

**ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.**

In the Matter of:

**CHOCTAWHATCHEE ELECTRIC
COOPERATIVE, INC. (“CHELCO”)**

**With respect to the applicability of the Davis-
Bacon Act, 40 U.S.C. §§ 3141-3148 (“DBA”), to
the U.S. Government’s solicitation, acting
through the Defense Logistics Agency (“DLA”),
to privatize the electric distribution system at
Eglin Air Force Base (“Eglin AFB”)**

ARB Case No. 17-032

**BRIEF OF THE ADMINISTRATOR
IN RESPONSE TO INITIAL BRIEF OF PETITIONER**

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With respect to the applicability of the Davis-Bacon Act, 40 U.S.C. §§ 3141-3148 (“DBA”), to the U.S. Government’s solicitation, acting through the Defense Logistics Agency (“DLA”), to privatize the electric distribution system at Eglin Air Force Base (“Eglin AFB”)

ARB Case No. 17-032

**BRIEF OF THE ADMINISTRATOR
IN RESPONSE TO INITIAL BRIEF OF PETITIONER**

In a ruling letter dated January 18, 2017, the Administrator of the Wage and Hour Division (“WHD”), United States Department of Labor (“Administrator”), concluded that the Davis-Bacon Act (“DBA” or “Act”), 40 U.S.C. § 3141 *et seq.*, is applicable to a solicitation for privatization of utility systems at Eglin Air Force Base in Florida (“Eglin”) and the resulting electric utility contract with the Choctawhatchee Electric Cooperative, Inc. (“CHELCO”). CHELCO seeks reversal of the Administrator’s determination. For the reasons set forth below, the Administrator seeks affirmance of the ruling letter.

ISSUE PRESENTED

Whether the Davis-Bacon Act applies to construction, alterations, and repairs by CHELCO to the Eglin electric utility system pursuant to CHELCO’s contract with the Federal government, which calls for the government to pay for upgrades to and maintenance of the

system, as well as CHELCO's delivery of electricity to Eglin, pursuant to governmental oversight and control.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Under the Davis-Bacon Act, contractors generally must pay prevailing wage rates to laborers and mechanics working on contracts with the Federal government for construction of public buildings and public works. Similarly, under the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. § 6701 *et seq.*, contractors must pay prevailing wage rates to service employees working on contracts with the Federal government that are principally for services. When a single Federal contract calls for both services and construction—for example, utility services as well as upgrades to the relevant utility system—that single contract is covered by both the DBA and SCA (assuming the other coverage requirements under the respective statutes are met) if the contract is principally for services but contains "substantial amounts of construction, reconstruction, alteration, or repair work" that is capable of being performed on a "segregated basis" from the other work called for by the contract. 29 C.F.R. § 4.116(c); *see also* 48 C.F.R. § 22.402(b) (same, in the Federal Acquisition Regulation). For such covered "hybrid contracts," the DBA applies to the construction work called for under the contract and the SCA applies to the service work. 29 C.F.R. § 4.116(c).

Determining whether the DBA applies to a particular construction project (including construction called for by portions of a contract that is principally for services) calls for consideration of whether the contract in question is a "contract ... to which the Federal

Government ... is a party, for construction, alteration, or repair” of “public buildings and public works.” 40 U.S.C. § 3142(a).¹

Under the longstanding interpretation of the Department of Labor (“Department”), a contract is “for construction” if “more than an incidental amount of construction-type activity is involved in the performance of a government contract....” *See, e.g., Military Hous., Fort Drum, N.Y.*, WAB No. 85-16, 1985 WL 167239, at *4 (Aug. 23, 1985) (“*Fort Drum*”) (referring to this definition as the “traditional position of the Department of Labor” and citing Sec’y of Labor Op. No. DB-24 (May 8, 1962)); *see also Bldg. & Const. Trades Dep’t, AFL-CIO v. Turnage*, 705 F. Supp. 5, 7 (D.D.C. 1988) (affirming the Department’s longstanding interpretation, because “it is reasonable to conclude that the [Davis-Bacon] Act was meant to apply to contracts in which construction is more than an incidental element”). Conversely, in a recent case addressing DBA coverage, *District of Columbia v. Department of Labor*, 819 F.3d 444 (D.C. Cir. 2016) (“*CityCenterDC*”), the D.C. Circuit held that where the District of Columbia contracted with a private developer, which in turn contracted for—and provided all funding for—construction of a complex of private stores, restaurants, offices, and residences that the District would not own or operate, there was no “contract for construction” for purposes of the DBA. *See id.* at 444, 449-50 & n.2.

¹ More specifically, the Act provides that “every contract in excess of \$2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.” 40 U.S.C. § 3142(a).

The Department's regulations provide that a "public work" is a project "carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency." 29 C.F.R. § 5.2(k). In *CityCenterDC*, the D.C. Circuit concluded that the project at issue in that case was not a public work because it involved neither "public funding for the construction" nor "government ownership or operation of the completed facility." *CityCenterDC*, 819 F.3d at 446, 453 (noting that there was no government occupation of space at the completed, privately owned and financed facility, nor were any government services provided there). The court made explicit that although it believed "at least one of the two characteristics," that is, public funding or government ownership or operation, "is *necessary* for a project to qualify as a public work," it was not holding that both were required. *Id.* at 446 n.2, 453 n.5 ("[W]e need not and do not decide whether either characteristic alone is *sufficient* for a project to qualify as a public work.").

B. Statement of Facts

On September 28, 2012, the Defense Logistics Agency of the U.S. Department of Defense ("DLA") issued Solicitation No. SPE600-12-R-0827 for the privatization of Eglin's utility systems ("Solicitation"), including an electric utility system that consists in significant part of distribution and transmission systems, including power substations. Administrative Record ("AR") 20, 216-27. The Solicitation proposed to convey utility infrastructure on the base to an awardee, which would subsequently provide utility services to Eglin, the Air Force's largest base. AR 27, 111, 206. The Solicitation also contemplated that the awardee would perform significant construction work to improve the system. Specifically, it required bidders to submit a plan, to be incorporated into the awarded contract, identifying the "Initial System

Deficiency Corrections” (“ISDCs”) necessary to bring the infrastructure up to legal and industry standards and to improve energy efficiency and resource conservation. AR 42, 128. The awardee would also be required to submit plans for additional System Deficiency Corrections (“SDCs”) on an annual basis during the contract term. *Id.*

CHELCO submitted a proposal in response to the Solicitation, and on September 14, 2016, CHELCO and DLA entered into Contract No. SP0600-16-C-8314 for privatization of the Eglin electric utility system (“Contract”). AR 459. The Contract provides that CHELCO will take title to Eglin’s electric utility system, which CHELCO will use to provide “adequate and dependable utility services” to the government. AR 464-65.

The Contract includes various provisions regarding how CHELCO must fulfill its obligation to provide utility services to Eglin. Under the Contract, CHELCO must schedule with the government in advance any routine repairs to or other work on the utility system that will interfere with service delivery; perform such work during the “normal duty hours” defined in the Contract unless it has permission to deviate from those hours or is scheduling work in accordance with the government’s preference that it not interfere with other functions at Eglin; create a procedure for the government to submit service requests, including emergency requests, whenever there are interruptions to or other issues with the electricity service; and permit the government to operate the utility system itself if necessary, such as if CHELCO fails to perform under the contract. AR 473-76. CHELCO may not use the utility system to provide electricity to any other customers without the government’s permission and agreement regarding compensation to the government. AR 466. The government, however, may “enter into any future energy saving projects” it wishes at Eglin, and CHELCO must coordinate with the

government and any third party to facilitate implementation of any such projects “that will require changes in the privatized system.” AR 466.

Perhaps unsurprisingly because the system is located on an operating military installation, the Contract also provides that the government will retain significant physical control over the system. In particular, the Contract does not convey the land on which the utility infrastructure is located, and it provides that the government will retain control over CHELCO’s access to Eglin, including the sites of the utility system infrastructure. AR 464, 470-71. The government is permitted to have “property and equipment installed on or attached to” pieces of the utility system and may use and access the system to perform work on or replace this property and equipment. AR 467.

Although the Contract provides for conveyance of the electric utility system to CHELCO, it contemplates that ownership will ultimately revert to the government. CHELCO “shall be obligated to transfer the privatized system(s) to the Government” at the government’s option either “at the end of the contract term or in the event the contract is terminated for the convenience of the Government or for default.” AR 464, 495 (noting that the government may exercise its repurchase option simply “by providing written notice” to CHELCO). While CHELCO owns the system, it must maintain “record drawings” of all existing and new parts of the system, and it must permit the government to “use and copy such drawings” upon request. AR 468. The contract includes provisions regarding the condition in which CHELCO must leave the sites of the infrastructure, including which unused pieces of the system CHELCO must remove or may leave behind, when CHELCO ceases to own the system. AR 472.

The Contract also provides that CHELCO will perform a number of specific ISDCs, including, for example, “Pole-by-Pole Inspection and Repair,” “Install Fault Indicators,” and “Interconnect East and West Substations,” in the first few years of contract performance. AR 461-63. In addition to the ISDCs, CHELCO is responsible for “all required SDCs, upgrades, and renewals and replacements necessary to maintain and operate the utility systems in a safe, reliable condition....” AR 478-79.² CHELCO will “prepare and submit annually to the Contracting Officer for approval” a five-year plan for SDCs, upgrades, and connections, as well as renewals and replacements, which will include detailed information about work CHELCO proposes to perform in the upcoming year and more general descriptions of work it suggests for the four subsequent years. AR 479. When the government wants new connections to the utility system installed, CHELCO must perform the work, subject to coordination with and approval from the Contracting Officer. AR 480. Although in such circumstances CHELCO will own the newly installed infrastructure, the government will pay for any new permanent connections. AR 480. CHELCO must also install and maintain any new sub-meters requested by the government. AR 466.

During the Contract’s 50-year performance period, the government will pay CHELCO a monthly Utility Service Charge “for the provision of utility services, including operations and maintenance, and renewals and replacements.” AR 460, 486. For the first eight years of Contract performance, it will pay CHELCO additional amounts for completion of ISDCs. AR 461, 692; *see also* AR 461-63 (noting prices for each ISDC). The government will also pay

² “Renewals and replacements” are defined in the Contract as “investments in the utility systems to renew or replace system components that fail or reach the end of their useful life.” AR 479.

for SDCs, upgrades, and connections it has approved as part of CHELCO's proposed annual plans. AR 479, 497.³

The Contract includes a clause providing that CHELCO shall comply with the SCA and DBA and that the DBA will apply to ISDCs, "capital upgrades," SDCs, and "new connections" "that involve construction, alteration, or repair (including painting and decorating) (as defined by the DBA)." AR 470; *see also* AR 504-05, 663-86. The Contract also provides that the SCA applies to "[a]ll other services ... unless an exception exists." AR 470.

C. Course of Proceedings

On April 22, 2016, CHELCO sent a letter to WHD to request a ruling on the applicability of the DBA to the Solicitation. AR 12; *see also* AR 18-436 (Solicitation).⁴ CHELCO's letter asserted, relying on *CityCenterDC*, that the DBA did not apply because neither of the two conditions necessary for a project to be a public work—public funding for construction and government ownership or operation of the completed facility—was present. AR 16. CHELCO later also provided the Contract (including its voluminous attachments) to WHD. AR 459-953.

On January 18, 2017, the Administrator issued a ruling letter concluding that the DBA applies to the Solicitation and Contract. AR 954. As a preliminary matter, the Administrator

³ The contract also provides that CHELCO "is purchasing the electric distribution system through a billing credit of (\$30,409,773) to the Utility Service Charges" over the first 176 months of contract performance. AR 460. This credit is "offset by an equal Purchase Price recovery" over the same period of time. *Id.*

⁴ By the time it submitted this written request, CHELCO had met with representatives of WHD with staff of U.S. Congressman Jeff Miller, who had written to WHD regarding this matter on CHELCO's behalf. AR 1, 2-3, 12. At the time of that meeting, WHD had not received sufficient information to determine whether the DBA applied to the Eglin electric utility system project. *Id.*

noted that the Contract “contain[ed] specifications for substantial and segregable construction work in the form of itemized ISDC / initial capital upgrades and projected renewals and replacements, as well as the potential for additional segregable construction work through annual SDC and new connections”; for these reasons, the DBA could apply to the construction portions of the Contract, which was otherwise for services, under the Department’s regulation at 29 C.F.R. § 4.116(c). AR 957.

Next, the Administrator addressed the two requirements for DBA coverage: that there be (1) a contract for construction of (2) a public work. AR 957-63. As to the first requirement, although noting that “[t]here appears to be no dispute” that the Contract is for construction for purposes of the DBA, the Administrator explained that the statute authorizing utility privatization by the military, 10 U.S.C. § 2688(h), the Solicitation, and the Contract all contemplate significant construction work to the relevant privatized utility system. AR 957-59. Here, such work included the ISDCs for which the government was to pay CHELCO as well as “renewals and replacements” that consist of alteration of and repairs to the system to occur throughout the Contract’s term. *Id.*

With respect to the second requirement, the Administrator explained that the construction clearly “involves a public work” because it “is carried out directly by the authority of the federal government to serve the interest of the general public” as provided in the Department’s regulation at 29 C.F.R. § 5.2(k) defining “public building or public work.” AR 959. Specifically, the Administrator observed that CHELCO’s upgrades and repairs to the utility system will occur “at the government’s request to improve the capacity and efficiency of the

systems that provide electricity throughout the military installation.” AR 959 (also noting that “power lines” are among the examples of a “building or work” under DBA regulations).

The Administrator also noted that the Department has treated contracts for construction or renovation of utility systems as DBA-covered over many decades, citing a 1958 letter from the Solicitor of Labor concluding that the DBA applied to a contract involving the installation of a new centralized telephone cable system and a 1988 Administrator letter concluding that a “contractor-owned contractor-operated” high-temperature water plant on a site designated and supplied by the U.S. Army was a “public building” the construction of which was subject to the DBA. AR 960 (citing Letter from Stuart Rothman, Solicitor of Labor, to Colonel J. J. Tracy (October 22, 1958) (reproduced at AR 968-69); Letter from Paula V. Smith, Administrator, Wage & Hour Division, to Charles Flachbarth (Apr. 27, 1988) (“Smith Letter”) (reproduced at AR 965-76)).

Next, in light of the discussion of the term “public work” in *CityCenterDC*, the Administrator wrote that he “disagree[d] with [CHELCO’s] characterization of the project as one that is not publicly funded,” explaining that under the Solicitation and Contract, the government is paying for ISDCs as already agreed and will pay for additional annual SDCs to be proposed in the future. AR 960. That these payments and those for renewals and replacements are to be made over several years and to some degree as part of the monthly Utility Service Charge does not, the Administrator noted, alter the conclusion that they are public payments for construction. AR 961.

The Administrator went on to reject CHELCO’s theory that the Contract is not for construction of a “public work” because the government will not own the Eglin electric utility

system. AR 961. In support of this position, the Administrator cited prior Department of Labor decisions in which the DBA was held to apply to projects that involved construction of facilities to which the government did not hold title. AR 961 (citing *Phoenix Field Office*, ARB Case No. 01-010, 2001 WL 767573, at *7-9 (June 29, 2001); *Fort Drum*, 1985 WL 167239, at *4-5; Smith Letter at 2). He relied on 29 C.F.R. § 5.2(k), which has contained identical text since 1951 expressly providing that a facility can be a public building or public work “regardless of whether title thereof is in a Federal agency.” *Id.* The Administrator also noted that *CityCenterDC* explicitly declined to require public ownership for DBA applicability. AR 961-62 (citing *CityCenterDC*, 819 F.3d at 452). Finally, the Administrator noted that in light of numerous facts about the Contract—including that the government retains ownership of the land beneath the utility system, controls CHELCO’s access to the premises, may limit CHELCO’s ability to provide electricity to any customers other than the government, and will retake ownership of the system at the conclusion of the Contract or any earlier point of the government’s choosing—it was not clear that the government does not own or operate the electric utility system. AR 962.

On March 17, 2017, CHELCO filed a petition for review of the Administrator’s ruling letter with this Board.

JURISDICTION AND STANDARD OF REVIEW

Although contracting agencies make initial determinations of DBA coverage of their contracts, disputes about such coverage are subject to administrative review by the Department. *Univs. Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 760 (1981); 29 C.F.R. § 5.13; *see also Paper Allied Indus. Chem. & Energy Workers Int’l Union v. U.S. Dep’t of Energy*, No. CV-04-194, 2006 WL 2524120, at *1-3 (D. Idaho Aug. 30, 2006) (affirming the Department’s “authority to

make final and binding coverage determinations under the [DBA]”). The Administrator’s ruling letter was a final decision under 29 C.F.R. § 7.9 and was properly appealed to this Board pursuant to 29 C.F.R. Part 7.

Because “[t]he Board is an essentially appellate agency,” it “will not hear matters de novo except upon a showing of extraordinary circumstances.” 29 C.F.R. § 7.1(e). Rather, the Board’s review consists of assessing “whether [the Administrator’s ruling is] consistent with the DBA and its implementing regulations” and is “a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.” *Gary J. Wicke*, ARB Case No. 06-124, 2008 WL 4462982, at *3 (Sept. 30, 2008) (citing *Miami Elevator Co.*, ARB Case Nos. 98-086, 97-145, 2000 WL 562698, at *13 (April 25, 2000)). 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.’” *Id.* (quoting *Titan IV Mobile Serv. Tower*, WAB Case No. 89-14, 1991 WL 494710, at *4 (May 10, 1991)) (alteration in original).

SUMMARY OF ARGUMENT

The Board should affirm the Administrator’s conclusion that the DBA applies to the Solicitation and Contract at issue in this case. Because the Contract contemplates substantial and segregable construction work for which the government will pay, the “contract for construction” requirement for DBA coverage is plainly met; indeed, CHELCO does not argue otherwise. Because the government is requesting and funding construction to repair and upgrade the Eglin electric utility system from which it will continue to receive services, the construction is of a

public work. CHELCO's only argument—that government ownership or operation of a facility is necessary to satisfy the DBA's public work requirement—is inconsistent with the longstanding, reasonable position of the Department and is certainly not compelled by *CityCenterDC*. Even if government ownership or operation were required, the Contract's provisions calling for government approval and oversight of CHELCO's improvements to and use of the utility system support a finding that the project constitutes construction of a public work.

ARGUMENT

The Administrator correctly concluded that the DBA applies to the construction, alteration, and repairs called for by the Contract. CHELCO did not previously and does not now dispute that the Contract is a “hybrid contract,” that is, although it is principally for services, it also contemplates “substantial amounts of construction, reconstruction, alteration or repair work” that can be performed on a “segregated basis” from the remainder of the contract. 29 C.F.R. § 4.116(c)(2); 48 C.F.R. § 22.402(b). Moreover, the Contract plainly requires CHELCO to repair and upgrade the utility system in addition to providing utility services. AR 478-79 (addressing ISDCs, SDCs, upgrades, connections, and renewals and replacements). As the Administrator concluded, and as explained below, the Contract constitutes a contract for construction of a public work under longstanding Davis-Bacon principles.

I. THE CONTRACT IS A “CONTRACT FOR CONSTRUCTION”

As noted above, a threshold requirement for DBA coverage is that the contract at issue be with the Federal government and “for construction, alteration, or repair...” 40 U.S.C. § 3142(a). CHELCO's brief includes no argument regarding this requirement, *see* Pet'r's Br. at 5 (noting

that “[f]or purposes of argument, CHELCO will assume that for purposes of the DBA, the Contract is a contract for construction” without including any argument that this requirement is not in fact met), so the Board should consider the issue to be waived. *See Palisades Urban Renewal Enters., LLP*, ARB Case No. 07-124, 2009 WL 2371237, at *5 (July 30, 2009) (declining to consider arguments not raised in petitioner’s opening brief contesting a finding of DBA violations); *Walker v. Am. Airlines*, ARB Case No. 05-028, 2007 WL 1031366, at *7, 14, 15 (March 30, 2007) (holding that one argument not raised in petitioner’s brief was waived; another as to which petitioner included only “passing references and commentary” should not be considered; and another mentioned in petitioner’s statement of facts but about which the brief contained no actual argument “has been abandoned and thus waived”).

Moreover, the record makes abundantly clear that the Administrator’s conclusion is correct. The Contract calls for renovations, alterations, and repairs—in the form of ISDCs, SDCs, renewals and renovations, and new connections, AR 461-62, 478-79, 480—comprising “more than an incidental amount of construction-type activity,” and therefore meets the Department’s longstanding definition of the term “contract for construction.” *See Military Hous., Fort Drum, N.Y.*, 1985 WL 167239, at *4; *see also Turnage*, 705 F. Supp. at 7 (concluding that the Department’s longstanding interpretation is reasonable); 29 C.F.R. § 5.2(j) (defining “construction, prosecution, completion, or repair” as “[a]ll types of work on a particular building or work at the site thereof ... including without limitation – (i) [a]ltering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;

(ii) [p]ainting and decorating; (iii) [m]anufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work”).⁵

II. THE CONSTRUCTION IS OF A PUBLIC WORK

A. The Construction is Publicly Funded.

That a construction project is paid for with government funds is indisputably an indication that the project is a public work. *See* 29 C.F.R. § 5.2(k) (providing that a public work includes a project that “is carried on ... with funds of a Federal agency”); *CityCenterDC*, 819 F.3d at 452 n.5, 453 n.6 (noting, without deciding if public funding in the absence of government ownership or operation is sufficient to render a construction project a public work, that public funding is a characteristic of public works). CHELCO does not challenge the Administrator’s finding that the construction at issue in this matter is publicly funded. *See* Pet’r’s Br. at 5-11 (explaining that CHELCO is taking the position that both public funding and government ownership or operation are necessary for a facility to be a public work and continuing to argue only that government ownership or operation is lacking as to the Eglin electric utility system); *see also Palisades Urban Renewal Enters.*, 2009 WL 2371237, at *5 (holding that arguments not presented in a petitioner’s brief are waived); *Walker*, 2007 WL 1031366, at *7, 14, 15 (same). Furthermore, it is clear from the Solicitation and Contract that DLA, a Federal agency, has agreed to pay for construction, alteration, and repair to the Eglin

⁵ Furthermore, because the Contract is between a Federal agency and the party that will perform the construction and calls for payment by the Federal agency for the construction work, AR 461-62, 479, 687-88, 692, this Contract is wholly unlike the contract at issue in *CityCenterDC*. *See CityCenterDC*, 819 F.3d at 444, 449-50 & n.3, 453 (concluding that the “contract for construction” requirement is not met when a private developer contracts and pays for construction of a private development).

electric utility system, some portions of which are specified in the Contract (with prices) and others of which are to be defined over time. AR 461-62, 478-79, 497, 687-88, 692 (Contract provisions addressing construction work to be performed and paid for, including ISDCs, with costs, as well as SDCs, upgrades, connections, and renewals and replacements); *see also* AR 955-56 (description in Administrator’s ruling letter of payments the government will make to CHELCO).

B. Government Ownership or Operation of the Facility is Not Necessary for the Construction to be of a Public Work.

CHELCO argues that in the absence of government ownership or operation, a facility cannot be a “public work” for purposes of DBA coverage. This argument is based entirely on the suggestion in *CityCenterDC* that such ownership or operation *might* be necessary to conclude that a facility is a public work. Pet’r’s Br. 5-6 (citing *CityCenterDC*, 819 F.3d at 452 & n.5, 453, and acknowledging that “[t]he court did not need to decide, and did not decide,” whether government ownership or operation was necessary because the project at issue also did not involve any public funding for construction and, in the absence of both characteristics, it could not be a public work). The Board should accept the Administrator’s interpretation that government ownership or operation is not a prerequisite for DBA coverage, particularly where, as here, the construction is not only publicly funded but also serves the interest of the general public by ensuring that the infrastructure used to provide electricity to the U.S. Air Force’s largest base operates efficiently and meets legal and industry standards.

1. The principle that a facility can be a public building or public work without regard to whether the government owns it is longstanding, reasonable, and not in conflict with *CityCenterDC*. *See Gary J. Wicke*, 2008 WL 4462982, at *3 (explaining that the Board should

not overturn the Administrator’s interpretation absent unreasonableness or unexplained deviation from past interpretations).

The Department has treated projects that do not involve government ownership as DBA-covered for 75 years. The regulation defining “public building or public work” for purposes of the DBA has explicitly provided that a facility can fall into those categories “regardless of whether title thereof is in a Federal agency” since 1942. *See* 7 Fed. Reg. 686, 687 (Feb. 4, 1942) (codifying regulations “to effectuate the purpose of the Davis-Bacon Act” at 29 C.F.R. Part 2, including, at 29 C.F.R. § 2.2(c), a definition of “‘public building’ or ‘public work’”: these “include building or work for whose construction, prosecution, completion, or repair, as defined above, a federal agency is a contracting party, regardless of whether title thereof is in a federal agency”); 16 Fed. Reg. 4430, 4430 (May 12, 1951) (relocating the definition of “‘public building’ or ‘public work’” for purposes of the DBA to 29 C.F.R. § 5.2(h) and adding the phrase “is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public” without change to the phrase “regardless of whether title thereof is in a Federal agency”); 29 C.F.R. § 5.2(k) (current regulation with language identical to that promulgated in 1951).

The historical context of the regulatory language further supports the conclusion that public works need not be government owned. 29 C.F.R. § 5.2(k) “appears to paraphrase the holding” of *Peterson v. United States*, 119 F.2d 145 (6th Cir. 1941), *Fort Drum*, 1985 WL 167239, at *5-6, which held that a project to relocate privately owned railroad tracks with public funds was a “public work” for purposes of the Heard Act (a bond statute applicable to government construction contracts), because that term includes “any work in which the United

States is interested and which is done for the public and for which the United States is authorized to expend funds,” *Peterson*, 119 F.2d at 147. In *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23 (1942), the Supreme Court cited *Peterson* in holding that for purposes of the Miller Act (which superseded the Heard Act), a library built with public funds at Howard University, a private institution, was a “public building.” *Id.* at 27-30. In reaching this conclusion, the Court overturned a lower court’s conclusion that a public work must be owned by the government and explained that because Congress had initially established Howard University “for the education of youth in the liberal arts and sciences,” that institution “serves ‘the interests of the general public.’” *Id.* at 28, 29 (also citing the definition of “public works” in the National Industrial Recovery Act, which, like 29 C.F.R. § 5.2(k), refers to projects built “either directly by public authority or with public aid to serve the interests of the general public”); *see also, e.g., Fort Drum*, 1985 WL 167239, at *5-6 (citing *Irwin*, 316 U.S. 23, in discussing the meaning of the term “public work”); *CityCenterDC*, 819 F.3d at 452 (same).

In more recent decades, this Board has repeatedly relied on 29 C.F.R. § 5.2(k) and this historical precedent to conclude that various construction projects that did not involve government ownership were public buildings or public works. For example, in *Fort Drum*, the Board held that the DBA applied to construction of housing units that the military would lease from their private owner for 20 years. *Fort Drum*, 1985 WL 167239, at *5-7. Because the residences were built “directly by the authority of the Department of the Army” and their construction “serves the public interest in providing decent, cost efficient housing for our enlisted military personnel,” they were public buildings. *Id.* at *6-7. In *Crown Point, Ind. Outpatient Clinic*, WAB Case No. 86-33, 1988 WL 247049 (June 26, 1987), *aff’d sub nom.*

Bldg. & Constr. Trades Dep't, AFL-CIO v. Turnage, 705 F. Supp. 5 (D.D.C. 1988) (“*Crown Point*”), the Board affirmed the Administrator’s ruling that the DBA applied to a contract between the Veterans Administration (“VA”) and a private developer for construction of an outpatient clinic the VA would lease for 15 to 20 years, explaining that the project was being built only because the VA had solicited it and that it “serves the public interest in providing clinical care to veterans.” *Id.* at *4-5.⁶ The Board again concluded in *Phoenix Field Office*, ARB Case No. 01-010, 2001 WL 767573 (June 29, 2001) (“*Phoenix Field Office*”), that the DBA applied to a facility the government did not own, reasoning that when the Bureau of Land Management (“BLM”) paid for construction of office and warehouse space that it would lease from a private entity, it was clear that the “public building” requirement was met because “BLM’s occupancy for an extended period” was “for the public’s benefit.” *Id.* at *7.⁷

⁶ In an opinion addressing the issues raised by *Crown Point*, the Office of Legal Counsel (“OLC”) cited *Peterson* and *Irwin* in noting that courts “have made clear that public ownership is not essential for a finding that a contract is for construction of a public work....” *Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration’s Lease of Medical Facilities*, 18 Op. O.L.C. 109, 118, 1994 WL 810699 (1994) (“1994 OLC Opinion”); *see also id.* at 119 n.10 (“[I]t is well established that the government need not have either initial or permanent title to a building for the construction project to be deemed a public work....”).

⁷ It is also the longstanding position of the Comptroller General of the United States that facilities can be public buildings or public works for purposes of the DBA even if the government does not own them. *See, e.g., Comptroller Gen. Campbell to the Postmaster Gen.*, 34 Comp. Gen. 697, 702, B-122382, 1955 WL 1089 (June 27, 1955) (explaining that it is “clear” that “the ownership of the building is not the sole criterion for determining whether the contracts involve the construction of a ‘public building’ or ‘public work,’” but rather, “there is for consideration the further question as to whether the work is being constructed for public use at the expense of the United States”); *The Honorable George M. White Architect of the Capitol Washington, D.C. 20515*, B-234896, 1989 WL 240971, at *2 (July 19, 1989) (reasoning that “although the building will be built by a private entity and will temporarily be the property of that entity,” it is nevertheless a public building because it “is intended to serve the interest of the general public just as is any other building which will house government activities”).

The Administrator’s interpretation that a public work need not be owned by the government is not only longstanding and consistent with a variety of legal authorities, but also reasonable. Facts other than ownership can indicate that the public interest is served by construction of a facility. For example, that the government pays for a project is a strong indication that the project fulfills a purpose important to the functions of the contracting agency. *See, e.g., Phoenix Field Office*, 2001 WL 767573, at *8 (emphasizing in concluding that a project was DBA-covered that the government would “substantially pay for the cost of the facility”). In this case, although the government will no longer hold title to the Eglin electric utility system, DLA has requested and is paying for maintenance of and upgrades to the system, and the Air Force will directly benefit from a reliable, modern source of electricity at its base. There is a public interest in the U.S. Air Force having access to electricity that allows it to operate its largest base to fulfill its purpose of protecting the nation.

Furthermore, a strict requirement of government ownership would be counter to the remedial goals of the statute, *see United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177 (1954) (explaining that the DBA serves “to protect [contractors’] employees from substandard earnings by fixing a floor under wages on Government projects”); *N. Ga. Bldg. & Constr. Trades Council v. Goldschmidt*, 621 F.2d 697, 702 (5th Cir. 1980) (“The purposes of the Davis-Bacon Act are to protect the employees of Government contractors from substandard wages and to promote the hiring of local labor rather than cheap labor from distant sources.”); *Drivers Local Union No. 695 v. Nat’l Labor Relations Bd.*, 361 F.2d 547, 553 n.23 (D.C. Cir. 1966) (explaining that the DBA is “a remedial act for the benefit of construction workers” (citing *Binghamton Constr. Co.*, 347 U.S. at 176-78)), because it would permit the evasion of DBA requirements

with creative contracting, *see* 1994 OLC Opinion at 112 (requiring government ownership for DBA coverage “would leave substantial room for agencies to evade the requirements of the Act by contracting for long-term leases rather than outright ownership of public buildings and public works”). In this instance, for example, treating the utility system as no longer a public work simply because title has been transferred to a private entity would permit the payment of substandard wages to laborers and mechanics performing identical work on identical infrastructure serving an identical purpose than would be called for if the government retained title to the system.

Moreover, CHELCO’s suggestion that *CityCenterDC* supports its position is misguided. *CityCenterDC* addressed circumstances that were markedly distinct from those presented here and rejected what it believed would be an unprecedented and inappropriate expansion of DBA coverage. *See CityCenterDC*, 819 F.3d at 444, 450, 453 (placing significant emphasis on the private nature of and funding for the project at issue, which was constructed, pursuant to a contract with a private developer that funded the construction, for use as private stores, restaurants, offices, and residences and noting that holding the DBA applicable to the project “would significantly enlarge the scope of the Davis-Bacon Act”). It explicitly distinguished, without calling into question, this Board’s line of cases holding that the DBA applies to leases of facilities constructed with government funding. *Id.* at 450 & n.3 (citing *Fort Drum*, *Crown Point*, and *Phoenix Field Office* and noting that “in those cases, unlike here, the Government was the lessee not the lessor, and the leases required construction for which the Government would pay de facto through its rental payments”). The circumstances here involve a utility system on a military base that has provided and will continue to provide electricity to the U.S. Air Force.

The government is paying for and has a role in overseeing both the delivery of electricity and the maintenance of the facility. And application of the DBA to the Contract would be consistent with past interpretations rather than reflecting a broadening of the DBA's traditional scope. *See, e.g.,* Smith Letter (ruling that the DBA applies to a "contractor-owned contractor-operated" plant); All Agency Memorandum ("AAM") 222, *Scope of Davis-Bacon Act Coverage in Light of the D.C. Circuit's Opinion in CityCenterDC* (Jan. 11, 2017), at 10-11, available at <https://www.wdol.gov/aam/aam222.pdf> (noting that the DBA has been applied to the privatization of military housing). Because the Administrator's interpretation is not in conflict with *CityCenterDC* or any other precedent, CHELCO has offered no sound reason for the Board to reject the Administrator's conclusion on the basis of the absence of government ownership.

2. Nor should the Board reverse the Administrator on the ground that the Eglin electric utility system is not operated by the government. In *CityCenterDC*, the D.C. Circuit reviewed a series of definitions of "public work" from a variety of sources (including dictionaries, court cases, and 29 C.F.R. § 5.2(k)) and endeavored to distill them into definitive principles. *See CityCenterDC*, 819 F.3d at 451-53 (citing, *inter alia*, BLACK'S LAW DICTIONARY (3d ed. 1933); THE AMERICAN COLLEGE DICTIONARY (1947); *Irwin*, 316 U.S. at 28; 29 C.F.R. § 5.2(k)). Although several of the definitions the court quoted used the terms "public use" or "public benefit" and none included the words "ownership" or "operation," the court opined that in addition to public funding, "government ownership or operation" might be a necessary prerequisite for a facility to be a public work. *See id.* The court's opinion did not directly address the meaning of "government operation" of a facility, but it made clear that such operation was lacking in the project at issue, which was "privately owned and privately

operated,” *i.e.*, the District of Columbia did not “occupy any space at CityCenterDC,” “own or operate any of the businesses located there,” or “offer any government services there.” *Id.* at 454, 447; *see also id.* at 444 (explaining that CityCenterDC “features upscale retail stores such as Hermès, Boss, and Louis Vuitton; high-end restaurants such as DBGB and Centrolina; the large private law firm of Covington & Burling; and luxury residences”); *id.* at 447 (“Today, CityCenterDC is already home to several upscale shops and restaurants, and to a major private law firm. When it is finished, CityCenterDC will house approximately 60 retail stores and nearly 700 residential units. A 370-room hotel catering to luxury travelers is scheduled to open in the next three years.”).

After the D.C. Circuit issued its opinion in *CityCenterDC*, the Administrator issued guidance to Federal agencies regarding the meaning of the court’s decision. *See* AAM 222. In addressing the concept of a “public building” or “public work,” the Administrator explained that under 29 C.F.R. § 5.2(k), only public funding for construction, rather than government ownership or operation of a facility, “may be considered necessary under *CityCenterDC* to satisfy this requirement for DBA coverage.” *Id.* at 8-10 (citing 29 C.F.R. § 5.2(k) and *Irwin*, 216 U.S. 23). The AAM explained that although government ownership or operation of a facility demonstrates that the facility “serve[s] the interest of the general public,” 29 C.F.R. § 5.2(k), other facts about a project—for example, the government’s decision to pay for its construction—could indicate public interest in the project’s completion such that the project fell within the definition of a public building or public work. AAM 222 at 8. The AAM included as an example of DBA-covered projects publicly funded construction associated with the privatization of utility systems by the military pursuant to 10 U.S.C. § 2688. *See* AAM 222 at 11

(explaining that by statute, “[s]uch arrangements may include both the government’s receipt of the utility system’s services, *see id.* § 2688(c)(1)(B), (c)(2), and “a contribution toward the cost of construction, repair, or replacement of the utility system by the entity to which the utility system is being conveyed,” *id.* § 2688(h)).

Although the question of whether government operation is necessary for DBA coverage was not directly addressed by any authority pre-dating the decision in *CityCenterDC*, it is clear that the Department of Labor has not applied that requirement in assessing whether a facility is a public building or public work. In the 1988 ruling letter cited in the Administrator’s ruling letter challenged here, the Administrator considered circumstances notably similar to those in this matter and concluded that the DBA applied to a contract for construction of “a contractor-owned *contractor-operated*” high water temperature plant at Fort Drum in New York. *See* Smith Letter at 1 (AR 965) (emphasis added) (specifying that the contract at issue involved “a facility to be ... owned, maintained and operated by the contractor”). The ruling letter explained, citing 29 C.F.R. § 5.2(k), that “it is not necessary for the Government to hold title to a building for the DBA to be applicable,” and because the facility was “being built at the request of the Army, on Government land, to serve the interest of the general public by providing [high temperature water] to Fort Drum,” the contract at issue called for construction of a public building. AR 965-66. And none of this Board’s decisions involving facilities the government leased from private owners treat as relevant how operation of the facility (whether housing, office space, or a medical clinic) would occur or be divided between the private owner and government occupant of the space. *See Fort Drum*, 1985 WL 167239; *Crown Point*, 1987 WL 247049; *Phoenix Field Office*, 2001 WL 767573.

With respect to this Contract, consistent with the Administrator’s prior ruling letter in similar circumstances and as was contemplated in the general example regarding military privatization of utility systems in AAM 222, facts other than ownership or operation by the government amply support the Administrator’s conclusion that the public interest is served by the Eglin utility system: the government is directing and paying for construction to maintain and upgrade the system, and the system provides crucial services, *i.e.*, electricity that allows a military base to function, directly to the U.S. Air Force. Moreover, as explained further below, the government has retained significant control over the utility system in order to advance quintessentially public objectives through the Contract.

C. Even if Government Ownership or Operation is Required for a Facility to be a Public Work, the Contract is Covered by the DBA.

CHELCO argues that there is no government ownership or operation of the Eglin electric utility system because the Contract conveys the system to, and calls for its operation by, CHELCO. Pet’r’s Br. at 8-11 (citing various Contract terms that refer to conveyance of the system, transfer of title, or ownership by the contractor). But this issue is not as simple as CHELCO asserts. Government operation of a facility can take a variety of forms, and in this case, as the Administrator explained in his ruling letter, there are indications in the Contract that the government has interest in and meaningful control over the Eglin electric utility system. AR 962-63.

The Administrator’s post-*CityCenterDC* guidance addressed the concept of government operation introduced in the D.C. Circuit’s opinion, noting that WHD understood the term broadly. *See* AAM 222 at 9. It included as examples of government operation “occupancy by the employees of a Federal agency ... or relatives of such employees,” such as for office space or

residences, *id.* (citing *Phoenix Field Office*, 2001 WL 767573; *Fort Drum*, 1985 WL 167239), as well as “circumstances in which the building or work is used to serve a governmental function or purpose,” such as if the facility is used as a clinic or for storage space, *id.* (citing *Crown Point*, 1987 WL 247049; *Phoenix Field Office*, 2001 WL 767573).

Here, the government retains significant interest in and control over how CHELCO uses the utility system. The Contract does not simply require that CHELCO provide electricity to Egin; it requires that CHELCO do so pursuant to oversight from and approval by the government of its plans for and execution of repairs, upgrades, or other changes to the system. *See* AR 473-76 (requiring that CHELCO provide notice of and approval for work to the system that could temporarily interfere with its operation, perform work only during specified hours, provide the government with a specific way to report problems, make certain specific changes to the system at the government’s request, and allow the government to operate the system itself in the event of a problem with service). And although CHELCO holds title to the system, the government’s ongoing interest in the property is clear. *See* AR 464, 466, 467, 468, 470-71, 472, 495 (Contract provisions restricting CHELCO’s access to the system, permitting the government to access it, requiring CHELCO to maintain and provide the government with records about it, restricting CHELCO from providing utility services to others, and contemplating reversion of ownership to the government at the government’s option). In other words, although CHELCO owns and will perform the work involved in running and maintaining the utility system, it must do so according to government specifications and with ongoing government involvement; the government is not an ordinary customer but rather a controlling entity and future owner of the infrastructure.

CHELCO responds to the Administrator’s findings on this point primarily by arguing that they are not relevant to CHELCO’s ownership of the system. *See* Pet’r’s Br. at 13-17. But the Administrator does not suggest that the restrictions on CHELCO’s control over the system affect whether CHELCO holds title to it.⁸ Nor does the Administrator question whether the restrictions are important or even necessary to ensure that security at Eglin is not compromised and/or to protect the government’s investment in crucial infrastructure. Rather, it is the Administrator’s view that the analysis of what constitutes a public work does not rest on who holds title to a facility or on any other legal formalities. *Cf. Peterson*, 119 F.2d at 147 (“The term ‘public work’ as used in the act is without technical meaning and is to be understood in its plain, obvious and rational sense.”).⁹ The factual circumstances matter, *cf.* 1994 OLC Opinion (“[T]he

⁸ The Administrator also does not take the position that the method of payment by CHELCO to the government for the system—*i.e.*, the fact that it appears that CHELCO will not actually make such a payment, because the debt it theoretically owes to the government is entirely offset by a credit from the government—is inappropriate or invalidates the conveyance. *See* Pet’r’s Br. at 15-16 (defending the purchase methodology). The arrangement is, however, consistent with the Administrator’s understanding that the government retains a strong interest in the status and operation of the system and that the same public interest is served by the system after privatization as before it.

⁹ For related reasons, CHELCO’s other assertions should not persuade the Board that this project does not involve a public work. The government’s repurchase of the system may well formally be a transaction distinct from the cessation of CHELCO’s delivery of electricity to Eglin, *see* Pet’r’s Br. at 13, but the Contract terms make reversion of the system mandatory upon the government’s request, *see* AR 464, 494. In other words, CHELCO cannot choose to keep the system to use for its own private purposes. The government’s ownership of the land on which the system sits, control over the base generally, and access to the system specifically similarly are relevant contextual facts indicating that the system’s functioning is not merely a private concern. And CHELCO’s analogy to the security screening of a service member’s private car, *see* Pet’r’s Br. at 14, is not apt. In such circumstances, the driver would not be required to ask for government approval to make repairs to the car’s engine, to schedule such repairs at a time convenient to the government, or to be prepared to transfer ownership of the car to the government upon request.

determination whether a lease-construction contract calls for construction of a public building or public work likely will depend on the details of the particular arrangement.”), and here, the authority the government retains over the utility system indicates that the government is an operator of it. For that reason, even if government ownership or operation were deemed necessary for DBA coverage, such a requirement would be met in the circumstances presented here.

CONCLUSION

For the foregoing reasons, the Board should affirm the Administrator’s conclusion that the DBA applies to all construction, alterations, and repairs performed pursuant to the Contract.¹⁰

¹⁰ Because the Contract clause regarding the DBA refers to ISDCs, capital upgrades, SDCs, and new connections but not to renewals and replacements, the Administrator’s ruling letter noted that the Contract “should be amended ... to apply DBA requirements to renewal and replacement work that involves construction, alteration, or repair (including painting or decorating), as defined by the DBA.” AR 963. CHELCO argues that this statement is beyond the scope of its request for a DBA determination that resulted in the ruling letter and is not reviewable because it is a recommendation rather than an order. Pet’r’s Br. at 4. But the question of to which portions of the Contract the DBA applies is plainly within the scope of the ruling letter and this appeal, the language is not tentative, and CHELCO has made no argument that there is any reason the DBA would not apply to some or all renewal and replacement work if it applies generally to construction work performed under the Contract. Should the Board affirm the Administrator’s ruling letter, then to the extent any renewals and replacements call for construction, alteration, or repair to the utility system, that work is subject to DBA (rather than SCA) requirements. DLA and CHELCO are required to amend the Contract to accurately reflect the scope of DBA coverage.

CERTIFICATE OF SERVICE

This brief was filed electronically through the Administrative Review Board's Electronic File and Service Request (EFSR) system.

I certify that on this 31st day of July 2017, a copy of this Brief was sent by email and, as to the first two recipients, first class United States mail to:

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