs as provided for or pursuant to Executive Order No. 11246, as amended, and 41 C.F.R. Parts 60-1 and 60-30.[11]

DISCUSSION

OFCCP is charged with investigating and prosecuting alleged violations of EO 11246. A claim of employment discrimination may be established under a disparate impact or disparate treatment theory of discrimination.[12] For the reasons set forth below, we conclude that the ALJ erred under both theories.

1. The ALJ Erred in his Disparate Treatment Analysis

To prevail in a pattern-or-practice discriminatory treatment claim, OFCCP has the burden to produce credible evidence that there was a statistically significant racial disparity, and that intentional racial discrimination was the cause of that disparity. A pattern-or-practice discriminatory treatment claim requires that "racial discrimination was the company's standard operating procedure" and that

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[11] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (March 6, 2020).

[12] While disparate treatment and disparate impact are different, it is clear that OFCCP may bring claims of liability under both as alternate theories for relief in a given case. *See, e.g., Wright v. Nat'l Archives & Records Serv.,* 609 F.2d 702, 710-11 (4th Cir. 1979) (noting plaintiffs' election to pursue alternate theories was permissible, but not for the purpose of establishing multiple violations on the same set of facts); *Mozee v. Am. Com. Marine Serv. Co.*, 940 F.2d 1036, 1042 (7th Cir. 1991) (Plaintiffs brought two types of evidence, statistical evidence and evidence of discipline practices, that were "probative both of disparate impact and of a pattern of practice of disparate treatment.").

racial discrimination was a "regular rather than the unusual practice."[13]

It is the OFCCP's threshold burden to establish, by a preponderance of the evidence, a prima facie case of discrimination.[14] A prima facie case of a pattern-or-practice discrimination can be proven by both statistical disparity and anecdotal evidence of discrimination.[15]

If OFCCP establishes a prima facie showing, then the burden shifts to the employer to rebut the presumption by either offering legitimate, nondiscriminatory reasons for its actions, or by demonstrating that the statistical proof was unsound.[16] The employer's burden here is a "burden of production, of 'going forward' with evidence of 'some legitimate, nondiscriminatory reason for the [action].'"[17] The employer must "defeat the prima facie showing of a pattern or practice by demonstrating that the [ ] proof is either inaccurate or insignificant."[18] The burden

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[13] *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977).

[14] *Id.* at 360.

[15] *See Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 307 (1977).

[16] *Palmer v. Schulz*, 815 F.2d 84, 99 (D.C. Cir. 1987). Citing to *Teamsters*, OFCCP argues on appeal that "[a] framework designed to analyze singular events does not easily translate to the systemic context. That is why the Supreme Court has held that the *McDonnell Douglas* prima facie test is inapplicable in government broad-based pattern and practice cases." OFCCP's Response Brief, at 87. OFCCP's point addresses proof of individual instances of causation, which OFCCP correctly noted are not necessary in a pattern-or-practice case. We disagree that *Teamsters* rejected *McDonnell Douglas* altogether for pattern-or-practice cases. *Teamsters* simply noted the need for flexibility. *See Teamsters*, 431 U.S. at 336 (internal citations omitted); *see also id.* at 360 n.46. We believe the *McDonnell Douglas* framework can be flexibly used by factfinders in pattern-or-practice cases. *See U.S. v. City of N.Y.*, 717 F.3d 72, 83-91 (2d Cir. 2013) (discussing *McDonnell Douglas* and *Teamsters* in pattern-or-practice cases).

[17] *Wright*, 609 F.2d at 713-14 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578) (1978)).

[18] *Teamsters*, 431 U.S. at 360. As "*Teamsters* sets a high bar for the prima facie case the Government or a class must present in a pattern-or-practice case: evidence supporting a rebuttable presumption that an employer acted with the deliberate purpose and intent of discrimination against an entire class . . . . An employer facing that serious accusation must have a broad opportunity to present in rebuttal any relevant evidence that shows that it lacked such an

can be met by "provid[ing] a nondiscriminatory explanation for the apparently discriminatory result."[19] The employer's purported, legitimate nondiscriminatory reasons must be articulated with some specificity to avoid "conceal[ing] the target" at which employees must aim pretext arguments.[20]

If the employer satisfies its burden of production, the focus returns to the plaintiff. The trier of fact must determine whether the plaintiff has sustained its ultimate burden of proving, by a preponderance of the evidence, that the defendant intentionally discriminated.[21] In other words, if the employer offers a legitimate, nondiscriminatory reason, the plaintiff must demonstrate that the proffered reason was not its true reason, but was a pretext for unlawful discrimination.[22] OFCCP may prove that the given reasons were pretextual by showing enough instances that a court could find a pattern or practice of racial discrimination.[23]

The record supports the ALJ's conclusion that OFCCP met its initial burden because it produced statistical evidence establishing a racial disparity sufficient under the law to create a prima facie case of racial discrimination.[24] The statistical evidence from both experts demonstrates that the disparity between the expected value and the observed value of offers of employment for white and African-American applicants was or exceeded two standard deviations for every year during

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intent." *City of N.Y.*, 717 F.3d at 87 (citing *Teamsters*, 431 U.S. at 358); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000).

[19] *Teamsters*, 431 U.S. at 360 n.46.

[20] *Figueroa v. Pompeo*, 923 F.3d 1078, 1088 (D.C. Cir. 2019) (citing *Lanphear v. Prokop*, 703 F.2d 1311, 1316 (D.C. Cir. 1983)).

[21] *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

[22] *Id*.

[23] *See Paxton v. Union Nat'l Bank*, 688 F.2d 552, 567 (8th Cir. 1982) ("It was then incumbent on the plaintiffs and intervenors to prove that the given reasons were pretextual in at least enough instances that the court could find a pattern and practice of racial discrimination against blacks in the discharge class."). Pretext "means a lie, specifically a phony reason for some action." *Russell v. Acme–Evans Co.*, 51 F.3d 64, 68 (7th Cir.1995).

[24] The statistical evidence from both experts demonstrates that offers of employment by race (between white and African American applicants) had a significant two standard deviation equivalent or higher (some years exceeding three standard deviations) for every year during the relevant time period except for 2013. Plaintiff's Exhibit (PX) 106, at 18; PX 114, at 1.

the relevant time period except for 2013.[25] Courts have consistently found significance in disparities exceeding two standard deviations.[26]

Accordingly, the burden shifted to the Defendant to rebut the presumption or inference created by the prima facie case. Defendant, unable to establish OFCCP's statistical proof as unsound because its expert provided similar statistical evidence, provided evidence of legitimate, nondiscriminatory hiring practices.[27] Specifically, Defendant provided extensive documents consisting of individual application packets for management trainee program applicants during the time period to rebut the presumption by explaining its hiring decisions by use of nondiscriminatory disposition codes.[28] Some of Defendant's documents also included hand-written notes from interviewers explaining why they selected certain disposition codes for an applicant to demonstrate that disposition codes were applied in a race-neutral manner. Accordingly, the record shows that Defendant articulated nondiscriminatory reasons for rejecting applicants for the management trainee program.

As noted above, Defendant's burden in the rebuttal stage is one of production, not persuasion. As the Supreme Court stated in *Burdine*, "[t]he explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima

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[25] Recommended D. & O. at 100.

[26] *See Hazelwood*, 433 U.S. at 308 n.14; *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984) (finding the plaintiff presented statistical analyses that met "the generally accepted .05 level of statistical significance" and noting a two standard deviation corresponds to a statistical significant .05 level which "are certainly sufficient to support an inference of discrimination."); *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 245 (4th Cir. 2010) (finding the statistical evidence demonstrated that African American subcontractors were underutilized because the level "fell outside of two standard deviations from the mean and therefore, was statistically significant at a 95 percent confidence level."); *see also Palmer*, *supra* note 16, 815 F.2d at 92 (noting that a statistical "disparity measuring two standard deviations (to be more precise, 1.96 standard deviations) corresponds to a 5% probability of randomness").

[27] Recommended D. & O. at 108.

[28] The ALJ noted that the record contained at least sixty individual application packets. *Id.* at 106. The ALJ identified that Defendant submitted DX 7366, via a thumb drive, and described it as "Enterprise's application set, Excel Spreadsheet showing which applications were analyzed by Dr. Madden and Dr. White." *Id.* at 2-3, 98. The record submitted to the ARB did not contain the thumb drive.

facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[29]

The ALJ appeared to state the correct standard for Defendant's rebuttal but nonetheless conducted a persuasion analysis.[30] The ALJ found that the application packet documents were not persuasive because of the subjectivity used by the recruiters to reject applicants.[31] The ALJ also reviewed four applications (comparing the use of disposition codes between two white applicants with two African-American applicants) to support his conclusion that the disposition codes were not applied consistently.[32] The ALJ's analysis of Defendant's rebuttal was legal error because at this point Defendant's burden was one of production, not persuasion.[33]

In particular, the ALJ did not explain why Defendant's production of documents explaining the racial disparities shown in the statistical evidence did not

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[29] *Burdine*, 450 U.S. at 255-56.

[30] Recommended D. & O. at 98-99, 103.

[31] The ALJ explained that recruiters' testimony demonstrated the subjectivity of Defendant's hiring process and use of disposition codes, finding that "[i]t is clear that Enterprise did not apply all of the disposition codes consistently. That is patently obvious with respect to the S3 disposition code that was used frequently and had a disparate impact on African-American applicants." Recommended D. & O. at 105.

[32] *Id.* at 106.

[33] In a pattern-or-practice case, an employer can satisfy its burden of production by "produc[ing] any evidence that is relevant to rebutting the inference of discrimination." *City of N.Y.*, 717 F.3d at 85. An employer can satisfy this burden by either showing the plaintiff's statistics are flawed, or by establishing legitimate, nondiscriminatory reasons for the observed disparities. *See Teamsters*, 431 U.S. at 360 n.46 (noting that the employer's burden must "be designed to meet the prima facie case" and in cases where the government's case consists of proof of racial disparities of a regularly followed policy, an employer may "provide a nondiscriminatory explanation for the apparently discriminatory result."); *Segar*, 738 F.2d at 1267-68 (an employer can either refute the claim that a disparity exists, or "the employer can offer an explanation defense; such a defense amounts to a claim that an observed disparity has not resulted from illegal discrimination.").

satisfy the burden of production.[34] Accordingly, we find that the ALJ's persuasion analysis of Defendant's rebuttal was legal error.[35]

Further, the ALJ's burden of persuasion analysis was also flawed. The ALJ found that Defendant's subjective use of disposition codes did not adequately explain the racial disparities shown in the statistical evidence.[36] However, in

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[34] Yet, the ALJ recognized OFCCP's acknowledgement that Defendant's race-neutral hiring practices were "legitimate standards" "on paper" for the management training position. Recommended D. & O. at 108 ("The issue here is not the process as it existed on paper, it is the process as it was applied in actual practice.").

[35] In the response brief, relying on the Board's *Bank of America* decision, the Solicitor argues on appeal that the Board may accept the ALJ's factual findings if supported by substantial evidence and limit its review to the ultimate finding of discrimination**.** *See OFCCP v. Bank of Am.*, ARB No. 2013-0099, ALJ No. 1997-OFC-00016, slip op. at 12 (ARB Apr. 21, 2016) ("After a full evidentiary hearing, there is no need to engage in the burden of production analysis to determine whether the OFCCP presented a prima facie case or whether BOA presented legitimate, non-discriminatory reasons for its practices. This burden of production analysis applies to motions for summary judgment and motions for judgment as a matter of law."). It is true that in cases arising under many statutes, we discourage the ALJ from analyzing a prima facie case for matters that have had a full evidentiary hearing. *Brune v. Horizon Air Indus., Inc.*, ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 15 (ARB Jan. 31, 2006). However, in these EO cases, the subject matter is complex and often built upon statistical models serving as a prima facie case or inference of discrimination. Further, federal case law follows this prima facie case framework. Our problem with *Bank of America*'s avoiding the prima facie case is that it dispels the model in one respect, but cites cases which in turn depend on the prima facie model in another, creating a mismatch from citations operating within the inference and prima facie model but for the premise of proof of intentional discrimination. Proof of a prima facie case is not proof of intentional discrimination. "A *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco*, 438 U.S. at 579-80.

[36] "It is clear that Enterprise did not apply all of the disposition codes consistently. . . . The testimony of Ms. Morris, Ms. Hardesty, Ms. Lichter and Mr. Wucher showed the highly subjective and seemingly arbitrary nature of what Enterprise counted as relevant work experience; where potentially two applicants could have held the same job and one gets credit for it and the other does not." Recommended D. & O. at 105; *id.* at 107. But in concluding that the Defendant was inconsistent, the ALJ did not fully analyze the employer's explanations, seemingly disregarding subjective explanations entirely. The full quote from Licther's testimony is as follows: "Ms. Lichter said two applicants could have held the exact same job, had the exact same job title, and worked for the exact same company and one could get credit for sales or customer service experience and the other

analyzing the evidence and arguments concerning Enterprise's hiring criteria, (including its requirement of sales and/or customer service), the ALJ conflated evidence of subjectivity with evidence of discrimination without allowing an employer's legitimate use of subjective hiring criteria.[37]

Although there is a risk that a nefarious employer may use subjective standards as cover for discrimination, subjective criteria which are facially nondiscriminatory "no matter how subjective the criteria—may constitute a legitimate reason" for rejecting applicants.[38] Subjective evaluation criteria "can constitute [ ] legally sufficient, legitimate, nondiscriminatory reason[s]" for an employer's business decisions.[39] In fact, "subjective evaluations of a job candidate are often critical to the decision-making process, and if anything, are becoming more so in our increasingly service-oriented economy . . . ."[40]

However, an employer's subjective criteria is not beyond scrutiny. The reasons given must have some substance to allow for evaluation.[41] If, for example, the ALJ compared the qualifications of those rejected with those that were hired in order to show intentional discrimination, the differences must be so striking as to permit a reasonable factfinder to raise the alarm of a pattern or practice of intentional discrimination.[42] Slight or even mistaken differences in qualifications fail to satisfy this burden because the ALJ does not sit as a super-personnel board

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rejected for a lack of the same *depending upon how they articulated their experiences during their telephone conversations with her*." *Id.* at 104 (emphasis added). Mr. Wucher explained "he was looking for applicants to 'sell themselves' at that moment and that it was helpful, but not necessary, for them to even talk about their prior work experience." *Id.* at 105.

37 *Id.* at 104-05, 107, 110 (rejecting employer's hiring criteria as examples of legitimate, nondiscriminatory reasons because they were subjective).

38 *Figueroa*, 923 F.3d at 1088.

39 *Denney v. City of Albany*, 247 F.3d 1172, 1185 (11th Cir. 2001) (internal quotations omitted).

40 *Id.* at 1185-86 (internal quotations omitted); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir. 2002) (similar subjective comments made of white and black candidates, negating any inference that comments were codes for race).

41 *Figueroa*, 923 F.3d at 1088 (internal quotations omitted) (analyzing how some subjective reasoning can be so skeletal that it can "conceal the target" in a pretext analysis).

42 *Millbrook*, 280 F.3d at 1180-81.

second-guessing the employer's hiring practices.[43]

This objective evaluation is not accomplished by reviewing and comparing a small number of applications.[44] The ALJ relied on the subjectivity of the hiring decision-making process to summarily conclude that the racial disparity shown in the statistical evidence, and the few number of applications he reviewed, was the result of racial discrimination. Thus, "absent evidence that subjective hiring criteria [was] used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on [ ] subjective criteria" does not in and of itself prove pretext for intentional discrimination.[45]

Because the ALJ erred in his disparate treatment analysis we must remand the case back to the ALJ.

2. The ALJ Erred in his Disparate Impact Analysis

In order to establish a disparate impact theory of discrimination, OFCCP must establish that a particular employment practice has a disproportionately

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[43] *See DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (a "[c]ourt does not sit as a kind of super-personnel department weighing the prudence of employment decisions") (internal quotation marks omitted).

[44] The ALJ conceded that "[e]xamining four applications from one fiscal year out of thousands of applications submitted over an 11-year period, and observing that standards were applied in an inconsistent manner that was more lenient for the white applicants than the African-American applicants, in and of itself might not cast substantial doubt on the legitimacy of the hiring process." Recommended D. & O. at 106.

[45] *Denney*, 247 F.3d at 1185*; see also Alvarado v. Texas Rangers*, 492 F.3d 605, 616 (5th Cir. 2007) ("An employer's subjective reason for not selecting a candidate, such as a subjective assessment of the candidate's performance in an interview, may serve as a legitimate, nondiscriminatory reason for the candidate's non-selection."); *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004) (the *McDonnell Douglas* framework of the employer's burden of production to articulate nondiscriminatory reasons for its hiring decisions "does not mean that an employer may not rely on subjective reasons for its personnel decisions."). It is important to note that the case before us presents a factual situation that is distinctly different from that of *Alvarado*, in the sense that here the employer did not exercise purely subjective judgment in a vacuum or without context. Indeed, the relevant documentation in the record contains other factors which shaped and explained the employer's hiring decisions as a whole. *See Alvarado*, 492 F.3d at 617 (discussion of the absence of these types of contextual factors).

adverse impact on African-American applicants.[46] Under a disparate impact claim, the challenged employment practice is facially neutral but has an adverse impact on a protected class.[47] The principals of a disparate impact analysis were summarized by the Supreme Court in the *Ricci v. DeStefano* case:

> Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice[48] that causes a disparate impact on the basis of race, color, religion, sex, or national origin." An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.[49]

Unlike the three-part test articulated above for disparate treatment, the employer's rebuttal to prove business necessity or job relatedness in disparate impact cases is proof by a preponderance of the evidence, not merely a burden of production.[50]

We conclude that the ALJ also erred in his disparate impact analysis. The ALJ's review of this alleged form of discrimination is cursory (two pages), without any of the necessary analysis following the relevant statute and the case law that forms the pillars of disparate impact liability.[51] The ALJ failed to identify what specific employment practice caused the disparate impact and failed to adequately discuss the issue of the respondent's possible defenses to the prima facie

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46 *See Davis v. Dist. of Colum.*, 925 F.3d 1240, 1248-49 (D.C. Cir. 2019).

47 *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

48 Plaintiff must "point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 542 (2015) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e–2(k)).

49 *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (citations omitted).

50 *Lewis v. City of Chicago*, 560 U.S. 205, 213 (2010).

51 Recommended D. & O. at 112-13.

case (i.e. job relatedness or business necessity), and whether there was an alternative practice which could have served the same purposes of the practice with a lesser disparate impact. These requirements are clearly spelled out in the applicable statutes and case law.[52] As a result, this, too, requires that we remand the matter to the ALJ.

CONCLUSION

The Board finds the ALJ committed legal error and that it is proper to remand the case to the ALJ to apply the correct legal standards. Accordingly, the ALJ's Recommended Decision and Order is **VACATED**, and this case is **REMANDED** to the ALJ for further proceedings consistent with this Order of Remand.

SO ORDERED.

Judge Randel K. Johnson, *concurring*

I concur with the majority that this decision should be remanded to the ALJ for reconsideration of both the claims of disparate treatment and disparate impact. I write separately to elaborate on the reasons for remand regarding the ALJ's analysis of the disparate impact claim. I also note one area where I slightly differ with the majority opinion.

In disparate treatment cases, the ultimate issue in question is the intent of the defendant underlying the complained of act—was there intentional discrimination based on a protected classification?[53] In disparate impact cases, however, intent of the defendant is irrelevant; rather the focus of the case is on some particular practice of the defendant which adversely affects classes protected under civil rights laws to a significantly greater degree than a majority group, depending on the comparators. The ALJ, in his brief analysis, found liability under

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[52] *Ricci*, 557 U.S. at 577-78 (citations omitted); Civil Rights Act of 1991, 42 U.S.C. § 2000e–2(k).

[53] On appeal, Defendant argues that the ALJ erred in finding liability under both theories of discrimination. While the theories of disparate treatment and disparate impact are very different, it is clear that OFCCP may bring claims of liability under both theories. On this point, *see supra* note 12.

disparate impact principles while discussing two cases, *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) and *Davis v. District of Columbia*, 925 F.3d 1240 (2019).[54]

As the ALJ implicitly recognized, the genesis of the theory of disparate analysis of liability under Title VII of the 1964 Civil Rights Act was the seminal 1971 *Griggs v. Duke Power Co.* case. However, not surprisingly, that case spawned multiple subsequent Supreme Court decisions[55] seeking to clarify the meaning of the decision (which had internal inconsistencies), and literally hundreds and hundreds of cases in the lower courts. The typical issues which generated litigation were: (1) what type of employment practice was even covered under disparate impact analysis; (2) what type and degree of statistical comparisons were appropriate to establish a prima facie case of a cognizable disparate impact claim; (3) to what degree did a plaintiff have to identify with specificity the employment practice complained of and prove a causal link between that employment practice and the statistically demonstrated disparate impact; (4) assuming that a prima facie case was shown, was the burden of proof on the defendant to show that (and thus justify) that the practice was justified by business necessity or job relatedness—was it a burden of production or persuasion; and (5) even upon such a justification, could the plaintiff still prevail upon showing that there was an alternative practice which the employer could have implemented with a lesser disparate impact which met the same business related reasons for that practice.[56]

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[54] Recommended D. & O. at 112-13.

[55] *See Watson v. Fort Worth*, 487 U.S. 977 (1988) (subjective criteria, e.g., alertness, personal appearance, ambition, leadership ability, ability to work with others; job related, manifest relationship); *Conn. v. Teal*, 457 U.S. 440 (1982) (written examinations; manifest relationship to the employment in question); *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (rule against employing drug addicts in both safety and non-safety jobs; if goals are "significantly served by—even if they do not require—"the practice it bears a manifest relationship to the employment in question); *Washington v. Davis*, 426 U.S. 229 (1976) (general written test of verbal skills; job relatedness); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements; manifest relation to the employment in question, job related); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (written aptitude tests; manifest relation to the employment in question, job related).

[56] For an in-depth review of the case law on these issues, as of 1991 prior to the enactment of the 1991 Civil Rights Act discussed below, *see* House Education and Labor Committee Report accompanying the "Civil Rights and Woman's Equity in Employment Act of 1991." H.R. Rep. No. 102-40, at 23-45, 124-137(1991).

Importantly, courts put their own gloss on these issues since the *Griggs* decision, with varying degrees of consistency, finally culminating in the controversial *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) decision. This decision triggered some three years of debate on Capitol Hill with introduction of major legislation, a veto by President Bush, and ultimately a legislative compromise embodied in the 1991 Civil Rights Act which amended Title VII. That compromise added a new subsection (k) to sec.703 of the Act, codified at 42 U.S.C sec. 2000e-2(k), which reads, in part, as follows:

> (k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity, or
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> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice
>
> (B)(i) with respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A) (i), the complaining party shall demonstrate that such particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of respondent's decision-making process are not capable of separation for analysis, this decision-making process may be analyzed as one employment practice.
>
> (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity…

The "exclusive" legislative history[57] of the 1991 Civil Rights Act concerning this language is as follows:

> The terms "business necessity" and "job-related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).
>
> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion standard, method of administration, or test such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally integrated practices may be analyzed as one employment practice.

The principals of a disparate impact analysis as delineated by the 1991 Act were recently summarized, as also noted by the majority opinion, by the Supreme Court in the *Ricci v. DeStefano* case:

> The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact. But in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Court interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are "discriminatory in operation." The *Griggs* Court stated that the "touchstone" for disparate-impact liability is the lack of "business necessity": "If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." Under those precedents, if an employer met its burden by showing that its practice was job-related, the plaintiff was required to show a legitimate alternative that would have resulted in less discrimination.
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> Twenty years after *Griggs*, the Civil Rights Act of 1991, 105 Stat. 1071,

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[57] "Section 105(b) of the 1991 Act states: 'No statements other than the interpretive memorandum [quoted here] appearing at Vol. 137 Congressional Record S.15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this act that relates to Wards Cove – Business necessity/cumulation/alternative business practice.'" *See also* Henry H. Perritt, Jr., Civil Rights in the Workplace, Vol. 1, at 4-5, 285-286 (2d ed. 1995).

> was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination. That provision is now in force along with the disparate treatment section already noted. Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.[58]

Similarly, a leading treatise on discrimination law summarized the elements of a disparate impact case as incorporated into the 1991 Civil Rights Act, broken out into separate paragraphs, as follows:

> Thus, the allocation of burdens now follows this scheme in Title VII adverse impact cases:
>
> (1) *The Prima Facie Case*: A court will consider statistical evidence offered by both the plaintiff and the defendant to determine whether, on the basis of those statistics that are most probative, the challenged practice or selection device has a substantial adverse impact on a protected group. The burdens of production and persuasion at this stage are on the plaintiff.
>
> (2) *Business Necessity*: If impact is established, the inquiry becomes whether the practice or selection device is "job-related for the position in question and consistent with business necessity." The burdens of production and persuasion at this stage are on the defendant, but the precise meaning of this standard remains an open question . . .
>
> (3) *Alternatives with a Lesser Impact*: To rebut the employer's proof of business necessity, a plaintiff can show that the employer refused to implement an effective alternative practice or selection device that would have a lesser adverse impact.

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58 *Ricci*, 557 U.S. at 577-78 (citations omitted).

> The 1991 Act confirmed the general rule—plaintiffs' causation burden generally requires plaintiffs to identify the specific policy or practice resulting in the disparity. But, crucially, where plaintiffs can affirmatively prove that the individual steps in the suspect policies or practices cannot be separated for examination, this general rule does not apply. [59]

Against this complex backdrop of judicial interpretations and statutory requirements, the ALJ summarily concluded, over barely two pages, that the Respondent was liable for implementing practices with a disparate impact. As noted above, the ALJ briefly quoted from the *Griggs* case and discussed one case out of the D.C. Circuit, *Davis v. District of Columbia*, 925 F.3d 1240 (D.C. June 7, 2019). The *Griggs* case has been modified over decades of case law, and in turn shaped by the statutory language in the 1991 Act (which is equally applicable here).[60] The *Davis*

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[59] 1 Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* 118-19 (4th ed. 2008) (citations omitted). For a detailed review of issues leading up to passage of the 1991 Act and how the provisions of that Act both adopted some aspects of the *Wards Cove* decision, such as the need to specifically identify the practice in question and prove that that practice caused the disparate impact alleged, but rejected others, particularly that the employer only has the burden of production in showing that the practice in question is job-related or justified by business necessity as distinguished from the burden of persuasion, *see* Kent Spriggs, *Representing Plaintiffs in Title VII Actions* §§ 3.02 & 3.03 (2d ed. 1994); Robert E. McKnight, Jr., *Representing Plaintiffs in Title VII Actions* § 6.02[A] (4th ed. 2014) ("If distinct practices used in combination are 'not capable of separation for analysis' [citing the applicable provision in the Civil Rights Act of 1991] of consequent disparity, then the combination may be used. Practices are not incapable of separation just because they exhibit a common feature, e.g., subjectivity."). *See* Henry H. Perritt, Jr., *supra* note 57, § 5.7, Legislative History of Disparate Impact Provisions, citing the above-referenced memorandum of interpretation noting, "his [referring to the memorandum] does not mean much, of course, without external references to Supreme Court cases applying the business necessity and job-related concepts before *Wards Cove. It does however make it clear that functionally integrated practices may be analyzed as one employment practice, thus helping to interpret the discrete practice provisions in (k)(1)(A) and (b) [of the Civil Rights Act of 1991."* (emphasis added).

[60] Of course the Civil Rights Act of 1991 did not directly amend Executive Order 11246. However, the proscriptions of Title VII govern the EO. *See U.S. v. Trucking Mgmt., Inc.*, 662 F.2d 36 (D.C. 1981) (finding EO 11246 does not override Title VII's protections of seniority). Further, OFCCP's compliance manual recognizes the applicability of Title VII principles. *See* Federal Contract Compliance Manual, at 361 ("Title VII of the Civil Rights Act of 1964.")

case was cited for the proposition that OFCCP need not specifically identify the individual practices which caused the alleged disparate impact.[61]

The ALJ in his conclusory decision, failed to link which statistical comparisons[62] were caused by what specific employment practice, and failed to meaningfully engage on the issue of the respondent's possible defenses to the prima facie case, (i.e. job relatedness or business necessity) as specified by the statute and case law, and regarding whether there was an alternative practice which could have met the same purposes of the practice with a lesser disparate impact and the employer failed to adopt those, again as specified in the statute.[63] Echoing these

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[61] Recommended D. & O. at 112-13.

[62] Although the 1991 Act did not define what type of statistical comparisons were necessary to prove a prima facie case, such comparisons are in fact critical and must be demonstrated to meet certain criteria as defined under the case law—which alone has many complexities. *See* Lindemann & Grossman, *supra* note 59, at 122-43 ("The Plaintiff's Prima Facie Case"); McKnight, *supra* note 59, at § 6.02 [A] ("The plaintiff normally proves the disparity resulting from a particular employment practice with statistical evidence that controls for other factors that might have caused or contributed to the disparity. For example, it will usually not suffice to show a disparity between the groups of people who occupy a certain type of position because such a comparison does not account for the demographics of the applicants. And if applicants are being scrutinized, it may be necessary to sort them into the categories of the qualified and the unqualified, and calculate the statistics only with reference to the qualified applicants.").

[63] "Enterprise contends that OFCCP failed to prove that any of its practices discriminated against African-Americans and that it demonstrated that it had legitimate, non-discriminatory business reasons for its hiring practices. Accepting these contentions requires taking a very myopic view of the record." This summary paragraph alone indicates the confusion of the ALJ's analysis in that while the concept of "legitimate, nondiscriminatory business reasons for its hiring practices" bears on the allegations of disparate treatment, the focus in a disparate impact case is on whether or not a particular practice which <u>does</u> have a discriminatory impact can be justified based on business related reasons. Recommended D. & O. at 112. The ALJ also noted that "[i]n this case, the evidence shows that the seemingly race neutral standards Enterprise articulated for hiring management trainees had a disproportionate adverse impact on African-American applicants. The statistical evidence presented by Dr. Madden and Dr. White show that the racial disparity in job offers to African-American applicants was well in excess of two standard deviations in every year of the charge period except for fiscal year 2013." *Id.* at 113. This broad observation of overall statistics does not meaningfully address what disproportionate impact was caused by which practice, which the law requires unless the plaintiff can show that it is impossible to disaggregate the practices.

omissions, a thorough review of the record found very little discussion of those principles at the trial hearing itself.[64]

Additional discussion with regard to the requirement to identify a specific practice is warranted. As made clear in the aforementioned case law and the 1991 Civil Rights Act, a plaintiff must establish that a particular practice caused the disparate impact. As the courts have explained, this requirement exists because blanket assertions of disparate impact arising from broad groupings of practices would effectively make it impossible for an employer to defend those practices as job-related or justified by business necessity, resulting in an employer engaging in racial balancing of workforce demographics to avoid liability.[65] This requirement is not a trivial or technical one to be lightly considered by the courts. This area is one of the few addressed in the "exclusive" legislative history which indicates its importance, but also that its contours are somewhat unclear. Moreover, it is also important to make clear that these requirements do not impose a straitjacket on the plaintiff; the statute itself and the legislative history indicate that where it is not possible on the part of the plaintiff to disentangle a grouping of practices ("not capable of separation") a plaintiff could be relieved of this requirement.[66]

The ALJ appears to be aware of this requirement by noting it was an issue in

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[64] In quoting from the case law, the ALJ makes passing reference to the concept of job relatedness and business necessity as a defense to a practice that has a disparate impact, but makes no reference at all to the subsequent prong of impact analysis which provides that a plaintiff can show that an alternative practice exists and the employer refuses to adopt such an alternative. Both are set out in the applicable language under the 1991 Civil Rights Act and thoroughly discussed in case law, albeit often with a lack of clarity, but are critical to a disparate impact analysis. *See The Civil Rights Act of 1991: The Business Necessity Standard*, 106 Harv. L. Rev. 896 (1993); Lindemann & Grossman, *supra* note 59, at 148-56; McKnight, *supra* note 59, at § 6.02[C] ("Since the Supreme Court's opinion in *Albermarle Paper Co.*, and in the codification of disparate impact case law, plaintiffs have a last chance in the pattern of proof: if the defendant produces evidence that the challenged practice was job-related and consistent with business necessity, the plaintiff 'may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.'") (internal citations to the applicable provision of the 1991 Civil Rights Act omitted).

[65] *See, e.g.*, *Watson*, 487 U.S. at 993-996.

[66] *See* Spriggs, *supra* note 59, § 3.03 [3] on how the statutory language and the interpretive memorandum appears to soften a strict application of the *Wards Cove* admonition on the need to identify a specific practice, when the practices are intertwined to some (unspecified) degree.

the *Davis v. District of Columbia* case[67] (which involved a reduction-in-force (RIF)), but provides little to no insight as to how he applies the requirement to the very different facts (which involve hiring), before him. The ALJ broadly notes the "race neutral standards" used by the Respondent and later discusses the "disproportionate adverse impact on African-American applicants" arising from three categories (customer service and sales experience, communication ability, and compatible career and direction), referencing Dr. White's analysis. Dr. White's analysis does provide information on disparities, but the ALJ provides little analysis as to how he believes they are relevant here, in terms of which criteria caused a disparate impact, much less moving to the next logical step of discussing whether or not they were job-related, or required by business necessity.

Further, the *Davis* case cited by the ALJ reasserts the importance, with a lengthy discussion in both the majority and the dissent, of identifying the particular practice in question and the rationale for this requirement. The court also noted that this was a case of first impression[68] and its limited findings, stating "We need not generally decide whether a RIF as such might ever be a 'particular employment practice' under section 2000e – 2(k)(1)(A)(i). Terminating a large group of employees in a compressed time frame is clearly an adverse employment action within the meaning of Title VII, and an employer's assertion that the firings were a required by budget cuts does not somehow immunize them from Title VII scrutiny."[69] The fact that the *Davis* case and its reasoning, focused on a one-time, immediate reduction-in-force, brings into question its applicability to the case before us where the facts involved allegations concerning hiring practices spread out over several years. The case certainly does not stand for the proposition that several hiring selection criteria can be simply grouped together, in the absence of a showing that such practices are not capable of separation. Such a proposition would be clearly contrary to the case law and the 1991 Act.

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67 "The district court granted summary judgement for the agency saying that the plaintiffs failed to identify a specific employment practice that had a racially disparate impact. The D.C. Circuit disagreed. The D.C. Circuit held that a disparate impact claim could include 'the process by which the Agency identified plaintiffs' jobs for elimination as a particular employment practice.'" Recommended D. & O. at 112 (citing *Davis*, 925 F.3d at 1251) (internal citations omitted).

68 "This is the first time this court has been asked whether a RIF, or more precisely, the practices through which an employer implements a RIF are subject to disparate impact review under Title VII, but we see no basis to exempt such practices from otherwise applicable law." *Davis*, 925 F.3d at 1250.

69 *Id.* at 1251-52.

Of course, what quantum of proof will be "particular" or specific enough to meet the criteria under the law will clearly be a question of fact—with gray areas being unavoidable. But here, the ALJ has provided little to no insight with regard to his reasoning as to how this critical aspect of disparate impact case law was applied to the facts before him and provided no reasoning in discussing how a plaintiff could be relieved of this burden if the practices are incapable of separation. This important aspect of the 1991 Act cannot be given short shrift. In this case, as a consequence of the ALJ's failure to analyze and apply other principles of disparate impact in reaching his conclusions, a remand is clearly necessary.

In closing, I note some concern over the analysis contained in Footnote 35 of the majority opinion. In my view, the case law with regard to the application of the so-called *McDonnell Douglas–Burdine* tripartite order of proof (beyond orders for summary judgment), is unclear. What has become clear, with the advent of jury trials under Title VII following the 1991 Civil Rights Act, is that juries should not be instructed in the intricacies of this tripartite order of proof. To avoid confusion, the rules as to when it must be applied in bench trials and when it should fall to the wayside (either as a matter of discretion or a matter of law) to allow the decision-maker to look at the evidence as a whole to determine the ultimate question of intentional discrimination is unsettled.[70]

Given this lack of clarity, I cannot say that the approach taken in the Board's *Bank of America* decision was wrong. There are, simply, a variety of strands in the case law. However, I do agree with the included sentence in the footnote that "[p]roof of a prima facie case is not proof of intentional discrimination" under *McDonnell Douglas*, but this appears to state a truism. Indeed, the prima facie case raises an inference of discrimination but that inference would only lead to conclusive "proof of discrimination" in an exceedingly rare situation where the

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[70] As one jurist put it, "I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike. The original *McDonnell Douglas* decision was designed to clarify and simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside." *See Coleman v. Donahoe*, 667 F.3d. 835, 862 (7th Cir. 2012) (concurring opinion); *see also Brady v. Sargeant at Arms*, 520 F.3d. 490, 494 (D.C. Cir. 2008) ("Much ink has been spilled regarding the proper contours of the prima-facie-case aspect of *McDonnell Douglas* . . . . It has not benefited employees or employers; nor has it simplified or expedited core proceedings. In fact, it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources.").

employer absolutely offered no evidence in rebuttal.[71]

Accordingly, the ALJ committed legal errors in his findings that OFCCP satisfied its burdens of establishing both a pattern or practice of intentional discrimination and a disparate impact in this matter, and I join in the majority's order of remand.

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[71] *See* McKnight, *supra* note 59, § 9.03 ("Once the employer has not remained silent – i.e., once the employer has articulated at trial its legitimate nondiscriminatory reason – then whether the plaintiff proved a prima facie case is generally deemed to be irrelevant, and decisions on motions for judgment as a matter of law should dispense with analysis of the prima facie.") (emphasis in original).

FILED
United States Court of Appeals
Tenth Circuit

August 6, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 113,

Plaintiff - Appellant,

v.

T & H SERVICES, a wholly owned subsidiary of Tlingit Haida Tribal Business Corporation,

Defendant - Appellee.

No. 20-1187

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CV-03159-LTB-KMT)

Terrence A. Johnson, Snyder, Colorado, for Appellant.

Todd A. Fredrickson (Micah D. Dawson with him on the brief), Fisher and Phillips, LLP, Denver, Colorado, for Appellee.

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

HARTZ, Circuit Judge.

T & H Services performed operation and maintenance services at Fort Carson Army base in Colorado Springs, Colorado, under a contract with the United States Army (the Army Contract) that was governed by several federal labor-standards

statutes, including the Service Contract Act, 41 U.S.C. §§ 6701–07, and the Davis-Bacon Act, 40 U.S.C. §§ 3141–44, 3146–47. The International Brotherhood of Electrical Workers, Local 113 (the Union) represented some T&H employees under a collective-bargaining agreement (the CBA) that included a provision for binding arbitration of disputes "limited to matters of interpretation or application of express provisions of [the CBA]." Aplt. App. at 29.

Several Union members who repaired weather-damaged roofs at Fort Carson in the summer of 2018 were paid the hourly rate for general maintenance workers under Schedule A of the CBA. The Union, believing that the workers should have been classified as roofers under the Davis-Bacon Act and paid the corresponding hourly rate under the schedule, filed a grievance and sought arbitration of the dispute. When T&H refused, claiming that the dispute was not arbitrable under the CBA, the Union filed suit in the United States District Court for the District of Colorado to compel arbitration under § 4 of the Federal Arbitration Act (FAA), which allows a "party aggrieved by the . . . refusal of another to arbitrate under a written agreement for arbitration [to] petition [a] court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."[1] 9 U.S.C. § 4. The district court agreed with T&H that the dispute was not arbitrable and granted summary

[1] The Union also sought to compel arbitration over a second unresolved grievance, but the parties later reached a settlement regarding this grievance and filed a stipulation of partial dismissal, which the district court granted.

judgment to the company. The Union appeals. Exercising jurisdiction under 9 U.S.C. § 16 and 28 U.S.C. § 1291, we affirm.

The essence of the dispute is whether the workers who repaired the roof should have been classified as general maintenance workers or roofers for that labor; the hourly rate owed to workers under either classification is not in question. As we explain in greater depth below, when the CBA is read in the context of the Davis-Bacon Act, it is clear that the CBA does not govern the classification of workers under the Act. The United States Department of Labor (DOL) has a robust system authorized by the Davis-Bacon Act and DOL regulations promulgated thereunder for determining job classifications for Davis-Bacon work and resolving disputes over classifications. *See* 29 C.F.R. Parts 1, 5–7; *Universities Rsch. Ass'n v. Coutu*, 450 U.S. 754, 759–61 (1981). The CBA recognizes this system, and the natural reading of that agreement is that Davis-Bacon job classifications are to be decided by the government, not by the parties to the CBA through negotiation, grievance proceedings, or otherwise. This reading of the CBA should not be surprising; what would be surprising is a CBA that provided for grieving and arbitrating Davis-Bacon job-classification disputes. Long-recognized policy reasons support not leaving Davis-Bacon job classifications to arbitration; and these policy reasons would likely dissuade those who negotiate collective-bargaining agreements from providing for arbitration of disputes over Davis-Bacon job classifications (and might well make such an arbitration agreement unenforceable).

I. BACKGROUND

Although most of the work under the Army Contract was apparently governed by the Service Contract Act, the Union contends that the roofing work in dispute was governed by the Davis-Bacon Act. The two acts are quite similar in operation, setting minimum wages for those who work on federal contracts. *See* 40 U.S.C. § 3142; 41 U.S.C. § 6703; *Carpet, Linoleum & Resilient Tile Layers, Loc. Union No. 419, Brotherhood of Painters & Allied Trades, AFL-CIO v. Brown*, 656 F.2d 564, 565 n.1 (10th Cir. 1981) ("The Davis-Bacon Act and the Service Contract Act . . . direct the Secretary of Labor to . . . write [a] wage standard as a minimum into the specifications of federal contracts."). But we will focus on the Davis-Bacon Act.

The Davis-Bacon Act governs federally funded contracts for construction. *See* 40 U.S.C. § 3142(a); *Universities Rsch. Ass'n*, 450 U.S. at 756 (Davis-Bacon Act applies to "certain federal construction contracts"). The Act requires the contractor to pay each worker on the contract at least the prevailing wage in the locality for the type of work performed by the worker. *See* 40 U.S.C. § 3142; *Universities Rsch. Ass'n*, 450 U.S. at 756–57. The DOL periodically determines the prevailing wage for each type of work in each locality.[2] Then the federal contracting officer for the contract determines the category for each of the types of work to be performed

[2] *See* 29 C.F.R. § 1.3 ("For the purpose of making wage determinations, the Administrator [of the DOL Wage and Hour Division] will conduct a continuing program for the obtaining and compiling of wage rate information."); *id.* § 1.6(c)(1) ("Project and general wage determinations may be modified from time to time to keep them current."); U.S. Dep't of Lab., U.S. Department of Labor Prevailing Wage Resource Book, *Chapter 6: Davis-Bacon Wage Determinations*, at 4 (May 2015),

under the contract.[3] This establishes the minimum wage, *see* 40 U.S.C. § 3142(a)–(b); 29 C.F.R. § 5.5(a), although the contractor may decide to pay higher wages.[4]

The category determinations and corresponding wage-rate calculations are made before the contract is awarded. *See Universities Rsch. Ass'n*, 450 U.S. at 760–61; 29 C.F.R. § 1.6. Any potential contractor, worker, or union for the project can then challenge a determination by requesting reconsideration or ultimately appealing to the DOL's Administrative Review Board (ARB), formerly the Wage Appeals

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available at https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book.

[3] *See* 29 C.F.R. § 1.6(b) ("Contracting agencies are responsible for insuring that . . . the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and for designating specifically the work to which such wage determinations will apply."); *id.* § 1.5; 48 C.F.R. § 22.404-2(a) ("The contracting officer must incorporate . . . the appropriate wage determinations in solicitations and contracts and must designate the work to which each determination or part thereof applies."); *Universities Rsch. Ass'n*, 450 U.S. at 760 ("The contracting agency has the initial responsibility for determining whether a particular contract is subject to the Davis-Bacon Act. If the agency determines that the contract is subject to the Act, it must determine the appropriate prevailing wage rate." (citation omitted)).

[4] *See Frank Bros. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 887 (7th Cir. 2005) ("[T]he Davis-Bacon Act . . . allow[s] for the payment of higher wages if the states, the market or individual employers conclude[] that supplemental wages [are] in order."); *see also Universities Rsch. Ass'n*, 450 U.S. at 771 ("[T]he [Davis-Bacon] Act is a *minimum* wage law designed for the benefit of construction workers." (emphasis added) (internal quotation marks omitted)).

Board (WAB).[5] [6] Typically, challenges to wage determinations "must be made prior to contract award or prior to the start of construction if there is no award." *ICA Const. Corp. v. Reich*, 60 F.3d 1495, 1498–99 (11th Cir. 1995) (referring to long-standing rule of WAB). The WAB stated that this rule is "to ensure that contractors competing for federally-assisted construction contracts know their required labor costs in advance of bidding. Manifest injustice to bidders would result if the successful bidder on a project could challenge (the) contract's wage determination after all other competitors were excluded from participation." *Modernization of the John F. Kennedy Fed. Bldg.*, WAB Case No. 94-09, 1994 WL 574115, at *7 (Aug. 19, 1994) (internal quotation marks omitted); *see Universities Rsch. Ass'n*, 450 U.S. at 782 (Congress provided for determination of wages before the letting of contracts

[5] *See* 29 C.F.R. § 1.8 ("Any interested person may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination."); *id.* § 1.9 ("Any interested person may appeal to the [ARB] for a review of a wage determination or its application."). The term *interested person* includes "any contractor . . . who is likely to seek or to work under a contract containing a particular wage determination, or any laborer or mechanic, or any labor organization which represents a laborer or mechanic, who is likely to be employed or to seek employment under a contract containing a particular wage determination." *Id.* § 7.2; *see id.* § 1.9 (incorporating 29 C.F.R. Part 7); *N. Georgia Bldg. & Const. Trades Council v. Goldschmidt*, 621 F.2d 697, 704 (5th Cir. 1980) ("A wage determination may be appealed by any 'interested person,' including a contractor or labor organization, who has unsuccessfully sought reconsideration of the contested decision.").

[6] In 1996 the DOL "establishe[d] the [ARB] and transfer[red] to it the authorities and responsibilities previously delegated to the [WAB] and the Board of Service Contract Appeals." Establishment of the Administrative Review Board, 61 Fed. Reg. 19982–01 (May 3, 1996). "[T]he functions previously performed by the [DOL's] Office of Administrative Appeals" were also assigned to the ARB. *Id.*

so that the contractor may "know definitely in advance of submitting his bid what his approximate labor costs will be" (internal quotation marks omitted)).

There are exceptions to this rule for certain circumstances, however, such as when a contractor requests a "conformance" to add a new wage classification to a contract after the contract has been let, 29 C.F.R. § 5.5(a)(1)(ii); *see Swanson's Glass*, WAB Case No. 89-20, 1991 WL 494715, at *3 (Apr. 29, 1991) ("Once the contract is awarded," "the conformance procedure" allows "for establishing an additional classification and wage rate"),[7] or when the DOL exercises its strictly limited authority under 29 C.F.R. § 1.6(f) to incorporate a new wage determination "retroactive to the beginning of construction."[8] When the DOL incorporates a new

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[7] The ARB has described the conformance procedure in 29 C.F.R. § 5.5(a)(1)(ii) as follows:

> Occasionally a class of laborers or mechanics is required on a construction project that is not found in the wage determination. In such instances, Wage and Hour is authorized to add an additional job classification and wage rate after the award of the construction contract through a process known as a conformance. The conformance procedure is designed to be a simple, expedited process for adding wage rates needed for job classifications not found in the wage determination. To protect the integrity of the competitive bidding system, the requirements for the addition of a conformed classification and wage rate are narrowly limited, and a conformed classification will be recognized only if it meets the following three-part test: (1) The work to be performed by the classification is not performed by a classification in the wage determination; (2) The classification is used 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.

Selco Air Conditioning, Inc., ARB Case No. 14-078, 2016 WL 4258213, at *5 (July 27, 2016).

[8] Section 1.6(f) provides, in full:

wage rate into a contract, the contractor typically will be "compensated for any increases in wages resulting from such change." 29 C.F.R. § 1.6(f).[9]

> The Administrator may 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. Further, the Administrator may issue a wage determination which shall be applicable to a contract after contract award or after the beginning of construction 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. Under any of the above circumstances, the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, *Provided* That the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.

29 C.F.R. § 1.6(f).

[9] *See Cox v. Bland*, No. CIV 300 CV 311 CFD, 2006 WL 3059988, at *7 (D. Conn. Oct. 27, 2006) (recognizing that § 1.6(f) allows for the incorporation of a new wage rate retroactive to the beginning of construction so long as "the contractor is compensated for any increases in wages resulting from such change," but finding that no such increased compensation was warranted "since the wage rate increase did not itself increase the cost of contract performance"); *Central Energy Plant*, ARB Case No. 01-057, 2003 WL 22312694, at *11 (Sept. 30, 2003) ("since the [agency] failed to include a proper wage determination in the . . . contract, [the DOL had] the authority [under § 1.6(f)] to modify the contract after contract award and after construction began," thereby increasing the agency's costs by $3 million); *Inland Waters Pollution Control, Inc.*, WAB Case No. 94-12, 1994 WL 596585, at *4 (Sept. 30, 1994) ("When a contracting agency fails to incorporate a wage determination into a contract, the DOL may retroactively incorporate the appropriate wage determination into the contract provided that the contractor is compensated for any increase in wages resulting from the change."); *E & M Sales, Inc.*, WAB Case No. 91-17, 1991 WL 523855, at *3 (Oct. 4, 1991) ("The utilization of [§ 1.6(f) to

Violations of the Davis-Bacon Act can result in withheld payments, contract termination, and debarment. *See* 40 U.S.C. §§ 3142–44; 29 C.F.R. §§ 5.9, 5.12; 48 C.F.R. §§ 22.406–9, 22.406–11. If withheld sums are insufficient to adequately compensate employees who have been underpaid, the Act also creates a limited right of action for employees to sue on the "payment bond" that government contractors must post for "the protection" of workers. *Universities Rsch. Ass'n*, 450 U.S. at 758; *see* 40 U.S.C. § 3144(a)(2).

Enforcement of the Davis-Bacon Act is the responsibility of both the contracting agency and the DOL.[10] Employees can submit complaints regarding alleged violations of the Davis-Bacon Act to the contracting officer,[11] who can investigate and take action against an offending contractor, and refer disputes to the

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retroactively modify a contract to include a higher wage] would compensate the workers at the appropriate rate, preserve and enhance the contract proceeds payable to [the contractor], and prevent unjust enrichment of the [agency]."); *see also D.C. v. Dep't of Lab.*, 819 F.3d 444, 451 (D.C. Cir. 2016) (Kavanaugh, J.) ("[I]f we were to rule that the Davis-Bacon Act applied to CityCenterDC, D.C. would suddenly owe approximately $20 million in backpay." (citing 29 C.F.R. § 1.6(f))).

[10] *See* 40 U.S.C. §§ 3143–45; 29 C.F.R. § 5.6; 48 C.F.R. § 22.406-1(a) ("Contracting agencies are responsible for ensuring the full and impartial enforcement of labor standards in the administration of construction contracts."); DOL Field Operations Handbook, Chapter 15, § 15a00(b), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf ("[T]he federal contracting or other administering agency has the primary responsibility for the enforcement of the [Davis-Bacon Act] labor standards provisions included in its contracts. The Secretary of Labor (Secretary) has coordination and oversight responsibilities.").

[11] *See* U.S. Dep't of Lab., Wage & Hour Div., *Employee Rights under the Davis-Bacon Act*, WH1321 (Oct. 2017), https://www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf; 48 C.F.R. § 22.404-10.

DOL.[12] Complaints specifically regarding classification must be submitted to the DOL for resolution.[13] The procedures by which the DOL resolves such disputes, which are set forth in 29 C.F.R. § 5.11, include notification of the affected parties by the Administrator of the DOL Wage and Hour Division, potential referral to an administrative law judge for factfinding, and eventual appeal of Administrator decisions to the ARB.[14] *See* 29 C.F.R. § 7.9(a) ("Any party or aggrieved person" may seek review with the ARB "from any final decision in any agency action under" Part 5 of the DOL regulations); *id.* § 7.1(b) (ARB jurisdiction includes review of final decisions regarding debarment and the payment of prevailing wage rates or proper classifications).

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[12] *See* 29 C.F.R. § 5.6(a)(3) (authorizing investigations); *id.* § 5.11(a) ("The [dispute-resolution] procedures in this section may be initiated upon . . . referral of the dispute by a Federal agency."); 48 C.F.R. §§ 22.406-7–22.406-12.

[13] *See* 29 C.F.R. § 5.11 (setting forth the DOL's "procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification"); *id.* § 5.13 ("All questions relating to the application and interpretation of wage determinations (including the classifications therein) . . . and of the labor standards provisions of [the Davis-Bacon Act] shall be referred to the Administrator [of the DOL Wage and Hour Division] for appropriate ruling or interpretation."); 48 C.F.R. § 22.403-6(c) ("Refer all questions relating to the application and interpretation of wage determinations (including the classifications therein) and the interpretation of the Department of Labor regulations in this subsection to the Administrator, Wage and Hour Division.").

[14] *See, e.g.*, *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1056–57 (D.C. Cir. 2007) (describing the course of the DOL's administrative proceedings in that case, including investigation by the Wage and Hour Division, findings by the Administrator that the employer had misclassified its employees, review of the Administrator's findings by an administrative law judge, and appeal to the ARB).

Overall, this "elaborate administrative scheme" is meant to provide "consistency" and "uniformity" in "the administration and enforcement of the [Davis-Bacon] Act," and "balances the interests of contractors and their employees." *Universities Rsch. Ass'n*, 450 U.S. at 782–83; *see* 5 U.S.C. App. 1 Reorg. Plan 14 (1950) (to "assure coordination of administration and consistency of enforcement," the "Secretary of Labor shall prescribe appropriate standards, regulations, and procedures" for the Davis-Bacon Act). Contractors know in advance of their bids what their approximate labor costs will be, and employees have recourse to enforce the stipulated wages. *See Universities Rsch. Ass'n*, 450 U.S. at 782. Of particular relevance to this case, the administrative scheme—in recognition of the inefficiency and potential unfairness of changing classifications or prevailing wage rates after construction has begun—strictly limits such changes and provides for additional compensation to the contractor in the event of such a change.

The Service Contract Act operates similarly to the Davis-Bacon Act. The Act applies to certain government contracts that "ha[ve] as [their] principal purpose the furnishing of services in the United States through the use of service employees." 41 U.S.C. § 6702(a). It requires that covered contracts include specific provisions "specifying the minimum wage to be paid to each class of service employee engaged in the performance of the contract," and it empowers the Secretary of Labor to "determine[]" the minimum wage. *Id.* § 6703(1). "[A]uthority to enforce" the Act is vested in the DOL, *id.* § 6707(a), and, in accordance with DOL regulations, "the head of a [contracting] Federal agency," *id.* § 6705(d), which can withhold payments from

a contractor, cancel the contract, or debar the contractor, *see id.* §§ 6705–06. The DOL has established an administrative scheme for administering the Act similar to that for the Davis-Bacon Act, under which "[a]ny interested party affected by a wage determination . . . may request review and reconsideration by the Administrator [of the Wage and Hour Division of the DOL]," 29 C.F.R. § 4.56(a)(1), or "may report to any office of the Wage and Hour Division . . . a violation, or apparent violation, of the Act," *id.* § 4.191(a).

II. DISCUSSION

We review *de novo* the district court's decision on arbitrability. *See Loc. 5-857 Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Conoco, Inc.*, 320 F.3d 1123, 1125 (10th Cir. 2003). "[W]hether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010) (original brackets and internal quotation marks omitted); *see id.* at 301 (ordinarily, "it is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning a particular matter" (internal quotation marks omitted)). "[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* at 297. There is a presumption in favor of arbitrability, *see id.* at 300, but a court "appl[ies] the presumption . . . only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and . . . [the court] adher[es] to the presumption and order[s] arbitration only where the presumption is not rebutted," *id.*

at 301. Thus, "the presumption favoring arbitration" applies "in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate . . . [is] best construed to encompass the dispute." *Id.* at 303. This framework vindicates "the first principle that underscores all [the Supreme Court's] arbitration decisions: Arbitration is strictly a matter of consent." *Id.* at 299 (internal quotation marks omitted).

Turning to the dispute before us, the CBA sets forth the following dispute-resolution procedure:

> **ARTICLE 22: GRIEVANCE PROCEDURE**
> **Section 1.** A grievance is a dispute, claim or complaint arising by and between the parties during the term of this Agreement. Grievances are limited to matters of interpretation or application of express provisions of this contract.
>
> . . . .
>
> **ARTICLE 23: ARBITRATION**
> **Section 1.** If either party desires Arbitration concerning any grievance or dispute, it shall make a request for a panel of arbitrators for Arbitration with the Federal Mediation and Conciliation Service . . . .

Aplt. App. at 29–30.[15] The Union argues primarily that the dispute concerns the interpretation of Schedule A and Article 28 of the CBA. Schedule A contains the

[15] The dispute-resolution provisions of the CBA provide, in full:

> **ARTICLE 22: GRIEVANCE PROCEDURE**
> **Section 1.** A grievance is a dispute, claim or complaint arising by and between the parties during the term of this Agreement. Grievances are limited to matters of interpretation or application of express provisions of this contract.
> **Section 2.** Grievances shall be handled in the following manner:
> Step 1 – An employee having a grievance under the terms of this Agreement shall within five (5) working days after the occurrence

agreed-upon rates of pay for work performed by various classifications of T&H employees at Fort Carson, including general maintenance workers and roofers.

Article 28 concerns Davis-Bacon work:

> **ARTICLE 28: SPECIAL ASSIGNMENTS**
>
> ---
>
> from which the grievance arose, discuss the grievance with the Steward and the immediate Supervisor designated by the Company. Step 2 – If the parties fail to resolve the grievance in Step 1, the grievance shall be reduced to writing and discussed between a Business Representative of the Union and the Project Manager or his designated representative. This meeting shall take place within Seven (7) working days of the Step 1 meeting. If the matter is not satisfactorily resolved within Seven (7) working days, it may be submitted to arbitration in accordance with the procedures hereafter.
>
> **Section 3.** Grievances involving discharges may be processed at any step of the grievance procedure in order to facilitate their handling. Any employee who is discharged shall leave the premises immediately.
>
> **ARTICLE 23: ARBITRATION**
>
> **Section 1.** If either party desires Arbitration concerning any grievance or dispute, it shall make a request for a panel of arbitrators for Arbitration with the Federal Mediation and Conciliation Service (FMCS) within ten (10) working days of the conclusion of Step two (2) of the grievance procedure. Once the panel is received, the parties will have ten (10) working days to make a selection. The parties will jointly share the cost of the panel of arbitrators and will strike from this panel to select the arbitrator to hear the case (the last arbitrator remaining will be selected). FMCS will be notified and will contact the arbitrator.
>
> **Section 2.** The arbitrator shall have jurisdiction and authority to interpret and apply the provisions of this Agreement insofar as shall be necessary to the determination of the grievance, but he/she shall have no power or authority to add to, change, or modify any of the terms of this Agreement or any supplementary agreements.
>
> **Section 3.** The cost of the arbitration process (other than counsel fees and witness fees which shall be borne by the respective party incurring them) shall be borne by the losing party.
>
> **Section 4.** The decision of the arbitrator within the purview of this authority is final and binding on the Company, the Union and the Grievant.

Aplt. App. at 29–30.

> **Davis Bacon Work** The parties agree that *the Company has the prerogative to perform the Davis-Bacon work as it deems appropriate* as modified under the provisions below:
> **Provision 1 – Work Day and Work Week.** Effective each contract option year following authorization from the government, *the Davis-Bacon rates, as provided by the Contracting Officer at Fort Carson, will be in effect until new Davis-Bacon wage rates are provided and will be paid to employees doing Davis-Bacon work*. In addition, employees that perform a combination of Service Contract Act and Davis-Bacon work will be paid at the appropriate rate for the hours worked under each classification of work. Any Davis Bacon that is worked as overtime, in accordance with all overtime provisions provided in this agreement, will be paid at 1 ½ times the appropriate rate for the hours worked under each classification of work.

Id. at 33 (emphasis added).

The Union also relies in part on two other provisions, while acknowledging that they do not "specifically address" the grievance, Aplt. Br. at 23: (1) the preamble to the CBA, which states, "[I]t is the intent and purpose of the Company and the Union to set forth herein the entire Agreement with respect to wages, hours and working conditions as it relates to operation and maintenance activities . . . and to facilitate peaceful adjustment of grievances," Aplt. App. at 18; and (2) Article 30 of the CBA, which says, "This Agreement . . . shall be deemed to define the wages, hours, rate of pay and conditions of employment of the employees covered," *id.* at 33.

The Union's reliance on the above provisions of the CBA is misplaced. The natural reading of the language of Article 28—"the Davis-Bacon rates, as provided by the Contracting Officer at Fort Carson, will be in effect until new Davis-Bacon wage rates are provided and will be paid to employees doing Davis-Bacon work," *id.*—is that the Davis-Bacon rates come from the Contracting Officer. That is, the Contracting Officer

determines how to categorize the Davis-Bacon jobs being performed under the contract and announces the wage rate applicable to each job. The dispute here does not involve the wage rate for either the general-maintenance or roofing category; it relates to how to categorize the roof-repair work performed by Union members. And that is the job of the Contracting Officer. *See* 29 C.F.R. § 1.6(b) ("*Contracting agencies* are responsible for . . . designating specifically the work to which . . . wage determinations will apply." (emphasis added)); 48 C.F.R. § 22.404-2(a) ("*The contracting officer* . . . must designate the work to which each [wage] determination or part thereof applies." (emphasis added)). Nothing else in the CBA can reasonably be read as authorizing, or imposing any duty on, the Union, T&H, or the two together to determine the proper categorization of any job. In short, determining the categorization is not a "matter[] of interpretation or application of [any] express provision[] of [the CBA]." Aplt. App. at 29.

Nor should we be surprised that the CBA declines to provide for arbitration of disputes regarding Davis-Bacon categorizations. As previously described, the task of categorizing jobs on federal construction projects under the Davis-Bacon Act is a highly developed process under the guidance and ultimate control of the DOL. *See* 29 C.F.R. Parts 1, 5–7; *Universities Rsch. Ass'n*, 450 U.S. at 759–61; *Abhe & Svoboda*, 508 F.3d at 1061–62 ("The [DOL's] regulations further underscore that contractors do not have the authority to determine the scope of job classifications based on their own methodologies, providing a means for contractors to obtain clarification from the [DOL] about the proper scope of jobs under wage determinations."). This process ensures national uniformity on which workers and employers can rely. *See*

Universities Rsch. Ass'n, 450 U.S. at 782–83 (the DOL's administrative scheme "foster[s]" "uniformity" and "carefully balances the interests of contractors and their employees"). It reduces transaction costs (in setting wage rates) and allows contractors to rely on the rates established before contract awards. *See id.*; *Mistick PBT v. Chao*, 440 F.3d 503, 507 (D.C. Cir. 2006) (the DOL's administrative scheme "ensures an equitable procurement process in order that competing contractors know in advance of bidding what rates must be paid so that they can bid on an equal basis"). Absent this system, contractors would likely have to raise their bids to protect against adverse decisions that might issue after construction begins. *See Universities Rsch. Ass'n*, 450 U.S. at 783 (uncertainty in wage determination procedure would "likely" cause contractors to "submit inflated bids to take into account the possibility that they would have to pay wages higher than those set forth in the specifications"). Thus, the Supreme Court decades ago declared that "disputes over the proper classification of workers under a contract containing Davis-Bacon provisions must be referred to the [DOL] for determination," *id.* at 761, and held that if there are no such provisions in a contract because it was administratively determined that the contract does not call for Davis-Bacon work, an employee has no private judicial right of action under the Davis-Bacon Act for back wages, *see id.* at 756. Since then, the circuit courts have been virtually unanimous in holding that

there is no private right of action to challenge worker classifications under the Davis-Bacon Act, because of the need for a uniform, reliable determination.[16] [17]

Arbitration of Davis-Bacon classification disputes would be even more problematic. The advantages of uniform, reliable determinations would be completely undermined by leaving the decisions to the idiosyncrasies of a multitude

---

[16] *See United States ex rel. Glynn v. Capeletti Bros.*, 621 F.2d 1309, 1317 (5th Cir. 1980) ("[N]either the language, the history, nor the structure of the [Davis-Bacon Act] supports the implication of a private right of action in this case."); *Weber v. Heat Control Co.*, 728 F.2d 599, 599 (3d Cir. 1984) (no "implied private right of action to enforce a contract that . . . contain[s] [Davis-Bacon] Act specifications"); *Operating Eng'rs Health & Welfare Tr. Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998) ("The Davis-Bacon Act . . . does not generally grant a private cause of action directly to employees."); *Grochowski v. Phoenix Const.*, 318 F.3d 80, 85 (2d Cir. 2003) ("Although the Supreme Court has not considered whether the [Davis-Bacon Act] confers a private right of action on an aggrieved employee for back wages, the great weight of authority indicates that it does not."); *Bane v. Radio Corp. of Am.*, 811 F.2d 1504, 1987 WL 35851, at *1 (4th Cir. 1987) (unpublished table decision) ("[T]here is no implied right of private action under the Davis-Bacon Act."). The Seventh Circuit reached the opposite conclusion in *McDaniel v. University of Chicago*, recognizing an implied private right of action in the Davis-Bacon Act. *See* 548 F.2d 689, 695 (7th Cir. 1977). But the Seventh Circuit later cast doubt on its own opinion, noting that *McDaniel* had been decided "without the guidance of the Supreme Court's pronouncements in *Cannon v. University of Chicago*, [441 U.S. 677 (1979),]" which addressed the proper analysis for determining whether to infer a private right of action from a statute. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1240 n.27 (7th Cir. 1980).

[17] The lack of an implied private right of action under the Davis-Bacon Act does not preclude litigation over agency decision-making under the Administrative Procedure Act, but review is deferential and occurs only after the agency has spoken. *See Mistick PBT*, 440 F.3d at 505 ("[T]he Davis-Bacon Act does not provide clear and convincing evidence that Congress sought to preclude review under the Administrative Procedure Act . . . of violations of Department regulations."); *Universities Rsch. Ass'n*, 450 U.S. at 761 n.10 ("At least two Courts of Appeals have held . . . that the practices and procedures of the Secretary [of Labor] are reviewable under the standards of the Administrative Procedure Act.").

of arbitrators. *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO Loc. 2-652 v. EG & G Idaho, Inc.*, 769 P.2d 548, 552 (Idaho 1989) ("[R]eview of [agency] Davis-Bacon determinations in [an] arbitration proceeding . . . would undermine the administrative review process provided in federal law."); *cf. Universities Rsch. Ass'n*, 450 U.S. at 783 (discussing how "[t]he implication of private right of action [in the Davis-Bacon Act] . . . would undercut . . . the [Act's] elaborate administrative scheme . . . [and how] [t]he uniformity fostered by [that scheme] would be short-lived if courts were free to make postcontract coverage rulings"). And contractors would need to adjust their bids even higher since the arbitration process, which would not involve the DOL, could provide no mechanism for compensation to the contractor if it loses a classification dispute. *Cf.* 29 C.F.R. § 1.6(f) (permitting DOL to compensate contractor if it increases wage rate after construction begins).

Further support for our conclusion can be found in cases declaring that the primary-jurisdiction doctrine prevents a federal court from resolving Davis-Bacon classification disputes in litigation under the False Claims Act, even though a worker does have the right to bring such litigation. The primary-jurisdiction doctrine provides in very limited circumstances that a court may refer a matter before it for initial resolution by an agency when such action will advance regulatory uniformity, enable the agency to answer a question within its discretion, or provide the court with the benefit of the agency's expertise on technical or policy matters. *See United States ex rel. Wall v. Circle C*, 697 F.3d 345, 352 (6th Cir. 2012). When the issue in a False Claims Act case is whether a government contractor has falsely certified

compliance with the Davis-Bacon Act, "the courts have drawn a dichotomy between a contractor's misrepresentation of wages and its misclassification of workers." *Id.* at 353. Determining whether the contractor has paid the wages it reported requires no agency expertise. *See id.* at 353–54. But classification of workers is another matter, and requires deferral to the DOL. *See id.* at 354; *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 431 (4th Cir. 2015) (plaintiff's allegations "that he was misclassified (that is, paid under the wrong Davis-Bacon Act wage schedule) . . . implicate primary jurisdiction"); *United States v. Dan Caputo Co.*, 152 F.3d 1060, 1062 (9th Cir. 1998) ("[T]he [DOL] should in the first instance determine how a particular type of work is classified for the purposes of wage determinations. . . . [D]eferral to the [DOL] with respect to classification determinations is proper under the doctrine of primary jurisdiction."). As one district court has explained:

> [P]ermitting [an employee's] claim [under the Davis-Bacon Act for payment on the employer's performance bond] to go forward absent an administrative determination [by the DOL that the employer had failed to pay prevailing wages] would raise the risk of inconsistent rulings by the DOL and the Court about whether a violation has occurred. This risk is especially heightened in a case like this one, where the principal dispute concerns the classification of labor, an issue on which the DOL has particular expertise. Indeed, many courts have gone so far as to rule that, in light of the complexity of the classification system, the primary jurisdiction doctrine gives the DOL *sole* jurisdiction to determine whether a laborer was properly classified.

United States ex rel. Krol v. Arch Ins. Co., 46 F. Supp. 3d 347, 354 (S.D.N.Y. 2014) (citations omitted).[18]

The parties have not pointed to any court decision ordering, or even permitting, arbitration of Davis-Bacon categorizations. The only relevant opinion we have found is to the contrary. *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO Loc. 2-652*, 769 P.2d at 551 ("Davis-Bacon determinations are clearly the province of [the contracting agency] under federal law . . . [and] [b]ecause neither [party] has any authority to make Davis-Bacon determinations, there can be no conflict leading to arbitration under [the CBA]."). And the only decision we have found by an arbitrator on the subject ruled that such matters are not arbitrable. *See Dyncorp v. Teamsters, Chauffeurs, Warehousemen Industrial and Allied Workers of America, Local Union 166*, No. 93-0129-1264, 1993 WL 13767135, at *5–6 (Dec. 1,

[18] We also note a potentially relevant Davis-Bacon regulation. It requires contracts under the Davis-Bacon Act to contain the following language (unless the DOL approves modifications to meet the needs of the federal agency):

> Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

29 C.F.R. § 5.5(a)(9). This language reflects federal policy against arbitration of a claim such as the one brought by the Union in this case and would appear to prohibit such arbitration. *See, e.g.*, *Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1429 (Fed. Cir. 1991) (interpreting § 5.5(a)(9)). But neither party has made the Army Contract available to this court; so we do not speculate on the presence or absence of this provision from the contract.

1993) (Richman, Arb.) (declining to arbitrate whether work performed by grievants was Davis-Bacon work entitled to higher rate of pay).

The Union cites *Bell v. Se. Pennsylvania Transp. Auth.*, 733 F.3d 490 (3d Cir. 2013), for the proposition that "wage disputes are arbitrable." Aplt. Reply Br. at 6. But the work at issue in that case was not construction work and, unsurprisingly, the opinion makes no mention of the Davis-Bacon Act. (Also, the court held that the dispute was not arbitrable. *See Bell*, 733 F.3d at 491.) The other cases cited by the Union in support of arbitrability are likewise inapposite. The courts compelled arbitration of grievances arising under a CBA that had nothing to do with classification of work under the Davis-Bacon Act. *See, e.g.*, *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 575, 585 (1960) (ordering arbitration of dispute over the employer's decision to lay off employees in favor of outsourcing maintenance work); *Harris Structural Steel Co. v. United Steelworkers of Am., AFL-CIO, Loc. 3682*, 298 F.2d 363, 363–65 (3d Cir. 1962) (ordering arbitration of dispute over reduction in Christmas bonus paid by employer to employees); *Suncor Energy (U.S.A.), Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC*, 474 F. App'x 729, 730 (10th Cir. 2012) (unpublished) (ordering arbitration of grievance that an employee had been discriminated against when the employer denied his request for a special assignment); *United Food & Com. Workers, Loc. 23 v. Mountaineer Park, Inc.*, 408 F. App'x 709, 710–11 (4th Cir. 2011) (unpublished) (ordering arbitration of grievance over whether employees who had voluntarily moved into lower-grade

positions were to be paid as new hires or as more senior employees, given their previous experience at the company).

In addition, we are not persuaded by these cases insofar as they are cited for the proposition that a dispute is arbitrable "[u]nless a specific CBA provision takes th[e] grievance out of the scope of arbitration." Aplt. Br. at 15; *see Warrior & Gulf*, 363 U.S. at 584–85 ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where . . . the exclusion clause is vague and the arbitration clause quite broad."); *Harris Structural*, 298 F.2d at 365 (ordering arbitration where, among other things, "the issue of bonus payments is not specifically excluded from the grievance provisions of the collective bargaining agreement"). To begin with, the dispute-resolution clause in the CBA significantly constrains what disputes are covered: "Grievances are limited to matters of interpretation or application of express provisions of this contract." Aplt. App. at 29. Yet the only "express provision" that can be said to encompass Davis-Bacon classifications implicitly assumes that the matter is left to the federal agency. As pointed out earlier in this opinion, when T&H exercises its "prerogative to perform the Davis-Bacon work," Article 28 of the CBA provides that "the Davis-Bacon rates" for such work will be "provided by the Contracting Officer at Fort Carson." *Id.* at 33. Particularly in light of the strong policy reflected in the Davis-Bacon Act and the regulations thereunder in leaving worker-classification decisions to the federal contracting agency and the DOL, we think it would be obtuse to

interpret the CBA as stating that Davis-Bacon worker classification is a "matter[] of interpretation or application of [an] express provision[] of [the CBA]." *Id.* at 29.

We conclude that the dispute is not arbitrable.[19]

III. CONCLUSION

We **AFFIRM** the order of the district court.

[19] Because we resolve this appeal on the above grounds, we have no need to address T&H's arguments that the Union's grievance is time-barred or that "an arbitrator would be required to exceed his or her jurisdiction to rule in the Union's favor." Aplee. Br. at 17.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1922

UNITED STATES OF AMERICA EX REL.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL UNION NO. 98

v.

THE FARFIELD COMPANY,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-09-cv-04230)
District Judge: The Honorable Mark A. Kearney

Argued March 10, 2021

Before: SMITH, *Chief Judge*, McKEE and AMBRO, *Circuit Judges*

(Filed July 13, 2021)

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OPINION OF THE COURT

SMITH, *Chief Judge*.

Contractors on most federally funded construction projects must pay their workers a minimum wage based on the type of work they perform. The Department of Labor (DOL) usually sets those prevailing wage rates for each classification of worker needed on such a project. A contractor who bids on a project knows well that compliance with these regulations is required. And once it commences work, the contractor knows that it must also certify its compliance on payrolls supporting invoices for payment.

If a contractor misclassifies workers—thereby paying them less than required—the federal government may withhold funds in an amount proportionate to the affected work. The DOL is usually the forum for adjudicating claims of misclassification, for misclassified employees to recover underpaid wages, and for aggrieved contractors to assert entitlement to withheld funds.

But a contractor found to have misclassified employees can also face collateral consequences. For example, its certifications of compliance with wage-and-hour regulations may have been false. And those same false certifications may, in turn, have been material to the Government's decision to pay invoices associated with the misclassified work.

So what happens when a contractor is sued under the False Claims Act for falsely certifying compliance, but the DOL declines to adjudicate the underlying issue of whether workers were misclassified? In this case, the results have been over a decade of litigation and a panoply of first-impression issues. We conclude that a 2009 amendment to the FCA's liability standard applies retroactively to cases, like this one, pending on or after June 7, 2008; that the record establishes the contractor's misclassification of its workers; that its false certified payrolls were material to the Government's decision to pay for the associated work; and that the burden-shifting framework for damages in Fair Labor Standards Act cases applies. We also reject the appellant-contractor's other arguments en route to affirming the challenged orders of the District Court.

I. LEGAL BACKGROUND

A. The Davis-Bacon Act

The Davis-Bacon Act, "[o]n its face," is "a minimum wage law designed for the benefit of construction workers." *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954). The Act was intended "to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area" where the work is to be done. *Univs. Res. Ass'n v. Coutu*, 450 U.S. 754, 773–74 (1981) (quotation omitted); *see* 40 U.S.C. § 3142(a). Its purpose was "to give local labor and the local contractor a fair opportunity to participate in [] building program[s]." *Coutu*, 450 U.S. at 774 (quoting 74 Cong. Rec. 6510 (1931)). To that

end, the Act requires contractors on most[1] federally funded infrastructure projects to pay employees minimum wages based on the DOL's determination of prevailing wages "for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed." 40 U.S.C. § 3142(b).

Per DOL regulations, *see* 29 C.F.R. pts. 1, 5, 7, prevailing wage determinations are typically promulgated at the county level, 29 C.F.R. § 1.7(a), often based on survey data of wages paid or local collective bargaining agreements. *See* 40 U.S.C. § 3142(b); 29 C.F.R. § 1.3(b). Though the determinations sometimes don't include detailed information about the duties covered by each job classification, the DOL's regulations provide that "[a]ll questions relating to the application and interpretation of wage determinations (including the classifications therein) . . . shall be referred to the Administrator for appropriate ruling or interpretation." 29 C.F.R. § 5.13; *see also Coutu*, 450 U.S. at 760–61 ("Disputes over the proper classification of workers under a contract containing Davis-Bacon provision must be referred to the Secretary for determination." (citations omitted)).

Shirking Davis-Bacon obligations can have dire consequences. For example, covered contracts must provide for the Government's withholding from the contractor as much of the accrued payments as is necessary to pay the workers the difference between the required wages and those paid. *See* 40 U.S.C. § 3142(c)(3). And if the contractor is found to have failed to

[1] The Act does not apply to federally funded construction contracts of $2,000 or less. *See, e.g.*, 40 U.S.C. § 3142(a).

pay the specified prevailing wages, the Government "by written notice . . . may terminate the contractor's right to proceed with the work or the part of the work as to which there has been a failure to pay the required wages." § 3143 (providing also that contractor and its sureties "shall be liable to the Government for any excess costs the Government incurs"). When a contractor is determined to have "disregarded" its Davis-Bacon obligations to employees or subcontractors, it is barred from federal contracts for three years. *See* § 3144(b).

B. The False Claims Act

The False Claims Act (FCA) imposes civil liability for making a false or fraudulent "claim," or a false record or statement material to such a claim, to obtain payment from the federal government. 31 U.S.C. § 3729(a)(1)(A)–(G), (b)(2). Both the Justice Department and private parties (called "relators") may bring an FCA action. The FCA imposes civil penalties on a per-violation basis plus three times actual damages, § 3729(a)(1), and authorizes recovery of a relator's attorneys' fees, § 3730(d)(1)–(2).

In 2008, the Supreme Court held in *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662 (2008), that liability under (former) § 3729(a)(1) required a defendant's direct presentment of the false claim to an officer or employee of the Government and that liability under (former) § 3729(a)(2) required proof of the defendant's specific intent to defraud the Government. *Id.* at 668–72. To "clarify and correct [those] erroneous interpretations of the [FCA]," S. Rep. No. 111-10, at 10 (2009); *see also id.* at 4, Congress amended the FCA in the Fraud Enforcement and Recovery Act of 2009 (FERA). Pub. L. No. 111-21, § 4, 123 Stat. 1625. FERA eliminated (a)(1)'s

requirement that the false claim be presented "to an officer or employee of the United States" and amended (a)(2) to remove the language that the Supreme Court had read to require specific intent to defraud the Government. *See, e.g.*, Pub. L. No. 111-21, § 4; S. Rep. No. 111-10 at 11.

FERA also amended the FCA to make clear that liability under the renumbered § 3729(a)(1)(B) (formerly (a)(2)), as well as another subsection not relevant here, requires that the false statement be material. So (a)(1)(B) liability now attaches when the defendant "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). After FERA,[2] materiality means "having the tendency to influence, or be capable of influencing, the payment or receipt of money or property." § 3729(b)(4). And "knowingly" embraces actual knowledge of the false information, deliberate ignorance of its truth or falsity, and reckless disregard of its truth or falsity. *See* § 3729(b)(1)(A).

Given FERA's substantive changes to the sweep of FCA liability, Congress anticipated that disputes would arise over how to apply the amendments to conduct pre-dating FERA's date of enactment. So Congress promulgated the following "Effective Date and Application" provision in section 4(f) of FERA:

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[2] We have recognized that FERA's materiality "changes merely made explicit and consistent that which had previously been a judicially-imposed, and oftentimes conflicting, standard." *U.S. ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 761 (3d Cir. 2017).

> The amendments made by this section shall take effect on the date of enactment of this Act [May 20, 2009] and shall apply to conduct on or after the date of enactment, except that—
>
> > (1) subparagraph (B) of subsection 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and
> >
> > (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625 (codified at 31 U.S.C. § 3729 note) [hereinafter "FERA § 4(f)"]. So the new liability standard in § 3729(a)(1)(B) for "knowingly . . . caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim," took effect "as if enacted on June 7, 2008, and appl[ies] to all claims under the [FCA] . . . pending on or after that date." The June 7, 2008 effective date is two days before the Supreme Court issued its decision in *Allison Engine.*

II. FACTUAL BACKGROUND

The Farfield Company is an open-shop construction company based in Lititz, Pennsylvania. It contracted with the Southeastern Pennsylvania Transportation Authority (SEPTA)

for a track and signal improvement project on a 7.5-mile stretch of railroad track running from the Wayne Junction station to the Glenside station in the Philadelphia area ("the Project"). The federal government partially funded the Project. Work began in 2002 and concluded in 2007.

The contract between Farfield and SEPTA was executed in 2002 and valued at $54.7 million. It included several provisions required by federal regulation, addressing how Farfield was to classify and pay its workers. For example, the contract provided that "[a]ll laborers and mechanics employed or working upon the site of the work . . . will be paid . . . at rates not less than those contained in the [incorporated] wage determination." A821[3]; *see* 29 C.F.R. § 5.5(a)(1)(i). It also required that workers "be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill." *Id*. And "[l]aborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed." *Id.*

The DOL's prevailing wage determinations incorporated into the contract derived from the rates specified in local collective bargaining agreements ("CBAs"). The prevailing wage determinations referenced a CBA executed on December 3, 2000, between a contractors' association and Local 126 of

[3] Citations preceded by "A" refer to Appellant Farfield's Appendix submitted on appeal.

the International Brotherhood of Electrical Workers (IBEW),[4] and listed certain relevant worker classifications and their associated minimum rates of pay: "groundman" ($19.34 hourly plus fringes), "lineman" or "journeyman lineman" (total cash equivalent of $41.34 hourly), and "electrician" (total cash equivalent of $46.83 hourly). A832. From a May 1, 2001 CBA involving a separate laborers union, the prevailing wage determinations derived the classification of "laborer," paid at a $32.70 cash equivalent for those able to lay "conduit and duct" and a $32.50 cash equivalent for laborers classified as "[y]ard workers." A838.

The contract also required that Farfield submit to SEPTA for transmission to the Federal Transit Administration (FTA) a copy of Farfield's certified payroll, setting out all the information required to be maintained under various provisions of the Davis-Bacon Act.[5] In each week's certified payroll, Farfield had to include a "Statement of Compliance" averring, among other things, that the information in the payroll was correct and complete and that each worker "has been paid not less

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[4] Local 126 represents electrical workers in the Philadelphia area who perform electrical work outside a property line. Local 126 organizes this "outside" work in the railroad track area, such as the work on the Project.

[5] For example, under 29 C.F.R. § 5.5(a)(3)(i), "payrolls and basic records related thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work," which records "shall contain" each worker's "correct classification," "hourly rates of wages paid," and "actual wages paid."

than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the Contract." A824; 29 C.F.R. § 5.5(a)(3)(ii)(B). Critically, "falsification" of a payroll certification could subject Farfield to criminal penalties or civil liability under the FCA. A824; § 5.5(a)(3)(ii)(D).

A few years before the Project, Farfield formed a transit division with the objective of obtaining contracts for rail work. To that end, it hired Joseph McGee, Sr. to be vice president of the new division because of his expertise in "captur[ing]" rail work. A1823–24. McGee's background included work with groundmen and linemen—experiences no one else at Farfield possessed when he was hired. Farfield relied on McGee to ensure that employees were properly classified based on the work they performed on the Project. Yet under McGee's management, Farfield's forepersons exercised unfettered discretion over which individual employee would perform which tasks on Project job sites. Neither Farfield nor McGee instructed them on how to classify workers on rail projects.

Farfield used daily "phase codes" internally to track labor, material, insurance, tax, overhead, subcontracting, and other costs of the Project. Farfield's forepersons tracked labor on the Project by recording on handwritten or typed timesheets the daily hours an employee had worked and associating those hours with a particular phase code.[6] These codes were applied irrespective of whether an employee was physically working

[6] Other than preparing these timesheets, Farfield did not document the work that a particular employee performed on the Project on any given day.

or, instead, attending briefings, traveling to and from the worksite, or waiting for trains to pass. Each week, forepersons were given prepared sheets—reflecting information generated by Farfield's corporate offices—that set forth phase codes associated with work needed on the Project, with a blank space for the foreperson to insert a phase code not already printed on the sheet. Forepersons prepared daily reports noting the work done by their crews as well as the number of workers in each classification who were part of a crew. But these reports did not identify which workers (or classifications of workers) performed which of the tasks embraced by the phase codes marked on the sheets.

In September 2004, about midway through the Project, a DOL auditor reviewed some of Farfield's certified payrolls and spoke with one of the company's vice presidents as well as certain employees not identified in the record. After reviewing one particular payroll, the auditor asked the vice president, who in turn consulted McGee, why certain employees had been paid at the "yard worker" laborer category rather than the slightly higher-paying laborer category. A1028 (mentioning "laying conduit"). But besides finding that four carpenters who worked on Labor Day had been paid at the Farfield shop rate—instead of the higher rate for holidays demanded by the SEPTA contract—the DOL auditor unearthed no wage-and-hour violations. Farfield paid $811.52 in holiday-pay arrears to the four carpenters.[7]

[7] On a few occasions, an unidentified SEPTA employee met with Farfield workers on the Project about their work and pay rates.

SEPTA made full payment of all monies that Farfield was due under the contract, with some funds ultimately reimbursed to SEPTA by the FTA. On September 18, 2007, Farfield submitted its final bill to SEPTA for the Project. The bill was paid in early December of the same year.

III. PROCEDURAL BACKGROUND

A business manager at IBEW Local 98[8] suspected that Farfield had won several government contracts with low bids by intending to pay less-skilled workers, such as groundmen, to perform certain work that would otherwise have been the bailiwick of higher-skilled (and higher-paid) workers, such as linemen.[9] So the business manager requested copies of Farfield's certified payrolls. His concerns unmollified, the business manager then contacted someone at Local 126 to discuss the Project. Local 98's business manager and its attorneys eventually met to discuss worker classification issues with eight Farfield employees who had worked on the Project.

On September 17, 2009, Local 98 filed a sealed *qui tam* FCA complaint in the Eastern District of Pennsylvania. Local 98 alleged that, on the Project and four others, Farfield had schemed to intentionally pay wages lower than required by the

[8] Local 98 represents electrical workers in the Philadelphia area who perform electrical work inside a property line. Little, if any, such "inside" work was performed on the Project.

[9] Groundmen lack an apprenticeship program and had only to fill out an application to be hired by Farfield. Linemen receive 7,000 hours of field training as an apprentice, including training in aspects of conduit installation and electrical wire pulls.

Davis-Bacon Act and then to submit claims to the federal government for payment based on sworn certifications of compliance with the Act. About two years later, the United States Department of Justice elected not to intervene in the action. After the District Court unsealed the complaint and Local 98 served it, Local 98 amended its complaint to allege that Farfield submitted fraudulent certified payrolls to SEPTA, intending that SEPTA then use those documents to secure the federal government's payment on the projects.

Farfield moved to dismiss the amended complaint, arguing that the FCA did not apply to its contract with SEPTA and that the Court lacked subject-matter jurisdiction because the DOL had sole authority to adjudicate Davis-Bacon worker misclassifications. The District Court denied Farfield's motion and appointed a Special Master to manage the discovery that ensued. Despite arguing that the case did not require the DOL to resolve complex worker classifications, Local 98 eventually requested expert witnesses to prove industry classification practices. So in a September 26, 2017 order, the District Court referred the case to the DOL as a complex Davis-Bacon worker classification case. Then the case stagnated. Local 98 took no action until November 2018 when the District Court ordered it to effectuate the DOL referral. But the DOL declined the referral, refusing to investigate chiefly due to "the passage of time and the significant resources that would be necessary to investigate a closed contract." A183–84.

With the case once again before the District Court, Farfield filed a renewed motion to dismiss. The District Court denied it. Local 98 then withdrew its claims arising out of Farfield's work on four of the five projects, leaving only worker classifications on the Project to anchor its FCA suit. After

deposing Local 98's three experts, Farfield moved for summary judgment. The District Court denied that motion and directed the parties to select a Special Master to conduct the trial. The parties designated the same Special Master who had presided over discovery.

Local 98 sought to introduce before the Special Master six workers' testimony about their own work and that of others on the Project as representative proof for the entire set of 42 Farfield employees who, as groundmen or laborers, had their daily time logged under phase codes that purportedly signified lineman work. To the extent that Farfield's phase codes fail to capture the work its employees performed, Local 98 argued, the burden should shift to Farfield—as it does in collective actions under the Fair Labor Standards Act—to show the amount of non-lineman work performed under those codes. The District Court granted Local 98's motion to authorize this burden-shifting and, in an October 2019 order, held that the damages burden would shift to Farfield were the Special Master presented with such "representative" damages evidence. *See* A139–57.

In his Report & Recommendation ("R&R"), the Special Master made extensive findings of fact and conclusions of law based on the evidence at trial. He found that employees whom Farfield classified (and thus paid) as laborers and groundmen had performed lineman work under six Farfield phase codes by pulling wire and laying conduit. He determined that local practice does not permit laborers and groundmen to perform such tasks, as they are reserved for higher-paid linemen with electrical experience. Thus, the Special Master concluded, Farfield had falsely certified on payrolls submitted to the FTA that "the classifications set forth therein for each laborer or mechanic

conform with the work performed." A824 (Contract ¶ 7(c)(2)(b)).

Concluding that wage underpayments were the measure of FCA damages, and after shifting the burden of proof to Farfield to rebut Local 98's prima facie damages showing, the Special Master calculated $159,273.54 in total wage underpayments. Trebling under 31 U.S.C. § 3729(a)(1) brought the sum to $477,820.62**.** Because the misclassifications occurred during 105 workweeks, thus tainting 105 certified payrolls submitted to SEPTA and then the FTA, the Special Master found 105 FCA violations. He imposed the minimum civil penalty of $5,500 per violation "because Farfield did not intend to make a false statement, but did so recklessly," and because $577,500 (105 times $5,500) was still a weighty penalty in relation to the wage underpayments.[10] A322 (Conclusions of Law ¶ 36). The Special Master recommended a total judgment of $1,055,320.62. Local 98, the relator, could recover between 25 and 30 percent of the total judgment, 31 U.S.C. § 3730(d)(2), so the Special Master suggested that Local 98 be awarded 30 percent of the recommended judgment, or $316,596.19.

The District Court overruled Farfield's challenges to the R&R, adopting it in its entirety. The Court entered judgment against Farfield in the amount of $1,055,320.62: $738,724.43

[10] In 1999, the Justice Department adjusted FCA penalties for violations occurring after September 29, 1999 to account for inflation. For those violations, it increased the civil penalty range to between $5,500 and $11,000. 64 Fed. Reg. 47099, 47103–04 at § 85.3(9). The range and method for computing penalties were later revised, but not as relevant here.

to the United States and $316,596.19 to Local 98. In a subsequent order and supporting opinion, it partially granted Local 98's motion for attorneys' fees and costs, taxing $1,229,927.55 in fees and $203,226.45 in costs. Farfield's appeal followed.

IV. JURISDICTION & STANDARD OF REVIEW

The District Court had jurisdiction over this action under 28 U.S.C. § 1331. We have jurisdiction to review the District Court's final orders under 28 U.S.C. § 1291.

A district court's findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). A finding of fact is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). When the disputed factual finding is based on a credibility determination, "'even greater deference' is owed." *Alimbaev v. Att'y Gen. of U.S.*, 872 F.3d 188, 195 (3d Cir. 2017) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)).

We review statutory constructions de novo. *United States v. Hodge*, 948 F.3d 160, 162 (3d Cir. 2020). We review any mixed questions of fact and law de novo insofar as "the primary facts are undisputed and only ultimate inferences and legal consequences are in contention." *U.S. Gypsum Co. v. Schiavo Bros.*, 668 F.2d 172, 176 (3d Cir. 1981). But when the mixed questions immersed the district court in case-specific factual issues, our review is a deferential one for clear error.

See U.S. Bank Nat'l Ass'n ex rel. CW Cap. Asset Mgmt. LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 967–69 (2018).

V. DISCUSSION

Farfield appeals the District Court's orders denying its initial and renewed motions to dismiss, referring the case to the DOL, denying its motion for summary judgment, shifting the damages burden of proof to Farfield, overruling its objections to and adopting the Special Master's R&R, and awarding attorneys' fees. We treat Farfield's most substantial arguments at length and dispose of the remaining ones in short order. We will affirm all the District Court's challenged orders.

A. Section 3729(a)(1)(B) Applies Retroactively to the Project and Does Not Violate the *Ex Post Facto* Clause.

This appeal presents a threshold issue of first impression in our Circuit: whether 31 U.S.C. § 3729(a)(1)(B) applies retroactively to conduct antedating that provision's June 7, 2008 effective date. Recall that FERA amended the provision to remove language that the Supreme Court had understood to require specific intent to defraud the Government.[11] The District Court found that Farfield's reckless misconduct on the Project concluded by 2007, when its work terminated and the last invoice was paid. And Local 98 did not sue until September 2009. So judgment must be entered for Farfield if § 3729(a)(1)(B) does not apply retroactively to pre-June 7, 2008 conduct.

[11] It is undisputed that Farfield did not intentionally misclassify workers or intentionally falsify payroll certifications.

Our retroactivity analysis is sequential. We first look for an "unambiguous directive" from Congress to apply the statute retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263 (1994). If there is one, we follow it—and our inquiry ends. *See id.*; *Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 161 (3d Cir. 1998). But if the statute contains no express retroactivity command and normal rules of construction do not require that it have only prospective reach, we next ask whether applying the statute would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed?" *Id.* at 280; *see Mathews*, 161 F.3d at 160–61 (also citing *Lindh v. Murphy*, 521 U.S. 320, 324–29 (1997)). If so, the statute has "retroactive effect"—and our final task is to employ the strong presumption against applying such statutes to pending cases *unless* Congress manifested clear intent that the statute apply retroactively. *Landgraf*, 511 U.S. at 280; *Mathews*, 161 F.3d at 161, 166.

The critical language in FERA's retroactivity provision applies § 3729(a)(1)(B) to "all *claims* under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after [June 7, 2008]." FERA § 4(f)(1) (emphasis added). By designating a pre-enactment effective date for § 3729(a)(1)(B)'s new liability standard, Congress sought to apply the provision to *some* conduct predating its enactment. Accordingly, we are applying a statute that includes an "express command" to apply it retroactively. *Landgraf*, 511 U.S. at 280. The question is whether that command is limited in scope to conduct that occurred on or after June 7, 2008, or whether it embraces conduct—whenever occurring—challenged in a *lawsuit* initiated on or after June 7, 2008. If it does not extend to the latter, then only Congress's clear intent that § 3729(a)(1)(B) apply in such a manner

can rebut the presumption against retroactivity. *See Landgraf*, 511 U.S. at 263, 280; *Mathews*, 161 F.3d at 161.[12]

Whether Congress used "claims" in the FCA-specific sense as "requests for payment" (*i.e.*, underlying conduct) or generically to mean "cases" has engendered a Circuit split. The Eleventh Circuit has interpreted FERA to apply § 3729(a)(1)(B) retroactively only to demands for payment that were pending on or after June 7, 2008. *See Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009) ("[T]he word 'claim' in [FERA] section 4(f) . . . mean[s] 'any request or demand . . . for money or property,' as defined by 31 U.S.C. § 3729(b)(2)(A) . . . . While this *case* was pending on and after June 7, 2008, the relators do not allege that any *claims*, as defined by § 3729(b)(2)(A), were pending on or after June 7, 2008.'"). Fifth and Ninth Circuit decisions have endorsed *Hopper*, though with little analysis. *See Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 475 n.4 (5th Cir. 2012) (adopting district court's conclusion that FERA "did not apply to conduct occurring before [its] enactment" and that its retroactivity provision did not apply "because Relator's 'claims' were not pending on June 7, 2008"); *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011) ("[FERA's] amendments do not apply retroactively to this case." (citing *Hopper*, 588 F.3d at 1327 n.3)); *but see U.S. ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 464 n.4 (5th Cir. 2015) ("[T]he 2009 version of

[12] The intermediate *Landgraf* step is met here: Section 3729(a)(1)(B)'s liability standard has "retroactive effect" because, by applying to substantive conduct completed pre-enactment, it "increase[s] a party's liability" for past conduct. *Landgraf*, 511 U.S. at 280.

§ 3729(a)(1)(B), which was formerly § 3729(a)(2), is retroactively applicable to the Rigsbys' false record count.").

By contrast, the Sixth and Seventh Circuits have rejected *Hopper*'s reading in thorough opinions, holding that Congress used the term "claims" in § 4(f) of FERA simply to mean cases or lawsuits. *See U.S. ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 637–41 (7th Cir. 2016); *Sanders v. Allison Engine Co., Inc.*, 703 F.3d 930, 936–42 (6th Cir. 2012). The Second Circuit has seemingly reached the same conclusion, though without detailed analysis. *See U.S. ex rel. Kirk v. Schindler Elev. Corp.*, 601 F.3d 94, 113 (2d Cir. 2010) (concluding that § 3729(a)(1)(B) applied "[b]ecause Kirk's claim was filed in March 2005, and was pending as of June 7, 2008"), *rev'd on other grounds*, 563 U.S. 401 (2011).

We agree with the more comprehensive decisions and conclude, following the Sixth and Seventh Circuits, that Congress used "claims" generically in FERA's retroactivity provision to mean cases or lawsuits. At any rate, Congress's intent to apply § 3729(a)(1)(B) to all cases pending on or after June 7, 2008 is sufficiently clear. Whether as an express command under the first step of *Landgraf*, or consistent with Congress's clear intent under the last *Landgraf* prong, FERA subjects Farfield's pre-2008 conduct to § 3729(a)(1)(B).

1. In context, "claims" can only mean cases. Proponents of limiting FERA's retroactivity, including Farfield, urge that the FCA's definition of "claim" controls Congress's use of "claims" in § 4(f)(1). But the mere fact that "claim" is a defined term does not mean that it is used in that technical sense every time it appears in the statute. "A given term in the same statute may take on distinct characters from association

with distinct statutory objects calling for different implementation strategies." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). With "several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing," the word "claim" eschews the presumption of uniform usage. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004). Indeed, § 4(f)(1) speaks of "claims *under the False Claims Act*," and FERA elsewhere uses "claims" as synonymous with cases. So Congress did not use "claims" in its technical sense in FERA's retroactivity clause.

First, in the specific context of the retroactivity provision, replacing "claims" with the word's technical definition "makes no sense." *Kmart*, 824 F.3d at 640. Doing so yields this: "all request[s] or demand[s], whether under a contract or otherwise, for money or property . . . under the [FCA] that are pending on or after June 7, 2008." It would be anomalous for Congress to say that a request for payment is submitted "under" a statute that only comes into play if the request violates (or is alleged to violate) it. *See, e.g.*, Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 IND. L.J. 257, 289 (2011). The FCA and its liability standards are more naturally understood to apply only once an allegedly fraudulent request for payment is made, and a civil action filed. *Sanders*, 703 F.3d at 938 & n.3; *see Kmart*, 824 F.3d at 640 ("Rather, a claim 'under the [FCA]' is a legal action by the government or a relator to recover fraudulently obtained funds." (alteration in original) (citations omitted)). To harmonize the technical definition of "claims" with the retroactivity clause, one must exclude the later phrase "under the False Claims Act." That we are loath to do. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 392 (1979) ("[A] statute should be

interpreted so as not to render one part inoperative." (citation omitted)); *United States v. Bass*, 404 U.S. 336, 344 (1971) ("[C]ourts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions . . . ."). The generic reading of "claims," on the other hand, avoids rendering superfluous the phrase "under the False Claims Act."[13]

Second, interpreting "claims" to mean legal actions reflects the broader statutory landscape. The FCA uses "claims" synonymously with "cases." *See, e.g.*, 31 U.S.C. § 3730(c)(5) ("the Government may elect to pursue its claim"); § 3730(d)(1) (discussing relator's right to receive "proceeds of the action or settlement of the claim"); § 3730(d)(2) ("the person bringing the action or settling the claim"); § 3730(d)(4) ("if . . . the court finds that the claim of the person bringing the action was clearly frivolous"); § 3731(c) ("to clarify or add detail to the claims in which the Government is intervening and to add any additional claims"); § 3732(b) ("Claims Under State Law"). Indeed, when the FCA uses the term in its technical sense, "claim" usually comes after "false" or "fraudulent." *See* Titolo, *Retroactivity*, at 291.

Granted, the second retroactivity clause of § 4(f) of FERA uses the word "cases." *See* FERA § 4(f)(2). But the negative contextual implication that Farfield would have us

[13] A common generic definition of "claim" is "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; cause of action." *Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019).

draw—that Congress's disparate use of "claims" in the preceding subsection reflects a different intent—is unreasonable.

To begin with, "the presumption that 'disparate inclusion or exclusion' is purposeful is weakened when, as here, the provisions were not joined together or considered simultaneously." *Kmart*, 824 F.3d at 641 (quoting *Sanders*, 703 F.3d at 937) (citation omitted). On the contrary, §§ 4(f)(1) and 4(f)(2) of FERA were drafted by different chambers of Congress, at different times. S. 386, 11th Cong. § 4(b) (as reported in Senate, March 5, 2009); S. 386, 11th Cong. § 4(f) (House engrossed amendment, May 6, 2009); *see also* Titolo, *Retroactivity*, at 300. This drafting history undermines any negative inference that Congress's differing word choice in the two subsections signals a different intention.

What's more, §§ 4(f)(1) and 4(f)(2) of FERA "address wholly distinct subject matters." *Martin v. Hadix*, 527 U.S. 343, 356 (1999). So we should not infer that Congress's use of different terms in the two sections is meaningful. Start, as did the *Hadix* Court, with *Lindh*. There, the Court concluded that Congress's use of disparate language regarding pending-case applicability in two adjacent chapters was intentional because the two chapters addressed overlapping subject matter: "new standards for review of habeas corpus applications by state prisoners" and "new standards for review of habeas corpus applications by state prisoners under capital sentences." *Hadix*, 527 U.S. at 356 (citing *Lindh*, 521 U.S. at 329). In *Hadix*, by contrast, the Court concluded that no such inference followed from disparate pending-case applicability language in two adjacent provisions because the two provisions covered different subject matters: "the propriety of various forms of relief and . . . the immediate termination of ongoing relief

orders," in the first, and "the award of attorneys' fees," in the second. *Id.* at 356–57. What was true in *Hadix* is true here: The relevant provisions of FERA concern different subject matters. Section 4(f)(1) discusses retroactive application of the new liability standard in § 3729(a)(1)(B). By contrast, § 4(f)(2) of FERA deals with entirely different subject matter: the retroactivity of changes to FCA provisions relating to procedure and jurisdiction. *See* 31 U.S.C. §§ 3731 ("False claims procedure"), 3733 ("Civil investigative demands"), and 3732 ("False claims jurisdiction"). Concern for the first's retroactivity would thus not necessarily have mirrored that for the second's, so we cannot say that Congress's disparate use of words was intentional.

Tools of statutory interpretation leave us, then, with a provision that admits of only "one interpretation." *INS v. St. Cyr*, 533 U.S. 289, 316–17 (2001) (quoting *Lindh*, 521 U.S. at 328 n.4). By using concrete temporal language ("pending on or after") linked to a pre-enactment date and a word ("claims") whose only logical meaning in context is as a synonym for "cases," § 4(f)(1) of FERA expressly commands that the new liability standard in § 3729(a)(1)(B) apply to conduct challenged in a case pending on or after June 7, 2008.[14] *See, e.g.*, *St. Cyr*, 533 U.S. at 318–19 (identifying amendment's express application to "conviction[s] . . . entered before, on, or after" enactment date as clear retroactivity statement (internal quotation marks omitted)); *Hadix*, 527 U.S. at 355 (language

[14] *Landgraf*'s presumption against retroactivity does not trump other interpretive principles. *Lindh*, 521 U.S. at 324–26. So in deciding the scope of Congress's express command, we do not impose a higher bar for legislative clarity than in other contexts demanding a clear statement.

applying section "to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title," was clear statement (quotation omitted)); *Graham v. Goodcell*, 282 U.S. 409, 418–419 (1931) (clear statement rule satisfied where new tax refund statute "expressly applied to internal revenue taxes" assessed before pre-enactment date certain).

2. Congress repudiated Allison Engine *with clear intent for full retroactivity.* Even if § 4(f)(1) lacks an express command to apply § 3729(a)(1)(B) retroactively to cases pending on or after June 7, 2008, FERA otherwise shows Congress's clear intent to subject to the new provision relevant conduct, whenever occurring, that was subject to a lawsuit pending on or after that date. That clear intent suffices to rebut the presumption against retroactively applying § 3729(a)(1)(B) in such a manner. *See, e.g.*, *Landgraf*, 511 U.S. at 272–73, 280; *Mathews*, 161 F.3d at 166–70.

The Supreme Court's decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), is instructive. At issue was the retroactivity *vel non* of § 101 of the Civil Rights Act of 1991, which defines "make and enforce contracts" in 42 U.S.C. § 1981 to include "the making, performance, modification, and *termination of contracts*, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 1981(b) (emphasis added). Section 101 was passed in the wake of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which held that § 1981 "does not apply to conduct which occurs after the formation of a contract." *Id.* at 171. Section 101 thus enlarged the category of conduct that is subject to § 1981 liability to include all aspects of the contractual relationship, including termination. *Rivers*, 511 U.S. at 303.

The *Rivers* petitioners, garage mechanics covered by a collective-bargaining agreement who were allegedly fired in 1986 for racially discriminatory reasons, argued that § 101 of the 1991 Act applied retroactively because their appeal was pending at the time of its passage. *Id.* at 301–03.

In rejecting the petitioners' arguments, the *Rivers* Court contrasted the 1991 Act with a prior version of the bill that the President had vetoed. The Court stated that Congress clearly intended for the vetoed bill to apply retroactively: Its express purpose was to "respond to the Supreme Court's recent [*Patterson*] decision[] by restoring the civil rights protections that were dramatically limited [there]by." *Id.* at 307–08 (quoting S. 2104, § 2(b)(1) (alterations omitted)). The section of the bill responding to *Patterson* was titled "Restoring Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts." 511 U.S. at 307 (quoting S. 2104, § 12). The bill also included a provision establishing "that the amendment to § 1981 'shall apply to all proceedings pending on or commenced after' the date of the *Patterson* decision." 511 U.S. at 307–08 (quoting S. 2104, § 15(a)(6)).[15]

By contrast, the statute enacted in 1991 lacks comparable language about its application to pending proceedings, describes its function as "*expanding* the scope of relevant civil rights statutes" rather than *restoring* pre-existing rights, and "lacks any direct reference to cases arising before its enactment, or to the date of the *Patterson* decision." 511 U.S. at 308 (quoting Act of 1991 § 3(4), 105 Stat. 1071). So the Court

[15] The *Rivers* Court also discussed legislative history. *See, e.g.*, 511 U.S. at 306 n.6, 308. We rest our decision solely on the text of FERA and the implications following directly from it.

could glean from the 1991 Act only that it was passed in response to *Patterson*. *See id.* at 308–09; *see also id.* at 304–05 (noting that legislatively overruling Supreme Court decision, without more, does not "reveal whether Congress intends the 'overruling' statute to apply retroactively to events that would otherwise be governed by the judicial decision").

Like the vetoed bill in *Rivers* that sought to "restore" pre-existing rights supposedly trammeled by a Supreme Court decision, FERA's amendments to the FCA after *Allison Engine* are expressly meant "to reflect the original intent of the law." FERA § 4(f) (heading). And in setting § 3729(a)(1)(B)'s effective date as June 7, 2008—a Saturday, and two days before the decision—Congress abrogated *Allison Engine*'s construction of what was then § 3729(a)(2) to the fullest possible extent "without reopening judgments that were already final when *Allison Engine* was decided." *Kmart*, 824 F.3d at 640; *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–19 (1995) (explaining that Congress cannot reopen final judgments without triggering separation-of-powers concerns).

Conversely, Farfield's interpretation of "claims" would subvert Congress's intent to undo the effect of *Allison Engine* to the maximum extent possible. Indeed, on that reading, what significance would attach to Congress' May 2009 choice of a June 2008 date? Just as FCA defendants in prior cases could not explain Congress's choice of retroactivity date, *see, e.g.*, *Kmart*, 824 F.3d at 640 (concluding that Kmart's reading rendered June 7, 2008 date meaningless), Farfield fails to do so as well.

Reasons rooted in federal procedure also counsel against Farfield's reading. "When a new law makes clear that

it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut*, 514 U.S. at 226 (citations omitted). And even Farfield concedes that FERA's choice of a pre-enactment effective date for § 3729(a)(1)(B) means that Congress expressly commanded retroactivity, if only for underlying conduct occurring on or after June 7, 2008. But reading "claims" as the defined term would require post-FERA appellate courts to deviate from the *Plaut* rule when reviewing judgments related to pre-June 7, 2008 conduct, without a separate directive from Congress (or anyone else) to do so.

FERA's express purpose of "clarify[ing]" the FCA "to reflect the original intent of the law" and the pre-enactment effective date chosen for § 3729(a)(1)(B) reveal Congress's clear intent that the provision be applied retroactively to all conduct, whenever occurring, that was the subject of a non-final lawsuit at the time of (or after) *Allison Engine*.

* * *

There is no reasonable contextual reading of § 4(f) of FERA other than that it mandates applying § 3729(a)(1)(B) to cases pending on or after June 7, 2008. That makes it an express retroactivity command. At all events, Congress's stated purpose in passing FERA was to reinstitute the FCA's "original intent" rather than expand its coverage, something highlighted by its pre-enactment date preceding *Allison Engine* by two non-business days. Reading "claims" as "cases" reflects that intent and recognizes Congress's overruling of *Allison Engine* to the fullest extent allowed by the Constitution.

3. Applying § 3729(a)(1)(B) does not violate the Ex Post Facto *Clause.* To be sure, even a law that Congress intended to apply retroactively may offend the Constitution's *Ex Post Facto* Clause or otherwise fail to satisfy due process.[16] Farfield argues that retroactively applying § 3729(a)(1)(B)'s liability standard amounts to an unlawful *ex post facto* criminal penalty. We disagree, as have most federal courts to pass on such claims. *See, e.g.*, *Sanders*, 703 F.3d at 948; *see also U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 608 F.3d 871, 878–79 (D.C. Cir. 2010); *Genty v. Resolution Tr. Corp.*, 937 F.2d 899, 912 & n.7 (3d Cir. 1991) (recognizing that FCA's multiple damages provision is not punitive but provides for "liquidated damages to assure the plaintiff's full compensation" (citing *United States v. Bornstein*, 423 U.S. 303, 315 (1976)).

[16] Though Farfield stresses that its conduct here—reckless violations of worker-classification regulations—is inoffensive, it makes no argument that § 4(f) of FERA violates the Due Process Clause by failing to advance a rational legislative purpose. *See, e.g.*, *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Any due process argument is thus forfeited. *See, e.g.*, *N.J. Dep't of Env't Prot. v. Am. Thermoplastics Corp.*, 974 F.3d 486, 492 n.2 (3d Cir. 2020) ("argument . . . vaguely presented without legal or factual support . . . is forfeited"). And we would reject such a claim even if preserved because, as noted in *Sanders*, 703 F.3d at 948–49, Congress rationally sought to correct to the fullest extent what it deemed an erroneous interpretation of the FCA by passing FERA "to reflect the original intent" of its previously enacted legislation. FERA § 4 (heading).

Our Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." U.S. CONST., art. I, § 9. This clause prohibits the enactment of any law that "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). Applying the Clause requires us first to ask whether Congress "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for" a civil or criminal label. *Hudson v. United States*, 522 U.S. 93, 99–100 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)).

Congress intended the FCA to impose a "civil penalty" plus three times the amount of damages sustained by the Government, and for a relator to bring a "civil action" on the Government's behalf for a violation. 31 U.S.C. § 3729(a). The Act also authorizes lawsuits brought in accordance with the Federal Rules of Civil Procedure, and imposes a preponderance-of-the-evidence standard of proof. §§ 3732(a), 3731(d). It could hardly be clearer that Congress "meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

That said, it is possible for a civil statute to be criminally punitive in effect. But a finding of punitive effect requires the "clearest proof" to override legislative intent based on factors such as

1) Whether the sanction involves an affirmative disability or restraint;
2) Whether it has historically been seen as punishment;
3) Whether it comes into play only upon a finding of scienter;

4) Whether its operation will promote the traditional aims of punishment—retribution and deterrence;
5) Whether the behavior to which it applies is already a crime;
6) Whether an alternative purpose to which it may rationally be connected is assignable for it; and
7) Whether it appears excessive in relation to the alternative purpose assigned.

See Hudson, 522 U.S. at 99–100 (citing *Ward*, 448 U.S. at 249; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). Taking these factors in turn, we conclude that Farfield has not shown by the "clearest proof" that retroactively applying § 3729(a)(1)(B) amounts to criminal punishment in violation of the *Ex Post Facto* Clause.

First, the FCA's treble damages and civil fines do not involve an affirmative disability or restraint because they do not restrict one's physical liberty similar to imprisonment. *See, e.g.*, *Myrie v. Comm'r, N.J. Dept. of Corr.*, 267 F.3d 251, 260–61 (3d Cir. 2011) (requiring comparison to "infamous punishment of imprisonment" (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960))). This factor does not favor characterizing the FCA as criminally punitive in effect.

Second, the sanction here—monetary penalties—has not historically been viewed as punishment. *See, e.g.*, *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003) ("Treble damages certainly do not equate with classic punitive damages, which leave the jury with open-ended discretion . . . ."); *Hudson*, 522 U.S. at 104 ("payment of fixed or variable sums of money . . . ha[s] been recognized as enforc[ea]ble by

civil proceedings" (quotation omitted)). The second factor too disfavors viewing the FCA as criminally punitive.

Third, the post-FERA FCA requires proof only of "reckless disregard" and thus penalizes acts committed without guilty knowledge. 31 U.S.C. § 3729(b)(1); *see United States v. Stadtmauer*, 620 F.3d 238, 255–56 (3d Cir. 2010) (defining "scienter" to include knowledge and willful blindness, but not recklessness). Because the FCA does not come into play only upon a finding of (criminal) scienter, the third factor also suggests that the FCA's effect is civil.

Fourth, the FCA's operation does promote deterrence—one of the traditional aims of punishment. Indeed, the original goal of the FCA was to stop massive frauds perpetrated by government contractors during the Civil War. *See, e.g.*, *Bornstein*, 423 U.S. at 309. But "all civil penalties have some deterrent effect." *Hudson*, 522 U.S. at 102 (citations omitted). If the fourth factor favors a determination that the FCA is criminally punitive in effect, then it does so only slightly.

Fifth, the conduct for which the FCA imposes sanctions may also bear criminal liability under 18 U.S.C. § 287. But it's unclear which way this cuts. On one hand, it might stand to reason that the FCA has a criminally punitive effect by targeting behavior that is already a crime. *See, e.g.*, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (citing *Mendoza-Martinez*, 372 U.S. at 168–69). On the other hand, the post-FERA FCA covers more conduct than does the criminal fraudulent-claims statute.[17] *Sanders*, 703 F.3d at 946;

[17] Section 287 criminalizes "mak[ing] or present[ing] to any [federal official or agency] any claim upon or against the

cf. 89 Firearms, 465 U.S. at 366 ("Congress in fact drafted § 924(d) to cover a broader range of conduct than is proscribed by the criminal provisions of § 922(a)(1)."). And the separate existence of a criminal statute suggests that the civil statute serves a different purpose. *See, e.g.*, *Hudson*, 522 U.S. at 105. This factor thus carries neutral weight or, at best for Farfield, only slightly favors a determination of criminally punitive effect.

Sixth, the FCA's treble damages provision may be assigned a remedial (*i.e.*, compensatory) purpose. *See, e.g.*, *Chandler*, 538 U.S. at 130–31 (stating that "some liability beyond the amount of the fraud is usually 'necessary to compensate the Government completely'" and that "[i]n *qui tam* cases the rough difference between double and triple damages may well serve not to punish" (quoting *Bornstein*, 423 U.S. at 315)). After all, the FCA does not authorize the award of prejudgment interest or consequential damages, which typically accompany recovery for fraud. *See id.* at 131. Another unique purpose of the FCA's treble damages function is to incentivize private enforcement, "to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government, while benefitting himself as well." *Id.* (citation omitted) ("The most obvious indication that the treble damages ceiling has a remedial place under this statute is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action."). This alternative remedial purpose supports a conclusion that the FCA operates civilly.

United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent." 18 U.S.C. § 287.

Seventh, although recovery can significantly exceed the pecuniary loss sustained directly as a result of the false claims—as it arguably did here—this does not mean that the FCA permits sanctions that are constitutionally excessive in relation to their civil compensatory purpose. Farfield makes much of statements by the Supreme Court that Congress has increased the FCA's civil penalties so that liability is "essentially punitive in nature." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784–85 (2000). And it is true that the Supreme Court cited this language from *Stevens* in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016). But other post-*Stevens* cases such as *Chandler*, *supra*, suggest that the Court does not view the *Stevens* characterization as exclusive and also endorses a "softe[r] . . . view of the role of the treble damages available under the FCA." *Sanders*, 703 F.3d at 948 (citing *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405–06 (2003)). The most we can say is that the seventh factor "weakly favor[s] a finding of punitive effect," *Sanders*, 703 F.3d at 948, making it only—at best for Farfield—the third factor (out of seven) to cut in that direction. And none of those three are strong indicators. So we lack the "clearest proof" necessary to override Congress's intent that the FCA be civil in nature.

* * *

We therefore conclude that the FCA's treble damages and civil penalties do not violate the *Ex Post Facto* Clause so as to vitiate Congress's express command or, alternatively, clear intent that § 3729(a)(1)(B) apply retroactively to cases pending on or after June 7, 2008.

B. Farfield Misclassified Its Employees.

Farfield next contends that the District Court erred in adopting the Special Master's conclusion that it misclassified certain of its employees as groundmen and laborers when what they actually performed was lineman work. First, Farfield urges, the record shows that a lineman was present on nearly every job site on the Project and, because a groundman was permitted to assist a lineman in performing all the relevant tasks, there was no misclassification. Second, Farfield presses that whatever the local industry practice, its worker classifications were proper because they did not violate Local 126's CBAs. Neither argument carries the day.

1. No clear error in finding that groundmen were not "assisting" linemen. The Special Master's factfinding disposes of Farfield's first contention because he found the relevant testimony of Farfield's witnesses "not . . . credible." A292 (Findings of Fact ¶ 144). Neither the Special Master's findings of fact, nor the District Court's adoption of his R&R, were clearly erroneous. Fed. R. Civ. P. 52(a)(6); *U.S. Gypsum Co.*, 333 U.S. at 395. The evidence did not support a finding that groundmen and laborers were simply helping linemen install conduit or pull wire. Testimony highlighted that many groundmen and laborers performed all tasks associated with conduit installation and wire pulling. Other proof told a similar tale. For example, most crews were not limited in the work they performed; forepersons did not receive any training or instruction from Farfield on how to assign workers of different classifications to different tasks; classifications played only a minor role in the assignment of work to members of a crew; and tasks associated with "installing conduit and pulling were

not performed by any particular classification" but by "all workers on a crew." A290–91 (Findings of Fact ¶¶ 133–41).

2. Local industry practice controls the propriety of worker classification. Farfield points out that nothing in contemporaneous CBAs negotiated by Local 126 restricted the work that a groundman could do, other than certain tasks not relevant here. These CBAs provided that the employer "ha[s] no restrictions, except those specifically provided for [herein], in planning, directing and controlling the operation of all his work [and] in deciding the number and kind of Employees to properly perform the work." A853. So Farfield protests that it could classify workers based on what it views as the CBAs' permissive approach to the duties of groundmen. But neither the case law nor DOL authority supports that proposition. Under the Davis-Bacon Act, Farfield's obligations flowed from *local industry practices* that sharply limited the range of electrical work that groundmen may perform.

Davis-Bacon decisions establish that "[w]age determinations implicitly include the locally prevailing practice of classifying jobs [and] [w]here collective bargaining agreements form the basis of wage determinations, *the practice of local signatory unions is conclusive*." *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1058–59 (D.C. Cir. 2007) (emphasis added) (citations omitted) (citing *In the Matter of Fry Bros. Corp.*, WAB Case No. 76-06, 1977 WL 24823, at *6 (June 14, 1977)).[18] And the DOL instructs that, when classifications are

[18] Circuits other than the D.C. Circuit follow *Fry Brothers*. *See, e.g.*, *U.S. ex rel. Plumbers & Steamfitters Loc. Union No. 38 v. C.W. Roen Const. Co.*, 183 F.3d 1088, 1093–94 (9th Cir. 1999).

unknown or disputed, "[i]f . . . the rates listed for all the classifications that may perform the work in question are union rates, the dispute will be resolved by examining *the practice(s) of union contractors in classifying workers* performing the duties in question on similar construction in the area (usually the same county)." U.S. DOL Field Ops. Handbook, Ch. 15, § 15f05(c)(5)(b) (emphasis added). The legal question as Farfield frames it, then, is whether local "practices" control even in the face of silent or potentially inconsistent CBAs.

Before reaching the merits of Farfield's argument, we first address a threshold issue. The DOL's wage determination incorporated into the contract prescribes wage rates for groundmen under "ELEC0126D 12/03/2000," which seemingly refers to a Local 126 CBA executed on December 3, 2000. A832. *See, e.g.*, *Abhe & Svoboda*, 508 F.3d at 1056 ("[T]he wages for painters, laborers, and carpenters were each based on union collective bargaining agreements; the relevant unions were noted in the wage determinations by their initials."); *id.* at 1056 n.1 ("[T]he general wage determination includes the initials PAIN0011C to indicate that wages for 'Painters (Bridge Construction)' were based on the wages established in a collective bargaining agreement signed by District Council 11 of the International Brotherhood of Painters and Allied Trades." (citation omitted)). But the earliest CBA in the record was executed December 3, 2001.[19] And though

[19] In response to a question at oral argument, counsel for Farfield stated that "[a]ll of the collective bargaining agreements are in the record," including "three that covered the time period of the project because it lasted four and a half years." OA Trans. 12:13–23; *see also id.* at 13:15–21. That is inaccurate, of course, inasmuch as no CBA relevant to the "laborer" clas-

they contain a classification for "groundhands," the Local 126 CBAs in the record include no classification of "laborer"; the "laborer" classifications in the wage determination appear to derive from a Laborers' Union CBA omitted from the record.[20] In other words, it is unclear whether the CBA on which the DOL's prevailing wage determinations and classifications were based contains the same "permissive" approach to

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sification is before us. And though Farfield's employees worked on the Project from 2002–2007, the prevailing wage determination incorporated into the SEPTA contract associated the electrician worker classifications with the earlier December 3, 2000 CBA not in the record. Counsel represented at oral argument that "the relevant provisions didn't change," *id.* at 13:21–22, so we will consider Farfield's argument on the assumption that the subsequent CBAs in the record are indeed identical in relevant respects to the critical one cited in the prevailing wage determination.

[20] Confusingly, Farfield recognizes that "[t]he Laborers have their own collective bargaining agreement" and that "there isn't a collective bargaining agreement that governs both the Laborers and the IBEW," OA Tr. 14:24–25, 15:3–8, while also arguing that the relevant "classifications [are] all under one collective bargaining agreement." OA Tr. 16:3–7. While groundmen and linemen may have been classifications contemplated by the same Local 126 CBA, that cannot be said for laborers, whom the District Court also found were misclassified. So Farfield's CBA-based argument, at best, constitutes only a partial defense to the Special Master's findings that Farfield misclassified groundmen *and* laborers by having them perform lineman work (such as laying conduit and pulling wire).

groundman duties—to say nothing of "laborer" duties—as the later Local 126 CBAs included in the record.

In any case, Farfield's argument fails because it is not the language of a CBA but rather signatory parties' local practice that controls worker classifications under the Davis-Bacon Act. To that end, the DOL's Field Operations Handbook provides that when the applicable wage determination reflects union wage rates for the classifications involved, "the unions whose members may have performed the work in question" should be contacted "to determine whether the union workers performed the work on similar projects in the county in the year prior" to the relevant start date of the project. U.S. DOL Field Ops. Handbook, Ch. 15, § 15f05(d)(1)(a). "If *union contractors* performed the work, each union should be asked how the individuals who performed the work in question were classified." § 15f05(d)(1)(c). That information "provided by the unions should be confirmed with collective bargaining representatives of management," and "the area practice is established" only "[i]f all parties agree as to the proper classification of the work in question." § 15f05(d)(1)(d)–(e). The Handbook thus requires that a contractor, rather than simply reading a CBA to determine for itself whether a classification is prohibited, achieve consensus with both labor and management on how individuals who perform comparable work are *actually* classified.

Following the Handbook's dictates, the most comprehensive court decision on point similarly holds that local practices of the referenced CBA's signatories control Davis-Bacon

worker classifications.[21] In *Abhe & Svoboda*, the D.C. Circuit held that wage determinations derived from CBAs require worker classifications to be "determined exclusively by the *practices* of signatory unions." 508 F.3d at 1059 (emphasis added) (citations omitted). Farfield tries to minimize the import of this ruling, arguing that it doesn't elevate local practices over inconsistent terms of a CBA. While we acknowledge that such a proposition was unnecessary to the D.C. Circuit's decision, large swaths of the opinion do, in fact, support such a holding in the case before us.

Abhe & Svoboda arose out of a contractor's classification of workers based on its own national "tools of the trade" analysis, which it claimed to have relied on for over 500 government contract jobs across the country. 508 F.3d at 1056.

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[21] To be sure, two members of a Ninth Circuit panel held in *Roen* that "where the Department [of Labor] determines that prevailing wages are established by a collectively bargained agreement, the job classifications for the project or area at issue are also established by that agreement." 183 F.3d at 1093. But the facts of *Roen* differed significantly from those we confront. The relevant job tasks were enumerated in an inter-union agreement on how to classify piping workers on Northern California water treatment plant projects. *See id.* at 1090–91. By formal letter, the DOL adopted that agreement because it reflected "the appropriate classifications and wages for work done on water treatment projects in Northern California." *Id.* Not so here. The CBAs in the record did not affirmatively establish the duties of groundmen other than merely prohibiting them from performing certain tasks. Nor did the DOL so clearly and formally adopt the sparse work descriptions therein as the proper classifications on the Project.

The court held that this practice strayed from DOL regulations and practices establishing "that contractors do not have the authority to determine the scope of job classifications *based on their own methodologies*." *Id.* at 1061–62 (emphasis added). Noting the DOL's *Fry Brothers* decision, the court held that the contractor was on notice of the need to "follow the practice of the local unions." *Id.* at 1060–61 (citing *Fry Bros.*, 1977 WL 24823, at *5–6). "From start to finish," the court noted, "the focus of the [Davis-Bacon] Act is on local practice" such that a contractor's application of its own classifications, even if based on a national standard, "is inconsistent with the fundamental principle of the Davis-Bacon Act that local practice should control government contracts." *Id.* at 1061. The court rejected a narrow construction of *Fry Brothers* that would have "require[d] only that contractors abide by *known union practices*," instead faulting the contractor "for not contacting the relevant unions or inquiring of the Department [of Labor] if it was unclear about the local practices for classifying jobs." *Id.* at 1062 (emphasis added) ("the Company made no effort to ascertain the practices of the unions noted in the wage determination").[22] And the court was unpersuaded by the arguments of amici that contractors should not be saddled with "break[ing] through the union wall to adequately and clearly determine their *invariably unwritten practices and rules*." *Id.* (emphasis added).

The takeaway from *Abhe & Svoboda* is straightforward. If the DOL's prevailing wage determinations rest on a particu-

[22] Contacting the union would have been especially fruitful for Farfield: The Local 126 business manager listed on every CBA is Thomas Leach, who served as Local 98's expert on local industry practices in this case.

lar CBA, then a contractor may not base classification practices on its own reading of that CBA. Rather, it must engage with the signatory union(s) and management on local classification practices, even if "unwritten." Failing that, the contractor may contact the DOL for clarification.

The evidence before the Special Master offers no quarter to Farfield. Local 98's expert testified that under local practice "groundmen are not permitted to connect conduit; thread conduit; lay conduit; connect or splice conduit at a manhole; pull wire; monitor[] or address[] tension of a cable through a conduit; terminate a cable run; and perform splicing and/or stripping functions." A83–84. It is linemen who perform this work. Farfield offered no compelling evidence on the issue.[23] Farfield's assigning groundmen and laborers to perform such tasks—its logging their hours under phase codes that reflected

[23] Farfield states that Local 98's expert "admitted that under local union practice laborers also install and lay conduit and pull wire." Appellant's Br. 28. Though he acknowledged that members of other trades, such as laborers, do install conduit and pull wire, the expert testified that Local 126 is "adamantly against that" because such work "should be done by electrical workers and signatory electrical contractors." A1653–54. And he later clarified that on Local 126 jobs, laborers do not pull wires. Farfield's own witnesses established that "under local area practices, only journeymen [linemen], and not laborers, could install conduit on transit projects." A298 (Findings of Fact ¶ 169). The Special Master thus found that "under local area practices in the Philadelphia area, only journeymen [linemen] may perform the tasks associated with installing electrical conduit" and "pulling electrical wires or cable." A299 (Findings of Fact ¶¶ 170–71).

"journeyman [lineman] work, including installing electrical conduit [and] pulling electrical wires or cable," A303 (Findings of Fact ¶ 184)—conflicted with prevailing local practices and so amounted to misclassification of its workers.

* * *

The District Court, via the Special Master, did not clearly err in finding any of the relevant facts. We reject Farfield's legal contention that it did not misclassify workers because one could read the relevant CBAs to permit its practices. Instead, whether workers were properly classified turns on the local practices of the CBA signatories. And the direct evidence showed that, under such practices, only linemen could lay conduit and pull wire. So the District Court correctly held that Farfield misclassified workers on the Project.

C. Farfield's False Certified Payrolls Were Material.

A materiality inquiry under the FCA is a holistic, totality-of-the-circumstances examination of whether the false statement has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4); *see Escobar*, 136 S. Ct. at 2003–04. The Government's "decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive" of materiality. *Escobar*, 136 S. Ct. at 2003. While materiality "cannot be found where noncompliance is minor or insubstantial," it may be found where the Government "consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Id.* In this context, as in all others,

materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* at 2002 (alteration in original) (quoting 26 R. Lord, WILLISON ON CONTRACTS § 69:12, p. 549 (4th ed. 2003)).

Farfield argues that even if it misclassified workers, it cannot be liable under the FCA because the false certified payrolls that it submitted to SEPTA, which SEPTA in turn submitted to the FTA, were not material to the Government's decision to pay.[24] This is so, Farfield claims, because (1) the contract language permitted, but did not require, the Government to withhold payment from SEPTA if work was misclassified or certified payrolls were false; (2) the Government took no action at various stages of the Project and this litigation; and (3) the total amount of underpaid wages due to misclassifications was small in relation to the overall value of the contract. But none of the relevant circumstances convince us that the false certified payrolls were immaterial to the Government's decision to pay invoices for Farfield's work.[25]

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[24] Farfield does not dispute its obligations to classify workers properly and submit accurate payrolls containing a sworn certification of compliance. *See* 29 C.F.R. § 5.5(a)(3)(ii)(B).

[25] Farfield also contends that the false certified payrolls (submitted weekly) cannot anchor Local 98's FCA claim because they are not a "request or demand" for payment within the FCA's definition of "claims." Appellant's Br. 30, 50–53. Farfield argues that any FCA violations it committed must instead trace to (monthly) invoices affected by the worker misclassifications. Not so. Post-FERA, the FCA imposes a civil penalty on any person who "knowingly makes, uses, or causes to be made or used, *a false record or statement* material to a false or

1. Proper classification and accurate certified payrolls were payment conditions. After *Escobar*, the Government's designation of compliance with a particular regulatory requirement as a condition of payment is relevant to, but not dispositive of, materiality. 136 S. Ct. at 2003. The SEPTA contract incorporates several of the federal regulations pertinent to this

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fraudulent claim." 31 U.S.C. § 3729(a)(1)(B) (emphasis added). Farfield's "false record or statement" was each certified payroll report (more specifically, each certification of compliance) submitted to the FTA to backstop the associated invoices. *See, e.g., U.S. ex rel. Sheet Metal Workers Int'l Ass'n, Loc. No. 20 v. Horning Inv., LLC*, 828 F.3d 587, 591–92 (7th Cir. 2016) (highlighting evidence that defendant's employee "submitted the Certified Payroll Reports and the eight applications that initially went to [the prime contractor] with the knowledge that they were to be presented to the Department of Veterans Affairs for payment" (citation omitted)); *United States v. Saavedra*, 661 F. App'x 37, 45–46 (2d Cir. 2016) ("[N]othing in the [FCA] requires the court to impose penalties based on the number of false claims under § 3729(a)(1)(A), instead of the number of false statements under § 3729(a)(1)(B)."); *see also U.S. ex rel. Schwedt v. Planning Res. Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995) (claim need not be an invoice but may be a progress report submitted to induce payment); *United States v. Bd. of Educ. of City of Union City*, 697 F. Supp. 167, 176 (D.N.J. 1988) ("Although each individual report did not trigger separate payments, the release of funds was predicated upon the grant agreement which required the periodic submission of accurate reports.").

materiality factor. These provisions give the Government the unilateral right to exercise withholding and debarment remedies in response to Farfield's non-compliance with Davis-Bacon requirements.

First, the federal agency (here, the FTA) "*shall* upon its own action or upon [application] of the Department of Labor withhold or cause to be withheld from the contractor . . . so much of the accrued payments or advances as may be considered necessary to pay . . . the full amount of wages required by the contract." 29 C.F.R. § 5.5(a)(2) (emphasis added).

Second, "[i]n the event of failure to pay . . . all or part of the wages required by the contract, the (Agency) *may*, after written notice . . ., take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased." *Id.* (emphasis added).

Third, if the contractor fails to maintain or submit required documents, the Government "*may*, after written notice . . ., take such action as may be necessary to cause the suspension of any further payment," with "failure to submit the required records" a permissible "grounds for debarment" for a three-year period. 29 C.F.R. § 5.5(a)(3)(iii) (emphasis added) (citing § 5.12); *see also* § 5.5(a)(3)(ii)(A)–(D) (describing required payrolls and certifications of compliance).

Still another regulation says that the Government "*shall*" suspend sufficient payments when a contractor fails "to comply with the labor standards clauses contained in § 5.5," 29 C.F.R. § 5.9 (emphasis added), but the relevant statute calls only for contractual stipulations that there "*may* be withheld

from the contractor so much of the accrued payments as the contracting officer considers necessary" to pay the required wages. 40 U.S.C. § 3142(c)(3) (emphasis added); *accord Coutu*, 450 U.S. at 757.

The parties spill more ink than necessary arguing whether the Government has a mandatory obligation to suspend payment when it learns of Davis-Bacon noncompliance or merely the right to do so. Farfield claims that the Government has discretion and thus that Davis-Bacon compliance is not a condition of payment, whereas Local 98 presses that the Government must withhold payment for noncompliance. There is scant case law interpreting whether the Government must withhold funds sufficient to make misclassified employees whole. *See, e.g.*, *Favel v. Am. Renovation and Const. Co.*, 59 P.3d 412, 420 (Mont. 2002) ("Whether [withholding was] discretionary or mandatory, the USAF Contracting Officer had the unilateral authority to make such a decision . . . ." (citing 29 C.F.R. §§ 5.5(a)(2), 5.5(a)(3)(iii), 5.9; 40 U.S.C. § 276a(a))).

We need not decide whether the Government lacks or indeed has discretion to withhold payment unilaterally. Its undisputed right to do so and to debar Farfield—combined with Farfield's relevant actual knowledge and the lack of evidence that the Government would overlook misclassification—support the conclusion that proper worker classification and, by extension, submission of payrolls accurately certifying the same were conditions of payment. Post-*Escobar*, courts decide whether regulatory compliance is an express condition of payment based on what the regulation *requires the defendant to do* under the federal contract or program, not

whether the Government must act in response.[26] *See, e.g.*, *U.S. ex rel. Prather v. Brookdale Sr. Living Communities, Inc.*, 892 F.3d 822, 831–33 (6th Cir. 2018). Here, that analysis supports the District Court's materiality finding.

Compliance with the relevant Davis-Bacon regulations was mandatory for Farfield to bid on the contract and for the Government to perform under it. Under those regulations, Farfield's workers "will be paid unconditionally . . . the full amount of wages . . . computed at rates not less than those contained in the wage determination." 29 C.F.R. § 5.5(a)(1)(i). Such workers "shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed." *Id.* They may be compensated for work performed in more than one classification only if "payroll records accurately set forth the time spent in each classification in which work is performed." *Id.* "Payrolls and basic records relating thereto shall be maintained by the contractor," and they "shall contain . . . [each worker's] correct classification" and "hourly rates of wages paid." § 5.5(a)(3)(i). And Farfield "shall submit weekly . . . a copy of all payrolls . . . to [SEPTA] for transmission to the [federal agency]," which "shall set out accurately and completely all of the information

[26] To the extent that Government action is relevant, it goes to the next *Escobar* factor we discuss below. If, for example, the Government exercised its discretion not to withhold payment—and instead paid in full—despite knowledge of misclassifications or false certifications, then that would cut against materiality, per *Escobar*. But the mere existence of remedial discretion alone does not mean that the regulatory compliance otherwise required of the defendant was not an express condition of payment.

required to be maintained under [(a)(3)(i), except Social Security numbers]." § 5.5(a)(3)(ii)(A). Each payroll "submitted shall be accompanied by a 'Statement of Compliance,' signed by the contractor . . ., and shall certify," among other things, that "each laborer or mechanic has been paid not less than the applicable wage rates . . . for the classification of work performed, as specified in the applicable wage determination incorporated into the contract." § 5.5(a)(3)(ii)(B).[27] If the contractor fails "to comply with the labor standards clauses in § 5.5" or "fails to submit the required records," the Government unilaterally may withhold funds and, for records non-compliance, debar the contractor for three years. § 5.5(a)(3)(iii); § 5.9. And all of the above provisions "shall" be "insert[ed] in full in any [covered] contract," § 5.5(a), making clear their centrality as contractual conditions.

Farfield's Davis-Bacon compliance and weekly submission of complete and accurate certified payrolls were thus designated conditions of the Government's obligation to perform (*i.e.*, pay) under the SEPTA contract. *See Prather*, 892 F.3d at 832–33; *U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 713 (7th Cir. 2014) ("[A] reasonable jury could certainly find that these MDS [Minimum Data Sheet] forms were conditions of payment because they specif-

[27] The contract, the regulations, and Farfield's payroll certifications all provide that "falsification of any of the above certifications" may subject the contractor to criminal prosecution under 18 U.S.C. § 1001 or civil liability under the FCA. A824; 29 C.F.R. § 5.5(a)(3)(ii)(D); A1265. Given the contemplated FCA liability, the submission of payrolls falsely certifying Davis-Bacon compliance must, at least in some cases, be material to the Government's decision to pay.

ically affirm that reimbursement is 'conditioned on the accuracy and truthfulness of [the] information' contained in the forms. And such a certification of accuracy is required by the Medicare and Medicaid regulations." (last alteration in original) (citing 42 C.F.R. § 483.20)). That conclusion finds further support in the Government's recourse to debarment of a contractor that falsifies certified payrolls or otherwise disregards its Davis-Bacon obligations to employees. 29 C.F.R. § 5.12(a)(2); *see, e.g.*, *Metro. Home Improvement Roofing Co.*, B-215945 (Comptr. Gen. Dec. Jan. 25, 1985). The express-condition-of-payment factor thus favors the District Court's conclusion that Farfield's submission of false certified payrolls was material to the Government's decision to pay. *Escobar*, 136 S. Ct. at 2003.

Even were we disinclined to call Davis-Bacon compliance an express or designated condition of payment here, testimony of Farfield's witnesses reveals actual knowledge that compliance was a de facto condition of both payment and Farfield's continued eligibility for federally funded projects. "The existence of express contractual language specifically linking compliance to eligibility for payment . . . is not, as [defendant] argues, a necessary condition" for materiality. *United States v. Sci. Apps. Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010). And the Supreme Court, endorsing a similar conception of materiality, recognizes that "[a] defendant can have 'actual knowledge' that a condition is material without the Government expressly calling it a condition of payment." *Escobar*, 136 S. Ct. at 2001–02; *Sci. Apps.*, 626 F.3d at 1269 ("The plaintiff may establish materiality in other ways, such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue.").

As the District Court summarized, one of Farfield's vice presidents testified that he "understood if the DOL ever found Farfield to have . . . violated a prevailing wage act the consequence 'would have put us out of business.'" A103. McGee testified that, based on "a problem years prior," Farfield was "concern[ed]" at the Project's inception "that we used the proper people in the proper positions and certified payrolls were accurate." A1294. It was clear to McGee that "if there was a problem" with classification, it "would be a real problem." A1306. There was also evidence that Farfield had generally "been very sensitive to [prevailing wage laws]" and perceived itself as "'under a magnifying glass' by the union." A105. While a defendant's actual knowledge "that the Government would be *entitled* to refuse payment were it aware of the violation" is not dispositive of materiality, *Escobar*, 136 S. Ct. at 2004 (emphasis added), Farfield's clear appreciation that Davis-Bacon violations would "*likely*" so affect the "behavior of the recipient of the alleged misrepresentation" is enough to tilt the condition-of-payment factor in favor of materiality. *Id.* at 2002 (emphasis added) (quoting WILLISTON ON CONTRACTS, at 549).

2. No evidence of past relevant Government (in)action. The parties have pointed us to no record evidence showing that the Government "consistently refuses to pay claims in the mine run of cases based on noncompliance with" Davis-Bacon requirements or pays claims like those at issue here "despite its actual knowledge that certain requirements were violated." *Escobar*, 136 S. Ct. at 2003–04. So nothing suggests that this is a case where the Government would have knowingly paid invoices associated with false certified payrolls or, by extension, misclassified workers. *Cf. U.S. ex rel. Spay v. CVS*

Caremark Corp., 875 F.3d 746, 764 (3d Cir. 2017) (summarizing evidence of Government's knowledge that pharmacy benefit managers were submitting claims that flouted regulatory requirements and its payment of such claims anyway). Left intact is Local 98's prima facie materiality showing based on the contract and regulations as well as the knowledge of Farfield decisionmakers. *See, e.g.*, *U.S. ex rel. Doe v. Heart Sol'n, PC*, 923 F.3d 308, 318 (3d Cir. 2019) (faulting defendants for failing to show "that Medicare generally pays this type of claim 'in full despite its actual knowledge that certain requirements were violated'" (quoting *Escobar*, 126 S. Ct. at 2003)).

In a *trompe l'œil*, Farfield paints the Justice Department's choice not to intervene in the litigation as a Government act that fatally undermines materiality. But intervention decisions are, at best, of minimal relevance. In *Escobar*, the Government chose not to intervene, *see* 136 S. Ct. at 1998, yet the Supreme Court did not mention this as a pertinent materiality factor. And "[if] relators' ability to [meet] the element of materiality were stymied by the government's choice not to intervene, this would undermine the purposes of the Act." *Prather*, 892 F.3d at 836 (citation omitted) (rejecting similar intervention argument); *cf. U.S. ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (listing non-intervention as one among many Government actions and inactions that undermined relator's materiality allegation). Nor do the "administrative mechanism[s]" for enforcing compliance with wage-and-hour laws weigh against materiality—at least not on the record we confront here. Appellant's Br. 32–33. The DOL declined to act on the District Court's referral of the case, mak-

ing that forum well and truly unavailable to Local 98.[28] And it did so based on the vintage of the facts and related concerns for investigatory resources, not on any grounds suggesting immateriality.

3. Davis-Bacon compliance was essential to the bargain. A third materiality factor is whether the noncompliance is "minor or insubstantial" or, instead, goes "to the very essence of the bargain." *Escobar*, 136 S. Ct. at 2003 & n.5 (quotation omitted). Farfield argues that its misclassification violations were small, calculated at just over $150,000 in wage underpayments, in comparison to the $54.7 million value of the SEPTA contract. We refuse to measure materiality based only on the monetary value of Farfield's wrongdoing in relation to some larger, undefined whole. After all, Davis-Bacon compliance is concerned *not* with minimizing costs but, on the contrary, aims to impose additional costs on contractors and the Government in pursuit of goals that Congress has prioritized for federally funded projects.

Holding otherwise would require us to engage in difficult, if not impossible, line-drawing. Even if valuing the affected work were easy to accomplish—something belied by the history of this case—at what level of generality should we

[28] Farfield points to one tangential circumstance that it claims weighs against a materiality determination: SEPTA spoke with Farfield's workers during the Project but raised no concerns about worker classification. The District Court found that these alleged conversations lacked the necessary specificity to sway its materiality finding. We see no fault in that finding. And, in any case, such discussions would fail to show the *Government's* (*i.e.*, the FTA's) knowledge of the noncompliance.

evaluate the materiality denominator? Should we look at the ratio between the affected work and the overall amount of electrical work performed on the Project? The overall dollar value of the Project? The overall budget of the FTA while the work was performed? And then, even if we could formulate the correct denominator, what percentage of misclassified work in relation to that whole suffices to meet the materiality threshold? 0.1 percent? One percent? Ten percent? A search for answers proves a Sisyphean task. Neither Davis-Bacon nor case law provides a guide.

And opposite the dollar magnitude of the violation are other factors one might reasonably consider in evaluating whether a contractor's regulatory violations were minor or insubstantial. We might ask, for example, about temporal duration: For how long did the Davis-Bacon noncompliance affect the contractor's work? Farfield falsely certified compliance 105 times—once a week for more than two years on the five-year Project. Arguably, undercutting the local labor market for over two years is neither minor nor insubstantial. Though we have no reason to think that any work on the Project was sub-standard, we might also consider in our objective materiality analysis the possible consequences to the public of unskilled workers building public infrastructure that local practices reserve for an electrician's skill and experience. *Cf. Spay*, 875 F.3d at 764 ("The misstatements that gave rise to this qui tam action allowed patients to get their medication, and they are precisely the type of 'minor or insubstantial' misstatements where 'materiality . . . cannot be found.'" (alteration omitted) (quoting *Escobar*, 136 S. Ct. at 2003)). Should the potential for widely felt negative consequences from public transit failure lower the dollar threshold for materiality in cases like this one? One might even say that the Davis-Bacon Act's debar-

ment remedy implicitly recognizes that certain regulatory violations on public works projects should have ramifications for the contractor beyond wage restoration. And, of course, Davis-Bacon compliance is a keystone of federally funded construction projects. *See, e.g.*, *Coutu*, 450 U.S. at 771, 773–76; *Fry Bros.* at *6. Whether a contractor "complied with the regulations" that are central to decisions about how to spend public funds "is a fact that a reasonable person would want to know." *Prather*, 892 F.3d at 835; *see also United States v. Luce*, 873 F.3d 999, 1007–08 (7th Cir. 2017) (misrepresentation that no officers of loan-originating company were currently subject to criminal proceedings was material because certification "addressed a foundational part of the Government's mortgage insurance regime, which was designed to avoid the systemic risk posed by unscrupulous loan originators").

In view of the totality of the circumstances, we conclude that Farfield's Davis-Bacon violations were not minor or insubstantial. Farfield misclassified more than $150,000 in electrical work on a public infrastructure project. The consequence was that, on 105 occasions across more than two years' worth of payrolls, Farfield falsely certified its compliance to the Government. And it did so under a regulatory regime and a contract that authorized debarment as a remedy for misclassification and false certifications. This *Escobar* consideration also favors a conclusion that Farfield's false statements were material to the Government's decision to pay SEPTA invoices.

* * *

Proper worker classification and submission of accurate payroll certifications were express conditions of the Government's payment—or, at minimum, de facto conditions of pay-

ment based on Farfield's knowledge of the Government's likely response to non-compliance. And Farfield's regulatory violations were not minor or insubstantial. Seeing no evidence of relevant Government (in)action, we conclude that Farfield's false certified payrolls were material to the Government's decision to pay.

D. The Facts Support the District Court's Finding of Recklessness.

The District Court adopted the Special Master's finding that Farfield recklessly ignored its worker classification obligations under the Davis-Bacon Act, and thus acted with reckless disregard for the truth or falsity of its certified payrolls. Under the FCA, an individual or entity responsible for submitting an objective falsehood must have acted "knowingly"—that is, with actual knowledge of the falsehood, in deliberate ignorance of its truth or falsity, or in reckless disregard of its truth or falsity. *See* 31 U.S.C. § 3729(b)(1)(A). Congress added the "reckless disregard" prong to the FCA's definition of "knowingly" to target the defendant who has "buried his head in the sand" and failed to make an "inquiry into the claim's validity" that is "reasonable and prudent under the circumstances." *U.S. ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 530 (6th Cir. 2012) (quoting S. Rep. 99-345, at 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286).

The Special Master's essential conclusion from the facts was that Farfield, via McGee, delegated full discretion to forepersons to use workers on their crews as they saw fit while, at the same time, fully aware of Farfield's contractual and regulatory obligations to ensure that employees were paid prevailing wages for the classification of work performed. Farfield

raises a hodgepodge of factual objections that it claims render the recklessness finding erroneous, but none have merit.

1. *The testimony supported the District Court's recklessness finding.* Farfield contends that its forepersons and managers reasonably believed that groundmen could do whatever work linemen could do. They testified that McGee told them so. Transit work was not something that Farfield specialized in prior to undertaking the Project, and its supervisors may have understandably relied on McGee for direction. But Farfield's argument fails to grapple with the District Court's recklessness finding. For his part, McGee testified that a groundman *could not* do all the work that a lineman could, including specifically "pulling wire through conduit," A1338–39, because groundmen were "completely unskilled" "grunt[s]." A1313–14; A1341. So McGee's statements to subordinates that "any worker could do any task" such that they needn't worry about properly classifying groundmen, A291 (Findings of Fact ¶ 141), conflicted with his own knowledge of the proper role of groundmen and the centrality of proper classification to the health of Farfield's business.[29]

The District Court reasonably concluded from this conflicting testimony that McGee, and thus Farfield, recklessly delegated to unknowledgeable individuals the responsibility

[29] A groundman could assist a lineman in most tasks, Farfield points out, and a lineman was usually included on a crew. But the Special Master found "not credible" the testimony of Farfield's witnesses that only linemen performed the skilled tasks involved, with groundmen "simply 'helping' [them] with the installation of conduit and pulling of wire." A292 (Findings of Fact ¶¶ 143–44); *see supra* Section V.B.1.

for ensuring that employees were properly classified. *See, e.g.*, *United States v. Krizek*, 111 F.3d 934, 941–42 (D.C. Cir. 1997) (observing that, although FCA is "not intended to apply to mere negligence, it is intended to apply in situations that could be considered gross negligence where the submitted claims to the Government are *prepared in such a sloppy or unsupervised fashion* that resulted in overcharges to the Government" (emphasis added) (quotation omitted)); *United States v. Stevens*, 605 F. Supp. 2d 863, 867, 869 (W.D. Ky. 2008) (finding "reckless disregard" of physician's duty as Medicare and Medicaid provider to "take reasonable steps to ensure that his clinic's claims for reimbursement [were] accurate" where physician "*completely delegated*" all billing responsibilities to someone with "*absolutely no prior experience with medical billing*" (emphases added)). That Farfield hired McGee for his knowledge of and experience with classifications on rail projects, or that other individuals may have been ignorant for their part, does not mean that Farfield is unaccountable for McGee's reckless actions. An entity's knowledge for FCA purposes may be imputed based on that of a particular employee or officer. *See, e.g.*, *Sci. Apps.*, 626 F.3d at 1272–73; *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 919–20 & n.11–12 (4th Cir. 2003).

2. No clear error based on DOL audit. Farfield next claims that the District Court's recklessness finding was clearly erroneous for glossing over the DOL's 2004 audit of the Project, which found only minor holiday-pay violations. But the District Court did indeed recognize that the DOL audit was "evidence going to whether a defendant acted in reckless disregard of wage and classification requirements." A81 (citing *U.S. ex rel. Rueter v. Sparks*, 939 F. Supp. 636 (C.D. Ill. 1996), *aff'd*, 111 F.3d 133 (7th Cir. 1997)). The audit evidence

simply wasn't compelling or specific enough to rebut the otherwise strong proof that Farfield acted recklessly. For instance, though the DOL auditor appears to have reviewed some payroll information, the record does not show that he examined information about the work that groundmen and linemen were actually performing. In fact, the limited evidence related to the audit suggested that the auditor's remit may have been much narrower than examining worker classification and prevailing wage compliance across the entire project.

3. Farfield's other arguments fail. Farfield throws additional facts at the wall, but none of them stick. Farfield contends that it could not have recklessly misclassified workers on the Project because Local 98 voluntarily dismissed its claims against Farfield related to four other projects. But that tells us nothing about recklessness as to the Project at issue. Nor does the Special Master's description of the case as entailing "close questions of fact and law" mean that Farfield could not have acted recklessly. Appellant's Br. 40–41. This case implicates fact-bound wage-and-hour issues and complex questions of law, including issues of statutory retroactivity, but nothing that would diminish Farfield's culpability.[30]

[30] Farfield's possible compliance with the CBAs' restrictions on groundman work does not vitiate the recklessness finding. Even if Farfield or McGee relied on the CBAs when making decisions relevant to how employees would be classified (which was not proven), "parties dealing with the government are expected to know the law, and there is no grave injustice in holding parties to a reasonable knowledge of the law." *Abhe & Svoboda*, 508 F.3d at 1060 (cleaned up). As suggested by our earlier treatment of Farfield's industry-practice argument, *supra* Section V.B.2, relying solely on the CBAs' lack of

Farfield also claims that it could not have recklessly disregarded its legal obligations so as to "cheat" or save money because it paid some employees wages higher than those required by Davis-Bacon and the SEPTA contract. Appellant's Br. 41–43. But even if that were true, it is irrelevant. To "establish[] liability under the FCA, a plaintiff need not prove the defendant had a financial motive to make a false statement relating to a claim seeking government funds." *Harrison*, 352 F.3d at 921 (citation omitted). There may well have been reasons for Farfield's recklessness besides aggregate profit. At all events, Farfield offers no legal support for offsetting amounts underpaid to certain employees with funds overpaid to others. *Cf. Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325, 332–35 (3d Cir. 2016) (declining to offset employer's FLSA liability for unpaid pre- and post-shift work with amounts paid for unproductive lunch breaks).

* * *

The record supports the Special Master's factual findings underpinning his conclusion that Farfield recklessly disregarded whether its workers were properly classified and paid, and thus recklessly disregarded the truth or falsity of the payrolls' certifications of compliance with the Davis-Bacon Act.

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detailed classification strictures—without contacting the signatories or the DOL—would not have been reasonable enough to preclude "deliberate ignorance" or "reckless disregard" under the FCA.

E. The District Court Properly Shifted the Burden of Proof on Damages to Farfield.

Next, Farfield argues that the District Court improperly shifted the burden of proof on damages after Local 98 introduced "representative" evidence about the 42 employees found to have been misclassified and underpaid. Appellant's Br. 44–50. Recall that Farfield did not segregate its employees' hours spent performing groundman or laborer work from those performing lineman work. The Special Master found that substantial lineman work, such as laying conduit and pulling wire, was performed when an employee's daily time was coded to six of the 12 Farfield phase codes that Local 98 challenged. He then required Farfield to show that the 42 groundmen and laborers whose time was recorded under those six codes actually performed non-lineman work for which they were paid appropriately. After crediting Farfield's rebuttal evidence that an average of 1.5 hours of unproductive time per day was billed to these codes, and after reducing the misclassified hours accordingly, the Special Master calculated damages based on the resulting hours recorded to those codes for the 42 employees. The Special Master awarded this recovery while acknowledging that "it [wa]s possible . . . that some of the remaining time . . . was not [lineman] work." A307.

The District Court authorized this burden-shifting as an extension of the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Under *Mt. Clemens*, an FLSA plaintiff bears the initial burden of proving that employees have "in fact performed work for which [they were] improperly compensated" and "produc[ing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687. The burden

"then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687–88. If the employer fails to do so, "the court may then award damages to the employee, even though the result be only approximate." *Id.* (citation omitted). *Mt. Clemens* also permits an award of back wages to non-testifying employees based on the representative testimony of only some employees. *See id.* at 687; *see also Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471–72 (11th Cir. 1982) ("[E]ach employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference.'" (citing *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973)).

According to Farfield, the burden should have remained with Local 98 throughout to prove all damages with specificity. While granting that *Mt. Clemens* burden shifting is appropriate in FLSA cases, Farfield nonetheless argues that it cannot apply in this FCA case. It points out that no cases have applied *Mt. Clemens* to shift the damages burden to the defendant in an FCA case and that, unlike an FLSA case, the underpaid employees will not receive the damages award here. Farfield also challenges the "representativeness" of Local 98's evidence. Appellant's Br. 45–49. We reject both arguments.

1. Mt. Clemens *applies in an appropriate FCA case, like this one.* Farfield correctly notes that *Mt. Clemens* burden-shifting has not been applied in an FCA case prior to this one. But *Mt. Clemens* has been either cited approvingly or applied outright in Davis-Bacon cases. *See, e.g.*, *Janik Paving & Const., Inc. v. Brock*, 828 F.2d 84, 93 (2d Cir. 1987) (charac-

terizing *Mt. Clemens* as "the burden of proof to which the Department [of Labor] and employees [a]re generally subject in wage-standard violations"); *Pythagoras Gen. Contracting Corp. v. U.S. Dept. of Labor*, 926 F. Supp. 2d 490, 495–96, 498–99 (S.D.N.Y. 2013) (affirming DOL Administrative Review Board's invocation of *Mt. Clemens* in Davis-Bacon dispute). And a contractor's false certifications that its workers were paid at the rate legally required by the Davis-Bacon Act are fodder for an FCA claim.[31] *See, e.g.*, *U.S. ex rel. Plumbers*

[31] A line of cases can be read to preclude FCA claims where the falsity of the claim or statement depends on the determination of complex Davis-Bacon classification issues. *See U.S. ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844, 851–53 (E.D. Va. 1995) ("[A] Davis-Bacon Act worker classification dispute, by itself, is not an FCA claim because such disputes must be resolved by the Department of Labor."). Farfield has not argued that the District Court lacked jurisdiction on this basis, and it cites *DynCorp.* only in its Reply brief to counter an unrelated point made by one of amici. *See Barna v. Bd. of Sch. Dirs.*, 877 F.3d 136, 146 (3d Cir. 2017) (noting that we will not "reach arguments raised for the first time in a reply brief or at oral argument"). Of course, the District Court *did* refer this case to the DOL for resolution of worker classification questions. It is unclear whether *DynCorp*'s rationale still applies in the wake of a referral that the agency declines. *Cf. U.S. ex rel. Wall v. Circle C Const., LLC*, 697 F.3d 345, 353–54 (6th Cir. 2012); *U.S. ex rel. Plumbers & Steamfitters Loc. Union No. 342 v. Dan Caputo Co.*, 152 F.3d 1060, 1062 (9th Cir. 1998) (per curiam). And the Supreme Court has said only that "[d]isputes over the proper classification of workers under a contract containing Davis-Bacon provision must be *referred* to the Secretary [of Labor] for determination," not that they must always

& Steamfitters Local Union No. 38 v. C.W. Roen Const. Co., 183 F.3d 1088, 1091–92 (9th Cir. 1999) ("[A] false certification that workers have been paid at the legally required wage rate may give rise to liability under the FCA. If, as the Plumbers allege, [defendant and its agents] submitted such false certifications, it may be liable under the False Claims Act." (citation omitted)).

In this FCA false-certification case, the Davis-Bacon Act supplies the substantive law by which the falsity of Farfield's statements is judged as well as the measure by which employees were misclassified and underpaid. Just because the employees themselves will not receive the underpayments originally owed them does not mean that an employer can, by keeping shoddy records, defeat the recovery of a person or entity statutorily entitled to those damages.[32] Indeed, account-

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be *adjudicated* by the DOL for dependent federal-question claims to proceed. *Coutu*, 450 U.S. at 760 (emphasis added). We are also guided by court decisions "narrowly draw[ing]" other jurisdictional bars to judicial review of Davis-Bacon issues. *Abhe & Svoboda*, 508 F.3d at 1058 ("shield[ing] only the substance of wage determinations from judicial review" (citing *Binghamton*, 347 U.S. at 177; 40 U.S.C. § 3142(b))). So to the extent that we must independently assure the existence of subject-matter jurisdiction, we conclude that the District Court had jurisdiction to adjudicate the applicable worker classifications after it referred the case to the DOL and the DOL declined the referral.

[32] Though Farfield seeks to distinguish FLSA cases on the grounds that the underpaid employees enjoy the recovery, it does not challenge the District Court's conclusion that the

ability would seem at least equally important when a contractor recklessly fails to track its employees' work on a project funded by the public fisc.

While the FCA specifically places the burden of proving damages by a preponderance of the evidence on the Government or, as here, the relator, 31 U.S.C. § 3731(d), that burden is met where the Government establishes "the prima facie value" or "face amount" of the damages. *United States v. Thomas*, 709 F.2d 968, 972–73 (5th Cir. 1983). The burden then shifts to the defendant "to establish the actual value" of the damages. *Id.* *Mt. Clemens* enables a similar process in cases such as this one, where a relator draws prima facie evidence from the defendant's own documents to ascribe a face value to the Government's damages. Nor is the FLSA so unique as to monopolize the principles of *Mt. Clemens*; indeed, they have been applied in other contexts, including, for example, antitrust cases. *See, e.g.*, *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264–266 (1946) ("[T]he wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable.").

Finally, though it argued as much to the District Court, Farfield does not sufficiently raise whether *Mt. Clemens* is inapplicable because Farfield complied with recordkeeping obligations, such as "the three-year record retention" regula-

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measure of the Government's damages is the amount of underpaid wages. We assume without deciding that such damages were "sustain[ed]" by the Government "because of the act of [the defendant]," within the meaning of 31 U.S.C. § 3729(a).

tion under 29 C.F.R. § 5.5(a)(3)(i).[33] A153. We cannot say whether Farfield violated any such requirements. Though Farfield may only have learned of a dispute about pay and hours four years after cessation of work on the Project, we do not know what records, if any, did not survive beyond the three-year period.[34] And Farfield may have ignored its obligations by, for example, failing in the first instance to create records reflecting each worker's "correct classification." § 5.5(a)(3)(i). In any event, the issue is unpreserved—and we doubt that the employer's actual violation of a recordkeeping regulation is the *sine qua non* of *Mt. Clemens* burden-shifting. *See, e.g.*, *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701–02 (3d Cir. 1994) (applying *Mt. Clemens* burden-shifting due to employer's *inadequate* records, with no mention of record-keeping violation).

2. Local 98's evidence was sufficiently representative. Farfield's challenge to the "representativeness" of Local 98's evidence also fails. Local 98 adduced direct testimony from six workers who were classified as groundmen or laborers on the Project yet whose work was logged using the phase codes associated with lineman tasks. Those witnesses testified about the work of 22 of the 42 affected groundmen and laborers (*i.e.*, a 52-percent sample). Contrary to Farfield's argument, this evidence is quantitatively representative. *See, e.g.*, *Mt. Clemens*, 328 U.S. at 680 (8 out of 300 employees testified);

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[33] Farfield argues in its opening brief only that it saw "no need to keep records of each task that every employee performed, nor is such required." Appellant's Br. 50.

[34] We express no view on whether Farfield violated record-keeping obligations.

Reich v. S. New Eng. Tel. Corp., 121 F.3d 58, 66–68 (2d Cir. 1997) (39 of 1,500 employees representative); *Gateway Press*, 13 F.3d at 701 (testimony of 22 out of 70 employees for whom back wages were sought); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (5 out of 28), *cert. denied*, 488 U.S. 1040 (1989); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983) (testimony of 12 employees sufficient for all former employees); *New Floridian Hotel*, 676 F.2d at 472 (23 testified out of 207 receiving an award).

The testimony of the six workers was also qualitatively representative. Farfield cites nothing suggesting that the frequency with which testifying workers performed lineman work under the relevant phase codes was so unique that it was unreasonable to conclude that they devoted "approximate[ly]" the same amount of time as the other affected workers to lineman work. *Mt. Clemens.* 328 U.S. at 688: *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016) ("Reasonable minds may differ as to whether the average time [] calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the [factfinder]. The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing." (citation omitted)). In fact, there was evidence that "most crews were not limited in the work they performed" and that "all workers on a crew performed all of these tasks [installing conduit and pulling wire] at various times." A290–91 (Findings of Fact ¶¶ 135, 140). And to the extent that differences existed, the factfinding seems to have accounted for them.

* * *

Shifting the burden of proof on damages to Farfield after Local 98 made out a prima facie case valuing those damages was justified here, just as it would have been in an FLSA case or a Davis-Bacon proceeding before the DOL. And the testifying workers' incidence of lineman work under the relevant phase codes was representative of that experienced by the non-testifying affected workers.

F. The Award of Attorneys' Fees Was Reasonable.

Finally, we reach Farfield's challenge to the District Court's award of $1,229,927.55 in attorneys' fees to Local 98. Farfield does not claim that the District Court erred in awarding $203,226.45 in costs, nor does it assert that any of the Court's factual findings were erroneous. The core of Farfield's argument is that Local 98's attorneys' fees incurred on the four voluntarily dismissed claims relating to other projects were not fully excluded from the lodestar, and that many of a paralegal's time entries were too vague. Along with Farfield's other arguments, these fail as well.

Under our precedent, district courts have "substantial discretion to determine what constitutes reasonable attorneys' fees because they are better informed than an appellate court about the underlying litigation and an award of attorney fees is fact specific." *United States ex rel. Palmer v. C&D Techs., Inc.*, 897 F.3d 128, 137 (3d Cir. 2018) (cleaned up). So long as the District Court employed correct standards and procedures (as judged under de novo review) and made findings of fact that are not clearly erroneous, we should let its fee award stand. *See, e.g., Pub. Interest Res. Grp. of N.J., Inc. v. Windall*, 51 F.3d 1179, 1184 (3d Cir. 1995).

In a 54-page memorandum opinion and order, the District Court granted in part Local 98's motion for attorneys' fees and costs. The Court made extensive findings of fact and rejected the same arguments Farfield makes here. On the point about limited success, the Court noted that Local 98's attorneys cut over 1,000 hours to account for time spent pursuing work on the four voluntarily dismissed claims. The Court then applied the test announced in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to conclude that no further reductions were warranted because "the legal theories and claim were the same across all five projects." A19–24.[35] And the Court rejected Farfield's challenge to the paralegal's time entries.

The District Court applied the correct legal standards and procedures, and it made extensive findings of fact that are supported by the record and the posture of the litigation. We will affirm its award of attorneys' fees to Local 98.

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[35] Farfield cursorily states that the "multiplier" of fees over and above damages shows that the fees awarded were excessive in relation to the recovery—*i.e.*, the degree of Local 98's success on its claim relating to the Project. Appellant's Br. 53. But here, there was no appreciable "multiplier": Local 98 proved up a judgment of over $1 million (70 percent of which flows to the Government), and the attorneys' fees awarded were more or less equivalent to that judgment. At all events, this recovery is substantial—if not "large" relative to the typical FCA case or the aggregate value of the Project. And "a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 461 U.S. at 440.

VI. CONCLUSION

In the preceding pages, we resolve several issues not previously decided by our Court. Congress's 2009 amendments to 31 U.S.C. § 3729(a)(1)(B) apply retroactively to cases pending on or after June 7, 2008, no matter when the underlying conduct occurred. When deciding how to classify workers on a federally funded project, a contractor must contact either the DOL or the signatories, including the union(s), to the CBA underpinning the prevailing wage determination incorporated into the contract. A contractor's false certifications of Davis-Bacon compliance on payrolls submitted to the Government are material, absent evidence of the Government's past action relevant to associated claims or proof that the contractor's noncompliance was minor or insubstantial. And the damages burden-shifting framework applicable in FLSA and Davis-Bacon cases may apply in the appropriate FCA case. These holdings, along with the foregoing analysis, compel us to affirm the challenged orders of the District Court.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12272

D.C. Docket No. 1:18-cr-20530-UU-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JAVIER ESTEPA,
DIEGO ALEJANDRO ESTEPA VASQUEZ,

Defendants - Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(May 25, 2021)

Before LAGOA, ANDERSON, and MARCUS, Circuit Judges.

LAGOA, Circuit Judge:

Javier Estepa and his brother, Diego Estepa-Vasquez, appeal their convictions and sentences for conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; and wire fraud, in violation of 18 U.S.C. § 1343. Specifically, the brothers argue that the evidence at trial was not legally sufficient to warrant those convictions because (1) the conduct the government alleged, even if true, did not constitute a fraudulent scheme; and (2) the government did not prove that the brothers had the requisite *mens rea*. For the reasons discussed below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Javier[1] owns Aaron Construction Group, Inc. ("Aaron Construction"), which he operates with Diego. Aaron Construction's business included contracting with Miami-Dade County (the "County") to perform repair work in public housing units that were partially funded by the federal government.

The essential facts, viewed in light most favorable to the government, are as follows. Aaron Construction successfully won its bids on the three Requests for Price Quotes ("RPQ") specified in the second superseding indictment. In 2014, Aaron Construction won its bid on RPQ #152574. In 2015, Aaron Construction won its bid on RPQ #158639. And, in 2016, it won its bid on RPQ #171090. The County

[1] For ease of reference, we refer to the defendants by their first names, Javier and Diego.

paid Aaron Construction a total of $3,977,438.47 from January 2014 through September 2016 for these bids.

To obtain a contract for a project that involves more than $2,000 in federal funds, the contractor must agree to comply with the Davis-Bacon Act (the "Act" or "Davis-Bacon"), which requires contractors and subcontractors to pay mechanics and laborers the prevailing local wage for their work, as determined by the United States Secretary of Labor.[2] 40 U.S.C. § 3142(a)–(b). The Act and its implementing regulations include several mechanisms to encourage and monitor compliance. For example, contractors must, on a weekly basis, create and preserve a certified payroll document that lists all employees, their hours worked, and their pay rate. *See* 40 U.S.C. § 3145(a); 29 C.F.R. § 3.4(b). Knowingly and willfully submitting a materially false certified payroll statement is a felony. *See* 40 U.S.C. § 3145(b); 18 U.S.C. § 1001. If the contractor pays covered employees at a rate lower than the prevailing local wage, the contracting agency may withhold from the contractor the amount that should have been paid to the employees. *See* 40 U.S.C. § 3142(c)(3). The contracting agency may also terminate the contract for non-compliance with the

[2] By its terms, the Act applies only to contracts to which the federal government or the District of Columbia is a party. 40 U.S.C. § 3142(a). Related provisions, however, extend the Act's wage requirements to federally-funded housing projects. *See* 29 C.F.R. pt. 1, app. A; *id.* § 5.1. In any event, the bid requests involved in this case expressly refer to "Davis-Bacon" compliance.

Act. *See id*. 40 U.S.C. § 3143. All of these requirements for contractors equally apply to subcontractors.

Aaron Construction regularly bid for, and sometimes obtained, federally-funded contracts with the County's Public Housing and Community Development ("PHCD")—a public housing agency managing over 9,200 units of public and mixed income housing in family and elderly housing developments—to repair vacant housing units and perform other miscellaneous work. The bids were in response to the County issuing RPQs and invitations for bids seeking bids for new projects for the renovation and repair of public housing units. Each RPQ contains a target price that takes into account the requirement for contractors to pay Davis-Bacon compliant wages. After receiving bids, the County awards the contract to the lowest bidder, provided that the bid conforms to the material terms and conditions of the County's invitation to bid associated with the RPQ.

As noted above, Aaron Construction won three RPQs from the County. Aaron Construction's bids for all three RPQs acknowledged the Act's wage requirements and represented that Aaron Construction did not expect to use subcontractors. Yet when federal agents executed a search warrant on Aaron Construction's primary office after opening an investigation into the company, they discovered subcontractor agreements in effect during each RPQ, including more than fifty subcontractor agreements for 2016 alone. These agreements indicated that Aaron

Construction would pay the subcontractors a flat rate regardless of hours expended. Indeed, at trial, several subcontractors testified that the Estepas did not ask them about the amount of hours the subcontractors and their workers worked and, instead, they paid them a per-unit flat fee, regardless of whether they worked overtime.

Despite not inquiring into the actual hours the subcontractors worked, the Estepas signed several certified payroll documents as accurately representing which employees were present at job sites and the hours those employees worked. For example, Javier signed certified payroll documents for the pay periods ending September 7 and 14, 2014, that listed Pedro Guzman as working in Miami. However, U.S. Department of Homeland Security records revealed that Guzman was in fact out of the country during those periods. Rather, Rony Sandoval was the person performing the work attributed to Guzman. Sandoval used Guzman's name and social security number because Sandoval was not legally authorized to work in the United States, and Aaron Construction would write checks made out to Guzman, who, in turn, would pay Sandoval. In another example, Javier and Diego both certified that Nicolas Segura worked certain hours for the week ending April 12, 2015. Segura, however, testified that he was paid a flat fee, never submitted his hours to Aaron Construction, and was at all times a subcontractor rather than an employee of Aaron Construction.

Occasionally, a contractor needs to hire a subcontractor after beginning work to address an unanticipated problem even though the contractor's bid did not indicate it would utilize subcontractors. Should that occur, the contractor is required to notify the County within ten business days of the subcontractors it plans to use. Additionally, the information about the new subcontractor should be included in the final estimate for payment packet for a project, which contractors must submit to the County before the County issues the payment. Despite Aaron Construction using subcontractors for the three bids, the final estimate for payment packets for those projects indicated that Aaron Construction did not use subcontractors.

On June 21, 2018, a grand jury indicted Javier and Diego in connection with the three public housing repair contracts that Aaron Construction procured following successful bids to the County. The grand jury subsequently returned two superseding indictments. The second superseding indictment alleged that the brothers agreed to, and did in fact, scheme to "unlawfully enrich themselves by securing PHCD bid awards and causing [the County] to make payments on those contracts by making materially false and fraudulent representations," and by concealing or omitting "material facts concerning, among other things, their utilization of subcontractors, the number of workers employed on the construction projects, and the status of those workers as full-time employees of Aaron Construction." Count 1 of the second superseding indictment charged the brothers

with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349. Counts 2 through 4 charged the brothers with substantive wire fraud, in violation of 18 U.S.C. § 1343. Counts 5 through 7, which applied to Javier, and Count 8, which applied to Diego, charged the brothers with making false statements to the County's PHCD, which was acting as an agent in implementing a program funded by the federal government, in violation of 18 U.S.C. § 1001(a)(2). Count 9 charged Javier with tampering with a witness, in violation of 18 U.S.C. § 1512(b)(3).

Following pretrial motions, the case proceeded to jury trial at which Javier and Diego were jointly tried. At trial, the government argued that the testimony and evidence demonstrated that the Estepas engaged in a scheme to underpay workers in violation of the Act and to conceal that underpayment from the County, e.g., by hiring and illegally paying subcontractors at flat pay rates, by not reporting the use of those subcontractors to the County, and by classifying some of those subcontractors as employees of Aaron Construction. And, as a result of this scheme, Aaron Construction was able to artificially lower its costs and submit—and win—bids that competitors who paid the requisite wages may not have been able to afford, and the County paid Aaron Construction nearly $4 million between January 2014

and September 2016 in connection with those bids.[3] This testimony and evidence are summarized as follows.

First, Indira Rajkumar-Futch, a procurement manager for the County's PHCD who oversees construction contracts at various public housing units located within the County, testified. Rajkumar-Futch testified that she reviewed the specific bids and contracts related to Aaron Construction at issue in the case and explained the bidding and award process for projects that the County advertises to potential contractors, including how PHCD establishes the initial amount for the potential contract and the RPQ system. She noted that the majority of funds PHCD received for its projects were from the federal government and that a contractor, once being awarded a bid, must comply with the Act's requirements as to worker wage rates, including as to its subcontractors. She also explained that a contractor is required to report whether it intends to use subcontractors and that, if it initially does not intend to use subcontractors but later decides to do so, the contractor must inform the County within ten business days of the subcontractors it intends to use.

The government, through Rajkumar-Futch, introduced into evidence documents related to the 2014, 2015, and 2016 RPQs on which Aaron Construction successfully bid. Rajkumar-Futch testified that Aaron Construction's formal bids

[3] The Estepas stipulated at trial that these payments from the County were interstate wire payments.

for those projects indicated that it would not use subcontractors and that it would comply with the Davis-Bacon requirements. She also testified that she met with both Javier and Diego, and neither ever informed her that they planned to use subcontractors as to the three RPQs. And she stated that if she knew a bidder was providing false information on the forms submitted with the bid, she would not accept the bid. On cross-examination, Rajkumar-Futch agreed that Aaron Construction had a good reputation with the public housing community and that the County approved of the work that Aaron Construction had done for the three RPQs. However, she noted that good work did not excuse lack of compliance with the Act. She also stated that Aaron Construction had not been fined by the County for Davis-Bacon wage violations.

Agent Matthew Broadhurst, an Assistant Special Agent working in the Office of the Inspector General for the U.S. Department of Labor, testified for the government. Broadhurst explained that the Department of Labor opened an investigation into Aaron Construction and that he was the evidence custodian for the search warrant executed on the company's office. Broadhurst testified that the investigators found subcontractor agreements for 2013, 2014, 2015, and 2016, as well as waivers and releases of lien, invoices, checks, and payment reports related to subcontractors and the RPQs at issue. Broadhurst also testified that, during the course of the investigation, he saw Guzman was listed as an employee of Aaron

Construction and that Guzman was not in the country during most of September 2014 based on travel records. Aaron Construction's certified payroll documents, which were signed by either Javier or Diego, and payroll checks, however, showed Guzman working on days when he was not in the United States. As to the certified payroll documents, Broadhurst testified that the forms required the signer to attest to the accuracy of the reported data—employees' hours and wages—and to confirm compliance with Davis-Bacon determinations, and further provided that the willful falsification of any of the statements contained within the form could subject a contractor or subcontractor to criminal prosecution.

Yanith Barrera, an owner of a roofing company who did subcontracting work for Aaron Construction, also testified. Barrera stated that his first subcontractor agreement with Aaron Construction was in early 2017 on the 2016 RPQ that Aaron Construction was awarded. Barrera stated that he was paid for this project via payroll checks and checks to his company, but that Javier never told him he was an employee of Aaron Construction. Barrera stated that the Department of Labor had interviewed him in April and October 2018.

Next, Mauricio Jimenez testified, explaining that he owned a construction company and entered into a subcontractor agreement with Aaron Construction for public housing work. Jimenez testified that he was paid a fixed price for each unit he worked on as a subcontractor, that no one at Aaron Construction ever asked him

the amount of hours he or his workers worked, and that, in his invoices to Aaron Construction, he never listed the amount of hours his workers worked. He stated that he and his workers worked at least sixty hours per week and were never paid overtime. He also testified that neither he nor his workers were ever employees of Aaron Construction and that Javier and Diego told him that they needed the names and social security numbers of three of his employees for payroll, even though Jimenez was employing seven workers at the time. Jimenez was paid with a payroll check and another check for his company, which he would use to pay his other workers. Jimenez also testified that Diego and Javier never told him not to bring undocumented workers to complete the work. Jimenez stated that he was interviewed by someone from the County while at the construction site. Jimenez also testified he never saw or filled out Aaron Construction's certified payroll document that stated he was an employee of Aaron Construction and listed the alleged amount of hours he worked during the week. On cross-examination, Jimenez stated he never filed a complaint about not being paid a proper wage and that Aaron Construction paid him the full amount of money pursuant to the subcontractor agreement.

Franciso Trujillo, a construction manager with the County's PHCD, also testified as a government witness. Trujillo provided testimony similar to Rajkumar-Futch's testimony on the RPQ and bidding processes, including the fact that

successful bidders were required to inform the County about the subcontractors they were using by the end of the project. He also testified that the County relied upon the contractors being truthful when submitting their bids. He agreed that subcontractor employees should not appear on a contractor's certified payroll. Trujillo stated that, while Aaron Construction did "good work" and had a "good reputation," his opinion would have changed if he knew the documents that Aaron Construction had submitted, which were signed by either of the Estepas, were not correct or if the employees were not being paid an hourly wage or overtime. Trujillo also confirmed that contractors such as Aaron Construction were not supposed to have partially filled out HUD interview forms, which are used to determine if Davis-Bacon wage rates are being used by a contractor. On cross-examination, Trujillo agreed that he had conducted five performance evaluations on projects Aaron Construction had worked, grading them to have "superior performance." He could not recall if he had received any complaints that Aaron Construction failed to pay one of its employees or subcontractors. But, on redirect, he testified that, even if the work is done well, it was not acceptable to the County that Aaron Construction did not comply with the Davis-Bacon requirements.

Anna Holder, the vice president of client services for FrankCrum, a company providing payroll and worker's compensation services to Aaron Construction, testified as a government witness. Holder testified that Javier had signed a contract

with FrankCrum specifying the services to be provided, which stated that eighty percent of Aaron Construction's work was subcontracted and that FrankCrum did not process hours for subcontractor employees.

Nicolas Segura also testified as a government witness. Segura, who was operating a company providing maintenance and electrical services, had a subcontracting relationship with Aaron Construction. Segura did not consider himself to be an employee of Aaron Construction. He testified that Aaron Construction paid him lump sums for the subcontracting work he and his company did and that the amount of pay did not differ based on the amount of hours actually worked. He stated that he would send weekly invoices and was paid by Aaron Construction via two checks—one made out to him and one made out to his company. Segura stated that he had other workers, including his brother, help with the subcontracting work for Aaron Construction—whom he paid using the checks he received from Aaron Construction—and that he did not report his or any of the other workers' hours to anyone at Aaron Construction. He also was never asked by the Estepas for the hours he worked. Segura was shown certified payroll documents from Aaron Construction indicating that he and his brother worked thirty-two hours at a rate of $10 per hour for several pay periods, but Segura indicated he never told Aaron Construction that either of them had worked that amount. On cross-

examination, Segura stated that he was interviewed twice by government agents and that no one from Aaron Construction ever told him to hide the method of payment.

Rony Sandoval also testified for the government. Sandoval, who does not have legal immigration status, stated that he met with Javier, discussed doing remodeling work with him, and became an "employee" of Aaron Construction. Sandoval stated that the amount he was paid to remodel units was not based on the amount of hours he worked, but instead was a flat rate, and that he was not paid extra if the work took longer than anticipated. He also testified that he used Guzman's company and its license in order to do work for Aaron Construction and that both Estepas knew he was doing so and had no problem with the arrangement. Sandoval also used Guzman's social security number in order to receive payment. Sandoval was shown Aaron Construction's payroll documents that listed Guzman as working hours instead of him, and Sandoval testified that Guzman did not work with him on the projects.

Sandoval also brought other people to aid him in doing the renovation work, and they would work between eight to ten hours a day. Sandoval, however, never reported the hours he or the other workers worked to Javier and only discussed the "percentage of work that was done during the week" with Diego. And the Estepas never asked him to keep track of the hours worked on each project. He testified that, when it was time for payment, he received a separate check made out to Guzman's

company from Aaron Construction that he would use to pay the other workers. Sandoval further testified that he had a discussion with the Estepas about "what to say if an inspector showed up" to a project site. Sandoval was told to say that he and his workers worked for Aaron Construction and that they were painters, although the remodeling work done was not limited to painting. On cross-examination, Sandoval stated he was interviewed by federal agents but denied being promised any benefit from his cooperation with the investigation.

Guzman also testified as a government witness. Guzman stated that he allowed Sandoval to use his company so Sandoval could work. He testified that he did not know either of the Estepas and had never worked for them. Guzman knew of the agreement that Sandoval had reached with Aaron Construction but did not work on any of the projects or report any hours to the Estepas. He testified that he allowed Sandoval to use his personal information—his driver's license and social security number—in connection with the Aaron Construction projects. He also testified that his company would keep part of the money to cover administrative expenses and payments the company had made in connection with the projects. Guzman also stated he was out of the country on days that Aaron Construction had listed him as working on its payroll documents. On cross-examination, Guzman stated that he told federal investigators that Sandoval gave his company money for operation costs.

Orlando Blanco, the government's last witness, testified that his company entered into subcontractor agreements with Aaron Construction for remodeling work. Blanco was paid a fixed amount of money per unit and did not get more money if a project took more hours than anticipated. Blanco never reported the hours that he worked to the Estepas. After being shown Aaron Construction's certified payroll documents listing Blanco and his cousin as employees of Aaron Construction, Blanco testified that neither of them were Aaron Construction's employees and that they had not reported the hours on the payroll documents.

Following the conclusion of the government's case, the Estepas sought to present testimony to show that, to the extent that the Estepas had made any misrepresentations, the misrepresentations were immaterial. Additionally, the Estepas focused on presenting testimony demonstrating that the County was satisfied with Aaron Construction's work on the RPQs at issue in the case.

Jose Arnaez, a project manager for the County's PHCD, testified that he had supervised Aaron Construction's work "[o]n and off, for about 11 years," and that its work was excellent. However, during the government's cross-examination, Arnaez stated that, if he knew Aaron Construction was not paying Davis-Bacon wages, was not collecting hours, and not paying overtime, his opinion about the company would change. He also stated that there was no reason why Aaron Construction should have had half-filled-out interview forms in its office. Giselle

Castillo, a construction manager for the County's PHCD, testified that she "probably" sent Diego a Davis-Bacon wage interview form. She testified that Aaron Construction always completed its jobs for the County "on time and well." On cross-examination, however, Castillo testified that her opinion on Aaron Construction would be affected if she knew its workers were not being paid Davis-Bacon wages or if the company was not paying the workers for all the hours they worked. She also stated that Aaron Construction had indicated in its bids that it was not planning to use subcontractors and that, if she knew she had received false documents from Aaron Construction concerning subcontractor payments and supply lists, then she would not have processed the documents. She noted that the documentation associated with RPQs could be complicated. But she testified that she did not remember if the Estepas had ever told her they did not understand the forms or had asked her for copies of the forms in Spanish.

Lisette Martinez, an architect for the County and former chief of facilities for PHCD, also testified. Martinez testified that she had evaluated the quality of Aaron Construction's work and generally graded its work as "superior," "outstanding," and "exemplary." Similar to Arnaez and Castillo, Martinez testified on cross-examination that her opinion of Aaron Construction would be affected if she knew it was not paying its workers hourly or the Davis-Bacon wage. And Marcos Caines, a construction project manager for the County, testified that he supervised Aaron

Construction and that its overall performance was good and that the County was satisfied with its work. But, as the other County employees similarly testified, his opinion of Aaron Construction would be affected if he knew they were not paying their workers Davis-Bacon wages or by the hour.

Diego also testified on his own behalf. Diego testified that Aaron Construction had informed the County it planned to use temporary workers for the 2014 RPQ and that he never tried to hide that from the County. He explained that it was more expensive for his company to list workers as temporary employees than subcontractors, as Aaron Construction paid for their worker's compensation and taxes and fees on the workers' paychecks. Diego testified that Aaron Construction paid its subcontractors as temporary employees to ensure the subcontractor's workers would receive Davis-Bacon compliant wages and worker's compensation, as well as to ensure that all the workers were legally authorized to work in the United States. As to the interview forms, he testified he received them from Castillo via email.

Diego additionally testified that Marian Restrepo Sanchez was the Aaron Construction employee responsible for obtaining the information for the projects and filling out the paperwork, including the hours worked on each project. He stated that he and Javier sometimes personally did labor work on the projects they were awarded by the County. He denied having any knowledge about Sandoval using

Guzman's personal information. He testified he relied on Restrepo Sanchez's and the contractors' representations when he signed the certified payroll documents and assumed that all the information was correct. He claimed he did not know that any of the information was false and that he did not intend to defraud the government and did not intentionally falsify documents to receive funds from the County. And he contended that the separate check payments to the workers and contractors were so that the temporary workers would get payroll and the subcontracting company would be paid for the use of their crew. On cross-examination, Diego could not recall which projects he or Javier performed labor work on. He admitted he never told any of the County's employees that he did not understand the documents Aaron Construction was required to fill out for the RPQs. The government showed Diego documents from bids Aaron Construction made prior to 2014 in which Aaron Construction did not report it was using subcontractors, even though subcontractor agreements were found by the government during its investigation. He also admitted that he never disclosed the subcontractor agreements to the County but stated he "had no need to do it because [he] was paying them the payroll . . . [and] the taxes" and "was taking out the deductions, because at the end of the year [he] did a W-2 for them." He claimed he had discussed Davis-Bacon wages with all the subcontractors, although the agreements did not mention the Act. Diego also claimed that he had

time sheets recorded for all the certified payroll documents, although the Estepas had not presented them as evidence.

Upon the conclusion of the trial, the jury acquitted Javier on the witness tampering count but found Javier and Diego guilty on all the remaining counts. The district court sentenced Javier to 51-months' imprisonment and a three-year term of supervised release, and it sentenced Diego to 41-months' imprisonment and a three-year term of supervised release.[4] This timely appeal followed.

II. STANDARD OF REVIEW

Sufficiency of the evidence is a legal question that we review *de novo*. *United States v. Capers*, 708 F.3d 1286, 1296 (11th Cir. 2013). When addressing a challenge to the sufficiency of the evidence, we must draw all reasonable inferences in favor of the government's case and must "assume that the jury made all credibility choices in support of the verdict." *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009). We may not overturn the jury's verdict "if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *Capers*, 708 F.3d at 1297 (quoting *United States v. Herrera*, 931 F.2d 761, 762 (11th Cir. 1991)); *accord Maxwell*, 579 F.3d at 1299.

[4] Following the start of the COVID-19 pandemic, Diego moved for the district court to redesignate the remainder of his sentence to home confinement in light of the pandemic. The district court granted Diego's motion. Additionally, Javier moved for the district court to redesignate the remainder of his sentence to home confinement and for compassionate release. The district court granted both motions and reduced Javier's sentence to time served effective the date of the order—August 10, 2020.

To support a conviction, "[t]he evidence need not be inconsistent with every reasonable hypothesis except guilt, and the jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial." *Capers*, 708 F.3d at 1297 (quoting *United States v. Poole*, 878 F.2d 1389, 1391 (11th Cir. 1989)). The government may introduce circumstantial evidence, but "reasonable inferences, not mere speculation, must support the conviction." *Id.* (quoting *United States v. Mendez*, 528 F.3d 811, 814 (11th Cir. 2008)).

III. ANALYSIS

On appeal, the Estepas contend that the government's evidence was insufficient to sustain their wire fraud and conspiracy convictions for two reasons.[5] First, they assert that there was insufficient evidence of a scheme to defraud because the County did not suffer a financial loss. Second, the Estepas contend that the government presented insufficient evidence of the requisite *mens rea* for the crimes for which they were convicted.

The Estepas were convicted and sentenced on counts of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; and wire fraud, in violation of 18 U.S.C. § 1343. The elements of wire fraud are "(1) intentional participation in a scheme to defraud, and, (2) the use of the interstate . . . wires in furtherance of that scheme,"

[5] Prior to oral argument, the Estepas separately moved to withdraw all the arguments they raised in their initial briefs except their arguments related to sufficiency of the evidence. We granted these motions and thus only address those sufficiency-of-the-evidence arguments.

and the government must prove both elements to sustain a defendant's conviction for wire fraud. *Maxwell*, 579 F.3d at 1299. "A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." *Id.* "A misrepresentation is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision maker to whom it is addressed.'" *Id.* (alteration in original) (quoting *United States v. Hasson*, 333 F.3d 1264, 1271 (11th Cir. 2003)). And, to prevail on the conspiracy charge, the government must additionally prove three things: "(1) agreement between two or more persons to achieve an unlawful objective; (2) knowing and voluntary participation in that agreement by the defendant; and (3) an overt act in furtherance of the agreement." *United States v. Broughton*, 689 F.3d 1260, 1277 (11th Cir. 2012); *see also Maxwell*, 579 F.3d at 1299.

As stated above, we must view the evidence in the light most favorable to the government. *Maxwell*, 579 F.3d at 1299. And based on the record evidence, which we have extensively detailed above, we hold a reasonable jury could find beyond a reasonable doubt that: (1) the Estepas engaged in a scheme to defraud by intentionally making material misrepresentations to the County that it intended to comply with the Davis-Bacon requirements and to not use subcontractors on the RPQs in order to receive federal funds associated with the RPQs from the County; and (2) the Estepas knowingly and voluntarily agreed to commit the scheme to

defraud and pursued overt acts in furtherance of that agreement. The Estepas won RPQ bids for Aaron Construction from the County in 2014, 2015, and 2016. When the Estepas bid on those three RPQs, they knowingly and materially misrepresented their intent to pay wages required by the Act, as well as their intention to use subcontractors on the paperwork they submitted. Despite the Estepas' representations that Aaron Construction would not use subcontractors, federal agents found a large number of subcontractor agreements at the Aaron Construction office during their execution of the search warrant. Additionally, after winning the bids from the County and performing work, the Estepas submitted payment packets to the County, in which the Estepas again represented that Aaron Construction was not using subcontractors. The payment packets included false certified payroll documents, which listed employees who either did not work on the specified jobs or were mislabeled as Aaron Construction employees when they were in fact subcontractors. Indeed, Guzman, who was listed on several of Aaron Construction's payroll documents, had never worked for Aaron Construction and was in fact out of the country during several of the pay periods at issue. Rather, Sandoval, using Guzman's personal information, was performing subcontracting work for Aaron Construction, and Sandoval testified that the Estepas were aware of this arrangement. And several of the individuals who did subcontracting work for Aaron Construction and were listed as "employees"—e.g., Jimenez, Segura, and Blanco—

testified at trial that they were *not* employees of Aaron Construction and had never seen the payroll documents that listed them as such.

Additionally, the evidence, viewed in the light most favorable to the government, shows that the Estepas signed the certified payroll statements listing the hours of its "temporary employees" despite never asking the "temporary employees" what hours they worked or paying them an hourly wage. The subcontractors consistently testified that they were paid flat rates, as opposed to an hourly wage, by Aaron Construction, that they were not paid overtime wages, that they never reported the amount of hours worked to the Estepas, and that the Estepas never inquired about their hours worked. Moreover, several subcontractors testified that they used other workers for the projects they took on for Aaron Construction; the Estepas, however, would only report some of those workers as employees. For example, Jimenez employed seven workers while doing subcontracting work for Aaron Construction, but the Estepas only asked for the information of three of Jimenez's employees.

The Estepas, however, contend that there was insufficient evidence of a scheme to defraud because the County did not suffer a financial loss from their conduct. Specifically, they assert that their misrepresentations did not affect the nature of the bargain because the County's interest was in obtaining high-quality, low-cost work, which is exactly what Aaron Construction provided. Thus, according

to the Estepas, any misrepresentations about whether Aaron Construction used subcontractors were not material, and the jury's convictions cannot be sustained.

This argument is without merit, and our precedent in *United States v. Maxwell* is instructive. In *Maxwell*, the defendant, a vice president of Fisk Electrical Corporation—a large, Texas-based electrical contracting corporation—obtained contracts from Miami-Dade County for which Fisk was not eligible because the work was meant to be performed by qualifying small, local businesses. 579 F.3d at 1288. The defendant obtained the contracts and funds on behalf of Fisk by misrepresenting that a qualifying business was subcontracted to complete the work and receive the program's payments when, in fact, Fisk was doing the work and receiving the payments. *See id.* at 1289–92. A grand jury indicted the defendant on numerous counts of mail and wire fraud, money laundering, and related conspiracies, and the paneled jury convicted the defendant. *See id.* at 1287–88.

On appeal, this Court affirmed the defendant's conviction and sentence. *Id.* at 1307. In doing so, this Court explained that the evidence demonstrated that the defendant made numerous misrepresentations to Miami-Dade County and took actions in support of those misrepresentations. *See id.* at 1290, 1300. This Court found that the misrepresentations were material—even though Fisk had completed the contracts' work—because without those misrepresentations, Fisk and its subcontractor would not have been awarded the contracts from the County. *See id.*

at 1288–89, 1300. This Court rejected the defendant's argument that there was no scheme to defraud because the actions he took "did not deprive the County or the United States of money or property, because, in the end, the County and the United States received the electrical work they sought." *Id.* at 1302. This Court explained that "financial loss is not at the core of these mail and wire frauds," but "[i]nstead, the penal statutes also seek to punish the intent to obtain money or property from a victim by means of fraud and deceit." *Id.* Thus, "[r]egardless of the quality or cost of the work completed," the funds used to pay out the contracts were meant only for qualifying small, local businesses, and Fisk did not qualify as such a business. *See id.* at 1302–03. And this Court noted that "[t]he County and the United States were free to prescribe the rules of this contracting process, and the defendant was not free to dishonestly circumvent the worthy purpose of the set-aside program." *Id.* at 1303.

The Estepas attempt to distinguish *Maxwell* by claiming that it involved "preferential hiring, in which an actual purpose of the contract and the funding is to provide otherwise disadvantaged people opportunities for hiring to correct prior discrimination," while asserting that the Davis-Bacon requirements in this case only relate to a "policing objective" of the government, not the actual act of "defrauding the payor as to the identity of the person hired or the quality or extent of the work." We find this argument wholly without merit. Under federal law, the County could not have lawfully granted Aaron Construction the contracts at issue had the Estepas

not certified that they would comply with the Act. *See* 40 U.S.C. § 3142(a); 29 C.F.R. pt. 1, app. A. And Rajkumar-Futch, the procurement manager for the County's PHCD, confirmed the materiality of the Estepas' misrepresentations when she testified that had the County known about the Estepas' intent to pay workers a flat rate and their failure to disclose the subcontractors, the County would not have awarded the contract. Thus, as a result of the Estepas' misrepresentations, the County paid Aaron Construction money that it otherwise would not have. While several County officials said that they were pleased with the work Aaron Construction performed, those officials also uniformly testified that their opinion of Aaron Construction would be affected if they had known about the misrepresentations. Therefore, a reasonable jury had ample evidence from which it could conclude that the Estepas' misrepresentations were material—and constituted a scheme to defraud—beyond a reasonable doubt.

The Estepas also contend that the government presented insufficient evidence of the requisite *mens rea* for the crimes on which they were convicted—i.e., that they had fraudulent intent, as required for the substantive wire fraud counts, and that they knowingly conspired to defraud, as required for the conspiracy count. Specifically, they argue that their misstatements that certain subcontractors were temporary employees arose from a reasonable and good faith interpretation of a

complex regulatory regime and cannot form the basis of a criminal conviction. We disagree.

As explained above, to sustain a wire fraud conviction, the government must prove that a defendant intended to defraud, meaning he intended to make a material misrepresentation aimed at obtaining the property of another. *Maxwell*, 579 F.3d at 1299, 1302. And, for a conspiracy to commit wire fraud conviction, knowing and voluntary participation in an agreement to achieve an unlawful objective is the relevant intent. *Broughton*, 689 F.3d at 1277.

Viewed in the light most favorable to the government, *see Maxwell*, 579 F.3d at 1299, the record evidence demonstrates that the Estepas' misrepresentations were not isolated mistakes based on their misunderstanding of the paperwork associated with the RPQs. Rather, the Estepas engaged in a pervasive pattern of deceit before, during, and after bidding on the three RPQs enumerated in the indictment. While the Estepas reported to the County that Aaron Construction did not intend to use subcontractors and would comply with the Act and accurately report workers' wages and hours, the Estepas in fact personally negotiated with various subcontractors to work on the RPQs at issue, asking them for personal information such as driver's licenses and social security numbers and agreeing to pay them flat rates for the projects contrary to Davis-Bacon wage requirements. The Estepas' deceit continued with each falsely certified payroll document and the final payment packets from

Aaron Construction that they submitted to the County. Although none of the subcontractors who testified in this case reported their hours to the Estepas for the projects they worked, the Estepas, in Aaron Construction's certified payroll documents, represented that the subcontractors were employees of Aaron Construction and falsely recorded their hours worked and hourly wage. And, while the charged conduct in this case began with the 2014 RPQ, the government introduced evidence that the Estepas submitted documents with misrepresentations about subcontractors even prior to 2014.

Diego testified that he lacked knowledge of the inaccuracies in the payroll documents and assumed the information contained in them was correct, but the jury was free to disregard this testimony and instead credit the contrary evidence the government presented through its witnesses, i.e., that the Estepas knew they were misrepresenting to the County that Aaron Construction was not using subcontractors and they knew they were not complying with the Act. *See id.* at 1301. And, although Diego testified that he and Javier acted in good faith—and did not intend to make the misrepresentations at issue—and that it cost Aaron Construction more money to list the subcontractors as temporary employees, the jury was again free to consider and reject this evidence in light of the overwhelming amount of evidence concerning: (1) the Estepas' intent to make material misrepresentations to procure

the RPQs, and (2) their intent in knowingly and voluntarily agreeing to commit wire fraud and in carrying out actions in furtherance of the agreement.

Based on the record evidence, a reasonable jury could conclude beyond a reasonable doubt that the Estepas had the requisite intents for their convictions. We therefore conclude that the government's evidence was sufficient to demonstrate the requisite *mens rea* elements of the Estepas' wire fraud and conspiracy to commit wire fraud convictions.

IV. CONCLUSION

For the foregoing reasons, we hold that the government presented sufficient evidence to demonstrate that the Estepas: (1) intentionally participated in a scheme to defraud to constitute wire fraud and, (2) knowingly and voluntarily engaged in a conspiracy to commit wire fraud. We therefore affirm the Estepas' convictions and sentences for wire fraud and conspiracy to commit wire fraud.

AFFIRMED.

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY,

PETITIONER,

v.

WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 2020-0035

DATE: September 27, 2021

Appearances:

For the Petitioner:
Terry R. Yellig, Esq.; North Potomac, Maryland

For the Respondent:
Kate O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah Kay Marcus, Esq., Jonathan T. Rees, Esq., and Susannah M. Maltz, Esq.; *Office of the Solicitor, United States Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Randel K. Johnson and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the provisions of the Davis-Bacon Act (DBA) and its applicable and implementing regulations.[1] The District Council of Iron Workers of the State of California and Vicinity (District Council or Petitioner) seeks review of a determination by the Administrator of the United States

[1] 40 U.S.C. §§ 3141-3148; 29 C.F.R. Parts 1, 5, and 7.

Department of Labor's Wage and Hour Division (WHD) that recognized three distinct classifications for ironworkers, rather than a single ironworker classification, in wage determination surveys. As discussed below, we affirm the Administrator's final ruling.

BACKGROUND

In 2013, WHD initiated a survey of prevailing wage rates on residential construction in rural counties in California.[2] Through its wage survey, WHD sought wage data for residential construction projects that were active from January 1, 2012, to June 30, 2013.[3] WHD contacted numerous interested parties, including relevant construction contractors and several international unions, seeking wage data from them and notifying them that the data collection period would end on April 30, 2014.[4]

In response to WHD's requests for wage data, it received data reflecting that some type of ironwork was performed on twelve projects.[5] WHD determined that the data submitted for five projects were not usable because either the project did not involve residential construction or the project did not involve construction during the survey period.[6] The remaining seven projects were reported on Standard Form WD-10, which identified eighteen individual workers on those projects.[7] Each form identified the worker's job classification as "Iron Worker," and the global type of work performed as "Structural/Reinforcing/Ornamental."[8]

WHD contacted the contractors for each of the seven projects in order to determine what kind of ironwork each worker performed.[9] Based on these follow-up inquiries, WHD determined that the workers performed only structural or reinforcing ironwork, and that none of the workers performed any ornamental ironwork. Specifically, WHD determined that three workers employed by two contractors had performed reinforcing ironwork, fifteen workers employed by two contractors performed structural ironwork, and zero workers performed ornamental

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2 Administrative Record (AR) at 2.

3 AR at 2.

4 *Id*. at 2-3.

5 *Id*. at 3.

6 *Id*.

7 *Id*.

8 *Id*.

9 *Id*.

ironwork.[10] Because none of the three ironworker classifications satisfied WHD's six-worker to three-contractor sufficiency criteria, WHD did not publish a prevailing wage rate for each classification.[11]

On October 13, 2016, District Council requested reconsideration of the residential wage determinations for the survey at issue.[12] The Administrator issued a final ruling denying Petitioner's request for reconsideration on July 5, 2019.[13]

On February 25, 2020, the Administrative Review Board (ARB or Board) received District Council's Petition for Review. For the reasons discussed below, we affirm the Administrator's final ruling.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final decisions under the DBA.[14] The ARB assesses the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations, and whether they are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.[15] The Board generally defers to the Administrator as in the best position to interpret the DBA's implementing regulations, and "absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside."[16]

DISCUSSION

The DBA applies to every contract of the United States in excess of $2,000 for construction, alteration, and/or repair, including painting and decorating, of public

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10 *Id*.

11 *Id*.

12 *Id*. at 8-19.

13 *Id*. at 1-7.

14 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

15 *The Residences at Boland Place*, ARB No. 2020-0031, slip op. at 6 (ARB Apr. 30, 2021) (citation omitted); Secretary's Order 01-2014, Delegations of Authority and Assignment of Responsibility, 79 Fed. Reg. 77527, 5(A); 29 C.F.R. §§ 1.1(a), 1.3.

16 *Coal. for Chesapeake Hous. Dev.*, ARB No. 2012-0010, slip op. at 5 (ARB Sept. 25, 2013) (quoting *Titan IV Mobile Serv. Tower*, WAB No. 1989-0014, slip op. at 7 (Sec'y May 10, 1991)).

buildings or public works in the United States.[17] It requires 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 to the various classifications of mechanics or laborers employed under the contract.[18] The minimum wage rates contained in the determinations derive from rates prevailing in the geographic locality where the work is to be performed or from rates applicable under collective bargaining agreements.[19]

The DBA does not prescribe any single method for determining prevailing wages—thus, the statute "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing."[20] Thus, in the absence of a statutory formula for determining prevailing wages, the DBA's implementing regulations charge the Administrator with "conduct[ing] a continuing program for the obtaining and compiling of a wage rate information."[21]

The Administrator surveys wages and fringe benefits paid to workers on four types of construction projects: building, residential, highway, and heavy. In surveying wages and fringe benefits, the Administrator may seek data from "contractors, contractors' associations, labor organizations, public officials and other interested parties . . . ."[22] Other sources of information may include "statements showing wage rates paid on projects that are similar in nature and character, signed collective bargaining agreements, wage rates determined for public construction by State and local officials under State and local prevailing wage legislation, data from contracting agencies, and telephone contact."[23] WHD will publish a wage rate for a classification only if the data for that classification meets its sufficiency requirements.[24] Although a prevailing wage determination is subject

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17 40 U.S.C. § 3142(a).

18 *Id*.

19 40 U.S.C. § 3142(b).

20 *See Coal. for Chesapeake Hous. Dev.*, ARB No. 2012-0010, slip op. at 5 (ARB Sept. 25, 2013) (quoting *Bldg. & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983)).

21 29 C.F.R. § 1.3.

22 29 C.F.R. § 1.3(a).

23 *Coal. for Chesapeake Hous. Dev,*, ARB No. 2012-0010, slip op. at 6 (ARB Sept. 25, 2013); 29 C.F.R. § 1.3(b); Davis-Bacon Construction Wage Determination Manual of Operations 38-40 (Department of Labor 1986) (Davis-Bacon Operations Manual).

24 *Road Sprinkler Fitters Local Union No. 669*, ARB No. 2010-0123, slip op. at 9-13 (ARB June 20, 2012); Davis-Bacon Operations Manual at 82-83; AR at 148.

to ARB review, "the substantive correctness of wage determinations is not subject to judicial review."[25]

The Administrator also has discretion to determine the relevant geographic area in which to collect survey data.[26] The "area" "shall mean the city, town, village, county, or other civil subdivision of the State where the work is to be performed."[27] Under the regulations, the area will normally be the county of the particular project unless sufficient data is not available.[28] In such instances, the Administrator may expand the data set to include other surrounding counties or use statewide data if the lesser subdivisions do not yield sufficient data. However, the Administrator may not mix survey data from metropolitan counties with data from rural counties.[29]

District Council sought reconsideration of WHD's August 2015 residential wage determinations for certain rural counties in California that did not yield a wage determination for the ironworker classification.[30] District Council argued that WHD received sufficient data for a survey-wide determination, and that WHD erred by dividing the single ironworker classification into three different ironworker classifications—structural, reinforcing, and ornamental—which it believes did not reflect the ironwork practice area as a whole.[31, 32]

Upon review and reconsideration, the Administrator denied District Council's request.[33] The Administrator explained that in exercising her authority to designate ironworkers into three distinct classifications, WHD has historically regarded structural, reinforcing, and ornamental ironworkers as separate classifications.[34] The Administrator also relied upon the work actually performed by the workers for

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25 *Coal. for Chesapeake Hous. Dev.*, ARB No. 2012-0010, slip op. at 5 (ARB Sept. 25, 2013) (quoting *In re Dep't of the Army*, ARB Nos. 1998-0120, -0121, -0122, slip op. at 25 (ARB Dec. 22, 1999) (citations omitted)).

26 29 C.F.R. § 1.2(b).

27 *Id.*

28 29 C.F.R. § 1.7.

29 29 C.F.R. § 1.7(b).

30 AR at 8.

31 *Id.*

32 The District Council also originally disputed WHD's "Craft/Rate Sufficiency Criteria: Data [must be] received on at least 6 employees from 3 contractors with no more than 60% from any one contractor." AR at 17-18. However, in its Petition for Review, the District Council notes that it is no longer challenging WHD's use of that sufficiency standard. District Council's Petition for Review (Pet.) at 2.

33 AR at 1.

34 *Id.* at 4.

whom wage data was submitted during the survey process.[35] Finally, the Administrator relied upon the District Council's collective bargaining agreement, which distinctly separated ironworkers into the same three "job classifications."[36]

District Council argues on appeal that the Administrator abused her discretion when she: (1) affirmed WHD's decision to expand the geographic scope of the survey[37] and seek clarification for the specific type of work performed by each ironworker in the survey;[38] (2) recognized the ironworker three sub-classifications as "key classes;"[39] and (3) failed to set a prevailing wage rate for a single "ironworker" classification.[40]

Upon consideration of the parties' briefs on appeal,[41] and having reviewed the evidentiary record as a whole, we conclude the Administrator did not abuse her discretion by recognizing three distinct ironworker classifications, and by not publishing a wage determination for each of the three ironworker classifications. None of District Council's arguments demonstrate that the Administrator abused

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35 *Id*. at 3.

36 *Id*. at 5.

37 Pet. at 8-10.

38 *Id.*; District Council's Reply Brief (Reply Br.) at 15-22.

39 Reply Br. at 15-22.

40 Pet. at 11-18; Reply Br. at 24-27.

41 The Administrator argues that the District Council's Petition for Review, filed almost eight months after the Administrator's final ruling, was untimely. Administrator's Response Brief at 13. Under 29 C.F.R. § 7.9(a), a party is required to file its petition for review "within a reasonable time from" the Administrator's final ruling. Under ARB precedent, "within a reasonable time" is based upon the specific circumstances of the case. *See Pizzagalli Constr. Co.*, ARB No. 1998-0090, slip op. at 4, n.2 (ARB May 28, 1999) (finding that filing a petition for review nine months and two weeks after the Administrator issued her final ruling satisfied the "reasonable time" requirement "under the specific circumstances of this case[.]"). In explaining why it waited almost eight months to contest the final ruling, District Council notes it needed additional information, and that it requested such information from WHD via several telephone calls and letters, and then, submitted a Freedom of Information Act (FOIA) request. WHD finally responded to the FOIA request almost nine months later, but the information did not provide District Council with the additional information that explained WHD's actions during the California wage survey. Moreover, District Council also requested reconsideration from the Administrator in December 2016 and did not receive a final ruling until two years, eight months, and twenty-two days later. WHD does not contest that these delays in responding to the District Council occurred. While we are mindful of the need for challenges to prevailing wage rates be filed as soon as possible so that the matters can be efficiently resolved and contract terms settled, we find that the Petition for Review was filed in a reasonable time based on the facts of this case.

her discretion to set a prevailing wage rate. In expanding the geographic scope, and dividing ironworkers into three distinct classifications, the Administrator and WHD reasonably followed the prescribed DBA regulations, agency guidance, and past practices in conducting the wage survey. Ultimately, the survey responses did not satisfy WHD's six-worker to three-employer sufficiency requirement, and consequently, WHD did not issue a prevailing wage determination for each ironworker classification.

In sum, we find the Administrator acted reasonably and within her discretion in designating structural, reinforcing, and ornamental ironwork into three separate and distinct job classifications. Accordingly, we summarily **AFFIRM** the Administrator's final ruling.

SO ORDERED.

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

SYSTEM TECH, INC.,

PETITIONER,

v.

UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATOR, WAGE AND HOUR DIVISION,

RESPONDENT.

ARB CASE NO. 2020-0029

DATE: May 25, 2021

Appearances:

For the Petitioner:
James F. Jacobson, Esq.; *Sasser & Jacobson, PLLC*; Boise, Idaho

For the Respondent:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Jonathan T. Rees, Esq.; Sarah Caudrelier, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This matter is before the Administrative Review Board (Board or ARB) pursuant to the provisions of the Davis-Bacon Act (DBA) and "Related Acts" (DBRA), 40 U.S.C. § 3141 et seq. (2006), and the applicable implementing regulations at 29 C.F.R. Parts 1, 5, and 7 (2020). The DBA applies to federal

construction projects and the DBRA apply DBA labor standards to certain federally assisted construction projects. System Tech, Inc. (Petitioner) seeks review of a determination by the Administrator of the U.S. Department of Labor's Wage and Hour Division (WHD) denying its request to add a "Telecommunications Installer" classification at a proposed wage rate of $19.75. As discussed below, we affirm the Administrator's determination.

BACKGROUND

On August 25, 2017, WHD approved the eighth modification of a wage determination (ID27) involving Department of Energy's (DOE) contract numbers 179446 (Cybercore Integration Center) and 179447 (Collaborative Computer Center) relating to DOE's plan to lease-build two facilities at the Idaho National Laboratory campus in Bonneville, Idaho. Petitioner was awarded a subcontract to perform telecommunications work on the project.

On November 15, 2018, DOE submitted a request for conformance on behalf of System Tech for a "Telecommunications Installer" at a proposed rate of $15.00 per hour plus $4.75 in fringe benefits, for a combined total of $19.75. On November 29, 2018, WHD's Branch of Construction Wage Determination (BCWD) denied the conformance request, finding that the proposed rate did not bear a reasonable relationship to the other wage rates contained in ID27. BCWD instead approved a rate of $27.77 per hour plus $14.08 in fringe benefits, for a combined total of $41.85.

Petitioner requested review and on April 5, 2019, BCWD affirmed its original conformance determination. BCWD explained that a proposed classification conformed to a wage determination should take into consideration wage rates within the same general classification category, and whether those wage rates are predominantly union prevailing wage rates or predominantly weighted average prevailing wage rates. BCWD found that the proposed Telecommunications Installer position is a skilled crafts classification and that ID27 contained 12 skilled crafts classifications, 8 of which reflected union rates and 4 of which reflected weighted-average rates. BCWD found that the proposed rate of $19.75 did not bear a reasonable relationship to the union skilled classification rates found in ID27.

Petitioner requested reconsideration of BCWD's decision by the Administrator. On December 20, 2019, the Administrator issued a Final Ruling affirming the BCWD's decision, finding that the proposed rate was more than 50% lower than nearly every union skilled classification rate in ID27, and was also lower

than a majority of the non-union skilled classification rates. On February 4, 2020, Petitioner filed a petition for review before the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final decisions under the DBA.[1] The ARB's review of the Administrator's ruling is in the nature of an appellate proceeding and the Board "will not hear [factual] matters de novo except upon a showing of extraordinary circumstances."[2] The ARB will assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations, and whether the rulings are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA.[3] "In considering the matters within the scope of its jurisdiction," the Board acts "as fully and finally as might the Secretary of Labor."[4]

In establishing a conformed rate for a wage classification, "the Administrator is given broad discretion 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 . . . ."[5]

DISCUSSION

Through the conformance process, the Administrator may grant a measure of relief to a contractor "[w]here, due to unanticipated work or oversight, some job classifications necessary to complete the work are not included in the wage

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1 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020). References to the DBA in this decision also include the DBRA unless otherwise noted.

2 29 C.F.R. § 7.1(e).

3 *William J. Lang Land Clearing, Inc.*, ARB Nos. 2001-0072, -0079; ALJ Nos. 1998-DBA-00001 through -00006, slip op. at 5 (ARB Sept. 28, 2004).

4 29 C.F.R. § 7.1(d).

5 *Millwright Local 1755*, ARB No. 1998-0015, slip op. at 7 (ARB May 11, 2000) (quoting *Envtl. Chem. Corp.*, ARB No. 1996-0113, slip op. at 3 (ARB Feb. 6, 1998)).

determination . . . ."[6] However, the conformance procedure is not intended to be a substitute process for challenging wage determinations in a timely manner."[7] The Administrator has broad discretion to accept or reject any given conformance request.[8]

In order for a proposed classification to be added to or conformed with an existing wage determination, the following criteria must be met: (1) the work to be performed by the classification requested is not performed by a classification already 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.[9]

The issue before us on appeal is whether the Administrator reasonably concluded that the proposed rate did not bear a reasonable relationship to the other wage rates in the applicable wage determination. Petitioner argues that the Administrator's interpretation of the wage determination is unreasonable. Specifically, Petitioner argues that the Administrator should have looked to job duties and considered the similarities of the Telecommunications Installer and Painter positions (the lowest union skilled classification rate in ID27), relying on *Strickland*, ARB No. 2013-0088 (ARB June 30, 2015). In other words, Petitioner argues that the job duties and other factors of a Telecommunications Installer do not merit a combined wage rate of $41.85.

However, the Administrator was not required to engage in detailed comparisons of job duties or skill levels of the different classifications found in the applicable wage determination in establishing a conformed rate for the requested wage classification.[10] AAM 213 instructs that if the applicable wage determination contains predominantly union prevailing wage rates for skilled crafts classifications, then it is appropriate to examine the entirety of the union skilled

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6 *Clark Mech. Contractors, Inc.*, WAB No. 95-03, 1995 WL 646572, at *2 (WAB Sept. 29, 1995) (available on Westlaw).

7 *Id.*

8 *Id.*

9 29 C.F.R § 5.5(a)(1)(ii)(A); All Agency Memorandum (AAM) No. 213 (March 22, 2013).

10 AAM No. 213.

classifications in establishing a conformed rate.[11] The Board's *Strickland* decision does not require the Administrator to look at job duties or consider other factors concerning different classifications in a wage determination to establish a conformed rate. As the union-negotiated wage rates make up the majority of skilled crafts classifications in ID27, the Administrator reasonably considered these rates in rejecting the proposed wage rate and proposing a wage rate reflecting the median rate of the union skilled classification rates.[12]

CONCLUSION

We hold that the Administrator's ruling that System Tech's proposed wage rate of $19.75 did not bear a reasonable relationship to the wage rates in the applicable wage determination was a reasonable exercise of her discretion. Accordingly, because the Administrator did not abuse her discretion in rejecting the proposed conformance request and substituting in its place a wage rate for the Telecommunications Installer classification that bears a reasonable relationship to the wage rates in the wage determination, we **AFFIRM**.

SO ORDERED.

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11 *Id.*

12 *Id.*; 29 C.F.R § 5.5(a)(1)(ii)(A).

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

THE RESIDENCES AT BOLAND PLACE, RICHMOND HEIGHTS, MISSOURI

ARB CASE NO. 2020-0031

DATE: April 30, 2021

With respect to Wage Rate Determination related to FHA Project No. 085-35566

Appearances:

For the Petitioner:
Robert J. Golterman, Esq.; *Lewis Rice LLC*; Saint Louis, Missouri

For the Respondent, Administrator, Wage and Hour Division:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus, Esq.; Jonathan T. Rees, Esq.; and Sara A. Conrath, Esq.; *United States Department of Labor, Office of the Solicitor;* Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

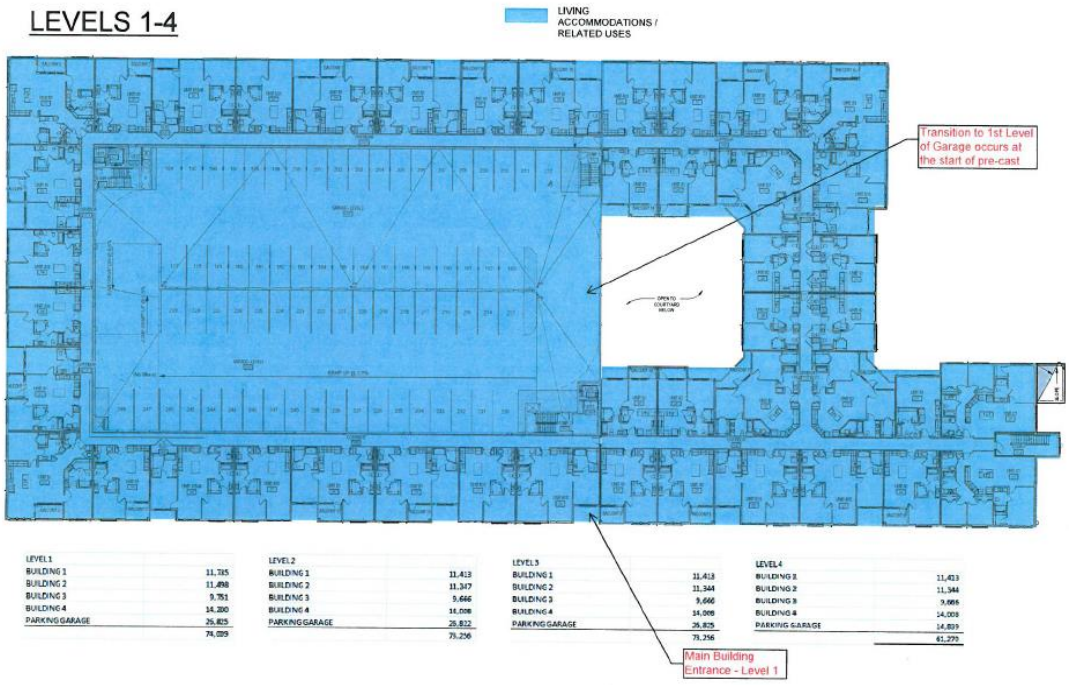
PER CURIAM. This matter is before the Administrative Review Board (Board or ARB) pursuant to the provisions of the Davis-Bacon Act (DBA) and "Related Acts" (DBRA), 40 U.S.C. § 3141 et seq. (2006), and the applicable implementing regulations at 29 C.F.R. Parts 1, 5, and 7 (2020). The DBRA apply DBA labor standards to certain federally-assisted construction projects, such as the project at issue here. P & M Holdings, LLC (Petitioner) is the owner of the project, which is known as "The Residences at Boland Place" (Boland Place). Petitioner seeks review of a determination by the Administrator of the U.S. Department of Labor's Wage and Hour Division (WHD) that a "building" construction wage rate under the DBA applied to Boland Place.[1] As discussed below, we affirm the Administrator's determination.

[1] *See* 12 U.S.C. § 1715l(d)(4); 29 C.F.R. § 5.1(a).

BACKGROUND

Boland Place is a planned, multi-use development project in Richmond Heights, Missouri. The architectural plans for Boland Place show four above-grade (i.e., above ground) stories on each level, and a Club Level beneath the upper four levels, which sits on top of the Sub Level. For illustrative purposes, we included the Petitioner's three separate and distinct floor plans for the four above-grade stories of residential apartments, the Club Level, and Sub Level, which we discuss in turn.[2] Petitioner color-coded the residential space or related uses in blue, retail spaces in purple, and the public parking garage areas in green.

1. Floor Plan for the Upper Floor Levels



From top to bottom of Boland Place, the first section shows the floor plan for each of the four upper levels. The residential units are located on the perimeter and displayed in blue. The four upper levels have a wood-frame structure, and each level contains approximately 43 apartments. The interior portion (also in blue) is the planned parking lot, which includes a transition or access to the other levels of the garage. The white square represents an "open courtyard" space that runs the entire vertical length of the four levels.

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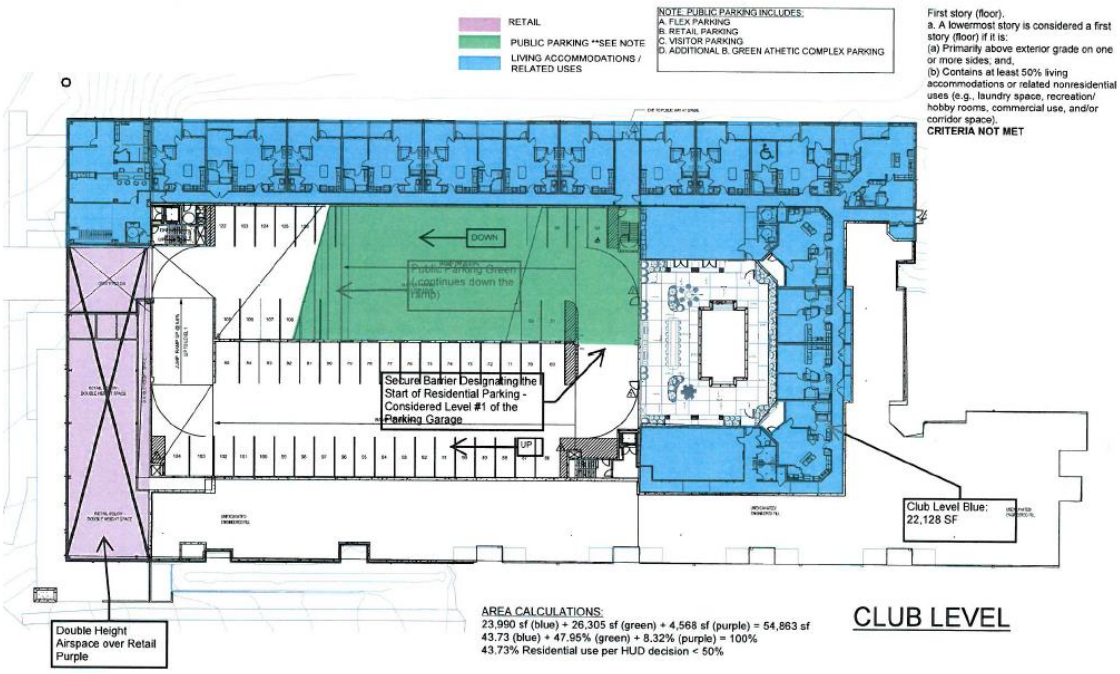
[2] The Petitioner submitted the floor plans for the four above-grade stories of residential apartments, the Club Level, and Sub Level in its Petition for Reconsideration of the wage rate determination by the WHD's Branch of Government Contracts Enforcement (BGCE). *See* Administrative Record (AR) at 123-125.

These four levels are also structurally attached with the garage space at the lower levels. Entry into all levels of the garage is located in the Sub Level.

2. Club Level Floor Plan

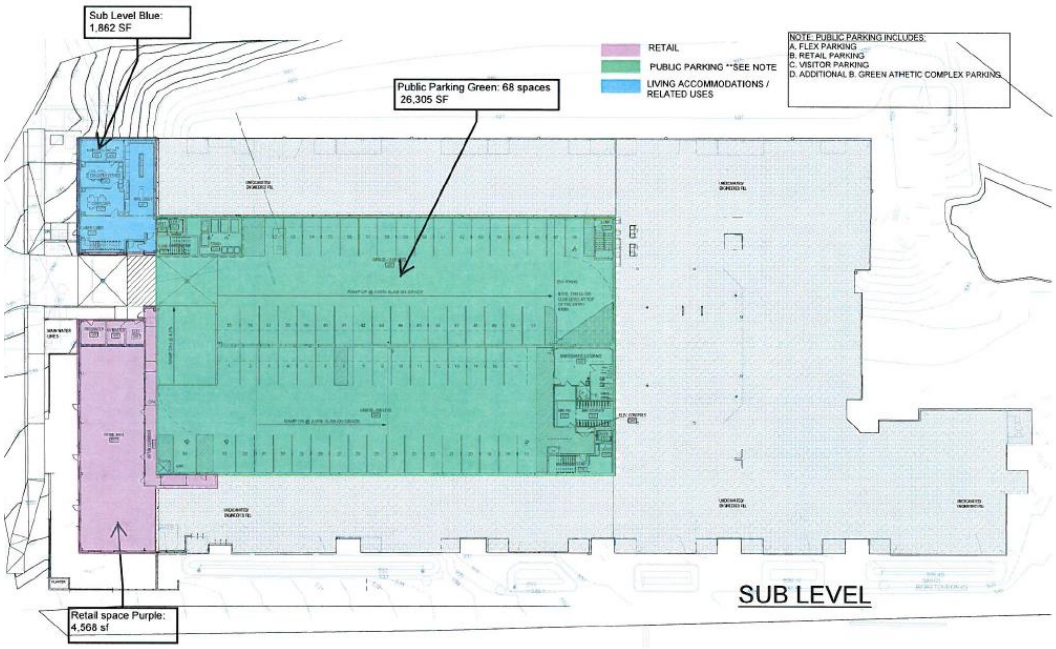


The second floor plan shows the Club Level, which is substantially above ground on two sides. It contains 13 residential apartments and space for related uses, as shown in the blue color in the floor plan above. The floor plan for the Club Level also contains a double-height retail space (purple) that sits on top of the Sub Level, and a public parking area (green). The white color in the middle of the floor plan shows the space for residential parking, while the white color on the right side (within the blue colors on three sides) shows the open courtyard for resident use. The Club Level floor plan shows two entrance doors from the parking garage into the courtyard, one on either side of the secure barrier.

3. Sub Level Floor Plan

The third section of the floor plan shows the Sub Level, which is above ground on only one side and does not have any residential apartment units. The floor plan for the Sub Level includes the double-height retail space (purple) located underneath the Club Level, a public parking garage (green), and some related non-residential space. The area at the top of the ramp up (upper right hand corner of the green shaded area) notes: “this is the Club Level at the top of the entry ramp.” The floor plan displays three sets of stairs, two elevators with connected vestibules, trash, maintenance and storage, and bike storage are also shaded green. The stairs

and elevators connect to each of the upper levels; each level includes entrances to the Project's elevators.



WHD determines the locally prevailing rates for job classifications used on construction projects and issues wage determinations that reflect those rates.[3] In determining the proper wage rate classification for a construction project, the Department of Labor (DOL) has distinguished among four general types of construction: building, residential, heavy, and highway.[4] The WHD generally applies a "residential" construction wage rate determination to apartment buildings of no more than four-stories in height.[5] In contrast, a "building" construction wage rate applies to apartment buildings of five or more stories.[6]

On October 30, 2018, the Department of Housing and Urban Development (HUD) determined that Boland Place is an apartment complex over four stories in height.[7] Therefore, HUD applied a "building" construction wage determination to the work on Boland Place, rather than a "residential" wage determination, because

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3 *See* 40 U.S.C. § 3142; 29 C.F.R. Part 1.

4 *See* 29 C.F.R. § 1.3(d). In addition, DOL's All Agency Memorandum (AAM) AAM No. 130 provides guidance concerning the determination of the appropriate wage determination for specific types of construction. *See* AAM No. 130 (March 17, 1978) (available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/memo-131.pdf).

5 AAM No. 130 at 4.

6 *Id*. at 2-3.

7 Administrator's Determination at 2.

apartment buildings over four stories are categorized with a "building" wage determination.[8]

On April 9, 2019, Petitioner's architect requested review of the "building" wage determination, claiming that the building only had four stories because the partially below grade Club Level was not the first story of the apartment complex.[9] On May 15, 2019, the WHD's BGCE issued a determination that the Club Level met the requirements to be considered the first floor, and, therefore, HUD had properly classified Boland Place as a five-story building with a "building" wage determination.[10]

On July 17, 2019, Petitioner requested reconsideration of BGCE's determination. At this stage, Petitioner reframed its argument by now claiming that the Club Level and Sub Level should be considered a single "lower level" rather than claiming that the Club Level did not constitute the first story of Boland Place.[11] Petitioner alleged that the single "lower level" utilized less than 50% of its space for residential purposes, and, thus, the "lower level" did not constitute a "story" in the apartment complex.[12] On January 9, 2020, the Administrator affirmed the BGCE's determination.

On February 12, 2020, Petitioner filed a petition for review before the ARB of the Administrator's ruling that a "building" wage determination applied to the construction work at Boland Place, rather than a "residential" wage determination.

ADMINISTRATOR'S DETERMINATION

The issue in dispute before the Administrator was whether Boland Place is a five-story building ("building" construction wage rate) or a four-story building ("residential" wage rate). Under the DBA, a floor that has at least one side above grade and contains at least 50% residential or related non-residential area is considered the first story for wage determination purposes. The Administrator rejected the Petitioner's argument that the Club Level and the Sub Level should be considered "a single level or story" that has less than 50% of the space dedicated to living accommodations and related nonresidential uses, thus making Boland Place a four-story building with a "residential" wage rate.[13] Instead, the Administrator

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8 *Id.* HUD relied on the Wage and Hour Division's input to make the determination. *Id.*

9 Architect's Request for Reconsideration at 4.

10 Administrator's Determination at 2.

11 Petitioner's Request for Reconsideration at 2.

12 *Id.* at 3.

13 Administrator's Determination at 5-6.

determined that Boland Place was a five-story building under the DBA, and, therefore, applied a "building" construction wage rate to the Boland Place project. The present appeal followed.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final decisions under the DBA.[14] The ARB's review of the Administrator's ruling is in the nature of an appellate proceeding and the Board "will not hear [factual] matters de novo except upon a showing of extraordinary circumstances."[15] The ARB will assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA.[16] "In considering the matters within the scope of its jurisdiction," the Board acts "as fully and finally as might the Secretary of Labor."[17]

DISCUSSION

The issue before us on appeal is whether the Administrator reasonably concluded that Boland Place is five-story building, and, therefore, correctly applied a "building" construction wage rate determination to Boland Place under the DBA. Considering the evidence and arguments the Petitioner submitted to the Administrator at the time, we decide that the Administrator's determination that a "building" construction wage determination applied to the Boland Place project was a reasonable exercise of her discretion to implement and enforce the DBA labor standards.

Petitioner essentially raises two arguments in challenging the Administrator's decision. First, Petitioner argues that the Administrator did not have a reasonable basis under the DBA to apply a "building" wage determination for all the construction work at Boland Place, rather than a "residential" wage determination. Second, Petitioner argues that, at the very least, Boland Place is entitled to a "split-wage" determination because the carpentry work

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[14] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020). References to the DBA in this decision shall include the DBRA unless otherwise noted. *See* 29 C.F.R. § 5.1(a).

[15] 29 C.F.R. § 7.1 (e); *Terrebonne Par. Juvenile Justice Ctr. Complex*, ARB No. 2017-0056, slip op. at 3 (Sep. 4, 2020) (citations omitted).

[16] *William J. Lang Land Clearing, Inc.*, ARB Nos. 2001-0072 through -0079; ALJ Nos. 1998-DBA-00001 through -00006, slip op. at 5 (ARB Sept. 28, 2004).

[17] 29 C.F.R. § 7.l (d).

on the wood frame structure of the "building" should be classified as "residential." We will address both arguments in turn.

1. "Building" Construction or "Residential" Construction Wage Determination

Under the DBA, the Secretary of Labor must determine locally prevailing wage rates based upon wages paid to "corresponding classes of laborers and mechanics employed on *projects of a character similar* to the contract work" of the relevant locality "in which the work is to be performed."[18] In determining "projects of a character similar," the DOL has different wage determinations distinguished by four general types of construction: building, residential, heavy, and highway.[19]

Whether an apartment building is classified as "residential" or "building" construction for wage determination purposes depends, in part, on the apartment structure's number of stories – five or more stories indicates that a "building" classification applies, while four or fewer stories means "a residential" classification applies.[20]

Levels that are below grade typically count as basement levels, not as a "story" in an apartment "building" for wage determination purposes. However, when the lowermost level is partially below grade, the level can count as the "first story" of an apartment "building" when it:

- (a) is primarily above exterior grade on one or more sides,[21] ***and***
- (b) contains at least 50% living accommodations or related nonresidential uses.[22]

On January 9, 2019, the Administrator affirmed the BGCE's determination that a "building" construction wage determination applied because the Club Level is the first story and, therefore, Boland Place has five stories.[23] Moreover, the Administrator rejected the Petitioner's argument that the Club Level and Sub Level are a "single level" because there is "substantial area of floor space at the Club

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18 40 U.S.C. § 3142(b) (emphasis added); *see also* 29 C.F.R. § 1.2.

19 *See* 29 C.F.R. § 1.3(d); *see also* AAM No. 130.

20 AAM No. 130 at 3-4.

21 This component is undisputed because the Club Level and Sub Level are above exterior grade on one side. Petition for Review at 3.

22 *See St. Francis Hosp. Renovation Project*, No. 85-11, at 4 (WAB Jan. 30, 1986). Three other criteria can be used to determine whether a lowermost level is the "first floor," but those criteria are not at issue here. *Id.*

23 Administrator's Determination at 5-6. *See also* BGCE's Determination at 3.

Level that sits atop much of the floor space of the Sub Level."[24] Similarly, "it appears that of the two levels, only the retail space (4,568 square feet) on the Sub Level is open into the Club Level above it."[25]

On appeal, Petitioner disputes the Administrator's application of a "building" wage determination, rather than a "residential" wage determination. Petitioner claims that the Administrator had no reasonable basis to conclude that Boland Place is five stories. Similarly, the Administrator erred in concluding the Sub Level and Club Level are separate levels. Instead, the Administrator should have considered the Club Level and Sub Level as "a single lower level" due to Boland Place's "unique structure."[26] Petitioner further alleges that the "single lower level" has a residential use of 43.73%, and a total commercial use of 56.27%. Thus, Petitioner alleges that the one "lower level" should not count towards the number of stories because it has a residential use of less than 50%.

Petitioner's argument for a single "lower level" is unpersuasive because: (1) Petitioner fails to clearly articulate why Boland Place's "unique structure" requires that the Sub Level and Club Level constitute a single "lower level," and (2) the Sub Level and Club Level each have their own floor plan, and the Club Level has "substantial area" over the Sub Level.

We agree with the Administrator's determinations that the Club Level and Sub Level are separate levels, that the Club Level is the first story of Boland Place, and that Boland Place is five stories. Accordingly, the Administrator's ruling that a "building" wage determination applied to Boland Place was a reasonable exercise of her discretion.[27] We find the Administrator reasonably concluded that a "building" construction wage determination applied to Boland Place under the DBA. Therefore, we affirm the Administrator's determination.

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[24] Administrator's Determination at 4.

[25] *Id*.

[26] Petition for Review at 3. Petitioner seems to argue that Boland Place has a "unique structure" because there is a grade differential from the northeast to the southwest corner of the site, which allowed for the construction of a large "lower level," with retail, residential, and parking uses. *Id*. at 3-4.

[27] In addition, Petitioner argues that "other factors" should be considered in support of a "residential" wage determination because the "project does not readily fall within any category." However, Boland Place readily falls into the category of a "building" wage determination because it is clearly five stories. Thus, in light of our holding that Boland Place is a five-story apartment building, we do not address the "other factors" raised by Petitioner.

2. Split-Wage Determination

Petitioner argues that, if the Board affirms the Administrator's "building" wage determination, Boland Place is at least entitled to a "split-wage" determination whereby the carpentry work on the wood frame structure is classified as "residential."[28] Petitioner claims it first requested a "split-wage" determination before the Administrator. However, as detailed below, Petitioner requested a "split-wage" determination for the first time on appeal. Under our well-established precedent, the Board declines to consider arguments that a party raises for the first time on appeal.[29]

Petitioner claims that its argument for a "split-wage" determination on appeal cannot be fairly characterized as a "new" argument before the Board, but is "best viewed as a more detailed exposition of an issue already placed before the Administrator."[30] However, Petitioner's request on appeal for a "split-wage" determination is distinct from Petitioner's argument before the Administrator for a "residential" wage determination, and no legal legerdemain can make it otherwise.

Before the Administrator, Petitioner explained that the project "is essentially a split wage job."[31] However, Petitioner's "split wage" reference was in the context of its request for a "residential" wage determination.[32] Petitioner was merely showing that if the Administrator issued a "residential" wage determination, it would have a "minimal impact" on wages because local bargaining agreements would still require different wages for certain workers.[33] In other words, Petitioner highlighted "split wages" only to persuade the Administrator to apply a "residential" wage rate, not as a request for the Administrator to issue a "split-wage" determination.[34]

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[28] Petition for Review at 8.

[29] *Privler v. CSX Transp., Inc.*, ARB No. 2018-0071, ALJ No. 2018-FRS-00021, slip op. at 3 (ARB Mar. 24, 2020).

[30] Petitioner's Reply Brief at 14-15.

[31] Petitioner's Request for Reconsideration at 4.

[32] Administrator's Response Brief at 26, n.11.

[33] Petitioner's Request for Reconsideration at 3.

[34] Petitioner also never raised arguments consistent with a request for a split-wage determination or cited to relevant authority for such a determination. In contrast, on appeal, Petitioner clearly argues for a split-wage determination. Petitioner claims that, in accordance with AAM No. 130 and 131, the residential carpentry work on the four-story wood frame is "substantial," amounting to 18.45% of the total project cost. Thus, Petitioner contends Boland Place is entitled to a split-wage determination. However, these arguments are noticeably absent from Petitioner's arguments before the Administrator, which further illustrates how Petitioner first raised the split-wage determination on appeal.

In addition, the Administrator contends that Petitioner first requested a split-wage determination on appeal. Thus, the Administrator claims it could not have erred by failing to issue a split-wage determination because the issue was not presented for consideration to the Administrator.[35] Indeed, Petitioner does not argue on appeal that the Administrator erred by failing to issue a split-wage determination. Instead, Petitioner claims that Boland Place is entitled to a split-wage determination.

The Board determines that Petitioner first requested a split-wage determination on appeal. Thus, it is a new argument, which the Board declines to consider. Moreover, because the issue was not before the Administrator, the Administrator could not have erred when she did not issue a split-wage determination.[36]

CONCLUSION

We hold that the Administrator's ruling that a "building" wage determination applied to Boland Place was a reasonable exercise of her discretion. In addition, we decline to address whether Boland Place is entitled to a "split-wage" determination because the issue was first raised on appeal. Accordingly, we **AFFIRM** the Administrator's determination.

SO ORDERED.

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[35] Administrator's Response Brief at 27.

[36] Petitioner also requests oral argument pursuant to 29 C.F.R. § 7.14. However, having resolved the issues before the Board, we decline Petitioner's request for oral argument.

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

NEVADA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; ASSOCIATED BUILDERS AND CONTRACTORS, NEVADA CHAPTER; and NEVADA TRUCKING ASSOCIATION, INC.

ARB CASE NO. 2020-0058

DATE: July 29, 2021

With Respect to Review and Reconsideration of Davis-Bacon Wage Det. Nos. NV20190002, NV20190004, NV 20190005, NV 20190007, NV20190008, NV20190009, NV20190010, NV20190011, and NV20190013, Highway Construction in Elko; Eureka; Humboldt; Pershing; White Pine; Churchill, Lander, Lincoln and Mineral; Douglas and Lyon; Carson City; and Washoe and Storey Counties, Nevada.

Appearances:

For Petitioners:
Maurice Baskin, Esq., *Littler Mendelson, P.C.*, Washington, District of Columbia; Phillip Mannelly, Esq., *McDonald Carano LLP*, Reno, Nevada

For the Administrator, Wage and Hour Division:
Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., Dean A Romhilt, Esq., *U.S. Department of Labor*, Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the Davis-Bacon Act, as amended (DBA or the Act).[1] Nevada Chapter of the Associated General Contractors of America, Inc., Associated Builders and Contractors, Nevada Chapter, and Nevada Trucking Association, Inc. (Petitioners) petition for review of the January 17, 2020 Response to Request for Review and Reconsideration and the June 26, 2020 Final Ruling from the Administrator of the Wage and Hour Division (Administrator)[2] affirming nine wage determinations for highway construction projects in several counties in Nevada.[3] For the reasons stated below, we find that the Administrator acted within the discretion afforded to her to determine prevailing wage rates under the DBA.

BACKGROUND

1. Statutory and Regulatory Background

The DBA applies to every contract in excess of $2,000 to which the Federal Government or the District of Columbia is a party for construction, alteration, and/or repair of public buildings or public works in the United States.[4] The Act requires that the advertised specifications for construction contracts subject to the DBA contain a provision stating the minimum wages to be paid to the various

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[1] 40 U.S.C. §§ 3141-3148 (2013); *see also* 29 C.F.R. Parts 1, 5, and 7 (2020).

[2] Although we appreciate that the wage survey and wage determinations in this case resulted from the efforts of many individuals within the Wage and Hour Division and other offices of the Department of Labor, to simplify matters we will use the term "Administrator" to refer to all of these individuals, unless otherwise specified.

[3] In the January 17, 2020 Response to Request for Review and Reconsideration, the Administrator affirmed Wage Determination Numbers NV20190002 (Elko County), NV20190004 (Eureka County), NV20190005 (Humboldt County), NV20190007 (Pershing County), NV20190008 (White Pine County), NV20190009 (Churchill, Lander, Lincoln, and Mineral Counties), NV20190010 (Douglas and Lyon Counties), NV20190011 (Carson City), and NV20190013 (Washoe and Storey Counties). In the June 26, 2020 Final Ruling, the Administrator reaffirmed Wage Determination Numbers NV20190011 (Carson City), and NV20190013 (Washoe and Storey Counties).

[4] 40 U.S.C. § 3142(a).

classifications of mechanics or laborers employed under the contract.[5] The minimum wage rates contained in the contracts derive from the rates the Administrator determines to be "prevailing" for each job classification in the geographic area where the work is to be performed.[6] The Administrator publishes these prevailing wage rates in wage determinations.[7]

The DBA's implementing regulations define "prevailing wage" as the wage paid to the majority of laborers or mechanics in the applicable job classifications on similar projects in the area where the work is to be performed.[8] The Administrator determines the prevailing rate for each job classification in each of four construction categories—residential, building, heavy, and highway.[9]

The DBA itself does not prescribe a method for determining prevailing wages, leading one court to observe that the statute "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing."[10] Indeed, "the substantive correctness of wage determinations is not subject to judicial review." Rather, courts limit review to "due process claims and claims of noncompliance with statutory directives or applicable regulations."[11]

In the absence of a statutory formula for determining prevailing wages, the DBA's implementing regulations charge the Administrator with "conduct[ing] a

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5 *Id.*

6 *Id.* § 3142(b).

7 *See* 29 C.F.R. § 1.1(a).

8 *Id.* § 1.2(a)(1). "Majority" means more than 50 percent. In the event that the same wage is not paid to a majority of employees within a classification, the prevailing wage is the weighted average of the wages paid to workers in that classification. *Id.*

9 DAVIS-BACON CONSTRUCTION WAGE DETERMINATIONS MANUAL OF OPERATIONS (DBA MANUAL) 23 (1986), *available at* https://babel.hathitrust.org/cgi/pt?id=uiug.30112104405474;view=1up;seq=3; *see also* 29 C.F.R. § 1.3(d) (identifying the four categories of construction).

10 *Building & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983).

11 *Dep't of the Army*, ARB Nos. 1998-0120, -0121, -0122, slip op. at 25 (ARB Dec. 22, 1999) (internal citations and quotations omitted).

continuing program for the obtaining and compiling of wage rate information."[12] The Administrator ordinarily fulfills this obligation by conducting wage surveys.[13] The Administrator may seek data from many sources during a survey, including "contractors, contractors' associations, labor organizations, public officials and other interested parties . . . ."[14] The Administrator may consider statements showing wage rates paid on projects, signed collective bargaining agreements, wage rates determined for public construction by State and local officials under State and local prevailing wage legislation, data from contracting agencies, and "[a]ny other information pertinent to the determination of prevailing wage rates."[15]

The Administrator also has discretion to determine the relevant geographic area for the prevailing rate determination. The "area" for purposes of determining a prevailing rate might be the city, town, village, county, or other civil subdivision in which the work is to be performed.[16] The area will normally be the county of the particular project, unless sufficient data is not available for the county; at that point, the Administrator may expand the relevant area to surrounding counties or even use statewide data if lesser subdivisions do not yield sufficient data.[17] Furthermore, "[i]f there has not been sufficient similar construction in surrounding counties or in the State in the past year," wages from projects completed over a year prior to the survey period may be considered.[18] Significantly, neither the DBA nor its implementing regulations define what constitutes "sufficient" data. Although the Administrator has the discretion to expand the scope of the relevant geographic

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12 29 C.F.R. § 1.3.

13 *See* DBA MANUAL at 43-68.

14 29 C.F.R. § 1.3(a).

15 *Id.* § 1.3(b).

16 *Id.* § 1.2(b).

17 *Id.* § 1.7(b); *Coalition for Chesapeake Housing Dev. (Chesapeake)*, ARB No. 2012-0010, slip op. at 6, 8 (ARB Sept. 25, 2013); *Road Sprinkler Fitters Local Union No. 669*, ARB No. 2010-0123, slip op. at 8 (ARB June 20, 2012).

18 29 C.F.R. § 1.7(c).

area to ensure sufficient data exists to determine a prevailing wage rate, the Administrator may not mix data from metropolitan counties with rural counties.[19]

2. Factual Background

In 2017, the Administrator conducted a wage survey to establish prevailing wage rates for highway projects in Nevada.[20] According to the Administrator, [21] as part of the survey process the Administrator contacted hundreds of interested parties, including the Nevada Office of the Labor Commissioner (NOLC) and the Nevada Department of Transportation (NDOT).[22]

The Administrator's contact with NOLC is significant to this case. The Administrator asserts that she invited NOLC to attend pre-survey briefings that were held in Nevada in April 2017 for interested parties to learn more about the survey process, including the method and deadline for submitting wage data.[23] Additionally, the Administrator asserts that representatives spoke with NOLC about the survey in July 2017 and followed up with a letter, dated July 17, 2017, which provided additional information about the survey.[24] The Administrator also gave NOLC power point slides that provided a detailed summary of the Nevada survey, including information on how, when, and where to submit wage data; summaries of relevant survey practices and procedures; information about how wage data collected during the survey would be used; and an explanation as to how prevailing rates would be determined if the Administrator could not collect

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19 *Id.* § 1.7(b). The DBA Manual explains that if a county is located in an area designated by the Office of Management and Budget (OMB) as a Metropolitan Statistical Area (MSA), it will be classified as metropolitan for survey purposes. DBA MANUAL at 39.

20 Administrator's Response to Petition for Review (Adm'r Br.) at 8; Administrative Record (AR) at 73.

21 Petitioners do not dispute the Administrator's recitation of facts, including those related to contacts with NOLC.

22 Adm'r Br. at 17; *see also* AR at 65-69, 714.

23 Adm'r Br. at 9; AR at 714.

24 Adm'r Br. at 9; AR at 69-162, 714.

sufficient data for a particular locality.[25] The Administrator closed the survey on or about September 29, 2017.[26] NOLC did not attend the pre-survey briefings or submit wage data during the survey period.[27]

According to the Wage and Hour Division's (WHD) internal guidelines in effect at the time of the Nevada survey, the Administrator required wage data for at least six workers paid by at least three contractors (the 6/3 Rule) before she would deem a data set sufficient to calculate a prevailing rate for a particular locality.[28] If the survey data did not satisfy the 6/3 Rule at the county level, the Administrator progressively expanded the data set to predesignated "groups" and "super groups" of counties, and then to the entire state, until the 6/3 Rule had been satisfied.[29]

The Administrator issued wage determinations for localities across Nevada in or around November 2018.[30] In several instances, the data the Administrator received during the Nevada survey did not satisfy the 6/3 Rule at the county level. Accordingly, the Administrator considered data at the group, super group, and statewide levels to calculate the prevailing rates.[31]

3. Procedural History

By letters dated October 18, 2019, and April 24, 2020, Petitioner Nevada Chapter of the Associated General Contractors of America, Inc. (AGC) requested that the Administrator review and reconsider several of the Nevada wage determinations.[32] AGC raised various concerns with the wage determinations, but its primary concern was that certain prevailing wage rates were based, at least in

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25 AR at 71-162, 714.

26 *Id.* at 73.

27 *Id.* at 714; Adm'r Br. at 9.

28 AR at 82, 673; DBA MANUAL at 62.

29 AR at 83, 673-74; *see id.* at 729. The Administrator only expands data sets to the super group and statewide levels for predesignated "key" classifications. AR at 83.

30 *Id.* at 182.

31 *Id.* at 675-703.

32 *Id.* at 603-61, 709-11.

part, on wage data from projects taking place outside of the pertinent geographic area.

In particular, AGC targeted the Administrator's method for setting rates for the dump truck driver classification in Carson City and Washoe and Storey Counties, which are metropolitan areas in northern Nevada. In each instance, the wage data the Administrator received during the survey period fell short of satisfying the 6/3 Rule at the county, group, and super group levels.[33] In accordance with WHD's established methodology, the Administrator therefore considered wage data from Clark County, which is the home of Las Vegas in southern Nevada and the only other metropolitan area in the state.[34] Using Clark County data, the Administrator ultimately determined the prevailing rate for dump truck drivers in the northern jurisdictions was $56.17 per hour, consisting of a base rate of $29.45 with an additional $26.72 per hour in fringe benefits.[35]

In its petitions to the Administrator, AGC argued that the Administrator erred by relying on data from distant Clark County to calculate the prevailing rates for Carson City and Washoe and Storey Counties. AGC argued that the Administrator should have relied exclusively on county-level data or, at most, data from surrounding counties. According to AGC, Clark County was not only too distant from the northern jurisdictions to be considered, but also had significantly higher rates set by collective bargaining that inflated the Administrator's calculations. In support of its position, AGC compared the Administrator's prevailing rate determinations for Carson City and Washoe and Storey Counties with the rates calculated by NOLC under the Nevada state prevailing wage laws. AGC maintained that the Administrator erred by failing to consider NOLC's wage rates when preparing the prevailing rate determinations and by failing to explain or

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33 Adm'r Br. at 28-30. There are no other localities within Carson City's group. Washoe and Storey Counties comprise one group. Carson City and Washoe and Storey Counties comprise one super group. AR at 729. Although WHD received data for several dump truck drivers in Carson City and Washoe County, each worker was employed by the same contractor. Adm'r Br. at 28-29.

34 *Id.* at 28-30.

35 AR at 50, 57.

account for the discrepancy between the Administrator's rates and the rates determined to be prevailing by NOLC for the same classification under state law.

NOLC supported AGC's petitions.[36] Like AGC, NOLC argued that Clark County data inflated the Administrator's calculations for Carson City and Washoe and Storey Counties. NOLC supplied the results of its own wage surveys performed under state law from 2016 to 2019, which showed that its rates for the dump truck driver classification had not exceeded $31.22 per hour in the northern metropolitan areas. NOLC and AGC requested that the Administrator adopt NOLC's wage rates, at least until the Administrator's rates could be reassessed.

In ruling letters issued on January 17, 2020, and June 26, 2020, the Administrator denied AGC's requests for review and reconsideration.[37] The Administrator responded to each point of error asserted by AGC and explained the method used to calculate prevailing rates based on the data the Administrator received during the survey period, including the process for expanding the scope of the data sets where data at the county level was not sufficient to determine a prevailing wage rate. The Administrator also stated that she did not consider NOLC's wage determinations because NOLC did not submit its information during the survey period. The Administrator also explained that NOLC's information could not be used because NOLC's rates did not distinguish between basic and fringe benefit rates and were not based exclusively on data for highway projects.

On July 27, 2020, Petitioners appealed the Administrator's determinations to the Administrative Review Board (ARB or the Board).

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36 *Id.* at 164-79, 663-68, 706-07.

37 *Id.* at 670-704, 713-24.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations.[38] DBA proceedings before the ARB are appellate in nature.[39] We assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.[40] In matters requiring the Administrator's discretion, the Board generally defers to the Administrator as being "in the best position to interpret [the DBA's implementing regulations] in the first instance . . . and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside."[41]

DISCUSSION

Petitioners basically raise two points of error in their appeal. First, Petitioners argue that the Administrator failed to properly investigate whether NOLC possessed relevant wage information during the Nevada wage survey. Second, Petitioners argue that the Administrator erred by relying on statewide wage data to determine prevailing wage rates for certain localities. For the reasons that follow, we reject both arguments.

1. The Administrator Acted Reasonably in Her Efforts to Encourage NOLC to Participate in the Wage Survey

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38 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020)

39 29 C.F.R. § 7.1(e).

40 *Chesapeake*, ARB No. 2012-0010, slip op. at 4-5 (citing *Y-12 Nat'l Sec. Complex*, ARB No. 2011-0083, slip op. at 5 (Aug. 8, 2013)).

41 *Titan IV Mobile Serv. Tower*, No. 1989-0014, slip op. at 7 (WAB May 10, 1991); *see also Road Sprinkler*, ARB No. 2010-0123, slip op. at 6.

It is undisputed that despite multiple instances of contact between the Administrator and NOLC during the survey period, and despite the Administrator's invitation to NOLC to supply any relevant wage data in its possession, NOLC elected not to respond to requests for participation during the Administrator's survey. Nevertheless, Petitioners contend that the Administrator erred by closing the wage survey and calculating prevailing wage rates without first collecting NOLC's wage information. According to Petitioners, the Administrator was obligated to take additional steps to engage NOLC when it did not respond, and unreasonably failed to locate the state wage determinations NOLC published on its website. Nevertheless, we find that the Administrator acted reasonably in her efforts to encourage NOLC to participate in the Nevada wage survey.

The DBA's implementing regulations give the Administrator significant discretion in conducting wage surveys. While the regulations direct the Administrator to "encourage the voluntary submission of wage data" from interested parties, including public officials like NOLC, the regulations do not require interested parties to respond, grant the Administrator the power to compel interested parties to participate, or dictate precisely how the Administrator must go about engaging interested parties or encouraging their participation.[42] Likewise, the regulations ultimately leave it to the Administrator's discretion to decide what information to seek and consider in wage surveys.[43]

Given the latitude afforded to the Administrator by the regulations, we conclude that the Administrator reasonably exercised the broad discretion granted to her with respect to her efforts to "encourage" NOLC to participate in the Nevada wage survey. Petitioners do not dispute that the Administrator invited NOLC to attend pre-hearing briefings, invited NOLC to participate in the survey, and supplied detailed information to NOLC about the survey, including how and by when to supply wage information. The Administrator also notified NOLC of the consequences if NOLC or other interested parties chose not to participate in the

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42 *See* 29 C.F.R. § 1.3(a).

43 *See id.* § 1.3(b) (stating that the Administrator "may" consider several types of information, including wage statements, collective bargaining agreements, and "[w]age rates determined for public construction by State and local officials . . . .").

survey. Specifically, the materials the Administrator supplied to NOLC stated that if NOLC did not respond by the survey deadline, the Administrator would not consider its wage data. Likewise, the materials stated that if the Administrator did not receive sufficient wage data during the survey period for a particular locality, she could draw data from other localities to calculate a prevailing rate.[44] We find that these multiple contacts with NOLC were sufficient to satisfy the Administrator's obligation to "encourage" NOLC to participate in the survey.[45]

However, Petitioners contend that NOLC was not an ordinary interested party. According to Petitioners, the Administrator had a greater responsibility to "investigate [NOLC] more thoroughly prior to determining that there was insufficient data available in Carson City and Washoe and Storey Counties" because NOLC "is a public repository of wage data."[46] We disagree. The Administrator has no greater obligation to attempt to engage NOLC than any other interested party.[47] Public officials like NOLC are one of several categories of interested parties listed in sequence in the regulations as those the Administrator must encourage to participate in a wage survey. The regulations do not differentiate or elevate public officials from any other interested party or potential source of wage data.

We also disagree with Petitioners that the Administrator erred by failing to locate NOLC's publicly posted wage determinations. Although NOLC publishes its state wage rate determinations on its website, we find no basis to conclude that the Administrator knew, or should have known, that the rates were available online. We also disagree with Petitioners that the Administrator should be faulted for failing to locate the determinations in the circumstances of this case, particularly

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44 AR at 77, 81-83.

45 *See* 29 C.F.R. § 1.3(a).

46 Petition for Review of a Final Ruling of the Wage and Hour Administrator at 7.

47 The only enhanced burden the regulations place on the Administrator to engage an interested party, as relevant to this case, concerns the Administrator's obligation to consult "the highway department of the State in which a project in the Federal-Aid highway system is to be performed . . . ." 29 C.F.R. § 1.3(b)(4). The Administrator consulted with the Nevada Department of Transportation (NDOT) and NDOT participated in the survey by providing wage data. Adm'r Br. at 8-9.

where NOLC failed to alert the Administrator to the existence of the published wage determinations in response to the Administrator's request for information.[48]

Although Petitioner's proffer that the Administrator could have done more to encourage NOLC to participate in the survey and could have taken additional steps to locate and secure NOLC's wage determinations, the Board's province is only to assess whether the Administrator's rulings were consistent with the DBA and its implementing regulations and reflect a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.[49] We find that the steps the Administrator took to encourage NOLC to participate in the wage survey were reasonable in the circumstances of this case and consistent with the discretion afforded to the Administrator to conduct surveys under the DBA.

2. The Administrator Reasonably Exercised Her Discretion When She Used Statewide Data to Calculate Prevailing Rates

In a series of related arguments, Petitioners also challenge the Administrator's use of statewide wage data to set prevailing wage rates for certain classifications and localities. In particular, Petitioners focus on the Administrator's decision to use wage data from Clark County to set prevailing wage rates for dump truck drivers in Carson City and Washoe and Storey Counties. We conclude that the Administrator exercised reasonable discretion when she used statewide data to calculate prevailing rates in this case.

A. The Administrator Has the Discretion to Consider Statewide Wage Data in Appropriate Circumstances

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[48] While not determinative, there is no indication in the record that NOLC provided any explanation with regard to its decision or failure to not respond, such as some type of extreme exigency.

[49] *Chesapeake,* ARB No. 2012-0010, slip op. at 4-5.

Petitioners argue that, as a matter of law, the Administrator does not possess the authority to consider data from geographically distant locations to set prevailing wage rates. Rather, according to Petitioners, the regulations allow the Administrator to only go so far as to consider data from "surrounding counties" if data at the county level is insufficient.[50] We disagree with Petitioners based on our holding in *Coalition for Chesapeake Housing Development*, in which the Board confirmed that the Administrator possesses the authority and discretion to use group, super group, or even statewide data to determine prevailing wage rates in appropriate circumstances.[51]

In *Chesapeake*, the Administrator's survey for residential construction projects in Virginia failed to return data for certain job classifications in Newport News and Chesapeake, two metropolitan areas in the southeastern corner of the state.[52] Accordingly, the Administrator considered data from the other MSAs in the applicable super group, including Fairfax and Alexandria, which are more than 150 miles away in northern Virginia.[53] The wage data from this super group represented all of the data submitted for metropolitan counties in the state.[54]

The Board held in *Chesapeake* that the Administrator may, in her reasonable discretion, utilize statewide wage data when she determines that data from lesser subdivisions are insufficient to determine a prevailing wage rate. As the Board stated, the DBA "does not dictate a particular methodology to be used by the Secretary or his designee, the Administrator, when determining the prevailing wage rate. There is nothing in the regulations that prohibits the Administrator from using the total data in a county, a metropolitan statistical area, super groups of counties, or even statewide data to determine, in particular cases, what might yield 'sufficient' data."[55] In fact, the Board recognized that the regulations contemplate

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50 Petitioner's Reply to Opposition to Petition for Review (Reply) at 6-8.

51 *Chesapeake*, ARB No. 2012-0010, slip op. at 8.

52 *Id.* at 2.

53 *Id.* at 3.

54 *Id.* at 7.

55 *Id.* at 9 (internal citations omitted).

and put the public on notice that statewide data may be used to determine prevailing wage rates.[56]

We adhere to our holding in *Chesapeake*. The broad discretion granted to the Administrator to conduct surveys and determine when wage data is sufficient to set a prevailing wage rate empowers her to consider group, super group, or even statewide data in appropriate circumstances. We reject Petitioners' interpretation of the regulations and the powers granted to the Administrator, and decline Petitioners' request to overturn *Chesapeake*.

B. The Administrator Reasonably Exercised Her Discretion by Using Statewide Data, Even After NOLC Belatedly Supplied Its State Wage Determinations

Petitioners next argue that even if the Administrator possessed the authority to consider remote or statewide data in certain circumstances, it was not reasonable for the Administrator to do so in this case. Petitioners specifically present two related, but distinct arguments. First, Petitioners contend that NOLC's wage determinations provided sufficient wage information at the county level such that it was inappropriate for the Administrator to resort to using wage data from distant labor markets. Second, Petitioners contend that the Administrator failed to account for or explain the disparity between rates in northern and southern Nevada, as reflected in NOLC's wage determinations, when she relied on wage data from Clark County to set the prevailing rates in Carson City and Washoe and Storey Counties. We reject both arguments.

i. The Administrator Exercised Reasonable Discretion in Declining to Use NOLC's Wage Determinations

In contrast to the circumstance in *Chesapeake* where it was undisputed that county level wage data was not available, Petitioners contend that NOLC's wage determinations provided sufficient county level information to allow the Administrator to set prevailing wage rates for Carson City and Washoe and Storey Counties in this case. We find that the Administrator reasonably exercised her

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56 *Id.* at 8 (citing 29 C.F.R. § 1.7(c)).

discretion in declining to use NOLC's wage determinations to set prevailing wage rates.

The Administrator offers two justifications for refusing to use NOLC's wage determinations. First, the Administrator declined to consider NOLC's wage information because it was submitted after the survey deadline. The record reflects that NOLC first submitted information regarding its wage determinations for the dump truck driver classification in Washoe County in May 2019, twenty months after the Nevada wage survey closed and six months after the Administrator issued the wage determinations.[57] NOLC then took another five months to supply information about its wage determinations for Carson City and Storey Counties.[58] As discussed above, NOLC was encouraged to submit its wage information before the survey deadline. It chose not to do so, and only supplied its information after the Administrator issued wage determinations with which it did not agree.

The Administrator's decision to decline to consider NOLC's belated information is consistent with WHD's established policies and practices and Board precedent. The DBA Manual instructs that the Administrator will not consider data submitted after a survey deadline.[59] During the survey period, the Administrator also notified NOLC of the deadline to supply information and made NOLC aware that data submitted after that deadline would not be considered.[60] The Board and its predecessor, the Wage Appeals Board (WAB), have affirmed that the Administrator may reject data submitted after the survey deadline.[61] As the WAB stated, "to permit the reopening of a survey to include information submitted after

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57 AR at 164-76.

58 *Id.* at 663-68.

59 DBA MANUAL at 56.

60 AR at 73, 77.

61 *Int'l Union of Bricklayers & Allied Craft Workers, Local Union No. 1*, ARB No. 2011-0007, slip op. at 7 (ARB Apr. 27, 2012); *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local 28*, No. 1991-0019, slip op. at 5 (WAB July 30, 1991). Petitioners attempt to distinguish these cases on the grounds that the late-submitted data came from private parties, rather than from a public office as in this case. For the reasons set forth in Section 1, we find no basis to elevate or distinguish NOLC's wage information from the information that may be supplied by private or other interested parties.

the cutoff date would mean that no survey was ever truly complete."[62] The Administrator may reasonably reject untimely data based on the obvious need for finality, and the dangers that could result from perpetually being forced to reopen surveys when parties belatedly present information when they are dissatisfied with the initial results.

Additionally, the Administrator states that she did not consider NOLC's information because it was not useable in the form in which it was submitted. For example, the Administrator states that NOLC's wage determinations did not separately list or distinguish between a basic hourly rate and a fringe benefit rate in accordance with the manner in which the Administrator publishes rates under the DBA.[63] The Administrator also states that NOLC's wage determinations reflected a single determination covering all four categories of construction—highway, residential, building, and heavy. As a result, the Administrator contends she could not rely on NOLC's determinations to set prevailing wage rates specifically for highway projects.[64]

Finally, the Administrator submits that NOLC made its determinations pursuant to state law and in accordance with the state's own survey and wage determination policies and practices. Other than the observation that the rates were calculated pursuant to state statutes and regulations, neither Petitioners nor NOLC offered NOLC's methodology or rules for surveying or calculating prevailing wage rates.[65]

Although Petitioners quarrel with the Administrator's criticisms of NOLC's wage determinations, Petitioners' arguments do not persuade us that the

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62 *Heat & Frost Insulators,* No. 1991-0019, slip op. at 5.

63 *See* AR at 1-60.

64 *See* 29 C.F.R. § 1.3(a) (stating that information submitted during a wage survey should "reflect not only the wage rates paid a particular classification in an area, but also the type or types of construction on which such rate or rates are paid . . . .").

65 *See* AR at 706-07. The manner in which NOLC determines prevailing wage rates appears to be materially different from the manner in which the Administrator determines prevailing wage rates under the DBA. Additionally, it does not appear from the record that NOLC ever made the Administrator aware of how many contractors or workers contributed to its determinations or from what geographic area NOLC pulled its data for each locality.

Administrator's decision to eschew NOLC's untimely wage information was an unreasonable exercise or abuse of the discretion granted to her by the DBA's implementing regulations. As we have stated, the Administrator has substantial discretion to determine survey and wage data collection methods, determine what type of information to consider, determine what constitutes sufficient wage data, and determine a prevailing wage rate. We appreciate Petitioners' argument that the Administrator may have been able to find value in NOLC's wage information or that the issues articulated by the Administrator may have been curable. However, the Administrator has articulated a reasonable basis for her judgment that the information as submitted was not sufficiently useable or probative so as to override the Administrator's firm policy that information supplied after the survey deadline will not be considered.

ii. The Administrator Did Not Act Unreasonably, Even in Light of the Disparities Evidenced by NOLC's Wage Determinations

Notwithstanding the foregoing, Petitioners also assert that even if the Administrator determined that NOLC's wage determinations could not be used to set prevailing wage rates based exclusively on data at the county or local level, the determinations at least demonstrated that the Administrator's decision to rely on data from distant Clark County to calculate the rates for dump truck drivers in Carson City and Washoe and Storey Counties was an abuse of discretion. Petitioners contend that the Administrator could not reasonably justify her decision to use Clark County data because, according to NOLC's wage determinations, wages were 80 to 100% higher there than in the northern jurisdictions. Similarly, Petitioners contend that NOLC's wage determinations revealed that the Administrator's determinations did not accurately reflect prevailing rates, because the Administrator's rates for the northern jurisdictions were nearly double those determined to be prevailing by NOLC for the same areas.

In support of their position, Petitioners cite the Board's decision in *New Mexico National Electrical Contractors Association.*[66] In that case, the Administrator, relying on limited and distorted data, published a prevailing wage

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66 ARB No. 2003-0020 (ARB May 28, 2004).

rate for electricians in Eddy County, New Mexico that was 48% lower than the previous rates set by the Administrator.[67] The Board remanded the case to the Administrator in part because she never acknowledged, discussed, or attempted to explain the marked change between the prevailing wage rate determinations.[68] Petitioners argue that the Administrator similarly abused her discretion in this case by failing to account for or explain the difference in wage rates paid to dump truck drivers in northern and southern Nevada, and the disparity between the rates determined to be prevailing by the Administrator and by NOLC for that classification.

The circumstances here are materially different than those presented in *New Mexico,* and do not persuade us that the Administrator unreasonably exercised her discretion by relying on statewide wage data in this case. In *New Mexico*, the disparity the Administrator failed to explain or account for existed between her own wage determinations from one iteration to the next. Here, in contrast, the disparity existed between the Administrator's determinations and the determinations of NOLC, a state body which determined prevailing wage rates pursuant to its own state laws and pursuant to a methodology and set of rules that neither NOLC nor Petitioners have described to, or made part of the record before, the Board.

Furthermore, in *New Mexico* we faulted the Administrator for merely "attest[ing], in general terms, to the survey's sufficiency" and failing to elaborate on the basis for her judgments.[69] Here, in contrast, the Administrator offered a reasonable explanation, consistent with the deference afforded to her by the DBA's implementing regulations, for how the Administrator determined the prevailing rates and why NOLC's wage information did not alter the Administrator's

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67 *Id.* at 3, 5. The Administrator set prevailing rates based on data from just three contractors. The majority of the data came from one contractor that imported workers from out of state. *Id.* at 3.

68 *Id.* at 7.

69 *Id.* at 7-8. The Administrator's explanation was: "This survey was conducted and reviewed in accordance with longstanding guidelines, practices, and procedures. . . . A survey is considered acceptable when established time frames, construction types, geographic areas, classes, area practices, and accepted procedures for data adequacy, data computation, and survey notification are properly observed." *Id.* at 8 n.7.

determinations. As already discussed, the Administrator reasonably declined to consider NOLC's wage determinations because they were submitted well beyond the survey deadline and long after the wage determinations had already been issued, and because they did not align with the Administrator's parameters for setting and publishing prevailing wage rates.

This is not to say that the Administrator could not have decided to reopen the wage survey or reexamine its wage determinations in light of the information supplied by NOLC. However, we cannot say that the Administrator's failure to do so in the circumstances of this case were so unreasonable as to override the broad discretion afforded to her by the regulations.[70]

C. The Administrator Reasonably Exercised her Discretion in Determining that the Wage Data Received During the Survey Period was not Sufficient to Set a Prevailing Wage Rate at the County Level.

Finally, Petitioners argue in their Reply that, even setting aside NOLC's wage determinations, the Administrator received sufficient data during the survey period to establish prevailing wage rates based on county level data for some classifications and localities. We reject this argument as well.

Once again, Petitioners target the Administrator's determinations for dump truck drivers in Carson City and Washoe and Storey Counties. The Administrator reported that during the survey period, she received wage data for 63 dump truck drivers in Carson City and 72 dump truck drivers in Washoe County. However, all of the drivers worked for a single contractor.[71] As set forth above, at the time of the Nevada wage survey, WHD's policies dictated that the Administrator had to have wage information for at least six workers paid by at least three contractors before she would determine a prevailing wage rate. Therefore, even though the

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[70] *See Chesapeake,* ARB No. 2012-0010, slip op. at 9 ("[Petitioner's] argument about [the disparity in rates between different] 'labor markets' delves into the area where we would defer to the Administrator's methodology."), 10 ("The regulations do not prohibit grouping to ascertain a prevailing wage simply because of higher income or pay in one or more of the associated counties.").

[71] Adm'r Br. at 28-30 (citing AR at 739-42).

Administrator received enough data in some of the northern Nevada jurisdictions to satisfy the six-worker portion of the 6/3 Rule, the Administrator did not consider the data set sufficient because she lacked information from at least three different contractors.[72] In accordance with the 6/3 Rule and her established practices, the Administrator therefore moved to the group, super group, and statewide levels to secure information from enough contractors to set a prevailing wage rate.[73]

Petitioners contend that strict adherence to the 6/3 Rule was unreasonable, given the size of the data set available to the Administrator at the county, group, or super group levels. We do not agree. The Administrator maintains reasonable discretion to decide when data is "sufficient," a term that is not defined by the regulations. The Administrator submits that she was required to look beyond the borders of Carson City and Washoe and Storey Counties in accordance with the 6/3 Rule to ensure that the data set was diverse enough to properly set a prevailing rate for the classification.[74] Rather than setting a prevailing wage rate based exclusively on the wages paid by a single contractor, the Administrator expanded the scope of the data set to the statewide level, which she was authorized to do by regulation. This is the type of reasonable, discretionary judgment that is reserved for the Administrator, and which we will not upset on appeal.

Petitioners also argue that for some other classifications and localities, the Administrator improperly relied on data at the group, super group, or statewide level despite having received sufficient wage data at the county level to satisfy the 6/3 Rule.[75] Petitioners referred generally to nearly 300 pages of payroll records reflecting wage data for numerous classifications across multiple counties, without elaborating or pointing to the specific portions of those records that they believe support their claims.[76] For example, although Petitioners claim that three

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72 *Id.* at 28-30 (citing AR at 81-82; DBA MANUAL at 62).

73 *Id.* at 28-30.

74 *Id.* at 36-37 n.12.

75 Specifically, Petitioners contend that the 6/3 Rule was satisfied for dump truck drivers in Washoe County, dump truck drivers in Humboldt County, laborers in the jackhammer classification in Elko County, and power equipment operators in the roller classification in Elko County. Reply at 5-6.

76 Reply at 5-6.

contractors reported wage data for dump truck drivers in Washoe County, Petitioners failed to identify who those contractors were, and did not cite to the specific pages in the payroll records in which wage information for those contractors appeared. Petitioners also failed to make these arguments in their initial brief, instead reserving them for their Reply. Accordingly, we reject Petitioners' arguments with respect to these classifications and localities.[77]

3. We Reject Any Other Challenges Petitioners Made to the Nevada Wage Determinations

As the foregoing discussion reflects, essentially all of Petitioners' arguments on appeal concern the Administrator's prevailing wage rate determinations for the dump truck driver classification in Carson City and Washoe and Storey Counties. However, in Petitioner AGC's October 18, 2019 requests for review and reconsideration to the Administrator, AGC also challenged the Administrator's determinations with respect to other classifications and other localities.[78] Some of AGC's arguments were similar to those presented in this appeal—that the Administrator erred by relying on group, super group, or statewide data to set prevailing wage rates. Others, though, are significantly different and concern issues such as the Administrator allegedly issuing multiple rates for a single classification or using metropolitan data to set rates in rural counties.[79] Petitioners ask the Board to resolve each of the arguments and issues it presented to the Administrator below, even if not specifically argued in their appellate briefs. [80]

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77 *Adm'r, Wage & Hour Div. v. XCEL Sol. Corp.*, ARB No. 2012-0076, 2011-LCA-00016, slip op at 11 n.51 (ARB July 16, 2014) (rejecting argument raised for first time in rebuttal brief).

78 *Id.* at 603-61.

79 *E.g., id.* at 603-04.

80 Although Petitioners appear to ask the Board to resolve each of the issues presented below, Petitioners nevertheless also appear to limit the scope of their appeal to the wage determinations for Carson City and Washoe and Storey Counties. Reply at 16 (asking the Board to reject the Administrator's waiver arguments and "find that each of the WHD's wage determinations which incorporate wage rates from Clark County into the distant northern counties of Nevada are arbitrary and capricious and contrary to the law . . . .").

We summarily reject Petitioners' petition with respect to any issue other than the Administrator's decision to rely on group, super group, or statewide wage data to set prevailing wage rates. In its January 17, 2020, 35-page ruling letter, the Administrator thoroughly responded to each point of error asserted by Petitioner AGC in its requests for review and reconsideration.[81] On appeal, Petitioners have not identified any particular error in the Administrator's explanation or judgment or any basis for the Board to overrule the Administrator in light of the Administrator's response, except with respect to the specific issue of the Administrator's reliance on group, super group, or statewide data.[82]

Regarding the issue of the Administrator's reliance on group, super group, or statewide data for classifications and localities other than dump truck drivers in Carson City and Washoe and Storey Counties, we rule in the Administrator's favor for all of the same reasons discussed in Sections 1 and 2 above.

CONCLUSION

For the foregoing reasons, we **DENY** Petitioner's Petition for Review.

SO ORDERED.

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81 AR at 670-704.

82 *See* 29 C.F.R. § 7.5(a) ("A petition for review of a wage determination shall . . . contain a short and plain statement of the grounds for review [and] be accompanied by supporting data, views, or arguments."); *see also Griebel v. Union Pac. R.R. Co.*, ARB No. 2013-0038, ALJ No. 2011-FRS-00011, slip op. at 2 n.1 (ARB Mar. 18, 2014) (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (stating that it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")); *Walker v. Am. Airlines*, ARB No. 2005-0028, ALJ No. 2003-AIR-00017, slip op. at 17 (ARB Mar. 30, 2007) (rejecting argument about which complainant made only "passing references and commentary" on appeal); *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Am. Truss*, ARB No. 2005-0032, ALJ No. 2004-LCA-00012, slip op. at 2 n.1 (ARB Feb. 28, 2007) (declining to consider arguments made below that were purportedly incorporated by reference into the appeal).

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 113, Third Party Complaint against KIRA, INC.

ARB CASE NO. 2020-0039

DATE: September 1, 2021

PETITIONER,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

Appearances:

For the Petitioner:
Terrence A. Johnson, Esq.; Snyder, Colorado

For the Wage and Hour Division:
Elena S. Goldstein, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., and Heather Maria Johnson, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

For KIRA, Inc.:
Todd A. Fredrickson, Esq. and Micah D. Dawson, Esq.; *Fisher & Phillips LLP*; Denver, Colorado

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Petitioner International Brotherhood of Electrical Workers, Local 113 (Petitioner), representing seasonal grounds workers who were employed by KIRA, Inc., filed a complaint with the Wage and Hour Division (WHD), alleging that the workers were not being paid benefits in accordance with the parties' collective bargaining agreement (CBA) as required by the McNamara-O'Hara Service Contract Act of 1965[1] (SCA). After an investigation, a WHD district office (DO) found no violations of the SCA. Petitioner sought review by the WHD Administrator. The Administrator issued a final ruling affirming the DO's determination. Petitioner appealed the ruling. For the reasons discussed below, we affirm the Administrator's final ruling.

BACKGROUND

KIRA provided general maintenance services under contracts with the U.S. Army Corps of Engineers at Fort Carson in Colorado Springs, Colorado.[2] Petitioner was the bargaining representative for all employees employed under KIRA's contract with the Corps.[3] KIRA and Petitioner had entered into a CBA effective from September 30, 2013 to September 29, 2016 that provided the minimum hourly wage rates and fringe benefits contributions for the employees on a contract,[4] as required by the SCA.[5] KIRA and Petitioner had entered into four previous CBAs for the same contract work.[6]

Schedule A of the CBA sets forth the labor rates for the workers. Full-time grounds laborers earned approximately $13.00 per hour, while seasonal grounds laborers earned about $16.50 per hour.[7] Article 21, Section 2 of the CBA provides that full-time employees are required to participate in the company's insurance benefits plans and that KIRA will contribute about $6.00 per hour to their insurance coverage.[8] With respect to part-time or temporary employees, Article 21, Section 6 provides that "Part-Time or Temporary Employees when not eligible for

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1 41 U.S.C. § 6701 et seq. (2011) and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2020).

2 Administrative Record (AR) at 238.

3 Administrator's Final Ruling (Final Ruling) at 2.

4 AR 238.

5 41 U.S.C. § 6703(1)-(2) (2011).

6 AR 3, 136-217.

7 *Id.* at 236.

8 *Id.* at 230. The rates for the wages and fringe benefits contributions increased slightly each year. *Id.* at 230, 236.

the Company benefits plans will receive their applicable fringe benefit monies paid out each pay period."[9] The amount of fringe benefits that temporary employees are entitled to is not specified in the CBA.

On September 16, 2016, Petitioner filed a complaint with the DO, alleging that KIRA was not paying seasonal grounds laborers fringe benefits in accordance with the CBA as required by the SCA.[10] The DO investigated the complaint and initially interpreted the CBA to require KIRA to pay seasonal grounds laborers both their Schedule A labor rate and the hourly fringe benefit contribution rate in Article 21, Section 2 under section 4(c) of the SCA.[11] Based upon this interpretation of the CBA, the WHD investigator calculated that KIRA owed $332,603.43 in back wages under the SCA. After the investigation, the WHD Assistant District Director (ADD) met with a representative of KIRA to advise them of the investigator's initial findings and afforded KIRA an opportunity to respond or provide additional information.[12] The ADD subsequently upheld the initial findings.[13]

However, after considering the CBA in light of the parties' historical practice under the prior CBAs, in which the seasonal workers' fringe benefits were included in their Schedule A labor rates, and a discussion with the regional WHD and Solicitor's offices, the DO determined that the CBA did not require KIRA to pay the Article 21, Section 2 benefit hourly fringe benefit contribution rate to the seasonal workers.[14] The DO therefore concluded that there were no violations of the SCA and closed its investigation.

Petitioner requested a "final ruling" by the Administrator. On January 14, 2020, the Administrator issued a final ruling affirming the DO's conclusion.[15] The Administrator found that the parties historically included the seasonal workers' fringe benefits payments in their Schedule A rates, and that the parties intended to

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9 *Id.* at 231.

10 *Id.* at 80-85.

11 Final Ruling at 3.

12 AR 238-39. In its reply brief, Petitioner expressed concern that the second level conference occurred without its involvement and that the WHD did not apprise it of the meeting until after the final decision. Petitioner's Reply Brief at 7-8. The Administrator addressed this concern in its supplemental brief by explaining that the WHD personnel involved in the investigation were merely following the agency's normal investigative process. Administrator's Supplemental Brief at 11-12. We discern no wrongdoing in the Administrator's actions during the investigation.

13 AR 238-39.

14 *Id.* at 239.

15 Final Ruling at 1.

continue the practice in the operative CBA, as full-time grounds laborers had more responsibilities and were expected to have more experience.[16]

From 2006 to 2013, KIRA provided the same services at Fort Carson that it did from 2013 to 2016.[17] The Administrator reviewed the parties' four previous CBAs. The earliest CBA contained higher schedule A rates for temporary workers than permanent workers, and stated under Article 21, Section 6 that "[i]t is understood and accepted that part-time and/or temporary seasonal employees covered by this Agreement will not be eligible for benefits under this Agreement."[18] The next three CBAs contained the same wage rate disparities and language. Thus, the Administrator observed that under each of these CBAs, (1) seasonal grounds laborers received a higher hourly rate of pay on Schedule A than their full-time counterparts, but (2) full-time grounds laborers received higher aggregate compensation because they received an hourly fringe benefit contribution in addition to their Schedule A pay.[19]

The Administrator also relied on a 2007 email exchange in which the parties calculated the Schedule A rates for seasonal workers by adding the minimum hourly wage rates and fringe benefits rates together.[20] Further, a 2011 CBA addendum demonstrated that the parties set the rate of pay for seasonal tire technicians to include the hourly wage rate and fringe benefits.[21] The Administrator also found that the evidence suggested that the parties intended to continue this practice in the operative CBA.[22] Job descriptions demonstrated that full time grounds workers performed a broader array of essential functions and were expected to have greater experience.[23] The Administrator noted that none of the evidence reflected an intent to pay seasonal workers more than full time workers.[24]

The Administrator then considered whether KIRA had satisfied its obligation to furnish fringe benefits separate from and in addition to the monetary wages, as required by the SCA. The Administrator noted that a contractor can satisfy its

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16 *Id.* at 4-6.

17 *Id.* at 3.

18 *Id.*

19 *Id.*

20 *Id.* at 5. The parties agreed that the seasonal grounds laborers would receive $10.83 in hourly wages and $3.16 for the fringe benefits, resulting in a Schedule A rate of $13.99 per hour. AR 31-34.

21 Final Ruling at 5.

22 *Id.*

23 *Id.*

24 *Id.*

obligation to provide separate fringe benefits if it informs covered employees that it has included fringe benefits in their pay.[25] The Administrator found that KIRA had informed the workers by negotiating the CBA with Petitioner, their legally authorized representative.[26]

The Administrator explained that she issued the final ruling pursuant to her authority to make official rulings and administer the SCA.[27] She disagreed with Petitioner's assertion that it was entitled to a written decision containing a final, reviewable ruling following an investigation, explaining that WHD's decision not to institute an administrative enforcement action is not subject to review.[28]

Petitioner filed a Petition for Review of the Administrator's final ruling with the Administrative Review Board (Board).[29] The Administrator filed a brief in response to the petition, and KIRA filed a brief as an interested party. Petitioner then filed a reply brief.

Upon review of the parties' briefs, the Board determined that additional briefing was necessary to allow it to issue a decision based on a complete administrative record. The Board issued an Order Directing Supplemental Briefing, requesting the Administrator to (1) explain the rationale behind the CBA's change in language, (2) explain whether it considers the language of Article 21 of the CBA ambiguous and, if so, why, (3) respond to Petitioner's concerns regarding the second level conference KIRA had after the initial decision with the ADD, which the WHD did not inform Petitioner of, and (4) provide several forms of missing information the Board had determined was necessary to issue a decision based on a complete administrative record.[30] The Board provided Petitioner and KIRA an opportunity to

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[25] *Id.* at 6.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] "The Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division . . . arising under the Service Contract Act." 29 C.F.R. § 8.1(b).

[30] Order Directing Supplemental Briefing (ODSB) at 5. Such information included: (1) "Documents and other information relating to the initial determination made by DO, including all records provided and interviews conducted during the course of the DO's investigation"; (2) "documentation and other information related to KIRA's second level conference with the ADD" and "the DO's subsequent meeting with the regional WHD and Solicitor's offices"; and (3) "the breakdown of the Schedule A labor rates for seasonal grounds laborers regarding the portion of the rates that compensate the workers for their labor and the portion that the Administrator and KIRA contends are the fringe benefits." *Id.* at 4-5.

reply to the supplemental brief. The parties all filed timely briefs in response to the Order Directing Supplemental Briefing, as well as a supplemental record.

JURISDICTION AND STANDARD OF REVIEW

The Board reviews questions of law de novo but defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with the law.[31] We defer to the expertise and experience of the Administrator and will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision.[32]

DISCUSSION

Petitioner contests the Administrator's final ruling on appeal, arguing that the Administrator incorrectly interpreted the CBA and that KIRA failed to compensate seasonal workers in accordance with its obligations under the SCA. The SCA requires federal contractors to pay covered service employees no less than specified minimum hourly wage rates and provide such employees certain fringe benefits.[33] If a collective-bargaining agreement covers the employees, the contractor must pay them in accordance with the rates provided for in the agreement.[34] The contractor must furnish the fringe benefits required under the SCA separate from, and in addition to, the specified monetary wages. The contractor may discharge this obligation by paying a cash amount equivalent to the cost of the fringe benefits required.[35]

The central issue of this case is whether the Administrator reasonably interpreted Article 21, Section 6 of the operative CBA in applying the SCA. In the CBAs covering the period from July 1, 2006 through September 29, 2013, Article 21, Section 6 contained hourly fringe benefit contribution rates for eligible employees, but stated: "[i]t is understood and accepted that part-time and/or temporary seasonal employees covered by this Agreement will not be eligible for benefits under this Agreement." In the operable CBA, covering the period from September 30, 2013 through September 29, 2016, this provision was changed to contain hourly fringe benefit contribution rates for full-time employees and now states that: "Part-Time or Temporary Employees when not eligible for the Company benefits plans will receive their applicable fringe benefit monies paid out each pay period."

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31 *Gino Morena Enters., LLC*, ARB Nos. 2017-0010, -0011, ALJ No. 2017-CBV-00001, slip op. at 4 (ARB Feb. 19, 2020).

32 *Ct. Sec. Officers*, ARB No. 1998-0001, slip op. at 4 (ARB Sept. 23, 1998).

33 41 U.S.C. § 6703(1)-(2); 29 CFR § 4.6(b).

34 41 U.S.C. § 6703(1).

35 29 C.F.R. § 4.170(a); § 4.177(c)(1).

Petitioner argues that the change in the language of Article 21, Section 6 plainly demonstrates that the parties renegotiated the CBA to allow seasonal employees to receive the fringe benefits rates for full time employees in Article 21, Section 2. In turn, Section 2 of the CBA states the amount of the fringe benefit contribution KIRA will make to permanent/full-time employees. The Administrator and KIRA, conversely, argue that the new provision only memorializes the parties' past practices of paying out fringe benefits to seasonal workers within the Schedule A rates, rather than making direct contributions.

In the Order Directing Supplemental Briefing, we requested the parties to discuss whether Section 6 was ambiguous and, therefore, that the Administrator correctly considered extrinsic evidence of the parties' intent.[36] The SCA provides that "any interpretation of the wage and fringe benefit provisions of the collective bargaining agreement where its provisions are unclear must be based on the intent of the parties to the collective bargaining agreement."[37]

In its supplemental brief, the Administrator argues that the language of Section 6 is ambiguous, noting that it does not refer to specific fringe benefit amounts, cross-reference any other provision of the CBA, or otherwise explain what is meant by the phrase "their applicable fringe benefit monies."[38] Petitioner does not directly dispute the Administrator's contention. However, Petitioner does argue that "the parties deliberately and voluntarily changed the language in the CBA at issue" and that "[i]t is clear that the parties agreed to start paying the seasonal employees fringe benefits based upon the plain language of the CBA."[39]

We agree with the Administrator that the "applicable fringe benefit monies" phrase is ambiguous. The only clear requirement of Section 6 is that seasonal workers will receive their fringe benefits payments with their paychecks, rather than via contribution to an insurance plan, when they are not on a benefits plan. The provision does not provide the amount of benefits, whether it is just the Schedule A amount or the Schedule A amount plus the amounts specified in Section 2. Therefore, the Administrator did not err in considering extrinsic evidence, including past historical practices, to determine parties' intent on how much the seasonal workers are owed.

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[36] ODSB at 4 (citing *Ruud v. Westinghouse Hanford Co.*, ARB Nos. 1999-0023, 1999-0028, ALJ No. 1988-ERA-00033 (ARB Apr. 18, 2002)).

[37] 29 C.F.R. § 4.163(j).

[38] Administrator's Supplemental Brief at 4.

[39] Petitioner's Supplemental Brief at 6.

In its supplemental brief, Petitioner claims that seasonal workers were never actually paid the required fringe benefits under previous CBAs and that the revisions to the operative CBA allowed them to receive the benefits. Evidence in the record demonstrates that Petitioner's claims are incorrect because the parties did in fact include the fringe benefits monies into the Schedule A rates in past CBAs. For example, a 2007 email exchange between the parties during negotiations for a previous CBA demonstrates that they calculated the Schedule A rates for seasonal workers by adding the minimum hourly wage rates and fringe benefits rates together. Evidence also demonstrates that the parties engaged in the same pay practice for other workers, including seasonal tire technicians. In each of the previous CBAs, the seasonal workers were paid substantially greater Schedule A labor rates, indicating that the parties' past practice was to include the seasonal workers' required fringe benefits monies in their Schedule A rates. The operative CBA's same pay disparity further demonstrates that the parties intended to continue the practice.

Petitioner's interpretation also rests on the faulty assumption that the phrase "their applicable fringe benefit monies" in Article 21, Section 6 refers to the fringe benefit contribution amounts specified in Article 21, Section 2. Section 2 provides that the "Company will contribute the sum per hour paid, up to forty (40) hours per week to each *full time employee* to be used to cover the cost of the employee's insurance" and lists the contribution amounts. Section 2 does not refer to the amounts *seasonal employees* will be paid, nor does any other provision in the CBA describe the amounts KIRA will contribute to a temporary employee receiving insurance. Petitioner alleges that Section 2 provides only that full time employees must use the fringe money to cover the cost of their insurance coverage. However, the plain meaning of this section only imposes a requirement on KIRA to pay the listed amounts to the full time employees' benefits plans.

If the parties intended for temporary employees to be paid contribution amounts in addition to their Schedule A labor rates, the parties would have included such rates in the CBA, as well as lowering the seasonal worker labor rates to be more even or less than the full time employee labor rates. Petitioner provides no persuasive explanation for why the parties would have agreed to pay the seasonal workers substantially more than full time workers who have greater responsibilities and are often more experienced. Though Petitioner suggests the parties negotiated higher rates for seasonal workers because it is more difficult to find quality employees for temporary work, it fails to explain why it did not do so for all of the past CBAs, as well. We therefore affirm the Administrator's interpretation of the CBA.

Petitioner also contests the Administrator's determination that KIRA had satisfied its obligations to pay seasonal workers the cash-equivalent of its required fringe benefits. Petitioner notes the overall compensation that full time grounds

laborers receive is higher than the labor rates that seasonal grounds laborers receive and, therefore, seasonal workers are not receiving the same amount in fringe benefits that full time workers receive in insurance contributions.[40] The SCA requires that the fringe benefit "cash payments must be 'equivalent' to the benefits" the worker would have received in terms of monetary value, if they were eligible for a benefit plan.[41]

The Administrator, however, points out that Petitioner wrongfully assumes that the SCA requires KIRA to provide the same amount in benefits to both the full time and seasonal grounds laborers. Rather, the Administrator determined that the SCA requirement means that the seasonal laborers must receive the cash equivalent of fringe benefits *they* would have received if they were eligible to enroll in benefits plans.

Under the pertinent standard of review, this decision was "a reasonable exercise of the discretion delegated to the Administrator."[42] We therefore **AFFIRM** the Administrator's final ruling affirming the DO's finding that KIRA had not violated the SCA.[43]

SO ORDERED.

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[40] Seasonal employees' labor rates were about $16.50 per hour, while permanent employees' labor rates were around $13.15 per hour, a difference of $3.35. Permanent employees received an additional $6.00 in benefit contributions per hour, as well, so the permanent employees' total hourly pay was around $19.15, which was about $2.65 more than the seasonal employees' total pay.

[41] 29 C.F.R. § 4.177(a)(3) ("When a contractor discharges his fringe benefit obligation by furnishing . . . cash payments . . . the substituted fringe benefits and/or cash payments must be 'equivalent' to the benefits specified in the determination. As used in this subpart, the terms equivalent fringe benefit and cash equivalent mean equal in terms of monetary cost to the contractor.").

[42] *U.S. Postal Serv.*, ARB No. 1998-0131, slip op. at 7 (ARB Aug. 4, 2000).

[43] Petitioner also contested on appeal the Administrator's statement in the final ruling that the "decision not to institute an administrative enforcement action is not subject to review," seemingly claiming that the Administrator would be required to initiate an enforcement action if it found that KIRA had violated the SCA. Because we affirm the Administrator's conclusion that KIRA had not violated the SCA, and that an enforcement action was not warranted, we need not address this contention.

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

INNOVAIR LLC, **ARB CASE NO. 2020-0070**

PETITIONER, **DATE: November 12, 2021**

v.

ADMINISTRATOR,
WAGE AND HOUR DIVISION,

RESPONDENT.

Appearances:

For the Petitioner:
Melissa A. Hamann, Esq.; *ReavesColey, PLLC*; Chesapeake, Virginia

For the Respondent:
Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., Shelley E. Trautman, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965 (SCA), as amended, and its implementing regulations.[1] AMVAC LLC (AMVAC), filed a request for review and reconsideration of a wage determination

[1] 41 U.S.C. §§ 6701-6707, and its implementing regulations at 29 C.F.R. Parts 4 and 8.

issued under Section 2(a) of the SCA. After a review, the Division of Wage Determinations (DWD) found that the wage rates and fringe benefits in a May 15, 2019 collective bargaining agreement (CBA 3 or May 2019 IAM CBA) were not the SCA-required rates for the successor contract between INNOVAIR LLC (Innovair) and the General Services Administration (GSA).[2] The Administrator issued a final ruling affirming the DWD's determination. Innovair petitioned the Administrative Review Board (ARB or the Board) for review. As discussed below, we affirm the Administrator's final ruling.

BACKGROUND

GSA and Innovair were parties to Contract Number GS08Q15BPC0006 (the Contract), which obligated Innovair to provide aircraft maintenance support at Marine Corps Air Station Miramar in San Diego, California.[3] Innovair's employees were members of the International Association of Machinists and Aerospace Workers, District Lodge 725 (IAM) which is the union representing the employees.[4]

The Contract had a one-year base performance period and four one-year option periods. The third option period was set to expire on April 30, 2019. The GSA Contracting Officer (CO) informed Innovair that it would not exercise the final option period but instead would exercise its right to extend performance until September 30, 2019, pursuant to 48 C.F.R. § 52.217-8.[5]

At the time GSA and Innovair entered into the Contract, there was a collective bargaining agreement (CBA 1) between Innovair and IAM. CBA 1 was effective from May 15, 2013, to May 14, 2016.[6] Prior to CBA 1's expiration, Innovair and IAM negotiated a replacement collective bargaining agreement (CBA 2), which was effective from May 15, 2016, to May 14, 2019.[7]

On March 26, 2019, Innovair informed the CO that it had renegotiated a collective bargaining agreement with IAM (CBA 3), provided the new collective bargaining agreement's effective date, requested reimbursement for travel costs and

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[2] Innovair is a joint venture and its managing member is AMVAC. Administrative Record (AR) at 109.

[3] *Id.* at 136.

[4] *Id.* at 60, 109.

[5] *Id.* at 130.

[6] *Id.* at 109.

[7] *Id.*

expenses, and attached a copy of CBA 3 to the e-mail.[8] CBA 3's effective start date was May 15, 2019.[9]

On April 15, 2019, the CO issued a unilateral extension of the Contract, Modification 15. Modification 15 extended the period of performance from April 30, 2019, to September 30, 2019.[10] However, Modification 15 did not include a wage determination for the extension period.[11]

On May 2, 2019, Innovair requested that the CO modify the contract extension's rates to account for the wage adjustments that would take effect under CBA 3 as of July 1, 2019.[12] The CO denied Innovair's request for an adjustment on May 15, 2019.[13] The CO determined that the wage rates and fringe benefits established in the 2017 Wage Determination applied throughout the extension period.[14]

On May 17, 2019, Innovair requested that the CO reconsider its request for an adjustment.[15] On June 28, 2019, the CO denied reconsideration, stating that a price adjustment under 48 C.F.R. § 52.222-43(d) was not appropriate because the 2017 Wage Determination was the current and applicable wage determination at the beginning of the extension period.[16] As a result of the CO's denial of the price adjustment, Innovair asserts it incurred higher direct labor rates and fringe expenses than those specified in the contract between Innovair and GSA.[17] Specifically, Innovair claims that the price adjustment denial resulted in $624,556.44 in additional costs.[18]

On July 10, 2019, AMVAC filed a request on behalf of Innovair seeking a review of the wage determination, alleging that the wage rates and fringe benefits

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8 *Id*. at 127-128.
9 *Id*. at 60, 110.
10 *Id*. at 120-121.
11 *Id*. at 110, 120-121.
12 *Id*. at 110.
13 *Id*. at 111.
14 *Id*.
15 *Id*.
16 *Id*.
17 Innovair Petition for Review at 3
18 *Id*.

in CBA 3 were the SCA-required rates for the extension period from May 1 to September 30, 2019.[19] The DWD reviewed the request and found that AVMAC's request for review and reconsideration was untimely.[20] The DWD also found that Innovair did not actually pay wages and fringe benefits in accordance with CBA 3 during the term of the predecessor SCA-covered contract, and as a result, were not the SCA-required rates pursuant to Section 4(c).[21]

On November 27, 2019, Innovair requested a review and reconsideration by the Administrator of the Wage and Hour Division (Administrator).[22] On August 7, 2020, the Administrator issued a final ruling affirming the DWD's conclusions.[23]

On December 4, 2020, Innovair petitioned the ARB for review of the Administrator's final ruling. The Administrator filed a brief in response to the petition, and Innovair filed a reply brief. Upon review of the parties' briefs, the Board determined that additional briefing was necessary. The Board issued an Order Directing Supplemental Briefing on June 22, 2021. The parties filed timely briefs in response to the Order Directing Supplemental Briefing. For the reasons discussed below, we affirm the Administrator's final ruling.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide in its discretion questions of law and fact arising from the Administrator's final determination under the SCA.[24] The ARB's review is in the nature of an appellate proceeding.[25] While the Board reviews

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19 AR at 1-2.

20 *Id*. at 100-101.

21 *Id*. at 101.

22 *Id*. at 103-106.

23 *Id*. at 136-141.

24 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020). *See* 29 C.F.R. §§ 8.1(b)(1), 8.1(c), 8.6.

25 29 C.F.R. §§ 8.1(b)(1), 8.1(d), 8.6; s*ee ServiceStar Landmark Properties-Fort Bliss LLC*, ARB No. 2017-0013, slip op. at 2 (ARB June 25, 2018); *see also Ct. Sec. Officers*, ARB No. 1998-0001, slip op. at 4 (ARB Sept. 23, 1998) (stating that "[t]he Wage and Hour Administrator is the primary interpreter of the contract labor standards and implementing regulations, with the Board acting in an appellate capacity.").

questions of law de novo, the Board "defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with the law."[26]

DISCUSSION

The SCA requires federal contractors to pay covered service employees prevailing hourly wages and fringe benefits as determined by the Secretary of Labor or his authorized representative.[27] The Wage and Hour Division (WHD) primarily issues two types of wage determinations: 1) prevailing in the locality determinations, also known as area-wide wage determinations, and 2) collected bargaining agreement (CBA) wage determinations.[28] The WHD issues CBA wage determinations in accordance with Section 4(c) of the SCA. Section 4(c) requires the successor contractor to ensure service employees are paid wage and fringe benefits that are no less than those offered by a predecessor contract for substantially the same services when such employees were under a CBA during the predecessor contract period.[29] Specifically, Section 4(c) provides that:

> Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including, accrued wages and fringe benefits and any prospective increases in wages and fringe benefits providing for in a [CBA] as a result of arm's-length negotiations.[30]

Thus, Section 4(c) operates as a "floor" to protect employees' wage and fringe benefits throughout the procurement bidding and negotiation process.

When a contracting agency extends the term of an existing contract, "the contract extension is considered to be a new contract for purposes of the application

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[26] *In re Forfeiture Support Assocs.*, ARB No. 2006-0028, slip op. at 2 (May 27, 2008).

[27] 41 U.S.C. § 6703(1)-(2); 29 C.F.R. § 4.6.

[28] 41 U.S.C. § 6703(1)-(2); 29 C.F.R. §§ 4.50-4.55.

[29] 41 U.S.C. § 6706(c)(1).

[30] *Id.*

of the Act's provisions."[31] Therefore, a contractor may be its own successor for purposes of Section 4(c).[32]

Innovair argues on appeal that the Administrator misinterprets 29 C.F.R. § 4.163(f), a regulation that implements Section 4(c).[33] Specifically, Innovair claims that the Administrator's interpretation is unreasonable because it precludes the effect of a CBA during the term of the successor contract if that CBA was not effective during the predecessor contract term.[34] In response, the Administrator reiterates that under 29 C.F.R. § 4.163(f), a contractor must actually pay its employees in accordance with the CBA applicable to the predecessor contract for Section 4(c) to render that CBA's rates the required for the successor contract period.[35] Because Innovair did not pay its employees in accordance to CBA 3 during the course of the predecessor contract, the Administrator determined that CBA 3's wage rates and fringe benefits were not the SCA-required wage rates and fringe benefits during the extension period.[36]

Upon consideration of the parties' briefs on appeal,[37] and having reviewed the evidentiary record as a whole, we conclude that the Administrator acted reasonably and within her discretion in finding that CBA 3's wage rates and fringe benefits were not the SCA-required wage rates and fringe benefits pursuant to Section 4(c) for the extension period.

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[31] 29 C.F.R. § 4.143(b); *see* 29 C.F.R. § 4.163(e); *accord Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302, 312 (5th Cir. 1998) ("a contractor may become its own successor.").

[32] 29 C.F.R. § 4.143(e).

[33] Innovair Reply Br. at 2.

[34] *Id*. at 7-9.

[35] Administrator's Resp. Br. at 18.

[36] *Id*. at 17-19.

[37] The Administrator argues that AMVAC's Request for Review and Reconsideration of the wage determination was untimely pursuant to 29 C.F.R. § 4.56(a)(1) because it was submitted more than two months after the May 1, 2019 effective date of the contract extension. Administrator's Resp. Br. at 15-17; AR at 1-2. Because we affirm the Administrator's finding that the wage rates and fringe benefits for CBA 3 were not the SCA-required wage rates and fringe benefits for the contract extension period, we make no determination on this issue.

Regulation 29 C.F.R. § 4.163(f) provides that "Section 4(c) will be operative only if the employees who worked on the predecessor contract were actually paid in accordance with the wage and fringe benefit provisions of a predecessor contractor's [CBA]."[38] Innovair became its own successor when GSA extended the Contract from May 1, 2019, to September 30, 2019. Thus, Innovair was required to not pay less than the wages and fringe benefits its employees would have received under the predecessor contract. CBA 3 was not applicable to the predecessor contract scheduled to expire on April 30, 2019, because Innovair's obligations under CBA 3 did not commence until May 15, 2019, which was approximately two weeks after the predecessor contract expired. It is uncontested that Innovair did not actually pay its workers in accordance with CBA 3 during the term of the predecessor contract term, which would be required in order to be the SCA-required wage rates and fringe benefits for the successor contract pursuant to Section 4(c). Therefore, we conclude the Administrator acted reasonably and within her discretion finding that CBA 3's wage rates and fringe benefits were not the required rates for the extension period.

Accordingly, we **AFFIRM** the Administrator's final ruling.

SO ORDERED.

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[38] 29 C.F.R. § 4.163(f).

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

AMERICAN SECURITY PROGRAMS, INC.,

PETITIONER,

v.

UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATOR, WAGE AND HOUR DIVISION,

RESPONDENT.

ARB CASE NO. 2019-0084

DATE: March 25, 2021

Appearances:

For the Petitioner:
Eric S. Crusius, Esq. and Vijaya S. Surampudi, Esq.; *Holland & Knight LLP; Tysons, Virginia*

For the Respondent:
Bradley G. Silverman, Esq.; Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Jonathan T. Rees, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA).[1] On December 20, 2019, the Administrative Review

[1] 41 U.S.C. § 6701 *et seq.* (2011) and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2020).

Board (ARB) accepted a Petition for Review from American Security Programs, Inc. (ASP) of the August 23, 2019, Final Determination of the Administrator, Wage and Hour Division (the Administrator). ASP challenged the Administrator's ruling that Section 4(c) of the SCA applies to the base year (September 1, 2017 through August 31, 2018) of Contract No. NAMA-17-F-0085 for security guard services between ASP and the National Archives and Records Administration (NARA). For the following reasons, the Board affirms the Administrator's Final Determination.

BACKGROUND

The material facts pertinent to the Administrator's ruling in this matter are not in dispute. NARA contracts with private entities to provide security guard services at its headquarters in Washington, District of Columbia, and in College Park, Maryland.

From September 1, 2014, through August 31, 2016, SecTek, Inc. provided security guard services to NARA (SecTek/NARA contract). The base year was from September 1, 2014, through August 31, 2015. The security guards covered under the SecTek/NARA contract received wages and fringe benefits under a collective bargaining unit (CBA) between the International Guards Union of America, Local 153 (IGUA) and SecTek (the SecTek CBA). The SecTek/NARA contract included two year-long option years that NARA could choose to exercise. NARA chose to exercise the first option year.

In July of 2016, SecTek informed NARA that it would be unable to provide services unless it received a price adjustment. NARA denied the price adjustment. In August of 2016, NARA learned of an internal SecTek memo and questioned whether SecTek intended to pay the required wages and fringe benefits if NARA chose to exercise the second option year. On August 24, 2016, NARA determined it would not exercise the second option year with SecTek.

Subsequently, NARA awarded ASP a sole-source contract to perform security guard services from September 1, 2016, through August 31, 2017 (the sole-source contract). NARA did not conduct an open procurement process in selecting ASP for this contract. As generally required by regulation, NARA created a "Limited Sources Justification" document explaining the reasons why it offered ASP a sole-source contract. The Limited Sources document explained that NARA had only one week to transition to a new contractor to avoid an interruption of safety services and that the sole-source contract would allow NARA the necessary amount of administrative lead time to conduct a competitive procurement of a new contractor.

During the period of the sole-source contract, NARA conducted an open procurement process, and ASP was the successful bidder of Contract No. NAMA-17-F-0085 (ASP/NARA contract). The base year of the ASP/NARA contract was from

September 1, 2017, through August 31, 2018, and included four one-year option periods. ASP entered a fully executed CBA with IGUA and submitted it to NARA on August 17, 2017, which listed its effective date as September 1, 2017.[2] The ASP/NARA contract did not incorporate the ASP CBA.[3]

On September 29, 2017, ASP requested NARA to increase the price for the base year of the ASP/NARA contract and incorporate the wage and fringe benefits provided for in the new CBA into the wage determination of the contract.[4]

On November 28, 2017, NARA subsequently requested a determination from the Administrator whether NARA should modify the base year of the ASP/NARA contract in order to incorporate the new ASP CBA.[5] NARA also sought a determination whether Section 4(c) applied to the ASP CBA.[6] On April 5, 2018, ASP submitted documentation that it had paid its workers the wages and fringe benefits under the SecTek/NARA CBA during the course of the sole-source contract, and "had followed all required statutory procedures and obligations under Section 4(c)[.]" [7]

On September 4, 2018, the Administrator issued a ruling that Section 4(c) of the SCA required a wage determination for the ASP/NARA full-term contract based upon the SecTek CBA, not ASP's own CBA.[8] ASP submitted a request for reconsideration. On August 23, 2019, the Administrator affirmed its prior determination.[9] This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide in its discretion questions of law and fact arising from the Administrator's final determination under the SCA.[10] The

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2 Administrative Record (AR) at 326, 329. All references to the AR in this decision are based upon the PDF version of the file in the record.

3 *Id.* at 325.

4 *Id*.

5 *Id*.

6 *Id*.

7 *Id*. at 326-27.

8 *Id*. at 13–18.

9 *Id*. at 6–9.

10 The Secretary of Labor has delegated to the Board authority to issue agency decisions under the SCA. Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020). *See* 29 C.F.R. §§ 8.1(b)(1), (6).

ARB's review is in the nature of an appellate proceeding.[11]

LEGAL BACKGROUND

The SCA requires that employees working on covered Government service contracts be paid prevailing hourly wages and fringe benefits as determined by the Secretary of Labor.[12] Section 4(c) of the SCA requires successor contractor to ensure that service employees are paid wage and fringe benefits that are not diminished from those offered by a predecessor contract for substantially the same services when such employees were under a CBA during the predecessor contract period. Specifically, Section 4(c) provides that:

> Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a [CBA] as a result of arm's-length negotiations."[13]

Section 4(c) thus operates as a "floor" to ensure that a successor full term contract may not pay less than the wage and fringe benefits its employees would have received under the CBA of the predecessor full term contract.

There is no requirement that the successor contract commence immediately after the completion or the termination of the predecessor contract for the application of Section 4(c) to the successor contract.[14] Section 4.163(h) outlines three examples of circumstances that may result in the interruption of contract services but which will not undermine the predecessor/successor contract relationship. This regulation provides that contract services under the predecessor contract "may be interrupted because the Government facility is temporarily closed for renovation, or because a predecessor defaulted on the contract or because a bid protest has halted a contract award requiring the Government to perform the services with its own employees." The regulation further provides that "in all such cases, the requirements of Section 4(c) would apply to any successor contract that may be awarded after the temporary interruption of a full term contract." Section 4.163(h) further states that the "basic principle in all of the preceding examples is that

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11 29 C.F.R. §§ 8.1(b)(1), (6).

12 41 U.S.C. § 6703(1)-(2); 29 C.F.R. § 4.6(b)(1).

13 29 C.F.R. § 4.163(c)(1).

14 29 C.F.R. § 4.163(h).

successorship provisions of Section 4(c) apply to the full term successor contract."[15] Consistent with this basic principle, the scope of Section 4.163(h) is not limited to these three examples and independently provides that "temporary interim contracts, which allow a contracting agency sufficient time to solicit bids for a full term contract, also do not negate the application of Section 4(c) to a full term successor contract."

DISCUSSION

The Administrator determined that Section 4(c) of the SCA required a wage determination for ASP's full term contract based on SecTek's CBA, rather than ASP's subsequent CBA. The Administrator explained that under the applicable regulations, ASP's sole-source contract was a temporary interim contract that did not break the predecessor/successor contract relationship under Section 4(c) between the SecTek/NARA full term contract and that ASP/NARA full term contract.[16] The Administrator concluded that Section 4(c) required ASP to pay its workers during the base year of the ASP/NARA contract no less than the wages and fringe benefits that the workers would have received under the SecTek CBA.

On appeal, in support of its request to NARA for a price adjustment to the base year of the ASP/NARA contract, ASP's overarching argument is that it should be allowed to pay its workers higher wages and fringe benefits pursuant to its own CBA negotiated with the union, rather than the lower wages of the SecTek CBA. The primary thrust of ASP's challenge to the Administrator's decision is that the Administrator erred in determining that the sole-source contract was a temporary interim contract and that the SecTek/NARA contract was the full term predecessor contract to the ASP/NARA contract. ASP specifically argues that the Administrator should have determined the sole-source contract between NARA and ASP was a full term successor contract. Consequently, ASP submits that the sole-source contract is the Section 4(c) successor contract to the SecTek/NARA contract and that the ASP CBA governs the wage determination for the base year of the APS/NARA successor contract.

Upon our review of the record, the parties' arguments, and the applicable law, we conclude that the Administrator reached a well-reasoned decision based on undisputed facts. For the reasons set forth below, we affirm the Administrator's decision the sole-source contract is a temporary interim contract, the SecTek/NARA full term contract is a predecessor to the ASP/NARA contract, and the SecTek CBA governs the wage determination for the base year of ASP/NARA Contract. Therefore, the Administrator determined Section 4(c) requires ASP to provide wages and fringe benefits that are no less than those provided in the SecTek CBA.

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[15] *Id*.

[16] AR at 20 (citing 29 C.F.R. § 4.163(h)).

The phrase "temporary interim contracts," as used in Section 4.163(h), refers to contract(s) "which allow a contracting agency sufficient time to solicit bids for a full term contract." The regulation also explicitly provides that such temporary interim contracts "do not negate the application of Section 4(c) to a full term successor contract." A temporary interim contract merely acts as a "bridge" from one full term contract to another full term contract and does not break the chain of Section 4(c) successorship. Thus, when an agency uses a temporary interim contract to procure services, the Section 4(c) predecessor contract is the prior full term contract (e.g., the SecTek/NARA contract), and not the temporary interim contract (e.g., the sole-source contract), and does not break the successor chain. The successor contract under Section 4(c) is the next full term contract awarded by an agency through the more traditional full and open competitive procurement process (e.g., the ASP/NARA contract).[17]

In this matter, NARA originally awarded SecTek a contract to provide security guard services from September 1, 2014 to August 31, 2015, plus two option years. NARA exercised its first-year option, which ended on August 31, 2016. But when it came time for NARA to decide whether to exercise the option for the second year, NARA learned that SecTek may not pay the required wages and fringe benefits under its CBA if NARA exercised its second-year option, especially in the aftermath of rejecting SecTek's request for a price adjustment for the option year. NARA decided not to exercise its second-year contract option with SecTek on August 24, 2016. Faced with SecTek's unexpected and last-minute unavailability, NARA had only a week to a find a temporary replacement vendor to prevent a disruption of those security services until a full term successor contract could be awarded. NARA subsequently entered into a one-year sole-source contract with ASP, effective September 1, 2016, to provide essentially the same security services as SecTek. As a result of the exigent circumstances, NARA intended the sole-source contract to be a short-term agreement that was necessary for NARA to keep its essential security forces up and running until it could solicit bids for the next full term successor contract.

During the period of the sole-source contract, NARA solicited bids for the next full term contract, which it awarded to ASP as the successful bidder. The final sole-source contract stated that it was a "[b]ridge" between two full term contractual agreements and that it had specifically incorporated the SecTek CBA.[18] The sole-

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[17] We note that Section 2(a) of the SCA, in conjunction with 4(c), requires the Administrator to calculate wage determinations using the predecessor contractor's CBA. *See* 41 U.S.C. §§ 6703(1)-(2). The regulations provide that Sections 2(a) and 4(c) of the SCA "must be read in harmony" to reflect the statutory scheme of the SCA. 29 C.F.R. §§ 4.163(d) and (e).

[18] AR at 31-32 (Item 11(b)).

source contract facilitated the transition from the full term NARA/SecTek contract to the full term NARA/ASP agreement without the interruption of security guard services to NARA. Under these circumstances, we agree with the Administrator that the sole-source contract in this case constitutes a temporary interim contract within the meaning of Section 4.163(h).

Temporary interim contracts that provide a contracting agency "sufficient time to solicit bids for a full term contract[] do not negate the application of Section 4(c) to a full term successor contract."[19] Thus, we agree with the Administrator that the SecTek/NARA contract was the predecessor full term contract, and, therefore, the SecTek CBA constitutes the applicable Section 4(c) WD for the base year of the successor contract between ASP and NARA.

NARA's Limited Sources Justification document further supports the Administrator's determination that the sole-source contract is a temporary interim contract and its purpose was necessitated by emergency circumstances that do not interrupt Section 4(c)'s predecessor-successor obligations. NARA explained in the Limited Sources Justification document that it was essential to have uninterrupted security guard services and that it chose to contact only ASP in order to meet the quick transition deadline based upon its prior experience with the agency.[20] The Limited Sources Justification document also explained that the sole-source contract was for one year because "[b]ased on NARA's experience, the administrative lead time to conduct the procurement and transition a new contractor require the year period of performance."[21] Finally, NARA's Limited Sources Justification document expressly stated that "[d]uring the one year task order, NARA will conduct a full and open competitive procurement for these services that will have a service period of performance start date of September 1, 2017."[22]

We turn next to ASP's contention that the sole-source contract was a full term successor contract, and not a temporary interim contract. In support of its contention, ASP advances two arguments. First, ASP submits that the sole-source contract is a full term contract because it lasted for a year, which is the same length of time as the base year in the ASP/NARA contract. Second, ASP submits there was no interruption of contract services between the SecTek/NARA contract and the sole-source contract that required a "temporary [contract] vehicle." These arguments are without merit.

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19 29 C.F.R. § 4.163(h).

20 AR at 23.

21 *Id.* at 24.

22 *Id*. at 28.

The SCA does not impose the requirement of an interruption of services for a contract to be considered a temporary interim contract; nor does it provide a fixed limit for the length of what is to be considered a temporary interim contract. Neither do the SCA's implementing regulations. Section 4.163(h) plainly does not require an agency to experience an interruption of contract services before it may enter into a temporary interim contract. This regulation also does not place any fixed limit on how long a temporary interim contract can last.[23]

In addition, ASP argues that its CBA should set the wage determination because it provides higher wages and fringe benefits than the SecTek CBA. However, the "Administrator specifies *the minimum* monetary wages and fringe benefits to paid as required under the Act" by either a prevailing locality rate or by wages rates and fringe benefits contained in a CBA through the successorship doctrine."[24] Thus, the SCA's successorship doctrine does not prohibit ASP from paying wages and fringe benefits that are higher than the SecTek CBA.[25]

In summary, we agree with the Administrator's determination that ASP's sole-source contract was a "temporary interim" contract that allowed NARA sufficient time to solicit bids for a full term successor contract and, therefore, did not break the chain of Section 4(c) successorship between SecTek's full term predecessor contract) and ASP's successor full term contract. Therefore, the Administrator properly concluded that the SecTek CBA constitutes the Section 4(c) wage determination for the base year of the ASP/NARA contract.

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[23] ASP argues that the Administrator erred by relying on *In re GSA* because in that case the government agency entered into a series of temporary interim contracts only after the initial contractor defaulted and the temporary interim contracts were under a year in length. *See In re Gen. Servs. Admin. (In re GSA)*, ARB No. 1997-0052, 1997 WL 733631 (ARB Nov. 21, 1997). We disagree. The situation in the present matter is akin to a default because SecTek made itself unavailable by forcing NARA's hand to decide whether to exercise a second option year with SecTek despite the risk it would not pay its employees the stated wages and fringe benefits, to agree to a price adjustment it had previously denied, or to find a new contractor to perform security services. *See* 20 C.F.R. § 4.163(h). Further, the Board in *In re GSA* did not set a specific length limitation for what is to be considered a temporary interim contract.

[24] 20 C.F.R. § 4.50 (emphasis added). Although a successor contract may have its own CBA, it does not negate the clear mandate of Section 4(c) that the wages and fringe benefits called for by the predecessor contract's CBA shall be the minimum payable under a successor contract. *See* 29 C.F.R. § 4.163(d).

[25] Furthermore, Section 2(c) of the SCA does not provide the Administrator with the discretion to calculate a wage determination based upon the CBA to a successor full time contract, rather than the CBA of a predecessor full time contract, simply because it pays higher wages and benefits than the predecessor CBA.

CONCLUSION

We find the Administrator properly concluded that the wage rates and fringe benefits in the SecTek CBA constitutes the Section 4(c) wage determination for the base year of Contract No. NAMA-17-F-0085 between NARA and ASP. Accordingly, we affirm the Administrator's Final Determination.

SO ORDERED.

GAO@100 U.S. GOVERNMENT ACCOUNTABILITY OFFICE
A Century of Non-Partisan Fact-Based Work

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Gemini Tech Services, Inc.

File: B-418233.5; B-418233.6

Date: March 2, 2021

Matthew Schoonover, Esq., John Mattox, Esq., Matthew Moriarty, Esq., and Ian Patterson, Esq., Schoonover & Moriarty, LLC, for the protester.
Jason Blindauer, Esq., and Isaias Alba, Esq., Piliero Mazza PLLC, for the intervenor.
Andrew J. Smith, Esq., Gregory O'Malley, Esq., and Eugenee Gray, Esq., Department of the Army, for the agency.
Christine Milne, Esq., Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation that the agency unreasonably waived material terms and conditions of the solicitation is denied where the protester failed to demonstrate that it suffered any competitive prejudice resulting from the agency's actions.

2. Protest allegation that the awardee's proposal demonstrated intent to violate the Service Contract Act is denied where the awardee's proposed pricing represented an unobjectionable below-cost offer.

3. Protest allegation that the agency unreasonably evaluated the firm's technical proposal is denied where the evaluation was consistent with the terms of the solicitation and any applicable procurement statutes and regulations.

DECISION

Gemini Tech Services, Inc., a small business of Willow Park, Texas, protests the award of a contract to Case Healthcare Solutions, Inc. (CHS), a small business of Reston, Virginia, under request for proposals (RFP) No. W9124D19R0031, issued by the Department of the Army for administrative recruiter support services at 268 United States Army Recruiting Command (USAREC) locations. The protester argues that the awardee's proposal failed to comply with the terms of the solicitation and that the agency unreasonably evaluated the awardee's proposal.

The protest is denied.

BACKGROUND

On September 24, 2019, the Army issued the RFP to procure administrative recruiter support services at 268 USAREC locations throughout the United States. Agency Report (AR), Tab 3, RFP at 1, 58. Support personnel would prepare correspondence, schedule meetings, receive visitors, and various other administrative tasks. *Id*. at 58. The RFP contemplated the award of a fixed-price contract to be performed over a 1-month phase-in period, an 11-month base period, and four 12-month option periods. *Id*. at 20-24.

Award would be made on a lowest-price, technically acceptable basis considering price and technical capability factors. RFP at 9, 28. The technical capability factor identified three subfactors. *Id*. at 28. Each subfactor would receive a separate rating of acceptable or unacceptable, and only proposals with acceptable ratings for all three subfactors would be considered for award. *Id*. Proposed prices would be evaluated to determine whether they were fair, reasonable, and balanced. *Id*.

CHS, Gemini, and 19 other offerors submitted proposals prior to the close of the solicitation period. Memorandum of Law (MOL) at 5. While both CHS and Gemini were found technically acceptable, CHS's lower-priced proposal was eliminated from the competition for failure to comply with Service Contract Act (SCA) labor standards requirements.[1] *Case HCS; INTEROP-ISHPI JV, LLC*, B-418233.3, B-418233.4, Oct. 5, 2020 (unpublished decision) at 2. On August 11, the agency awarded the contract to Gemini for $53,533,820. *Id.* at 1.

CHS challenged the award in a protest with our Office, arguing that the agency unreasonably evaluated its price proposal. *Id*. We dismissed the protest as academic because the agency explained that it intended to reevaluate proposals and make a new award decision. *Id*. After reevaluating proposals, the Army made award to CHS on November 25 at a price of $49,050,282. MOL at 6. This protest followed.

DISCUSSION

Gemini raises multiple allegations challenging the agency's conduct of the acquisition. Principally, Gemini argues that CHS's price proposal did not conform to the RFP's requirements. The firm also argues that CHS's average wage rate demonstrated intent to violate the SCA. Gemini next argues that the Army unreasonably evaluated CHS's technical proposal under the management/administration subfactor. Finally, Gemini argues that the Army conducted unequal discussions.

We address the principal allegations below, but note, at the outset, that an agency's evaluation of an offeror's proposal is a matter within the agency's discretion. *RIVA*

[1] Congress renamed the Service Contract Act of 1965 and it is now titled the "Service Contract Labor Standards." *See* 41 U.S.C. chapter 67; Federal Acquisition Regulations (FAR) 1.110(c), Table 1. To maintain consistent terminology with the solicitation, we will refer to the Act as the Service Contract Act or SCA.

Solutions, Inc., B-418408, Mar. 31, 2020, 2020 CPD ¶ 133 at 3. In reviewing protests of alleged improper evaluations, it is not our role to reevaluate proposals; rather, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement laws and regulations. *Id*.

CHS's Price

Gemini contends that CHS's price proposal omitted required information, and therefore should have been evaluated as unawardable. Specifically, the firm argues that CHS did not provide a detailed breakdown of fringe benefit components. Supp. Comments at 3. Gemini also argues that CHS did not provide discrete labor rates for each of the 268 administrative staff personnel. *Id.* at 5-6. The Army responds that CHS's price proposal complied with all solicitation requirements. Supp. MOL at 2.

As relevant here, the RFP required offerors to provide a "detailed breakdown" of pricing information, including the proposed fringe benefits for exempt and non-exempt positions. RFP at 100.[2] The RFP advised that proposed pricing information would be evaluated to determine whether proposed prices are fair, reasonable, and balanced. *Id.* at 28.

CHS's price proposal provides a "breakdown" of its labor compensation structure. AR, Tab 15, CHS Pricing Spreadsheet at 2. The firm provides details on the labor category, the SCA occupation code, the hourly pay rate, the total level of fringe benefit compensation, and the allocated indirect costs for each employee. *Id.* The firm does not provide details on the various components of the fringe benefit compensation (*i.e.*, the unemployment insurance, the workers' compensation, or health benefit contributions), or identify discrete labor rates for each of the 268 administrative staff personnel. *Id.* The agency evaluated CHS's price as complying with the solicitation's requirements. Contracting Officer's Statement (COS) at 5; AR, Tab 25, Source Selection Evaluation Board (SSEB) Report Second Addendum at 1, 4.

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[2] The exact language from the RFP is as follows:

> Offerors shall provide a detailed breakdown of how [they] arrived at proposed costs as follows: CLIN (Contract Line Item Number), Description, Service Contract Act (SCA) Occupation Code, Firm Fixed Price (FFP) Direct Labor Categories and Rates, for all proposed exempt and non-exempt positions clearly identify the proposed positions as exempt or non-exempt, full time equivalents for each labor category, productive hours, overtime hours and rate (if applicable based on technical proposal), proposed exempt and non-exempt fringe benefits, to include Federal Unemployment Tax Act (FUTA), State Unemployment Tax Act (SUTA), Workers Compensation, Health & Welfare, Annual Benefit Funds, Burdened Labor Rates, Site and Individual Other Direct costs, Overhead, G&A, and Profit.

RFP at 100.

Gemini complains that CHS's price proposal did not comply with an alleged requirement to provide details for each of the various components comprising the total fringe benefit compensation. Supp. Comments at 2-5. The firm argues that the RFP plainly included this requirement, and the Army should have evaluated CHS's proposal as unawardable since it did not provide details for those components. *Id.* at 2. The Army responds that Gemini's interpretation of the solicitation is unreasonable. Supp. MOL at 2-5. Alternatively, the Army argues that the solicitation contained a patent ambiguity which should have been challenged prior to the close of the solicitation period, or, at most, the solicitation contained a latent ambiguity and Gemini suffered no competitive prejudice. *Id.* at 6-7.

Despite the disagreement, we need not determine whether the omitted information should be considered material under the solicitation's terms because we agree that the Army effectively waived the requirement for fringe benefit components and Gemini did not demonstrate any prejudice from this waiver. An agency may waive compliance with a material solicitation requirement in awarding a contract if the award will meet the agency's actual needs without prejudice to other offerors. *Technology and Telecomms. Consultants, Inc.*, B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 12. Thus, even where an agency waives a material solicitation requirement, our Office will not sustain the protest unless the protester can demonstrate that it was prejudiced by the waiver--that is, the protester would have submitted a different proposal or could have done something else to improve its chances for award had it known the agency would waive the requirement. *Desbuild, Inc.*, B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 7.

Gemini has not alleged that it would have changed its price proposal to its competitive advantage had it known that the agency would have waived compliance with the alleged requirement. *See* Supp. Comments at 9 (arguing only that the firm suffered prejudice based on the fact that CHS was not excluded from the competition); *see also* Comments at 12. Significantly, Gemini has not explained how eliminating the need to itemize fringe benefit components would have decreased its total price, such that Gemini's proposal, and not CHS's proposal, would have represented the best value. *See* Supp. Comments at 9. Thus, we deny this protest allegation because Gemini has failed to demonstrate that it suffered any competitive prejudice. *See Platinum Business Corp.*, B-415584, Jan. 18, 2018, 2018 CPD ¶ 34 at 3-4 (protester did not suffer any competitive prejudice because the protester did not specify how it would have altered its proposal in light of waived solicitation requirements).

Gemini next complains that CHS's price proposal was deficient because it did not propose discrete wage rates for each location. Supp. Comments at 5-6. Gemini argues that, by omitting discrete wage rates, CHS did not provide a "detailed breakdown" as required by the solicitation. The Army responds that the solicitation did not require offerors to propose discrete wage rates, as opposed to an average wage rate. Supp. MOL at 7.

On this record, we do not object to the agency's evaluation. As relevant here, the RFP required bottom-line pricing for labor, and a pricing breakdown delineating "Direct Labor Categories and Rates[.]" RFP at 100. Consistent with the agency's position, we do not interpret this phrase as requiring discrete wages for each location because the phrase simply does not provide for that requirement. *See Anders Constr., Inc.*, B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 3 (a posited interpretation of a solicitation is reasonable when it is consistent with the solicitation's provisions when read as a whole). Further, our review confirms that CHS provided both its bottom-line pricing, and its direct labor categories and rates. AR, Tab 15, CHS Pricing Spreadsheet at 2. We also note that the solicitation did not prohibit offerors from using average wage rates as part of their proposals. *See* RFP at 100; *accord* Supp. MOL at 7-8. Thus, we deny this allegation.

Compliance with the SCA

Gemini argues that CHS intends to violate the SCA because its proposed average wage rate is lower than some of the applicable SCA rates. Protest at 4. The Army responds that it reasonably evaluated CHS's proposal as demonstrating compliance with the SCA. MOL at 11.

Again, the RFP required the selected contractor to staff administrative personnel at 268 USAREC locations throughout the United States. The RFP required the selected contractor to compensate these employees at the applicable SCA wage determination. RFP at 49, 87 (incorporating by reference FAR clause 52.222-41, Service Contract Labor Standards); *see also* COS at 3-4.

CHS's price proposal included an average wage rate for all 268 administrative staff positions. AR, Tab 15, CHS Pricing Spreadsheet at 2. CHS's proposed rate was lower than some of the applicable SCA rates. *Id.*; RFP at 87. Nevertheless, CHS's proposal also provided that its proposed compensation was in "full compliance with the [SCA] location specific [wage determination] requirements[.]" AR, Tab 14, CHS Price Proposal at 16. Based on this provision, the Army concluded that CHS's proposal did not evidence any intent to violate the SCA, even though the firm's proposed rate was lower than some of the applicable rates. COS at 4.

Where a firm offers hourly rates below those specified in an SCA wage determination, that firm is nonetheless eligible for a contract award provided the proposal does not evidence intent to violate the SCA and the firm is otherwise determined to be responsible. *Nirvana Enterprise, Inc.*, B-414951.2, B-414951.3, Dec. 19, 2017, 2018 CPD ¶ 5 at 3-4. On a fixed-price contract, as here, a proposal that does not take exception to the solicitation's SCA provisions yet offers labor rates that are less than the SCA-specified rates may simply constitute a below-cost offer, and an award to a responsible firm on the basis of such an offer is legally unobjectionable. *Id*. In contrast, where there is an indication that the offeror does not intend to be bound by the terms of the SCA, its offer must be rejected. *Id*.

We do not find the agency's evaluation objectionable. CHS's proposal did not take any exception to the requirement regarding compliance with the SCA; rather, CHS's proposal stated: "Full Compliance with the Service Contract Act (SCA) and Applicable Wage Determination (WD): Our proposed General Clerk II pay rates (Occupation Code 01112) are in full compliance with the location specific WD requirements – as provided with the solicitation[.]" AR, Tab 14, CHS Price Proposal at 16. Thus, we deny this protest allegation because, even if CHS's proposed wage rate represented a below-cost offer, its proposal did not evidence any intent to violate the SCA.[3] *See LATA-Atkins Tech. Servs., LLC*, B-418602, B-418602.4, June 10, 2020, 2020 CPD ¶ 192 at 7, n.3 (awardee's proposal constituted an unobjectionable below-cost offer because, even though the proposed wage rates were below the SCA rates, the awardee's proposal did not evidence any intent to violate the SCA).

Technical Capability

Gemini contends that CHS's proposal failed to address how it would minimize employee turnover. Protest at 4; Comments at 3. Gemini asserts that this omission constitutes a material failure to meet the solicitation requirements, and as a result, CHS's proposal should have been evaluated as "unacceptable" under the technical capability factor. Comments at 5.

As part of their management/administration approach, the RFP instructed offerors to describe how they would mitigate the impact of employee turnover on successful performance of the contract. RFP at 99. In relevant part, the RFP advised that the agency would evaluate proposals to determine whether they demonstrate an adequate approach to minimizing employee turnover. *Id.* The Army evaluated CHS's proposal as acceptable under this subfactor, and concluded that the proposal demonstrated an adequate approach. AR, Tab 17 SSEB Report at 5. As relevant here, the Army explained that CHS's proactive approach to personnel issues will minimize employee turnover. *Id.* The agency also noted that CHS's management/administration approach included multiple strategies for minimizing employee turnover. Supp. COS at 2.

On this record, we have no basis to object to the agency's evaluation. CHS's proposal outlined a four-step process demonstrating the firm's management/administration approach. AR, Tab 13, CHS Tech. Proposal at 9-10. As part of Step Two, "Early Issue Identification[,]" CHS articulates multiple techniques for minimizing employee turnover. *Id.* For instance, CHS explains that the firm offers staff performance incentives, continuing education, employee training, counseling services, and open-door communication policies in order to mitigate unexpected turnover and unacceptable employee performance. *Id.* Thus, we deny the protest allegation because our review

[3] The Army computed an average wage rate using applicable SCA rates, and determined that CHS's proposed rate was actually higher than the average SCA rate. COS at 2. Thus, CHS's proposed pricing does not necessarily represent a below-cost offer.

confirms that CHS's management/administration approach addressed techniques to mitigate personnel turnover.

Unequal Discussions

Finally, Gemini contends that the Army conducted unequal discussions. Supp. Comments at 8. Gemini asserts that the Army effectively conducted discussions through the bid protest process because it originally interpreted CHS's average wage rate for all 268 locations as demonstrating intent to violate the SCA, but revised its interpretation and its evaluation of CHS's proposal in response to information learned during the prior protest. *Id.* The Army responds that the reevaluation was based entirely on the information contained in CHS's proposal. Supp. MOL at 10. The Army explains that while it originally misinterpreted CHS's proposed average wage rate as applying to each of the USAREC locations, it revised its interpretation when reevaluating proposals. *Id.*

Under FAR section 15.306(d), discussions are exchanges with offerors after the establishment of the competitive range. Such exchanges are to be tailored to each offeror's unique proposal, with the intent of obtaining proposal revisions through bargaining, give and take, attempts at persuasion, the alteration of assumptions and positions, and negotiations. FAR 15.306(d). When an agency conducts discussions with competitive range offerors, it is required to address, at a minimum, deficiencies, significant weaknesses, and adverse past performance to which an offeror has not previously had an opportunity to respond. FAR 15.306(d)(3). After an agency advises offerors of deficiencies in their proposals, the agency must allow each offeror to submit a revised proposal satisfying the government's requirements. FAR 15.307(b).

Here, we do not find the agency's conduct objectionable. The record does not show that the Army conducted any type of exchange with CHS following the initial award decision that would qualify as discussions under FAR 15.306(d). COS at 2. The Army neither bargained with CHS to alter the terms of the firm's proposal, nor afforded CHS an opportunity to revise its proposal to cure a deficiency. *Id.* Instead, the record simply shows that, after CHS filed its protest, agency officials internally reviewed the evaluation results, and independently determined that they had misinterpreted CHS's price proposal. *Id.* Accordingly, we deny the protest allegation.

We deny the protest.

Thomas H. Armstrong
General Counsel

Paugh v. Lockheed Martin Corp.

Decided May 7, 2021

EP-20-CV-154-DB

05-07-2021

KYLEE M. PAUGH, Plaintiff, v. LOCKHEED MARTIN CORPORATION, Defendant.

THE HONORABLE DAVID BRIONES SENIOR UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER

On this day, the Court considered Defendant Lockheed Martin Corporation's ("Lockheed Martin") "Motion for Summary Judgment" ("Motion") filed on March 2, 2021. ECF No. 30. Plaintiff Kylee M. Paugh ("Ms. Paugh") filed a Response on March 17, 2021. ECF No. 32. Lockheed Martin filed a Reply on March 23, 2021. ECF No. 38. After due consideration, the Court is of the opinion that Lockheed Martin's Motion should be granted.

BACKGROUND

In 2018, Ms. Paugh worked for Tapestry Solutions, Inc. ("Tapestry Solutions") under a contract Tapestry Solutions had to provide certain services to the United States Department of the Army ("the Army") at Fort Bliss, Texas. Pl.'s First Am. Compl. ¶¶ 8-9, ECF No. 10; Mot. 3, ECF No. 30. Tapestry Solutions's contract with the Army expired on December 31, 2018. Pl.'s First Am. Compl. ¶ 9, ECF No. 10. On January 1, 2019, Lockheed Martin took over the services Tapestry Solutions was previously contracted to provide to the Army. Pl.'s First Am. Compl. ¶¶ 11-12, ECF No. 10; Mot. 3, ECF No. 30. Fewer positions for employees were funded by the Army under the new contract with Lockheed Martin than the predecessor contract with Tapestry Solutions through which Ms. Paugh was employed. Mot. 4, ECF No. 30. *2

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1. Ms. Paugh's Factual Allegations

Ms. Paugh argues that, as the successor contractor to Tapestry Solutions, Lockheed Martin was required to offer Tapestry Solutions employees, including herself, "a right of first refusal of employment." Pl.'s First Am. Compl. ¶¶ 16, 18, ECF No. 10 (citing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts ("Executive Order 13495"), 74 FR 6103; Federal Acquisition Regulation, 48 CFR 52.222-17, Nondisplacement of Qualified Workers; McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 6701-07); Resp. 7-8, ECF No. 32. Furthermore, Ms. Paugh claims that Lockheed Martin was not allowed to post employment openings under the contract until it provided the right of first refusal of employment. Pl.'s First Am. Compl. ¶¶ 17, 19, ECF No. 10.

Ms. Paugh alleges that, despite such requirement, Lockheed Martin never offered her a right of first refusal of employment. *Id.* ¶ 20. Instead, Lockheed Martin "posted job openings and required the Tapestry Solutions employees to apply for positions of employment." *Id.* ¶ 21. Ms. Paugh applied for nine positions with Lockheed Martin but was not hired for any of them. *Id.* ¶ 21; Mot. 3, ECF No. 30. To fill those nine positions, Ms. Paugh claims, "Lockheed Martin offered rights of first refusal to the eight male Tapestry Solutions' employees, and the eight workers accepted the offers for the positions and were

hired." Pl.'s First Am. Compl. ¶ 21, ECF No. 10; *see also* Resp. 10, ECF No. 32. Further, "Lockheed Martin hired one man from outside Tapestry Solutions and Lockheed Martin." Pl.'s First Am. Compl. ¶ 21, ECF No. 10.

2. Lockheed Martin's Factual Allegations

Lockheed Martin asserts that, because fewer positions were funded under their contract than the predecessor contract, it "posted individual 'job requisitions' for each position it *3 needed to fill" and required that employees under the predecessor contract apply to fill those positions.[1] Mot. 4, ECF No. 30. Lockheed Martin argues that it was not obligated under Executive Order 13495 to affirmatively offer each Tapestry Solutions employee his or her corresponding position under the new contract, as Ms. Paugh maintains. *Id*. at 5. Instead, Lockheed Martin "had a preference" for applicants who were employed under the predecessor contract. *Id*. at 4. When multiple applicants who were employed under the predecessor contract applied for the same job requisition, it reviewed the applications and selected the best qualified candidate for each position. *Id*.

[1] The distinction between "job requisition," "position," and "job title" is a point of contention between the parties. *See* Mot. 13-14, ECF No. 30 ("Paugh may argue that, because some of these men were hired for job requisitions that had the same job title as the requisitions she applied for, the Court should deem her to have applied for purposes of establishing a prima facie case."); Reply 6, ECF No. 38 ("At her deposition, however, Paugh admitted that she did not understand the difference between a requisition number and a job title."). According to Lockheed Martin, "[a] job requisition is an alphanumeric identifier that Lockheed Martin uses to facilitate the hiring of a new employee. Each open position is associated with a unique requisition identifier." Mot. 4, ECF No. 30. Lockheed Martin adds that "each person it hired applied for the specific job requisition number (as opposed to job title) to which the person was hired." Reply 6, ECF No. 38.

In this Opinion, the Court will attempt to maintain the distinction between "job requisition," "position," and "job title" as best as it understands Lockheed Martin to be making the distinction. It will use "job requisition" to refer to a specific job posting to which applicants apply, "position" to refer to discrete units of employment to which an applicant is hired, and "job title" to refer to a broad category of employment responsibility, for which there might be multiple job requisitions. At no point should the Court's use of one term instead of another be understood as determining the rights of the parties.

Of the nine job requisitions that Ms. Paugh applied for, only two were filled. *Id*. at 6. The other seven job requisitions were either cancelled or closed with no candidates hired. *Id*. Lockheed Martin maintains that the two candidates hired over Ms. Paugh were the best-qualified candidates for their respective job requisition. *Id*. Further, Lockheed Martin states that Ms. Paugh did not apply for any of the job requisitions for which Ms. Paugh's male colleagues at Tapestry Solutions were allegedly hired. *Id*. at 6-7.

LEGAL STANDARDS

Lockheed Martin has filed a motion for summary judgment. "The court shall *4 grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . ; or showing that the materials cited do not establish . . . a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012) (citing *Celotex*, 477 U.S. at 323). Where the burden of proof lies with the nonmoving party, the moving party may satisfy its initial burden by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. While the moving party "must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010).

A fact is material only if it would permit "a reasonable jury . . . [to] return a verdict for the nonmoving party" and "might affect the outcome of the suit." *Douglass v. United Servs. Auto. Ass'n*, 65 F.3d 452, 458-59 (5th Cir. 1995), *aff'd en banc*, 79 F.3d 1415 (5th Cir. 1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986)). "If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, *5 regardless of the nonmovant's response." *Duffie*, 600 F.3d at 371 (citation omitted).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Id.* The nonmovant "must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim." *Id.* "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citations omitted). "In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party." *Duffie*, 600 F.3d at 371 (citing *Liberty Lobby*, 477 U.S. at 255). However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, 477 U.S. at 255.

ANALYSIS

Ms. Paugh makes a claim of sex discrimination[2] under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Texas Labor Code,[3] asserting that "her sex was a motivating factor and consideration in [] Lockheed Martin's adverse employment decisions" against her. Am. Compl. ¶¶ 1, 34, ECF No. 10. The Court will hold that Ms. Paugh's claim of sex discrimination based on Lockheed Martin's alleged discriminatory implementation of Executive Order 13495 is cognizable under Title VII. The Court will then determine Lockheed *6 Martin's obligations to predecessor employees, such as Ms. Paugh, under Executive Order 13495 and its contract with the Army. Finally, the Court will find that Lockheed Martin's Motion should be granted because Ms. Paugh has not met the burden of identifying genuine disputes as to any material fact regarding her claims of sex discrimination.

[2] Ms. Paugh also made a claim of retaliation arising from Lockheed Martin making false and misleading statements to the Equal Employment Opportunity Commission. Am. Complaint, ECF No. 10. This claim of retaliation was dismissed by this Court on July 22, 2020. Mem. Op., ECF No. 16.

[3] In this Opinion, the Court analyzes Ms. Paugh's Title VII claims for sex discrimination. However, the same analysis applies to Ms. Paugh's Texas Labor Code claims, as courts look to federal law for

guidance when provisions of Title VII are analogous to the relevant portions of the Texas Labor Code. *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136-37 (Tex. 2015) (citing Tex. Lab. Code § 21.001(1); *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592-93 (Tex. 2008) (per curiam)).

1. Ms. Paugh's Claim of Sex Discrimination Based on Lockheed Martin's Alleged Discriminatory Implementation of Executive Order 13495 is Cognizable Under Title VII.

The Court will first determine if Ms. Paugh may make a claim for violation of Title VII and the Texas Labor Code based on Lockheed Martin's alleged discriminatory implementation of Executive Order 13495. Lockheed Martin argues that Ms. Paugh may not make such a claim because Executive Order 13495 "specifically states that it 'is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against . . . any other person.'" Mot. 15, ECF No. 30 (quoting Executive Order 13495 § 9(c), 74 FR at 6106). Lockheed Martin further asserts that "only the 'Secretary of Labor . . . is responsible for investigating and obtaining compliance with [the] order.'" *Id.* 30 (quoting Executive Order 13495 § 6(a), 74 FR at 6105).

Courts have held, as Lockheed Martin argues, that Executive Order 13495 does not create a right of action for employees who are denied a "right of first refusal." *See Atterbury v. United States Marshals Serv.*, No. 12-CV-502-A, 2018 WL 2100600, at *11 (W.D.N.Y. May 7, 2018), rev'd and remanded on other grounds, 941 F.3d 56 (2d Cir. 2019); *McClellan v. Skytech Enterprises, Ltd.*, No. CIV-12-202-RAW, 2012 WL 3156861, at *2 (E.D. Okla. Aug. 3, 2012).

However, Ms. Paugh is not suing under Executive Order 13495. Am. Compl. 2, 13, ECF No. 10. Rather, she is suing under Title VII and the Texas
7 Labor Code for Lockheed *7 Martin's allegedly discriminatory implementation of Executive Order 13495. *Id.* In *Sorber*, a court in the Western District of Texas suggests that implementation of Executive Order 13495 can be subject to anti-discrimination statutes, including Title VII. *See Sorber v. Sec. Walls, LLC*, No. A-18-CV-1088-SH, 2020 WL 2850227, at *2, *12 (W.D. Tex. June 1, 2020). The plaintiffs in *Sorber* were contractedsecurity guards at the Austin IRS offices, and the defendant was the successor contractor for the security services. *Id.* at *1. The plaintiffs claimed they were discriminated against when they were denied a "right of first refusal" in accordance with Executive Order 13495. *Id.* at *1-2. They claimed the successor contractor did not continue their employment because they failed or did not take either the medical examination or physical fitness test required by the successor contractor for continued employment. *Id.* at *1-2. Accordingly, the plaintiffs made claims of discrimination under three anti-discrimination statutes, including a claim for sex discrimination under Title VII. *Id.* at *2. The court denied summary judgment on the Title VII claim because the defendant could have potentially violated Title VII by denying two plaintiffs a right of first refusal under Executive Order 13495. *Id.* at *12.

Like the plaintiffs in *Sorber*, Ms. Paugh is making a claim for sex discrimination under Title VII for Lockheed Martin's alleged discriminatory implementation of Executive Order 13495. Am. Compl. 2, 13, ECF No. 10. Thus, the Court will hold here that Ms. Paugh can make such a claim. Accordingly, the Court will now turn to Lockheed Martin's obligations under Executive Order 13495 and its contract with the Army.

2. Lockheed Martin's Actions Were Consistent with its Obligations under Executive Order 13495 and its Contract with the Army when it Utilized Employment Screening Processes.

Executive Order 13495 applies to contracts the
8 federal government enter to *8 procure services " [w]hen a service contract expires, and a follow-on

contract is awarded for the same service." Executive Order 13495, 74 FR at 6103. It provides that:

> service contracts . . . *shall include a clause* that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of *the same or similar services at the same location*, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified.

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Id. (emphasis added). Both Lockheed Martin and Ms. Paugh agree that Lockheed Martin's contract to provide certain services to the Army ("Lockheed Martin Contract") has such a "Nondisplacement of Qualified Workers" clause. Mot. 15, ECF No. 17; Resp. 5-6, ECF No. 32. It reads:

> The Contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those service employees employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the service employees were hired, a right of first refusal of employment under this contract under which the service employees were hired, a right of first refusal of employment under this contract in positions for which the service employees are qualified.

Lockheed Martin Contract 7, ECF No. 32-6.

The Lockheed Martin Contract also provides for the situation where fewer positions are funded under the contract than the predecessor contract:

> • "The Contractor and its subcontractors shall determine the number of service employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work."
> • "The Successor Contractor and its subcontractors shall decide any question concerning a service employee's qualifications based upon the individual's education and employment history, with particular emphasis on the employee's experience on the

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> predecessor contract, and the Contractor may utilize employment screening processes only when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with Executive Order 13495."

Id. at 7-8.

Both Lockheed Martin and Ms. Paugh acknowledge that the Lockheed Martin Contract funded fewer positions than the predecessor contract. Mot. 4, ECF No. 30; Resp. 9, ECF No. 18. However, Lockheed Martin and Ms. Paugh disagree about how these fact affects Lockheed Martin's particular obligations under Executive Order 13495 and the "Nondisplacement of Qualified Workers" clause of the contract.

Lockheed Martin argues that, because fewer positions were funded under their contract than the predecessor contract, it was permitted to post job requisitions for each position it needed to fill and require employees under the predecessor contract to apply for those job requisitions. Mot. 4, ECF No. 30. Lockheed Martin further argues that it complied with Executive Order 13495 and the "Nondisplacement of Qualified Workers" clause by giving preference to applicants who were employed under the predecessor contract. *Id*. When multiple applicants who were employed

under the predecessor contract applied for the same job requisition, it reviewed the applications and selected the best qualified candidate for each position. *Id*.

On the other hand, Ms. Paugh has a more particularized interpretation of Executive Order 13495 and the "Nondisplacement of Qualified Workers" clause. Ms. Paugh argues that "Lockheed Martin hired the same number of employees to work at Range 66 A&B where Ms. Paugh and her male coworkers worked for Tapestry Solutions." Resp. 9, ECF No. 32. Thus, she argues, the services Lockheed Martin
10 contracted with the Army to perform at *10 Range 66 A&B constitute "the same or similar services at the same location" as those performed under the Tapestry Solutions contract. *Id*. Therefore, Ms. Paugh argues, particularly regarding Range 66 A&B, Lockheed Martin was required to offer rights of first refusal to all incumbents and could not require them to apply for continued employment nor engage in qualitative comparison between incumbent applicants. *Id*. at 9-10. Ms. Paugh argues in the alternative that Lockheed Martin did offer rights of first refusal to the male incumbents but not to her, thereby discriminating against her on the basis of sex. *Id*.

The Court will reject Ms. Paugh's particularized interpretation of Executive Order 13495 and the "Nondisplacement of Qualified Workers" clause for two reasons. First, Ms. Paugh's particularized interpretation of the "Nondisplacement of Qualified Workers" clause is contrary to common sense. *See Condea Vista Co. v. Gencorp Inc.*, 64 F. App'x 417 (5th Cir. 2003) (affirming "common sense interpretation" of an agreement). Any contract for services can be particularized to such an extent that the unit of comparison is each individual employee at the discrete location they work. Interpreting the contract in such a way would lead to a requirement that employers offer rights of first refusal to all predecessor employees, even when the successor contract provides for fewer positions. That would be contrary to common sense.

Second, Ms. Paugh's particularized interpretation —implying successor contractors are required to offer rights of first refusal to all predecessor employees—would render provisions of the Lockheed Martin Contract superfluous. *See Transitional Learning Cmty. at Galveston, Inc. v. U.S. Off. of Pers. Mgmt.*, 220 F.3d 427, 431 (5th Cir. 2000) ("[A] contract should be interpreted as to give meaning to all of its terms—presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous."). For example, the clause in the Lockheed Martin Contract providing that it "may
11 elect to employ *11 fewer employees than the predecessor contractor employed in connection with performance of the work" would be rendered superfluous if Lockheed Martin was required to offer rights of first refusal to all predecessor employees, as Ms. Paugh's particularized interpretation implies. Lockheed Martin Contract 7, ECF No. 32-6. For another example, the Lockheed Martin Contract provides that it "may utilize employment screening processes [on incumbent employees]." Lockheed Martin Contract 8, ECF No. 32-6. As Ms. Paugh notes, "[p]resumably this requirement applies when the successor contractor will hire fewer employees than the predecessor contractor." Resp. 9, ECF No. 32. However, under Ms. Paugh's particularized interpretation, this requirement would never apply because employers would be required to offer rights of first refusal to all predecessor employees. *See supra* 10. Thus, the requirement regarding employment screening processes would be rendered superfluous.

For these two reasons, the Court holds that because fewer positions were funded under the Lockheed Martin Contract than the predecessor contract, Lockheed Martin acted consistent with the contract and with Executive Order 13495 when it required Range 66 A&B incumbent

employees to apply for job requisitions and engaged in employment screening processes to determine the best qualified candidate when more than one incumbent employee applied. Executive Order 13495, 74 FR 6103. This holding essentially turns Ms. Paugh's discriminatory implementation claims into failure-to-hire claims when, as she alleges, incumbent men were hired over her. Accordingly, the Court will now turn to whether Lockheed Martin discriminated against Ms. Paugh in its employment screening processes.

3. The Court Will Grant Summary Judgment and Dismiss Ms. Paugh's Claims of Sex Discrimination.

Where, as here, the employee proffers no direct evidence of sex discrimination, courts employ the *McDonnell Douglas* burden-shifting framework to
12 determine whether the *12 employee's claims survive summary judgment. *Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 654 (Tex. App.—Dallas 2012, no pet.); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The employee bears the initial burden of establishing a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. To establish a prima facie case of sex discrimination, the employee must show: (1) she is a member of a protected group; (2) she applied and was qualified for the position at issue; (3) she was rejected despite being qualified; and (4) others similarly qualified but outside the protected class were treated more favorably. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 332 (5th Cir. 2019).

If the employee successfully establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decision. *See McDonnell Douglas*, 411 U.S. at 802. The employer's burden is one of production only, however, arid the ultimate burden of persuasion remains with the employee at all times. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the employer proffers a legitimate, non-discriminatory reason for its employment decision, the employee receives an opportunity to demonstrate that the given reason is pretext for retaliation. *See McDonnell Douglas*, 411 U.S. at 804.

Before undertaking *McDonnell Douglas* analysis, the Court notes that many of Ms. Paugh's claims for sex discrimination concern the results of Lockheed Martin's employment screening processes as a whole. *See*, *e.g.*, Resp. 12, 14, ECF No. 32. Ms. Paugh repeatedly points out that eight of her male Tapestry Solutions colleagues were hired by Lockheed Martin while she was not. Pl.'s First Am. Compl. ¶ 21, ECF No. 10; *see also* Resp. 12, ECF No. 32 ("It cannot be a coincidence that the eight men were hired to work on the same range where they had been working"; "Mr. Murphy hired all eight of Ms. Paugh's male
13 coworkers to work at *13 Range 66 A&B. It cannot possibly be a coincidence that of the 106 employees he was going to hire, all eight men would be hired to work on that range.").

Such statements amount to an assertion of statistical disparity. However, pointing out purported statistical discrepancies in hiring is not enough to demonstrate discrimination. *See Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 523 (5th Cir. 2008) (holding that an individual plaintiff pursuing an individual claim of discrimination may not rely on general statistical evidence); *Thompson v. Leland Police Dep't*, 633 F.2d 1111, 1114 (5th Cir. 1980) ("[S]tatistical evidence alone does not establish or necessarily imply racially discriminatory practices."). Moreover, the Court's consideration of individual failure-to-hire claims, like the ones Ms. Paugh makes, center on the discrete positions applied for, not on any alleged pattern or practice of discrimination. *See Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1021 (5th Cir. 1990) (holding that Title VII requires that the plaintiff apply for the position to make a failure-to-hire claim); *Taylor*, 554 F.3d at 523 ("[A]n individual plaintiff pursuing an *individual* claim may not rely on the type of pattern-or-

practice evidence that is acceptable in class action suits alleging similar conduct, such as general statistical evidence."). Accordingly, the Court, in determining whether Lockheed Martin discriminated against Ms. Paugh, will consider only the employment screening processes for the nine job requisitions to which Ms. Paugh applied; it will not consider her assertions about Lockheed Martin's employment screening processes as a whole.

a. Ms. Paugh has not identified genuine issues of material fact regarding the seven job requisitions that Ms. Paugh applied to that were cancelled or closed.

Lockheed Martin asserts that seven of the nine job requisitions that Ms. Paugh applied for were either canceled or closed with no candidate hired. Mot. 6, ECF No. 30. *14 Lockheed Martin moves for summary judgment on Ms. Paugh's claims of sex discrimination arising from these seven job requisitions because Ms. Paugh "cannot establish a prima facie case of discrimination based on these seven requisitions because she cannot prove that similarly situated non-protected employees were treated more favorably than her." *Id*. at 10.

Additionally, Lockheed Martin moves for summary judgment on claims related to the seven job requisitions because it "has presented a legitimate, non-discriminatory and non-retaliatory reason for not selecting Paugh for the requisitions, namely that the requisitions were cancelled or closed." *Id*. Lockheed Martin adds that Ms. Paugh has no evidence that its purported legitimate, non-discriminatory reason for not selecting her is a pretext for sex discrimination. *Id*. at 11.

Ms. Paugh responds that Lockheed Martin's cancellation of the job requisitions because of the Army's changing needs is pretext for discrimination. Resp. 15-17, ECF No. 32. Specifically, Ms. Paugh claims Lockheed Martin knew about the Army's needs months before the cancellation. *Id*. at 15. Ms. Paugh also claims that she applied for a job requisition months before it was cancelled. *Id*. at 16-17.

The Court agrees with Lockheed Martin. To make a prima facie case of discrimination, the plaintiff must show that "others similarly qualified but outside the protected class were treated more favorably" than her. *Wittmer*, 915 F.3d at 332. Ms. Paugh does not do that with regards to the seven job requisitions she applied to that were cancelled. For example, Ms. Paugh contends neither that the job requisitions were kept open for men nor that men were hired through those job requisitions. *See*, *generally*, Resp. 16-18, ECF No. 32.

Failing to make a prima facie case is enough to grant summary judgment on a plaintiff's claim. *McDonnell Douglas*, 411 U.S. at 802-04. But even if she could make a *15 prima facie case, Ms. Paugh's claim would still fail, as she cannot demonstrate that Lockheed Martin's legitimate, non-discriminatory reason for not hiring her—because the requisitions were cancelled or closed—is a pretext for discrimination. An employee alleging that an employer's stated reason for an action is a pretext for discrimination must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 143 (2000). Ms. Paugh's assertion that Lockheed Martin had knowledge of the Army's needs months before the cancellation of the job requisition is not evidence of pretext. On the contrary, it is logical that a job requisition would be open for applications at some point before it is cancelled. Moreover, "[t]iming standing alone is not sufficient absent other evidence of pretext." *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 330 (5th Cir.1998). Thus, Ms. Paugh's contentions that Lockheed Martin had knowledge of the Army's needs months before the cancellation and she applied for a job requisition

months before it was cancelled is not sufficient to establish that Lockheed Martin's stated reason for not hiring her is pretext.

Ms. Paugh can neither make a prima facie case of sex discrimination regarding the seven job requisitions that she applied to that were cancelled nor demonstrate that the cancellations were a pretext. *McDonnell Douglas*, 411 U.S. at 802. Accordingly, Ms. Paugh has not met the burden of identifying genuine issues of material fact on her claims of sex discrimination related to those seven job requisitions. *Cannata*, 700 F.3d at 172. Thus, summary judgment will be granted.

b. Ms. Paugh has not identified genuine issues of material fact regarding the two job requisitions that Ms. Paugh applied to that were filled.

Lockheed Martin asserts that two of the nine job requisitions that Ms. Paugh applied to were filled by two males employed under the predecessor
16 contract, Saul Padilla ("Mr. *16 Padilla") and Eddie Dominguez ("Mr. Dominguez"). Mot. 6, 11, ECF No. 30. Lockheed Martin purports to have hired Mr. Padilla and Mr. Dominguez over Ms. Paugh for a legitimate, non-discriminatory reason: they were the best qualified candidates. *Id*. at 4. Lockheed Martin moves for summary judgment on Ms. Paugh's claims of sex discrimination arising from these two job requisitions because Ms. Paugh "has no evidence that Lockheed Martin's legitimate, non-discriminatory reason for not hiring her for those requisitions—she was not the best qualified candidate—is pretext for discrimination." *Id*. at 11.

Demonstrating that qualifications are a pretext for discrimination requires showing that the plaintiff is "'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected." *Moss v. BMC Software, Inc*., 610 F.3d 917, 922-23 (5th Cir. 2010) (quoting *EEOC v. La. Office of Cmty. Servs*., 47 F.3d 1438, 1444 (5th Cir.1995)). Ms. Paugh cannot do so with the two comparators she identifies, Mr. Padilla and Mr. Dominguez. On the contrary, she admits she does not know whether she is more qualified than they are for their respective positions. Dep. of Ms. Paugh 19, ECF No. 30-2. Because Ms. Paugh cannot show that she is "clearly better qualified" than Mr. Padilla and Mr. Dominguez, she cannot demonstrate that Lockheed Martin's assertion that they were more qualified is a pretext for discrimination. *Moss*, 610 F.3d at 922-23.

Ms. Paugh also states that "Mr. Saul Padilla applied for a General Maintenance Worker position and was offered the position, but was reclassified as an Electronic Technician." Resp. 16, ECF No. 32 (internal citations omitted). She argues that Mr. Padilla's reclassification to a different job title is evidence of pretext because Lockheed Martin changed hiring practices for a
17 man but not her. Resp. 16, ECF No. 32. *17

Ms. Paugh's argument about Mr. Padilla's reclassification is also unfounded. As explained below, Title VII requires that the plaintiff apply for the position to make a prima facie case for failure-to-hire. *See infra* 19-20. Ms. Paugh did not apply for the Electronic Technician position to which Mr. Padilla was reclassified.

Accordingly, Ms. Paugh's claims that she was discriminated by Lockheed Martin because Mr. Padilla and Mr. Dominguez were hired over her will not survive summary judgement. Ms. Paugh cannot demonstrate that Lockheed Martin's claim that Mr. Padilla and Mr. Dominguez were more qualified is a pretext for discrimination. Ms. Paugh also cannot make a prima facie case that she was discriminated against when Mr. Padilla was hired and reclassified while she was not. Accordingly, Ms. Paugh has not met the burden of identifying genuine issues of material fact relating to her claims of sex discrimination based on the hiring of Mr. Padilla and Mr. Dominguez. *McDonnell Douglas*, 411 U.S. at 802; *Cannata*, 700 F.3d at 172. Thus, Lockheed Martin's Motion will be granted as it relates to those claims.

c. Ms. Paugh has not identified genuine issues of material fact regarding the nine job requisitions that Ms. Paugh did not apply for.

Ms. Paugh also makes claims of sex discrimination regarding nine other positions filled by males, eight of them her colleagues at Tapestry Solutions and one an incumbent from outside Tapestry Solutions. Pl.'s First Am. Compl. ¶ 21, ECF No. 10; Resp. 10, ECF No. 32. Ms. Paugh identifies Adam Granger ("Mr. Granger") and Sal Reyes ("Mr. Reyes") as male colleagues at Tapestry Solutions who were hired. Pl.'s First Am. Compl. ¶ 23, ECF No. 10. She identifies James Mendez ("Mr. Mendez") as the male from outside Tapestry Solutions who was hired. *Id*. ¶ 21. Lockheed Martin states that Mr. Mendez was an incumbent. Mot. 13 n.33, ECF No. 30. Ms. Paugh does not contest Mr. Mendez's incumbent status. *See*, *generally*, *Resp*., ECF No. 32. Mr. Mendez's
18 hiring is particularly contentious to Ms. Paugh *18 because she identifies him as the candidate who "took her position." Dep. of Ms. Paugh 27, ECF No. 30-2; *see also* Resp. 10, ECF No. 32. Regarding Mr. Mendez's qualifications, Ms. Paugh states

> While Mr. Mendez may be more educated than Ms. Paugh and have more experience at other ranges, he lacked what Mr. Murphy demonstrated he wanted from the men who worked at the range and what the Government wanted, familiarity with the Government's personnel, facilities, and requirements at Range 66 A&B that would promote the continuity of services being provided there.

Resp. 13, ECF No. 32. Because Ms. Paugh worked at Range 66 A&B and Mr. Mendez did not, Ms. Paugh argues that "there is a disparity in qualifications of such weight and significance that no reasonable person. . . could have chosen Mr. Mendez over Ms. Paugh for the position." Resp. 15, ECF No. 32.

Lockheed Martin responds that Ms. Paugh did not apply for any of the nine job requisitions through which those nine males where hired. Mot. 6-7, ECF No. 30. Lockheed Martin moves for summary judgment on Ms. Paugh's claims of sex discrimination arising from these nine job requisitions because Ms. Paugh did not apply for them. Mot. 13, ECF No. 30. Thus, Lockheed Martin argues, Ms. Paugh cannot establish a prima facie case on those job requisitions. *Id*.

Ms. Paugh suggests that, because she was an incumbent, she should have been considered for positions for which she did not apply. *See* Resp. 15-16, ECF No. 32. She argues that other incumbents took positions for which they had not apply. *Id*. Specifically, Ms. Paugh alleges that because "[m]en applied for General Maintenance Worker positions and were hired as such and later reclassified to Electronic Technician positions[,] it was not necessary to apply for Electronic Technician positions." *Id*. She identifies Hector
19 Villalobos, *19 Thomas Lawrence, and Mr. Padilla as those men. *Id*. On the basis of such reclassification, Ms. Paugh argues that

> Lockheed Martin is willing to change its hiring practices, as suits its fancy. It made changes in its practices for men, but not for Ms. Paugh. For these reasons, the alleged requirement for an application for an Electronic Technician position is a pretext.

Id. at 16.

It is well established that Title VII requires that the plaintiff apply for the position to make a prima facie case for a failure-to-hire claim. *See Fields*, 906 F.2d at 1021; *Morris v. Fru-Con Const. Corp*., No. CIV.A. C-05-565, 2006 WL 2794932, at *4 (S.D. Tex. Sept. 26, 2006). The plaintiff in *Morris* made an argument similar to Ms. Paugh's about not being hired for positions for which he did not apply. *Morris*, 2006 WL 2794932, at *4. He argued "that he effectively applied for several positions by virtue of his status as a former Fru-

Con employee" and "that Fru-Con ha[d] a practice of considering former employees eligible and subject to reassignment to other positions after they complete an assignment with Fru-Con Corporation." *Id*. (internal quotations omitted). The *Morris* court rejected the argument because the plaintiff presented no evidence to show that the employer's hiring policy automatically considered former employees for reassignment; rather, the employer's hiring policy required that an application be submitted, which plaintiff never did. *Id*. at *4-5. Therefore, he could not state a prima facie case. *Id*.

Like the plaintiff in *Morris*, Ms. Paugh relies on an unsupported assertion that she should have been considered for positions for which she did not apply. She presents no evidence that the reclassifications to different job titles were related to a Lockheed Martin hiring policy that should have led to her being considered for positions
20 under that job title, rather than *20 simply being responses to the Army's changing needs, as Lockheed Martin asserts.[4] *Id*.; Reply 6, ECF No. 38. As a result, the Court will hold that Ms. Paugh did not "effectively apply" for the Electronic Technician positions as required to make a prima facie case for failure-to-hire. *Morris*, 2006 WL 2794932, at *4-5.

[4] *See supra* 3 n.1 for explanation of distinction between "job requisition," "position," and "job title." --------

Ms. Paugh points to some of her male Tapestry Solutions colleagues being reclassified to a different job title. Resp. 15-16, ECF No. 32. But such a statistical argument is not enough to establish discrimination. *Taylor*, 554 F.3d at 523; *Thompson*, 633 F.2d at 1114.

Accordingly, the Court will find that Ms. Paugh has not made a prima facie case of discrimination based on Lockheed Martin's failure to hire her for positions for which she did not apply. Ms. Paugh also cannot show that Lockheed Martin's claim that more qualified candidates were hired is a pretext for discrimination. Demonstrating that purported qualifications of other candidates are a pretext to discrimination requires showing that the plaintiff is "clearly better qualified." *Moss*, 610 F.3d at 922-23. Ms. Paugh cannot do so against the comparators she identifies. Mr. Granger and Mr. Reyes had supervisory experience while she did not. Dep. of Ms. Paugh 3, ECF No. 30-2. Further, Ms. Paugh even acknowledges that Mr. Mendez was more educated and experienced than her. Resp. 13, ECF No. 32. Thus, Ms. Paugh cannot demonstrate that she was clearly better qualified than the comparators she identified. Ms. Paugh's failure to show that Lockheed Martin's legitimate, non-discriminatory reason for not hiring her is pretextual is another reason to dismiss her claim. *McDonnell Douglas*, 411 U.S.
21 at 802-04. *21

CONCLUSION

The Court holds that although Ms. Paugh's claim of sex discrimination for Lockheed Martin's alleged discriminatory implementation of Executive Order 13495 is cognizable under Title VII and the Texas Labor Code, Lockheed Martin acted consistent with its contract with the Army and with Executive Order 13495 when it required Ms. Paugh to apply for job requisitions and engaged in employment screening processes to determine the best qualified candidate when more than one incumbent employee applied. The Court also holds that there are no genuine disputes of material fact regarding Ms. Paugh's claims that Lockheed Martin's employment screening processes were discriminatory, and it holds that Ms. Paugh cannot make a claim of discrimination regarding positions to which she did not apply. Therefore, summary judgment should be granted on Ms. Paugh's claims of sex discrimination.

Accordingly, **IT IS HEREBY ORDERED** that Defendant Lockheed Martin Corporation's "Motion for Summary Judgment" filed on March 2, 2021 is **GRANTED.**

SIGNED this 7th day of **May 2021.**

/s/ _____

THE HONORABLE DAVID BRIONES

SENIOR UNITED STATES DISTRICT JUDGE