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U. S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington 25, D. C.

May 13, 1958

MEMORANDUM #6

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

From: Harold C. Nystrom
Acting Associate Solicitor of Labor

Subject: Physical Inclusion of Contract Labor Standards Stipulations in Subcontracts.

In the processing of labor standards enforcement cases, it has come to our attention that in many instances the contract stipulations specified in Section 5.5(a)(6) of Regulations, Part 5 (29 CFR, Subtitle A), are not being physically included in all subcontracts as required by the Regulations. This practice has occasioned serious and costly violations on the part of many subcontractors and could result in the imposition of sanctions as to the contractors as well as the subcontractors involved.

In order to achieve effective compliance and to prevent unnecessary enforcement actions, all contracting agencies are advised that Section 5.5(a)(6) requires that the contract stipulations cited therein be physically included in all subcontracts. Incorporation by reference does not constitute compliance with this Section of the Regulations.

In accordance with the foregoing, all agencies are requested to take appropriate measures to assure strict compliance with this requirement on the part of their contract administration personnel. In this connection, it is earnestly suggested that this contractual requirement be explained in detail in the course of preconstruction conferences as well as in preconstruction letters issued to prospective contractors. Contractors who subcontract by means of purchase orders or other informal-type contract forms will be considered in compliance with Section 5.5(a)(6) provided they attach copies of the appropriate labor standards clauses to the subcontract, and provided also that the subcontractor acknowledges receipt of the labor standards clauses in writing to the contractor awarding the subcontract.

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U. S. DEPARTMENT OF LABOR

Memo #5

OFFICE OF THE SOLICITOR

WASHINGTON 25

December 26, 1957

Mr. Malcolm P. McGregor
Assistant, Legal Division
Office of the Chief of Engineers
Department of the Army
Washington 25, D. C.

Dear Mr. McGregor:

This is in reply to your letter and enclosures of November 20, 1957, in which you request an opinion, in accordance with Section 5.11 of Regulations, Part 5 (29 CFR, Subtitle A), as to the applicability of the Davis-Bacon Act, 40 U.S.C. 276a, to the employees of the Westlake Quarry and Material Company, Inc., a firm currently active in connection with a contract awarded by the Department of the Army, Corps of Engineers, to the Markham and Brown Company.

The facts which this Department has received are as follows:

On October 2, 1957, the Corps of Engineers awarded contract No. DA-03-050-CIVENG-58-155 to the Markham and Brown Company, 1961 N. Industrial Boulevard, Dallas, Texas. The contract provides for bank-stabilization work consisting of bankhead paving, rockfill dikes, and trenchfill revetment. The contract specifications call for 77,000 cubic yards of grading and excavation under Item 1 and 137,000 tons of quarry-run stone with fines under Item 2. The work is to be performed between river miles 343 and 344 on the Arkansas River, which is approximately ten miles below Van Buren, Arkansas. On October 4, 1957, the Markham and Brown Company entered into an agreement with the Westlake Quarry and Material Company, Inc., of Robertson, Missouri, whereby the Westlake Company agreed to furnish, in accordance with the contract specifications, the quarry-run stone with fines required by Item 2. This material was to be delivered by truck drivers employed by the Westlake Company f.o.b. at the riverbank at a cost to the Markham and Brown Company of $1.35 per ton. The material is put in place by the Markham and Brown Company. In order to fulfill this commitment, the Westlake Company leased and opened

a quarry site approximately 10 miles north and two miles west of the site of the revetment work. The lease is being paid for on a royalty basis of three cents per ton. As of November 8, 1957, the Westlake Company had moved to the quarry site only that machinery necessary to produce quarry-run stone. This machinery generally consists of a shovel, air compressor, air-operated drill, bulldozer and sometimes a headache ball to break up oversize stone. All of the material taken from this quarry has been delivered to the Markham and Brown Company with the exception of approximately six or eight loads which were sold to Crawford County, Arkansas. In the past it has been the normal practice of the Westlake Company when a quarry was opened for a specific job to abandon it after completion of the particular contract.

The Davis-Bacon Act, as amended, provides that every contract subject to the Act shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work not less than the prevailing wages as determined by the Secretary of Labor. Since there appears to be no question but that the employees of the Westlake Company are laborers and mechanics within the meaning of the Act, the application of the Act involves only the following considerations:

(A) Is Westlake Quarry and Material Company, Inc., a subcontractor within the meaning of the Act?

(B) Are these employees employed "directly upon the site of the work?"

In construing these provisions, it must be kept in mind that the Davis-Bacon Act is a remedial labor standards statute and its provisions should be liberally construed to effectuate its basic purposes. Gillioz v. Webb, 99 F. 2d 585, 33 Comp. Gen. 497, and the cases collected at 163 A.L.R. 1302.

(a) The Davis-Bacon Act itself makes no attempt to define the word "subcontractor." In order to find such a definition we must therefore turn to similar and related statutes. One such statute is the Miller Act, 40 U.S.C.A. 270a, passed during the 1st Session of the 74th Congress in 1935. This Act provides that before any contract, exceeding $2,000 in amount, for the construction, alteration or repair of any public building or public

work of the United States is awarded to any person, such person shall furnish a bond for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract. The Miller Act repealed the Heard Act, 28 Stat. 298, 33 Stat. 811 and 49 Stat. 794, but restated its basic provisions. The close relationship between the Miller Act and the Davis-Bacon Act is shown in both the House and Senate Reports on the proposed amendments to the Davis-Bacon Act, which were also considered and passed during the 1st Session of the 74th Congress. House of Representatives Report No. 1756, 74th Congress, 1st Session, Senate Report No. 1155, 74th Congress, 1st Session. In commenting on these amendments, Senator Walsh stated that one of the purposes of the proposed changes was "to provide remedies for laborers and mechanics aggrieved by forced rebates or failure to pay the prevailing rate of wages by allowing such laborers and mechanics to have the same right of action against the contractor and his sureties in court which is now conferred by the bond statute on persons furnishing labor and materials . . .," 79 Cong. Rec. 12072. In this connection see also Senator Walsh's remarks in 79 Cong. Rec. 13383.

In MacEvoy Co. v. United States, 322 U.S. 102, a suit brought under the provisions of the Miller Act, the Supreme Court held that "under the more technical meaning, as established by usage in the building trades, 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 and materialmen." In Basich Bros. Const. Co. v. United States, 159 F. 2d 182, the facts are as follows: Basich Brothers entered into a contract with the United States to perform certain construction work at the Davis-Monthan Field, Tucson, Arizona. Duque and Frazzini agreed with Basich Brothers to furnish all the rock, sand and gravel, in accordance with the contract specifications, necessary for the work. This material was obtained from a site leased and opened by Duque and Frazzini about 4½ miles from the field, and hauled to the field by truck. The plaintiff, a truck rental firm, sued the prime contractor and its surety under the provisions of the Miller Act to recover amounts due from Duque and Frazzini. In deciding for the plaintiff, the Court held that Duque and Frazzini were subcontractors within the meaning of that Act, rather than materialmen, and quoted the rule in the MacEvoy decision. In

Avery v. Ionia County, 39 N.W. 742, the Court held that the plaintiff, having agreed to furnish the prime contractor with all the cut stone for a county building according to the specifications under the original contract, was a subcontractor, and not a materialman. See also Holt and Bugbee v. City of Melrose, 41 N.E. 2d 562, and G. G. Waugh and Co. v. Rollison, 192 S.E. 694.

Inasmuch as the Westlake Quarry and Material Company, Inc., took from the prime contractor a specific part of the original contract and agreed to perform for the prime contractor in accordance with the contract specifications, it seems evident from the above decisions that the Courts would hold that this firm is a subcontractor within the meaning of that term as it is used in the Davis-Bacon Act, as amended.

(B) In ascertaining whether a given contractor or subcontractor is engaged in construction activities on the "site of the work" under the Davis-Bacon Act, both the geographical and functional aspects of his activities must be considered. Geographically, the term "site of the work" normally contemplates a larger area than that which the completed building or other installation will actually occupy and will vary in size with the nature of the work required to be done on the project. Obviously, on some jobs all the contract work may be performed within a few feet from where the installation is made, while on others requiring elaborate facilities, such as a dam or flood control project, the area may be quite extensive. In this connection, Black's Law Dictionary says of "site" that "the term does not of itself necessarily mean a place or tract of land fixed by definite boundaries."

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 . . ."

Similarly, the Supreme Court pointed out in Brogan v. National Surety Co., 246 U. S. 257, that whether the furnishing of board by a construction contractor was an integral part of the construction work depends upon whether the boarding house was established as an independent business or exclusively for the construction activities. See also Illinois Surety Co. v. John Davis, 244 U.S. 376.

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."

In the instant case a similar situation obtains. The quarry operations, although not physically located on the river bank where the final spreading and placing operations are performed, are conveniently located close to and within the general area of this work and are so closely integrated with it as to be

a part of it. Such arrangements are common in the industry on projects of this nature. Further, Westlake set up its operations for the primary and express purpose of performing its contract with the prime contractor, and its contract relates exclusively to the performance of work called for by the prime contractor's contract with the Corps of Engineers. It follows, therefore, that the laborers and mechanics employed by Westlake at the quarry and in the hauling operations are within the coverage of the Davis-Bacon Act, as amended.

Very truly yours,

Stuart Rothman
Solicitor of Labor