Phillips 11/9/27

DECISION

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

FILE: B-202821 DATE: August 5, 1982

MATTER OF: Ingleside Contractors of Maryland

DIGEST:

Question raised is whether union labor classifications may be followed under Davis Bacon Act. Since evidence of record is insufficient for GAO to make final determination and DOL indicates that it will be necessary to hold hearings in order to complete DOL investigation and to develop record upon which to make a recommendation, GAO will defer action until hearings are complete and recommendation is received.

The Project Director for the Northeast Area, Office of Construction, Veterans Administration (VA), requested a decision in connection with the classification of certain workers employed by Ingleside Contractors of Maryland (Ingleside) on contract No. V101C-402 for the air conditioning of various buildings and the correction of electrical deficiencies at the VA Medical Center, Perry Point, Maryland.

The contract, in the amount of $9,553,330, was signed on May 23, 1977, and notice to proceed was given by the VA on June 15, 1977. The contract contained the applicable Davis-Bacon Act, 40 U.S.C. § 276a (1976), and Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 (1976), provisions.

As the result of a complaint by an employee of Ingleside and two complaints from the Building and Construction Trades Council of Baltimore that Ingleside had misclassified several of its employees, a labor standards

investigation was conducted by the Department of Labor (DOL). According to the complaints, Ingleside misclassified several of its employees by working them in skilled positions while they were classified and paid as laborers or as lower paid mechanics.

By letter of October 30, 1978, DOL requested a meeting with Ingleside to discuss area practices and employee classifications. The meeting was held on November 21, 1978, and was attended by representatives from Ingleside, DOL, VA and the Associated Builders and Contractors. It was explained to Ingleside at this meeting that, since DOL recognized union rates (as set forth in various collective bargaining agreements) as prevailing, it also recognized union craft designations. In other words, because union wage rates were adopted for the wage determination covering this construction project, union work rules and classifications had to be followed. Ingleside disagreed with DOL's position.

Subsequent to the meeting, there followed a period during which Ingleside and DOL attempted to resolve the dispute by negotiation, but they were unsuccessful. Since the negotiations had failed to resolve the dispute, DOL, by letter of January 12, 1981, formally apprised Ingleside of the results of its investigation. Ingleside was also advised of the availability of a hearing under DOL's regulations (29 C.F.R. § 5.11(b)). It was explained that a hearing before an administrative law judge could be directed by the Secretary of Labor in the event of disputes involving the payment of prevailing wage rates or improper classifications which involve significant sums of money, large groups of employees or novel or unusual circumstances. By letter of January 16, 1981, Ingleside requested a hearing. DOL responded by letter of February 13, 1981, advising Ingleside that the entire record was being forwarded to the Solicitor's Office, which is responsible for scheduling hearings. By Order of Reference dated March 26, 1981, the matter was referred to the Office of Administrative Law Judges for scheduling of a hearing under 29 C.F.R. § 5.11(b). The matter is still pending.

Prior to the referral to the Office of Administrative Law Judges, Ingleside, by letter of March 4, 1981, requested that the VA seek a determination from our Office concerning the validity of DOL's request for a withholding of contractor funds to cover the alleged labor standards violations by Ingleside. By letter of June 22, 1981, the VA requested us to make a determination for the resolution of this matter. The VA did, however, honor DOL's request and is now holding the sum of $42,440.68 pending disposition of this matter.

Ingleside contends that the wage dispute in the present case is the result of a dispute between it and DOL concerning the prevailing practice in Cecil County, Maryland, of dividing construction activities between journeymen tasks and laborer tasks; whereas, DOL treats this practice as a misclassification of employees.

It is Ingleside's position that, under the statutory scheme implementing the Davis-Bacon Act, the contracting agency is given authority for determining compliance or noncompliance with labor standards and that any wage disputes are to be resolved by the Comptroller General pursuant to the claims settlement authority and wage adjustment authority under section 3 of the Davis-Bacon Act.

In support of its position, Ingleside cites Electrical Constructors of America, Inc., B-188306, December 19, 1977, 77-2 CPD 479 (hereafter referred to as Elcon). In the Elcon case, we held that the area practice followed by certain union contractors of using electricians to perform certain functions in connection with the installation of underground cable need not be followed for Davis-Bacon Act wage purposes, since there was evidence of a substantial area practice to use electrician laborers to perform these functions.

However, the present case is distinguishable from the Elcon case in at least one respect. In the Elcon case, the contracting officer conducted an area practice survey and determined that there was a substantial area practice to use electrician laborers to perform the work in question. In the present case, the VA officials, the Project Director for the Northeast Area and the Senior Resident Engineer

made conclusionary statements to the effect that Ingleside was following a system of classification prevailing in the Cecil County area and that they (the VA officials) were unaware of any uncorrected misclassifications. No area survey was conducted. Ingleside failed to introduce any evidence bearing on the question of area practice.

While responsible officials at VA denied that there were any uncorrected misclassifications, DOL's Compliance Officer alleges in his investigation report that Ingleside misclassified several of its employees and he lists the names of 38 employees with whom he conducted interviews. Under each name there is indicated the worker's classification and type of work performed, which, in some instances, indicates classification violations. Also, the DOL file submitted to our Office included calculations for each employee supposedly indicating the number of hours worked by the employee and the extent of the underpayments. However, neither the information contained in the investigation report nor the calculations are corroborated by other evidence such as payroll records, check stubs, timesheets or employee records.

It is the position of DOL that our Office should refrain from issuing a substantive ruling and permit DOL administrative procedures under 29 C.F.R. § 5.11(b) to continue to a final determination, thereby producing a record and resolving all questions of fact pertaining to this case prior to referral to GAO for disbursement of wages found due.

We agree with DOL. It is our regular practice to receive a report and recommendations from DOL before taking any action where Davis-Bacon violations may be involved. Since DOL indicates that it will be necessary to conduct hearings in order to complete its investigation and develop a record upon which to make a recommendation, we suggest that the hearings proceed. We will defer action on this matter until the hearings are completed and we receive a recommendation from DOL as to the disposition that should be made of the withholdings. If the hearings reveal that this is a matter over which

our Office has jurisdiction, we reserve the right to make the ultimate determination regarding the withholding of funds due Ingleside under the contract.

for Milton J. Socolar
Comptroller General
of the United States