U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

DEC 1 1 1961

MEMORANDUM # 84

TO: AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29 CFR, SUBTITLE A, PART 5.

FROM: James M. Miller
Assistant Solicitor

SUBJECT: Opinions on application of the Davis-Bacon and related Acts.

Enclosed with previous covering memoranda, copies of opinions on the application of the Davis-Bacon and related Acts were furnished you for information and guidance in your enforcement programs under those Acts.

We are now enclosing a copy of a recent opinion on this same general subject, which we are sure will be of further interest and assistance to you.

Enclosure

cc: Mr Monge, Mr. Taylor, Mr. Gregory & Mr. Taylor
D-Bact
Divs. & Dists.

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U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

November 30, 1961

Lt. Colonel John S. Wilson, JAGC
Labor Adviser
Office of Assistant Secretary of the
Army for Logistics
Department of the Army
Washington 25, D. C.

Re: Signal Corps Project Advent
Camp Roberts, California
Bendix Corporation, Prime Contractor
E-62-649

Dear Colonel Wilson:

This is with further reference to our letter of November 21, 1961, and our several discussions by telephone regarding the above-referenced project.

As you know, we received a complaint from the International Brotherhood of Electrical Workers, and inquiries from interested members of Congress, regarding the failure of the Army Signal Corps to include the labor standards provisions of the Davis-Bacon Act in its contract with the Bendix Corporation covering the work in question. Following a discussion between our respective offices, we arranged to have our Regional Attorney in San Francisco assign a man to meet with a representative of the Contracting Officer on the job site to inspect the project, and to furnish this Office with a report on the nature and extent of the work in question. That report has now been received.

It is true that, in line with our established position consistently followed for many years - see Rulings and Interpretations No. 3, Section 6(b), copy enclosed - unless more than an incidental amount of construction-type activity is involved, supply and installation contracts as such are not normally considered to be within the coverage of the Davis-Bacon Act. Moreover, the $2,000 monetary requirement of that Act is not regarded as the only test of coverage on such contracts. Thus, even though the amount of construction-type work and materials exceeds $2,000, the contract will not be covered if such work is of a purely incidental nature, such as moving equipment into place, fastening or attaching it in place with prepared connectors, making simple connections of the "plug-in" type, and the like. It clearly appears, however, that the type of construction activities here involved are much more complex.

Our report on the above-referenced project indicates that among the work items and processes involved are the following, which, in the aggregate, appear to constitute construction-type activity which cannot be regarded as incidental:

1. Operations Room

Installation of power wiring for the signal rack and control rack units in the Operations Room, including the installation of prefabricated multiple bus, and the brackets on the tops of the racks to which it is attached.

2. Control Room

Running of power wiring and installation of control panel in Control Room, including the power wiring from the control panel to the rack locations.

3. Tower

Running of power and installation of control panel in Tower, including the power wiring from the control panel to the heat exchanger. Installation of the heat exchanger, including all related piping and connections required. In other tower rooms, all power wiring, conduits, and control panels for operating equipment.

4. Signal Wiring

Installation or extension of all metal cable trays, conduits, or ducts from Operations Room to the Tower. Placing and/or pulling numerous wires or cables (reportedly 280' in length). External termination of signal wires or cables at racks or terminal blocks by means of set screws or otherwise. Installation of all signal wiring from the tower rooms to the sliprings of the pedestal.

Note that the provisions of the Davis-Bacon Act in our opinion would not be applicable to any internal wiring or assembling of any racks or equipment or to any adjustment to equipment, nor to check out or validation of equipment or wiring, including resulting changes in panels already installed.

The report further indicates that three firms have contracts with the Army Signal Corps for this project, namely, the Bendix, Philco, and Sylvania Corporations. The contract with Sylvania Corporation reportedly includes some of the buildings at the site as well as the installation of certain electronic

equipment. We are informed that this contract contains the required Davis-Bacon Act provisions and that employees performing work under it, who are now doing the same type of work at the same location as the Bendix employees, are being properly compensated according to the Secretary's predetermination of wages. So far as we know, Philco has not as yet begun the performance of its contract.

It is clear that the cost of the installation work in connection with the Bendix contract, although minor when compared to the cost of the equipment, far exceeds the monetary standard of the Davis-Bacon Act, and, as previously stated, is so complex and substantial in scope that it cannot be regarded as merely incidental.

It is our opinion, based on the above, that the construction-type activity involved is subject to the provisions of the Davis-Bacon Act. Accordingly, to facilitate appropriate corrective action, we are enclosing an Advisory Opinion containing the wage rates, as of the date of contract award. We do not regard the Comptroller General's Opinion B-144901, dated April 10, 1961, which dealt with a contract performance of which had been substantially completed at the time of this Department's ruling, as precluding the incorporation of this schedule in the Bendix and Philco contracts by change order, and the voluntary payment of restitution or the withholding of sufficient funds to assure workers the wages to which they are legally entitled. Cf. 36 C.G. 341 and B-106987 dated May 8, 1953.

I will appreciate it if you will advise me of any action taken.

Yours sincerely,

Charles Donahue

Charles Donahue
Solicitor of Labor

Enclosure

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U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

October 13, 1961

Mr. E. J. O'Keefe
Deputy General Counsel
Office of the Chief of Engineers
Department of the Army
Washington 25, D. C.

Re: Hyde Construction Company, Inc.
Traxler Materials, Inc.
DA-34-066-CIVENG-60-864
Keystone Dam, Oklahoma
E-62-223 and 224

Dear Mr. O'Keefe:

This is in reply to your letter and enclosures of July 24, 1961, requesting a ruling on the applicability of the contract labor standards provisions to the operations of Traxler Materials, Inc., under the subject contract awarded to the Hyde Construction Company, Inc., for the construction of a concrete spillway for Keystone Dam. On the basis of the facts reported in your enclosures, the Contracting Officer found that the work in question was subject to the Davis-Bacon and related Acts and to the contract labor standards requirements, and so advised the prime contractor. The contractor has appealed this ruling and, accordingly, the matter has been presented to this Office for review and appropriate decision.

The record transmitted with your July 24th request for a ruling sets forth the following facts:

On April 4, 1960, the prime contractor notified your Resident Engineer in writing that "Traxler Materials, Inc., of Utica, Mississippi, is Subcontractor for the processing and furnishing of sand on the job site" under the subject contract. The prime contractor also enclosed a statement by Traxler Materials, Inc., acknowledging inclusion in its subcontract agreement of Contract Clauses 20 through 26 of Standard Form 23A. Under the above agreement, Traxler was to furnish a total of approximately 355,284 tons of concrete sand to the prime contractor's stockpiles at the job site. For a short time thereafter, Traxler attempted to produce from a location on the Government project site, sand of a quality and character sufficient to comply with the Government specifications.

While the sand producing facility was located on Government property, Traxler Materials, Inc. was required to and, in fact, did comply with the labor standards provisions of the prime contract, including the submission of weekly payrolls and payment of its employees in accordance with the applicable minimum wage and overtime requirements.

On July 27, 1960, however, the prime contractor gave written notice to the Resident Engineer of the removal by Traxler Materials, Inc. of its sand producing facility from the Government property to a site located approximately 2.8 miles East of the construction area. In its letter, the prime contractor stated that its April 4, 1960 letter relating to the processing and furnishing of sand on the job site by Traxler became null and void when all equipment of Traxler was removed from the property of the Government.

On the following day, July 28, 1960, the prime contractor again wrote the Resident Engineer advising that approximately 355,284 tons of fine aggregate would be processed by Traxler on property owned by Mr. Finis L. White (the site mentioned above, 2.8 miles East of the construction area). Traxler's operating facility consisted of equipment of the type necessary to dredge material from the Arkansas River; screening and blending was accomplished to meet the contract specifications.

Upon moving its plant to the above-described privately owned property, Traxler discontinued compliance with the contract labor standards, under the expressed contention that it was an established supplier of fine aggregate materials and thus not subject to the labor standards provisions of the contract. This expressed contention apparently followed the Resident Engineer's August 2, 1960 letter to the prime contractor. In that letter, it was stated that, inasmuch as the producing plant of Traxler Materials, Inc., on its new location, was established for the primary - if not sole - purpose of furnishing material according to specifications under the subject contract, the contract labor requirements were still applicable. In his August 2nd letter, the Resident Engineer emphasized that, should Traxler make a reasonable showing, by evidence of sales to others that his new plant was in fact serving the public, his operations in question would not be considered those of a subcontractor and, as a bona fide materialman, he would not be considered subject to the contract labor standards requirements.

Traxler Material's August 11, 1960 response to the foregoing was simply to the effect that its plant was specifically removed from the Government property in order that it could produce and sell its material to "both the General Public and Individual Contractors."

On August 23, 1960, in response to the prime contractor's request for reconsideration of his coverage ruling on the basis of Traxler's above statement, the District Engineer specifically set forth the criteria determinative of coverage in situations such as here involved.

Referring to previous decisions issued by this Department, the District Engineer advised the prime contractor as follows:

"Sand and gravel firms are normally 'materialmen' under the Davis-Bacon Act, and such firms do not lose that status merely because the material is produced or graded to meet contract specifications, is subject to rejection, or because the materials are delivered directly to a prime contractor's mixing machines on the work site.

"On the other hand, employees engaged in producing sand and gravel are covered by the Davis-Bacon Act when the materials are not produced from existing facilities but from an operation or plant opened or installed in the vicinity of the construction site for the exclusive purpose of fulfilling the contract material requirements. Under such circumstances the sand producing firm (whether an independent business or not) is considered as having undertaken a part of the construction contract and is therefore a subcontractor, not a materialman; and until such time as it can present proof of sales from the production plant in sufficient quantities to other than Government contractors, all laborers and mechanics employed at said plant must be paid not less than the contract rates, as predetermined by the Department of Labor. The physical location of the processing plant is not a governing factor. What constitutes 'sufficient quantities' of sales to other than Government contractors is dependent upon the attendant circumstances in each case. Certainly, a bona fide commercial supplier, well established at other producing sites, will be required to show a lesser amount of sales than a newly organized firm undertaking business for the first time at the site in question. Since no set standard has been established by law, the practice is to require a substantiala amounttof

total sales to be made to the public, beyond Government contract requirements, before an established producer may be considered exempt from the contract labor provisions at its new production site. This exemption by way of sales is accomplished by a review of the records of the firm, and is subject to change throughout the contract period as the circumstances warrant.

"Accordingly, since records of sales from the production plant in question will regulate the status of Traxler Materials, Inc. as being a materialman or subcontractor for your company under the existing contract, a reasonable time will be given after commencement of production at the new plant before any determination is made. Should the records of said firm then reflect substantial sales to the public, the exemption from the contract labor provisions will be established.

"It should be emphasized, however, that if, upon review, the records of said firm fail to disclose sufficient sales beyond those made under existing Government contracts, then the entire sand producing operation, including delivery of materials and erection of the existing facility will, as a subcontract, retroactively fall within your contract labor requirements. Thus, the possibility of being required to make restitution to underpaid employees on a nonreimbursable basis and becoming subject to penalties as required by applicable labor laws for the entire period beginning with the re-erection of the plant at new location, should warrant serious consideration."

The District Engineer closed his August 23, 1960, letter to the prime contractor with a request that the latter fully advise Traxler Materials, Inc. of the criteria for coverage and the possibility of retroactiveapplication of the contract labor standards requirements. He further advised that, if Traxler still disputed the matter, it was free to request review by this Department.

On March 10, 1961, the District Engineer, having found that sales of sand from the plant in question to the general public were minimal (for example, 10 tons of record, plus a possible additional 10 tons on which accurate records were not available, as against 146,678 tons produced and delivered to Hyde Construction Company, over a 7 1/2 month period), notified the prime contractor as follows:

"From record of sales to date I have found only token sales to the general public and must conclude that the plant's operation as of the present date is for the express purpose of furnishing sand under Contract No. DA-34-006-CIVENG-60-864. Based on precedents heretofore established by the Department of Labor, it is my decision that furnishing of sand by Traxler Materials, Inc., is an operation which is construction work contemplated by the contract and represents construction contract performance ordinarily performed by a prime contractor or subcontractor and not a materialman."

The prime contractor was accordingly requested to take appropriate action to bring his subcontractor into compliance. Again, the prime contractor was advised he had a right to appeal this decision to the Secretary of Labor under Regulations, Part 5, and the contract terms.

On May 2, 1961, the prime contractor wrote the District Engineer and advised that it was appealing the March 10, 1961, decision on coverage, which appeal is now the subject of our consideration.

In addition to reviewing the above facts as detailed in the data you furnished us, we have also completed a careful study of the lease arrangement between Traxler Materials, Inc., and the owner of the land in question, Mr. Finis L. White. This lease provided, among other things, that: "This contract shall continue in force from the date hereof until such time as demand for sand for the construction of the Keystone Dam project shall end, and may be continued in force by agreement of the parties after that date." In other words, although Traxler, a Mississippi corporation, apparently performing substantial supply operations in Mississippi, Louisiana and Alabama, was not so operating as a materialman serving the public in his sand facility here in question. Rather, the subject facility was opened to serve the needs of the Hyde contract and Traxler could not continue its operations on White's land after the Keystone Dam requirements had been fulfilled, unless White agreed to allow it to so continue. In the meantime, because of the volume of material required by the prime contractor for the Keystone Dam work, Traxler had to operate under a maximum output to Hyde Construction and could not divert any of its production to stockpiles at the plant upon which it could rely in negotiations for sales to the general public and/or individual non-Government contractors. As a matter of fact, the record indicates that as compared to the 146,678 tons of sand delivered to Hyde from mid-November until July 1, 1961, only 2 deliveries of 5 tons each were made by Traxler to private parties and several cash sales to individuals, estimated

at not over 10 tons. Other evidence of record would indicate that White contemplated operating the plant after its abandonment by Traxler when Hyde's contract requirements had been met.

From the above facts as presented to us, it appears that Traxler's operations on White's land were for all practical purposes designed to meet the construction contract requirements of prime contractor Hyde. There is insufficient evidence to establish that Traxler was operating at the site in question as a bona fide materialman set up to serve the public in general. Rather, apart from token sales, his plant was set up exclusively to serve the needs of the Keystone Dam job and, under these conditions, Traxler's plant employees and drivers from plant to the Keystone Dam construction area are laborers and mechanics engaged in construction contract performance and thus entitled to payment at not less than the contract rates for the classifications of work they performed. Accordingly, the decision of your District Office is confirmed.

We would appreciate receiving a final report in this matter when the necessary compliance action has been completed.

Yours sincerely,

Charles Donahue
Solicitor of Labor

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

October 11, 1961

John F. Lane, Esquire
Gall, Lane and Howe
Commonwealth Building
Washington 6, D. C.

Dear Mr. Lane:

This is in reply to your recent inquiry, submitted on behalf of the National Crushed Stone Association, regarding the applicability of the Davis-Bacon and related Acts to truck drivers employed by stone quarry firms and who use the "tailgate spreading" method in delivering stone to construction sites where work is being performed which is subject to the labor standards provisions of the above-mentioned statutes.

You presented the following factual situation as representing standard procedure at least in certain areas of the country:

> Jones has owned and operated a stone quarry for a number of years. Crushed stone from Jones' quarry is sold for private construction and also to city, county, state and federal governments and to contractors performing construction work for city, county, state and federal governments. Recently, Jones entered into a contract with the Able Construction Company, an FAHA prime contractor, to supply crushed stone on an Interstate Highway System project at $3.50 per ton. Following the normal practice of the aggregate industry in Jones' area, the contract price of $3.50 includes delivery of the stone to the construction site and unloading the trucks by the "tailgate" method at locations specified by personnel of Able. Tailgate unloading is performed by a driver raising the tailgate of his truck and driving slowly along the roadbed until his truck is empty. Neither the truck driver nor any other employee of Jones spreads, rolls or levels the stone after it is unloaded. Spreading, rolling, leveling, etc. of the stone is performed by employees of Able.

It is presumed that the Jones quarry cited in your example as typical of the type of quarry here involved, would be a commercial quarry de facto serving the public in general as a bona fide materialman. In other words, there is no question here as to any quarrying operation having been set up merely to serve the contractual needs of any given covered contract. With such an understanding, and under the facts recited, we would agree with your conclusion that the quarry company's truck drivers would not be subject to the contract labor standards provisions even though in their delivery of material, they utilized the "tailgate spreading" method as described in your factual situation. It would appear that the mere raising of the truck's tailgate and slowly driving along the construction roadbed until his truck is empty, with no additional construction-type work (such as spreading, rolling or leveling the stone after it has been unloaded) being performed by the quarry's truck drivers, would not affect the general rule that the delivery at or on the construction site is incidental to the sale by the materialman and not subject to the contract labor standards requirements.

Our conclusion would be otherwise if, in addition to or as an incident to delivery of the stone, Jones' truck drivers engaged in a substantial amount of work at the construction site, in which case, they would be considered laborers and/or mechanics within the meaning of the Davis-Bacon and related Acts. In this connection, we would regard work at the site as substantial if it exceeded 20% of the individual worker's time in any workweek.

If we can be of further assistance in these matters, please let us know.

Very truly yours,

Charles Donahue
Solicitor of Labor

By
/s/ James M. Miller
Assistant Solicitor