



AUG 27 2002

Mr. Edward C. Sullivan, President
Building and Construction Trades
Department, AFL-CIO
815 Sixteenth Street, NW, Suite 603
Washington, D.C. 2006-4189

Dear Mr. Sullivan:

Re: Request for Reconsideration, Project No. W-211 Hanford Site, Richland,
Washington

This final ruling concerns your request for review and reconsideration of the April 16, 1999 determination regarding application of prevailing wage requirements of the Davis-Bacon Act (DBA) and the Service Contract Act (SCA) to work items included in Project No. W-211, Initial Tank Retrieval Systems, at the U.S. Department of Energy's (DOE's) Hanford Site, Richland, Washington.

The April 16, 1999 letter, signed by Timothy J. Helm, Acting Government Contracts Team Leader, in the Wage and Hour Division's Office of Enforcement Policy, indicated that SCA prevailing wage requirements should apply to at least six activities included in a list of 12 "In-Farm [tank farm] Work Activities" involved in Project No. W-211, and requested that DOE inform us of their actions in this regard. It had been DOE's initial determination that all of Project W-211 constituted construction work subject to the Davis-Bacon Act.

The list of 12 "In-Farm Work Activities" involved in Project W-211 is enclosed as Appendix A. These activities, including the six at issue, along with the procurement of custom designed and off-the-shelf equipment and the construction of five electrical control buildings, comprise Project W-211. The April 16, 1999 letter directed DOE to apply SCA labor standards to the first 6 of the 12 items. These six items of Project W-211 involve the installation of the massive pumping and mixing equipment and related fixtures in each tank to prepare each tank for the transfer of the highly radioactive contents from each, one at a time, (during the 20-year span of Project W-211). The tank contents will be transferred to a new 65-acre radioactive waste treatment plant (WTP) that is to be built to process the slurry piped from each tank into glass (vitrification). Construction of the WTP was scheduled to begin in the spring of 2002, and the plant is expected to begin operations in 2007.

Litigation and pendency of the matter at issue here

On December 22, 1999, the Hanford Atomic Metal Trades Council (HAMTC) filed suit in U.S. District Court for the District of Columbia seeking declaratory and injunctive relief under the Administrative Procedures Act (APA) to compel DOE to segregate the "service components" from "construction components" of Project W-211 in accordance with the April 16, 1999 letter. Subsequently, DOE filed a motion to dismiss the case for lack of subject matter jurisdiction, asserting that the April 16, 1999 letter did not constitute "final agency action" subject to court review under the APA.

On June 20, 2001, the U.S. District Court for the District of Columbia granted DOE's motion to dismiss the case, stating that DOE's inaction was "not sufficiently 'final' to merit review pursuant to the APA". However, the Court stated that the April 16, 1999 Helm letter was a final agency ruling which directs the DOE to take specific action, but that, given DOE's (prior) belief that the letter did not represent the final DOL determination, DOE's inaction had not yet risen to the "level of unreasonableness necessary to justify judicial intervention".

On October 13, 2000, prior to the Court's decision, you requested review and reconsideration of the April 16, 1999 ruling. Subsequently, in an August 1, 2001 letter to Acting Wage and Hour Division Administrator Annabelle T. Lockhart, you further requested that the Wage and Hour Division proceed with review and reconsideration of Mr. Helm's April 16, 1999 determination. Interested parties were given an opportunity to submit their views and additional information.

In an August 14, 2001 letter to Acting Wage and Hour Administrator Annabelle T. Lockhart, Mr. Paul Davis, Acting Chairman of the Labor Standards Board, DOE's Richland (RL) Operations Office, stated "RL's intent to take action that is consistent with the Court's Order", and, acknowledging receipt of the Building and Construction Trades October 13, 2000 request for review in this case. He also noted the possibility that a new DOL ruling could lead to revised guidance, asserted that "RL-LSB is generally inclined to defer to DOL as the final authority for administering and interpreting the SCA and DBA," and requested "guidance regarding the appropriate action to take in order to ensure that the proper labor standards are applied to the W-211 Project at the Hanford Site."

In response, on August 27, 2001, in a letter to Mr. Davis, we acknowledged receipt of that correspondence and requested that DOE delay implementing guidance pending review of the Building Trades request for a ruling on the matter.

On May 1, 2002, Mr. Paul Davis, DOE's Hanford Site representative, submitted to the Wage and Hour Division's Government Contracts Team, a February 25, 2002 "Request for Proposal Statement of Work #82053-W-211 In-Farm Construction of AZ-101", which was a proposed contract release (subcontract) providing that CH2M Hill Hanford Group, Inc. (CHG) intended to issue award for the installation of equipment to complete a tank waste retrieval system in tank AZ-101, and related activities. DOE has also provided the

"Statement of Work" referenced in that RFP. The statement of work indicated that the following work activities are to be performed on this contract:

- ▶ Remove and dispose of existing contaminated equipment and components
- ▶ Modify the existing raw water supply header in AZ-801A
- ▶ Install one transfer pump with adapter plug and attendant systems (CHG furnished)
- ▶ Excavate and backfill as required
- ▶ Furnish, test, and install pipe jumpers (parts CHG furnished)
- ▶ Install cover blocks (CHG furnished)
- ▶ Install nitrogen bottle rack (CHG furnished)
- ▶ Furnish, install, and test ¼" nitrogen, ½" service air , and 3" process water piping
- ▶ Furnish and install valve actuators
- ▶ Install shaft extensions (CHG furnished)
- ▶ Furnish, install and test panelboards, transfer switches, and other electrical items
- ▶ Install electrical enclosures and racks (CHG furnished)
- ▶ Bond new piping into the existing cathodic system

The first, third and fifth items on this list are among the six items in dispute. This subcontract/work order for work to complete the installation of the tank waste retrieval system in tank AZ-101 was awarded on May 17, 2002. (Two mixer pumps and ancillary equipment were installed in tank AZ-101 previously as part of a demonstration project that preceded Project W-211.) DOE has advised that the work under the contract is to be performed consistent with the guidelines set forth in the Helm letter of April 16, 1999. According to DOE, additional solicitations for work on Project W-211 will be issued in the upcoming months.

Basis for review and reconsideration of the April 16, 1999 Wage and Hour determination

The Hanford Atomic Metal Trades Council (HAMTC) has asserted that there is no right to the review you have requested, and that your request is untimely, irrespective of whether it is treated as a request for reconsideration by the Administrator or an appeal to the Administrative Review Board.

Even assuming that the April 16, 1999 "Helm" letter constitutes a final ruling of the Wage and Hour Administrator, as indicated by the District Court, we believe that the Department has the inherent authority to reconsider the coverage issues addressed therein. See *Dunn & Bradstreet Corporation Foundation v. United States Postal Service*, 946 F.2d 189,193 (2nd Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decision, regardless of whether the applicable statute and agency regulations expressly provide for such review.") However, the reconsideration must normally occur within a reasonable time. See *Belville Mining Company v. United States*, 999 F.2d 989,997 (6th Cir. 1993).

Within the unusual context of this case, we believe our reconsideration prior to any contract award for work in dispute would be appropriate and would occur within a reasonable period of time. Moreover, although the District Court ultimately concluded that the April 16, 1999 "Helm letter" was a final ruling, the Department had never viewed it as such; nor did the letter specify a date by which action should be taken or reconsideration sought. During the pendency of the court proceeding, no action was reasonably taken.

Further, it is our view that the Court's decision does not preclude the Department from reconsidering the merits of the April 16, 1999 letter. The Court's ruling neither addressed these merits nor did it state that the Department of Labor was prohibited from taking such action.

Although the Court stated a belief that "in light of the ongoing work on Project W-211, ... [HAMTC's] members are suffering the effects of the DOE's delay in segregating the work" (p. 14), none of the work in dispute in this case had commenced prior to the recent subcontract awarded on May 17, 2002. In the course of our review of this matter, we have become aware that Project W-211 is a 20-year endeavor being carried out under evolving contractual arrangements, most of which are yet to be awarded.

In light of these considerations, especially the 20-year time-span of Project W-211, the fact that only one of multiple contracts has been awarded to perform the work in dispute, and the complex contractual arrangements at Hanford surrounding this issue, it is our belief that review and reconsideration of the coverage issues addressed in the April 16, 1999 letter continues to be appropriate with regard to any contract work not yet awarded.

Determining whether DBA or SCA labor standards apply

Contract work is subject to the Davis-Bacon Act if it constitutes "construction, alteration, or repair" of a "public building" or "public work". Moreover, in a situation such as the present one where the prime contract is principally for services, the construction work must be substantial, physically or functionally separate from, and capable of being performed on a segregated basis from the non-Davis-Bacon work. See 29 CFR 4.116(c)(2).

As noted earlier, Project W-211, including the six items at issue, involves the installation of equipment and related work for each of ten huge tanks in order to complete each waste retrieval system. These tanks clearly constitute "public works" within the broad definition given that terminology by our regulations at 29 CFR 5.2(k).

Viewing these contract activities in their entirety, the installation of the radioactive waste retrieval systems and their related components would appear to essentially constitute extensive overhaul work on the tanks. The installation work is designed to transform the function of the tanks from inactive storage to being ready to be activated for the transferal of their contents to the new vitrification treatment plant. The design of each system to be installed, which is also part of "Project W-211", closely resembles the design aspect of a construction project (or series of construction projects).

In determining whether SCA or DBA should apply to equipment installation work, it is important to distinguish between routine maintenance to keep something in a state of continuous utilization to which SCA requirements would apply, and restoration, modification, replacement, or overhaul work on a public work to which DBA requirements would apply. The work in items 2 through 6 of the "In-Farm Work Activities" under Project W-211 (see Appendix) falls within the latter category in our view.

Treatment of this installation of equipment and related work as construction activity is also in accord with the regulatory definition of construction at 29 CFR 5.2(j), and relevant case law such as *Dairy Development, Ltd.*, WAB Case No. 88-35 (August 24, 1990). In addition, the removal of the existing contaminated equipment and components referred to in item number 1 is integral to this construction activity and is appropriately treated as covered Davis-Bacon work just as demolition performed prior to follow-on construction of a building or work is subject to the Davis-Bacon labor standards.

Given that we conclude that all six items in dispute constitute construction work, and the fact the remaining six items of "In-Farm Work activities" have been appropriately treated as construction work, it is clear that this construction work meets all of the additional requirements set forth in 29 CFR 4.116(c)(2) of being substantial, physically or functionally separate from, and capable of being performed on a segregated basis from the non-Davis-Bacon work.

With regard to HAMTC's view that the Federal Acquisition Regulations (FAR) at 48 CFR 970.2204 support its position that some of the activities at issue constitute work subject to the Service Contract Act, not only would our interpretation of the statutes and our regulations supersede such a position, but our examination of the FAR regulations lead us to conclude that they would not mandate a result different from our ruling. This would also appear to be consistent with the Department of Energy's views given its original conclusion that all of the "In-Farm Work Activities" were construction work.

Concerning HAMTC's other primary argument that certain items are subject to SCA coverage because its members have traditionally performed such work and they are most qualified to engage in "intrusive work" involving radioactive waste materials, we do not believe that factor directly addresses the coverage issues in this case.

Final ruling

Based on our reexamination of the available information concerning Project W-211 and RFP 8204530-W-211, including the work involved in the installation of the tank waste retrieval systems and the massiveness of equipment to be installed, we conclude that the six items of work described in the April 16, 1999 ruling as "service activities" are integral to and constitute components of construction work involving major alteration to the tanks that are properly subject to the Davis-Bacon Act and exempt from SCA coverage pursuant to the statutory exemption of such work established by section 7(1) of the SCA and the regulatory requirements of 29 CFR 4.116(c)(2). Therefore, we hereby rescind the April 16, 1999 determination, and direct that this ruling be applied to any relevant contract awarded in the future.

This letter constitutes a final ruling under 29 CFR 5.13. A petition for review may be filed with the Department's Administrative Review Board pursuant to Regulations, 29 CFR 7. Any such petition should be filed within thirty days of the date of this letter and forwarded to: Executive Director, Administrative Review Board, 200 Constitution Avenue, N.W., Room S4309, Washington, D.C. 20210.

Sincerely,



Tammy D. McCutchen
Administrator

cc: Ms. Deborah Sullivan
Mr. Paul Davis
Mr. Daniel M. Katz

Enclosure