Dept. of Labor
Ruling Book

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

FEB 2 1962

MEMORANDUM # 34

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

FROM: Peter F. Martin
Acting 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: Messrs Monzer, Saylor, Saylor, Gregory
Dirs & Asts; DB Act

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

January 29, 1962

Mr. E. Manning Seltzer
General Counsel
Office of Chief of Engineers
Department of the Army
Washington 25, D. C.

Re: Fluor Corporation, Prime Contractor
Graver Tank and Manufacturing Company
Idaho-Maryland Industries, Inc.
Contract No. DA-04-548-ENG-43
Missile Launching Facilities
Davis-Monthan AFB and Vicinity
Tucson, Arizona
E-52-719 and 720

Dear Mr. Seltzer:

This is in reply to your letter and enclosures of January 5, 1962, requesting a ruling on the application of the labor standards provisions of the above-referenced contract to the operations of Idaho-Maryland Industries, Inc., which, through its Tucson Steel Division, is performing a portion of the work required under the contract pursuant to a subcontract with Graver Tank and Manufacturing Company, itself a subcontractor to the Fluor Corporation.

The enclosures to your letter set forth the following facts with respect to the work being performed under this subcontract, and to the facilities which the Tucson Steel Division of the Company is utilizing in the execution of its subcontract:

1. The work in question is the alteration and completion of cableway sections, assembly of inner sections of silo closure doors, and the fabrication of top and bottom sections of door plate for the silo doors.

The Steel plate is supplied by an out-of-State supplier to the plant in question. There the top and bottom plates for the silo doors are cut out and shipped to the

missile complexes where they are fitted and welded into place. The inner sections of the doors are also assembled at the plant and then shipped to the complexes for combining into a single door unit.

The tubes or cableways, including the stiffeners and floor plates and structural steel supports and cabletrays are fabricated elsewhere and are shipped to the Tucson plant. At the plant, these units are assembled and installed in the tubes and the completed cableways are shipped to the missile complexes for installation.

2. The plant is located on leased premises at 820 West Congress Street, Tucson, Arizona, proximate to railroad sidings and a main highway which leads to all of the eighteen missile complexes.

3. The Tucson Steel Division of Idaho-Maryland Industries, Inc., was nonexistent prior to the commencement of the missile project. It presently holds a one-year lease on the plant facilities and apparently refused to sign a lease for a period longer than one year. According to a letter from the Graver Tank and Manufacturing Company to the Small Business Administration, which has a controlling equity in the lease, Mr. Grange Morton, President of Idaho-Maryland Industries, Inc., informed the Graver Company that "they cannot and will not entertain paying out an additional $54,000 to occupy a plant for an additional year for which they would have absolutely no use." The present lease is apparently scheduled to expire at approximately the same time as the scheduled completion date for the project.

4. The leased plant contains such permanent equipment as an overhead crane, roller, etc., although some of the plant equipment has been moved to make room for operations in connection with the missile project. Additional portable equipment, such as welding and burning units, has been acquired for special operations for the missile work. It appears that

for all practical purposes, the full capacity of the plant is being used for the contract work and there is no evidence that the company is prepared either to accept any business from the general public or that they have solicited any.

5. At present all materials being stockpiled at the plant are eventually to be incorporated into the missile project, and have been purchased through the controlled materials program. Much of the material is unique in size and shape and would not be readily usable on ordinary commercial construction projects.

6. The company has approximately 60 employees engaged in assembly work at the plant, and approximately 54 employees who perform duties at the missile complexes and who are being paid at the construction rate of pay.

7. The work in question is called for by the specifications of the prime contract and represents construction-type work which is ordinarily performed by contractors or subcontractors and not by suppliers or materialmen. The alteration and assembly of the cableways could readily be accomplished at the complex sites, and the cutting and fabrication of the silo doors could also be accomplished at the project since a great amount of equipment presently being used at the plant is portable.

As you know, the Department of Labor has traditionally considered the manufacture and delivery of supply items to the site of the work when accomplished by a bona fide supplier or materialman who regularly serves the general public, as an activity not covered by the Davis-Bacon Act. However, where a facility, such as a batching plant or an assembly site, is established in the vicinity of a covered construction project for the exclusive purpose of serving the requirements of the construction contract, we have historically held that the operator of such a facility is functioning as a subcontractor as to the prime contract, and not entitled to an exemption from coverage of the contract labor standards provisions as a materialman. This view is consonant with that expressed by the Supreme Court in MacEvoy v. United States, 322 U. S. 102 (1944), wherein it was stated that ". . . a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers or materialmen," (emphasis furnished).

The fact that a coverage decision such as here involved would affect an otherwise generally recognized supplier presents no difficulty in this case since the Tucson Steel Division of Idaho-Maryland Industries Inc. was non-existent prior to the commencement of work on the missile project. At the present time, and for the foreseeable future, the entire capacity of the plant, in terms of equipment, materials, and employees, is being utilized exclusively to meet the requirements of the covered contract. Moreover, the lease for this facility is for one year, and for the approximate period required for the completion of the project. To consider such an operation, so established and so utilized, and therefore so intimately tied into the contract, as not covered by its labor standards provisions would defeat the admitted purpose of the Davis-Bacon Act and related statutes.

In determining Davis-Bacon Act coverage it is important to examine both the geographical and functional aspects of the work in question. The plant here involved is located somewhat centrally in relation to the various missile complexes. To allow that an employer could escape coverage of remedial legislation such as the Davis-Bacon Act simply by locating his facility away from the geographical site of the installation would be to defeat the clear intent of the statute.

Similar considerations are involved in treating the functional aspects of the work where the contractor is to perform a specific part of covered construction work. Clearly, the project in this respect should be treated as a whole, or in a realistic way, and it should not be broken down into its various phases where to do so would subvert the purposes of the statute. Cf. Bennett v. V. P. Loftis Co., 167 F. 2d 286, 288 (C.A. 4 1948); Goldberg v. Kelly, Calib & Cia., 291 F. 2d 371, 373 (C.A. 1 1961).

The Supreme Court in U. S. Fidelity Co. v. Bartlett, 231 U. S. 237, held that under a prime contract for building a breakwater the labor at a quarry which was opened 50 miles away solely to furnish rock "was work done in the prosecution of the work," that is the breakwater. The decision of the Circuit Court, which was confirmed by the Supreme Court in that case, stated that "the quarrying of the stone, its transportation and dumping should be regarded as a continuous operation contributing in its

entire progress to the prosecution of the work." Also, in United States v. D. L. Taylor Co., 268 Fed. 635, the Court held that "where the specifications and map for a proposed breakwater, with reference to which a contract for its construction was made, showed that the stone for the breakwater must be secured from distant quarries and transported by rail and barge to the site of the breakwater the term 'construction,' as used in the contract, is not confined to the last act of putting the stone in place in the water, but includes the essential steps for getting it to that place. . ."

In Archer v. Brown and Root, Inc., 241 F. 2d 663, the Court held that construction of a causeway was commerce, and workers producing materials going directly into its construction were producing goods for commerce. More pertinent to the case at hand, however, were the circumstances surrounding the construction of a field plant. This plant produced cylindrical pilings to be used in the causeway construction and without which the causeway, which is 25 miles long, could not have been built. With respect to the workmen engaged in the construction of this plant, the Court held that "those [employees] were, in effect also building the bridge." The Court further stated that, "Whether, as claimed by the employer, it chose to install a plant designed and equipped as a permanent plant for future use after completion of the bridge project, there can be no question whatsoever that this plant was indispensable to performance of this construction contract. The only reason it was built where it was and when it was, was because of this contract. It was an integral part of the whole project."

Based on the facts as presented to us, and in line with previous rulings of this Department and decisions by the Courts, it is our opinion that the operations of the Tucson Steel Division of Idaho-Maryland Industries, Inc., in connection with the work described above were designed to meet the construction requirements of the prime contract, and further that the employees engaged in the prosecution of such work are laborers and mechanics engaged in construction contract performance and thus entitled to payment at not less than the contract rates for the classification of work which they performed. Accordingly, it is our conclusion that the work in question is subject to the provisions of the Davis-Bacon Act, as set forth in the subject contract.

It would be appreciated if you would take appropriate steps to insure compliance, by the subcontractor here involved, with the labor standards provisions of the contract. We appreciate the contract administration difficulties which might arise from any effort to make this decision retroactive and, in view of all the circumstances, this will confirm our informal understanding that compliance will be required from the date of notice to the prime contractor.

Yours sincerely,

Charles Donahue

Charles Donahue
Solicitor of Labor

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON 25

November 29, 1961

MEMORANDUM

TO: John A. Hughes, Regional Attorney
New York, New York

FROM: James M. Miller
Assistant Solicitor

SUBJECT: Precrete, Inc.
20th Avenue & 31st St.
Astoria, New York
NY Project I-95-1(46)
George Washington Bridge
E-61-1266 and 1267(IH)

Reference is made to your memoranda of October 6, and October 26, 1961, regarding coverage of the subject's operations, in connection with the above project, under the labor standards provisions of the Federal Aid Highway Act of 1956 (23 U.S.C. 113).

It appears that this company is engaged in producing prestressed concrete supports for use in the construction of a lower deck on the George Washington Bridge, New York City.

A report furnished by the Bureau of Public Roads (memo: Koch to Swanson, June 29, 1961) states that:

> "(2) Precrete Incorporated has a permanently established commercial plant at 20th Avenue and 31st Street in Astoria at which location structural concrete products have, in the past, been constructed for other construction projects in the area, and which will presumably continue to operate after completion of this project."

An addendum to this report, dated August 31, 1961, states further that:

> "...Precrete Inc. has been, and is presently involved in the business of supplying concrete

products manufactured to the purchaser's specifications to several construction companies in the New York City area. Precrete products have been used in both highway and building construction."

We assume that the above findings are adequately supported by the facts and therefore accept them as controlling.

It is our opinion that the company's operations at its permanent plant do not qualify as those of a subcontractor, within the meaning of the Act, and the employees there engaged are not subject to coverage of the labor standards requirements on this project.

However, it also appears that certain of the subject's employees spent a substantial amount of their working time at the site of construction, and as to them, a contrary conclusion is reached. In the instant case, site work, constituting "refinements to the prestressed beams themselves," was performed by employees of Precrete. This work consisted of chipping away a small portion at the ends of the concrete beams. The Bureau of Public Roads found that this work "was necessary to insure that the beams could be installed in their proper position, which is on a skew with the abutment." We assume that this task was not performed by the truck drivers as a part time incidental activity but rather by certain assigned employees on a full time basis.

It does not detract from coverage of these employees that they were not engaged in actual construction operations. They were employed "directly upon the site of the (contract) work...," and what they did was an integral part of "the initial construction work" (cf. Archer v. Brown and Root, Inc., 241 F (2d) 663). The first quoted phrase was incorporated in the Davis-Bacon Act not to restrict coverage, as so many have assumed, but to enlarge it by including such laborers and mechanics as waterboys, flag men, cooks or employees (such as we have here) who are engaged in the preparation of materials as distinguished from their actual incorporation into the structure.

Kindly inform the Bureau of Public Roads accordingly.

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON 25

December 13, 1961

The Honorable Paul H. Douglas
United States Senate
Washington, D. C.

Dear Senator Douglas:

This is in reply to your letter of December 4, 1961, in which you ask that I address myself to the question raised by Mr. Theodore Dressel, the Business Representative of the Operating Engineers at East St. Louis, Illinois, as to why the Davis-Bacon Act would apply in the case of demolition on highway projects and not be deemed applicable for contracts for the sale of timber preliminary to the construction of a reservoir.

I can understand why Mr. Dressel feels that we have drawn a very fine line of distinction between the two situations. However, in the interpretation of remedial statutes, such as the Davis-Bacon Act and its application to various fact situations, lines must be drawn somewhere. In asserting coverage of demolition preliminary to highway construction in cases wherein the particular contract involved the sale of structures, we believe that we reached the outer limits of coverage. We think that we were fully justified in doing so, however, because of the fact that the demolition or removal of buildings often closely precedes new construction and is closely related to the construction industry in that many of the same classifications and crafts are utilized.

On the other hand, the cutting of timber or plywood by itself constitutes a recognized branch of industry which is not generally associated with the construction industry, nor are such activities generally engaged in as a preliminary to construction. It is, therefore, our opinion that even though the removal of the timber (in this case to be followed by an admittedly covered contract for clearing) is essential to the ultimate construction of the reservoir, the outright sale thereof to a timber producer would not fall within the scope of the Act. Were we to assert otherwise, we think it probable that this Department might be subjected to criticism on the ground that it was unduly extending the Act beyond the original congressional intent. We recognize, of course, that there is room for a difference of opinion on this point as on many others arising under this Act.

Your interest in these labor standards matters is greatly appreciated. If I can be of further assistance, please do not hesitate to call upon me.

Yours sincerely,

Charles Donahue
Solicitor of Labor