U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

July 22, 1963

MEMORANDUM # 53

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

FROM : E. Irving Manger
Associate Administrator

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
DB-38

Divisions, Districts, Saylor, Gregory, Saylor, Groat, D-B Book

DB-38

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

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July 8, 1963

Robert H. French, Esquire
Pogue, Helmholz, Culbertson & French
First National Bank Building
Cincinnati 2, Ohio

Re: George E. Detzel Co.
Ohio Equipment & Supply Co.
Project: I-65-2(30)54
Contract No. 5039
Indiana
Our Files: E-61-523(IH)
E-62-662 thru 667(IH)

Dear Mr. French:

Reference is made to your request, on behalf of the above firms, for a final ruling, pursuant to Section 5.11 of Regulations, Part 5 (29 CFR, Subtitle A), on the applicability of the Davis-Bacon Act, as extended to the Highway Laws of 1958, and the labor standards provisions of the captioned contract to employees of the Scott County Concrete Products Company who furnished ready-mix concrete for use in the project work. You also request relief from the action taken by the Indiana State Highway Commission in withholding sums due your clients under the contract, to assure the payment of additional wages which may be owed these employees, in the event the aforementioned laws and contract provisions are deemed applicable to the work here involved.

From the record furnished, it appears that on August 15, 1960, the Indiana State Highway Commission awarded to the George E. Detzel Co. and the Ohio Equipment & Supply Co., a contract for the construction of bridge structures on Interstate Highway 65, near Seymour, Indiana. This contract was one of several, awarded on that date, for initial construction on Interstate 65 in the same vicinity. The prime contractors performing this work, including Detzel and Ohio Equipment, thereupon awarded contracts to the Scott County Concrete Products Company, whereby the latter firm agreed to provide the necessary concrete for use in the project work.

The materials thus furnished by Scott County were produced at a portable batch plant located upon land leased by the company for a one-year

period, commencing in September of 1960. The plant, itself, was apparently removed upon conclusion of the project work. Access to this facility, which was situated between one and one-half to five miles from the project work, could be gained only by passing through the construction site upon which the Detzel Company had posted a "no trespassing" sign. The record also indicates that over 99% of the concrete produced at this plant was used in the covered construction work.

The Department of Labor has consistently held that where several covered (prime) contracts collectively serve the interest of a major project and are so interrelated in time and geography as to constitute an inseparable part thereof, an activity set up or opened primarily to serve, simultaneously or in succession, the needs of any one or more of these contracts is deemed to constitute the work of a subcontractor (Opinion of the Solicitor, DB-34, March 19, 1963). Under these circumstances, it is our finding that the activities of Scott County at their Seymour plant are clearly those of a subcontractor and accordingly, are governed by the requirements of Section 113, Title 23, U. S. Code, which provides that:

> The Secretary [of Commerce] shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the initial construction work performed on highway projects on the Interstate System...shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with...the Davis-Bacon Act (emphasis furnished).

As you may know, Reorganization Plan No. 14 of 1950, 5 U.S.C. 133z-15, note, centralizes in the Secretary of Labor the function of promulgating standards, regulations, and procedures to be observed by the agencies responsible for the administration of the above laws (Opinions of the Attorney General, Vol. 41, No. 82, September 26, 1960). Pursuant to this authority, the Secretary of Labor requires that these agencies include certain provisions in contracts for initial construction work performed on highway projects on the Interstate System. Section 5.5 of Regulations, Part 5 (29 CFR, Subtitle A) specifically provides that the parties to such contracts shall agree to the payment of all laborers and mechanics in accordance with the above laws, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and further, that there may be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics

employed by the contractor or any subcontractor on the work the full amount of wages required by the contract.

The George E. Detzel Co. and the Ohio Equipment & Supply Co. request relief from these mandatory requirements, as incorporated into their contract with the Indiana State Highway Commission. It is their position that such relief is warranted, having relied, to their detriment, upon an earlier determination of the Bureau of Public Roads, U. S. Department of Commerce, that the activities of Scott County, at its Seymour plant, were those of a materialman. This intervening decision, which is not binding upon the Secretary of Labor (Opinions of the Attorney General, Vol. 41, No. 82, September 26, 1960) and which was apparently based upon an inadequate investigation performed for the Bureau, was clearly erroneous. Under such circumstances, the Government cannot be estopped from asserting the rights it acquired under a contract, nor can it be barred from requiring that the parties thereto comply with the applicable statutes and regulations (Montana Power Co. v. Federal Power Commission, 185 F. 2d 491). "The Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials" (ibid, at page 497). Accordingly, we are without authority to grant the relief sought from the withholding provisions of the contract here involved. The withholding in this case, however, can only be justified to the extent necessary in effecting payment of additional wages owed to those laborers and mechanics as a result of their employment under this particular contract.

Yours sincerely,

Charles Donahue
Solicitor of Labor