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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

PHILIPS
P.L. I

FILE: B-188306 DATE: December 19, 1977

MATTER OF: Electrical Constructors of America, Inc.

DIGEST:

Area practice of one union using electricians to perform certain functions in connection with installation of underground cable need not be followed for Davis-Bacon Act wage purposes, since there is evidence of substantial area practice to use electrician laborers to perform functions.

The Acting Director, Logistics Service, Federal Aviation Administration, Department of Transportation, requested a decision in connection with the classification of certain workers employed by Electrical Constructors of America, Inc. (Elcon), on contract No. DOT-FA7650-9563 for the construction of an underground cable system at the H. W. Hartsfield-Atlanta International Airport, Atlanta, Georgia.

The contract was awarded to Elcon on October 28, 1975. According to the contracting officer, the work under the contract consisted of approximately 7 miles of trenching, and the installation of (1) approximately 1,800 feet of concrete encased PVC duct bank, (2) approximately 2,700 feet of direct burial steel conduit, (3) approximately 216,000 feet of multiconductor control, signal and communication cable, both aerial and underground, (4) approximately 12 line poles, and (5) reinforced concrete manholes. The contract did not include the installation of any power transmission cable, the performance of power connections or the making of power transmissions. The contract contained Standard Form 19-A which included applicable Davis-Bacon Act, 40 U.S.C. § 276a, et seq. (1970), and Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327, et seq. (1970), provisions. Wage Determination GA75-1019, incorporated into the contract pursuant to the Davis-Bacon Act, contained the rate of \$11.10 per hour for electricians and \$5.80 per hour for electrician laborers.

By letter of December 29, 1975, the International Brotherhood of Electrical Workers, AFL-CIO (IBEW), complained to the contracting officer that Elcon had misclassified and underpaid workmen by

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allowing electrician laborers to perform work normally performed by electricians. The work complained of was the following:

1. Pulling communication cable from the reel;
2. Carrying and placing cable in the trench;
3. Pulling cable by rope through underground ducts;
4. Assembling duct bank system; and
5. Carrying and placing duct and/or conduit in the trench.

The contractor used electrician laborers to perform these particular functions. According to the contractor's payrolls there was a ratio of one electrician to four electrician laborers.

In response to the complaint by IBEW, the contracting officer, in January 1976, initiated a survey to determine what the area practice was for classifying employees who performed the above functions. Information was received from the Atlanta Chapter of the Associated Independent Electrical Contractors of America, the Atlanta General Contractors Association, and various contractors, most of whom were either affiliated with the Communications Workers of America (CWA) or not affiliated with any union. The Department of Labor (DOL) was requested to furnish any available information concerning the area practice. DOL initiated a survey of the area practice and an investigation of Elcon's practices. According to DOL, its survey indicated that it was the prevailing practice for electricians to perform the above functions. The only contractors surveyed by DOL were those contractors affiliated with IBEW. Moreover, DOL did not restrict its survey to contractors performing communication conduit installation, but also included contractors doing power transmission installation work. On the basis of its findings, DOL computed Davis-Bacon Act and Contract Work Hours and Safety Standards Act underpayments and liquidated damages totaling \$32,112.92. On the basis of his own survey and the fact that he considered DOL's survey to be of limited scope, the contracting officer informed the IBEW by letter of March 29, 1976, that Elcon's classification practices were essentially in conformance with the area practice for installation of communication cable. However, by letters of April 17 and July 21, 1976, DOL requested that funds

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be withheld from amounts owed the contractor under the contract. The contracting officer is honoring the request but, because of the disagreement with DOL regarding the area practice, a decision has been requested from our Office as to the disposition that should be made of the withholding.

The Davis-Bacon Act provides that the advertised specifications for every construction contract in excess of \$2,000 which requires the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the State in which the work is to be performed, and that every contract based upon such specifications shall contain a stipulation that the contractor or his subcontractors shall pay all mechanics and laborers employed directly upon the site of the work the full amounts accrued at the time of payment computed at wage rates not less than those stated in the advertised specifications.

Essentially, it is the position of DOL that FVA and our Office should defer to DOL proceedings under 29 C.F.R. § 5.11(b) (1976) to determine the prevailing area practice of the classifications involved. However, there is no dispute between the contracting officer and the contractor requiring referral of the matter to DOL (see 51 Comp. Gen. 42 (1971)) and the ultimate authority to determine the propriety of the withholdings is vested in our Office by section 3 of the Davis-Bacon Act, 40 U.S.C. § 276a-2 (1970), which authorizes us to disburse the wages we find to be due. 45 Comp. Gen. 318, 325 (1965); B-147602, January 23, 1963. While the courts may have suggested, as DOL contends, that DOL has broad authority regarding the scope of classifications which is not subject to judicial review, no court decision has been cited which indicates that such suggestions were made in contemplation of our authority and were intended to be a limitation upon our Office taking into consideration in its settlement function under the Davis-Bacon Act the reasonableness of the contractor's utilization of the classifications in the wage determination. In exercising our settlement function, we have held that even if a particular practice is prevailing in an area, it would not have to be followed if a contrary substantial area practice can be shown to exist. 51 Comp. Gen., supra.

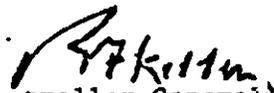
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Thus, if the matter were referred to DOL for a determination of prevailing area practice and DOL were to determine under its procedures the prevailing practice that would not be determinative of the issue from our standpoint. In B-147602, supra, we stated:

"* * * Since a substantial practice of using the laborer and pipelayer classification existed * * * we would be inclined to conclude that the classifications used by the contractor [laborer and pipelayer] should not be questioned for wage adjustment purposes."

In the present case, DOL only surveyed contractors affiliated with IBEW. DOL's rationale for restricting its survey to IBEW contractors appears to be based on the fact that the wage and fringe benefit payments of these firms were "prevailing" in the making of the wage determination accompanying the contract. Therefore, DOL concluded that the practices of these contractors would be the only practices considered in determining the prevailing area practice. However, it appears from the record that the local practices are the subject of a jurisdictional dispute in that contractors affiliated with CWA and nonunion contractors use electrical laborers to perform the disputed functions while firms affiliated with IBEW use electricians to perform the same functions. Also, in spite of the fact that the contracting officer's and the contractor's surveys were, for the most part, limited to contractors engaged in the installation of communication cables, there is sufficient evidence to establish that there is, at the very least, a substantial local area practice of using electrician laborers to perform the functions in question. Therefore, it cannot be said that the practices of the IBEW are exclusive.

Since Elcon's classification practices cannot be said to be unjustified, the monies withheld under the Davis-Bacon Act to cover underpayments allegedly resulting from misclassification should be released to the contractor. The Contract Work Hours and Safety Standards Act underpayments and liquidated damages are not for our determination. See 40 U.S.C. § 330 (1970).


Deputy Comptroller General
of the United States