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DECISION



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

FILE: B-189471

DATE: April 10, 1978

MATTER OF: Mashburn Electric Company, Inc.,
Thomas L. Mashburn and Frank J. Miller

DIGEST:

1. Concealment of underpayment of Davis-Bacon wages by submitting payrolls showing compliance was deliberate and willful act falling short of good faith, notwithstanding underpayment was in accordance with agreement with employees and employer may have had every intention to one day pay employees what they were due and did cooperate with Government investigators and eventually made restitution.
2. "Not guilty" verdict in related criminal case has no relevance in consideration of debarment under Davis-Bacon Act.
3. Although party debarred under Davis-Bacon Act may have been adversely affected by debarment, Congress specifically has provided for a 3-year debarment for violation of the act.
4. Procedural due process was not violated notwithstanding party charged with Davis-Bacon violations did not have legal representation in debarment proceedings and there was no cross-examination.
5. Question whether debarment provision of Davis-Bacon Act is unconstitutional is matter for determination by courts and Comptroller General is required to apply provision as long as it remains in force.

By letter of February 10, 1978, with enclosed memorandum of law, counsel for Mashburn Electric Company, Inc., Thomas L. Mashburn and Frank J. Miller (collectively referred to as Mashburn) requested reconsideration of the September 15, 1977, debarment of his clients for violation of the Davis-Bacon Act, 40 U.S.C. § 276a (1970).

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By way of background to the debarment, there follows a brief history of the events leading up to that action. General Services Administration (GSA) contract No. GS-04-15391, for the extension and remodeling of the Federal Records Center, East Point, Georgia, was awarded to Frontier Contracting Company, Inc. (Frontier), on December 19, 1972. Frontier, in turn, entered into a subcontract with Mashburn for certain electrical work. The prime contract contained a provision, mandated by section 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a(a) (1970), which requires that laborers and mechanics employed in the performance of the contract be paid a minimum wage as determined by the Secretary of Labor. This provision and Department of Labor (DOL) Wage Rate Decision AM-8606 dated April 28, 1972, were incorporated by reference into the subcontract between Frontier and Mashburn. Section 3(a) of the Davis-Bacon Act, 40 U.S.C. § 276a-2(a) (1970), authorizes the Comptroller General to debar for a period of 3 years any firms or persons found to have disregarded their obligations to employees.

As the result of an investigation conducted by GSA, which was completed in November 1973, it was determined that 14 employees had not been paid the prevailing wage rate as set out in Wage Rate Decision AM-8606. The total amount of the underpayments was \$7,506.76. The evidence also established that the certified payrolls submitted to the contracting agency contained incorrect information. The information indicated that the employees had been paid the prevailing wage rate when, in fact, they had not been paid this rate. Mashburn did, however, subsequently make full restitution to the employees.

In March 1975, criminal action was brought against Mashburn under 18 U.S.C. § 1001 (1970) for knowingly making false, fictitious, and fraudulent statements in connection with the certified payrolls. In June 1975, Mashburn was found "not guilty" of these charges.

In February 1976, GSA referred the matter to DOL with a recommendation that debarment action be

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initiated against Mashburn. DCL, by registered letter of April 15, 1976, notified Mashburn of the alleged violations of the Davis-Bacon Act and its conclusion that they constituted a disregard of obligations to employees under section 3(a) of the act. Mashburn was given an opportunity to rebut the allegations. At the request of Mashburn, informal proceedings were held by DOL's Assistant Regional Administrator in Atlanta, Georgia, on June 4, 1976. The Assistant Regional Administrator considered the record developed by GSA and the evidence presented at the June 4, 1976, proceeding and notified Mashburn on June 17, 1976, that in his opinion debarment action was warranted. Mashburn was also advised of its right to appeal to the Administrator, Wage and Hour Division, DOL, pursuant to DOL regulations. Mashburn chose not to appeal.

Subsequently, DOL referred the record of this matter to our Office with a recommendation for debarment. In finding of September 1, 1977 our Office concluded that the evidence of record warranted debarment of Mashburn. On September 15, 1977, Mashburn was placed on the debarred bidders list.

Mashburn has stated that it did not learn that the Davis-Bacon Act wage rates were applicable until after its bid was accepted by the prime contractor, Frontier. According to Mashburn, rather than bowing out of the subcontract at that point and in order to provide its employees with work, it entered into an agreement with the employees, to which they did not object, that if they would work at their regular wages, they would be paid the higher Davis-Bacon wages to which they were entitled when payment for the work was received from the prime contractor. This adds nothing new to the record. The information was included in the Assistant Regional Administrator's June 17, 1976, letter referenced in the September 1, 1977, finding.

Mashburn offers several arguments in support of its contention that it should not have been debarred and, consequently, should have its name removed from the list.

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First, Mashburn argues that there was not a bad faith effort to subvert the Davis-Bacon Act in that (1) there was no willful falsification of the payrolls evidencing a lack of good faith on its part, and (2) an intensive investigation by GSA was not necessary to protect the interests of the employees. Mashburn states that the record indicates that the employees would have been paid in full when the prime contractor paid Mashburn and that as a result of GSA's investigation this payment was, in fact, delayed. Mashburn further argues that, in regard to the falsification of the payrolls, good faith was evidenced by the fact that (1) the firm maintained records to show the amount due each employee, (2) the employees were told that they had higher wages coming to them under the Davis-Bacon Act, (3) the firm elected to fulfill its contract at a loss, and (4) there was never any attempt to hide any of the facts from the investigators. Mashburn also states that good faith is implicit in the fact that a jury returned a "not guilty" verdict to the charges that the payrolls were knowingly false, fictitious, and fraudulent. Further, it states that the debarment was unwarranted because it was punitive in that neither the Government nor the employees sustained any injury.

Mashburn also attacks the debarment on two constitutional grounds. First, Mashburn argues that the debarment proceedings were lacking in due process since Mashburn was not given an opportunity to be represented by counsel or to cross-examine witnesses. Second, Mashburn states that it was denied equal protection of the law in that it was not able to petition for a reinstatement upon a showing of an ability to comply with the Davis-Bacon Act. Mashburn argues that this right is granted under the act to others who have been debarred for the same actions by the Department of Labor.

Under section 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a(a) (1970), contracts of the kind involved here are required to contain a provision that--

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"* * * the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics * * *."

The required provision was included in the prime contract. The provision became operable against the subcontractor by the terms of the subcontract.

Week after week, the subcontractor paid its employees less than the required minimum wage. While the subcontractor had an agreement with the employees to pay them at a subsequent time the difference between the Davis-Bacon wage and the wage actually paid, the Davis-Bacon Act and the implementing contractual provision are specific that there is an obligation to pay the required minimum wages "not less often than once a week." Therefore, notwithstanding the agreement between the subcontractor and the employees, the subcontractor was in violation of the obligation imposed by the act and the implementing provisions. The subcontractor admits the violations. However, it contends that it did not willfully falsify the payrolls and it acted in good faith because it intended to eventually pay the employees the required wages and it never attempted to hide the facts from the investigators.

Notwithstanding the subcontractor's contentions, it did willfully falsify the payrolls. It knew the wage rates that were required to be paid and it knew it was not paying them, but it prepared and submitted payrolls showing compliance. This was not an inadvertent act. It was a deliberate concealment of the

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actual situation and in that sense was a willful falsification of the payrolls. While the subcontractor may have had every intention to one day pay the employees what they were due and did make restitution eventually, the initial act of concealment and falsification falls short of good faith. Although the subcontractor did cooperate with the investigators, it did not reveal its scheme before that time. Not once before then did it submit a payroll showing the actual payments being made with an explanation.

As indicated above, the subcontractor also considers the "not guilty" verdict in a related criminal case against it as being evidence of its good faith. In that regard, 29 Am. Jur. 2d Evidence § 335 states:

"It is generally held that a prior acquittal in a criminal prosecution is not admissible in evidence in a civil action, to establish the truth of the facts upon which it was based. Since an acquittal might merely mean that the offense was not proved beyond all reasonable doubt, the acquittal is of no relevance in a civil proceeding where the facts need only be proved by the greater weight of the evidence. * * *"

See also B-145606, June 6, 1962. Therefore, the verdict in the criminal case has no relevance here.

Further, the statement in the September 1, 1977, finding--"Only through a thorough and careful investigation was it possible for the Government to detect the misleading information furnished so as to adopt measures protecting the interests of the employees involved and insuring compliance"--only indicates that it was as a result of the investigation rather than the subcontractor's disclosure in the payrolls that protective measures for the employees (i.e., the withholding of \$10,000 from final payment under the prime contract) were made possible. Without the investigation, the Government would not have known that the Davis-Bacon obligations to employees were being violated. The

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fact that the subcontractor withheld no information when the matter came under investigation and had no intent to harm the employees does not affect the accuracy of the statement in the finding.

Although Mashburn may have been adversely affected by the debarment, Congress has provided specifically in the Davis-Bacon Act for a 3-year debarment for the violation of the act and Mashburn has violated the obligation to employees imposed by the act. In that regard, it has been recognized that "* * * the withholding of Government business for three years may be a very serious blow to an enterprise specializing in such business" but "Congress has explicitly used debarment for a period of time in implementing some labor acts * * *." Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 372 (1961). Further, in Gonzalez v. Freeman, 334 F.2d 570, 576-77 (1964), it was stated that "Notwithstanding its severe impact upon a contractor, debarment is not intended to punish but is a necessary 'means for accomplishing the Congressional purpose' * * *" and "without such power to deal with irresponsible bidders and contractors, the efficiency of * * * operations would be severely impaired."

The courts have held that a firm or individual has the right not to be debarred except in an authorized and procedurally fair manner and that the power to debar must be exercised in accordance with "accepted basic legal norms," i.e., due process must be accorded the firm or individual. Gonzalez v. Freeman, supra. Regarding Mashburn's contention that the proceedings for debarment were lacking in due process in that an opportunity to be represented by counsel was not given and the right of cross-examination was not afforded, the court in Schlesinger v. Gates, 249 F.2d 111 (1957), held that the regulations involved in that case, which did not provide for an oral hearing but only for notice and an opportunity to present evidence, were in substantial compliance with the requirement of "accepted basic legal norms." In the present case, not only did DOL give Mashburn notice of the specific charges against it and an opportunity to present a written rebuttal, but DOL also afforded

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an opportunity for an oral hearing. Mashburn accepted both invitations. Also, Mashburn was advised of certain appeal rights which it chose not to exercise.

Although Mashburn did not elect to be represented by legal counsel in its written and oral presentations to DOL, it had an opportunity to be so represented, if it desired. It is apparent from the record that it did seek legal counsel when it was being investigated by GSA. Therefore, it was Mashburn's decision not to have legal representation in responding to the subsequent formal charges against it.


Moreover, the matter of cross-examination of witnesses, who in this case would be employees of Mashburn, does not appear to be particularly pertinent, since Mashburn has admitted underpaying the employees weekly in accordance with an agreement with them. In any event, in Framlau Corporation v. Dembling, 360 F. Supp. 806 (1973), which involved the same regulations and procedures that apply here, the court held that where the party charged by DOL neither requested nor was refused an opportunity to confront and cross-examine witnesses at the informal hearing before DOL, the procedures followed did not violate procedural due process.

Finally, with respect to Mashburn's contention that debarring it without a right to be reinstated upon a showing of an ability to comply with the Davis-Bacon Act when such a right is granted under the act to others who have been debarred for the same actions by the DOL is unconstitutional, it should be understood that DOL has no authority to debar under the act. The debarment authority is vested exclusively in the Comptroller General in section 3(a) of the act, 40 U.S.C. § 276a-2(a) (1970). We recognize that under the Service Contract Act, 41 U.S.C. § 351, et seq. (Supp. V, 1975), and the Walsh-Healey Act, 41 U.S.C. § 35, et seq. (1970), which give DOL statutory authority to debar, and under other acts under which DOL's authority to debar is by regulation, DOL has the authority to remove the name of a firm or individual from

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the debarred bidders list upon a showing that the firm or individual will comply with the labor standards in the future. However, the Comptroller General was given no such discretionary authority by the provisions of the Davis-Bacon Act. See B-145606, supra. Thus, once an individual or firm is properly placed on the debarred bidders list for violation of the Davis-Bacon Act, there is no authority to remove the name from the list. To the extent that it is Mashburn's view that this absence of authority renders the debarment unconstitutional and that the debarment therefore should not have been instituted, we should point out that it has been the position of our Office that the question whether a statute is unconstitutional is a matter for determination by the courts and not by our Office and that we are required to apply the provisions of a statute as long as it remains in force. See Inter-Con Security Systems, Inc., B-186347, B-185495, March 7, 1977, 77-1 CPD 165.

We have reviewed the basis for our debarment of Mashburn under the Davis-Bacon Act and are satisfied that it was appropriate. Therefore, we have no authority to remove the debarment.


Deputy Comptroller General
of the United States