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DECISION

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

FILE: B-190834 DATE: February 22, 1978

MATTER OF: Mark Construction Company

DIGEST:

Overtime required by Department of Labor memorandum, which was subsequently withdrawn, to be paid to officers or owners of subcontractor firm who performed services as laborers or mechanics which could not be deducted from subcontractor's contract payments, may be reimbursed to contractor since payment was an unanticipated expense incurred in good faith.

By letter of November 3, 1977, the Chief, Accounting and Finance Branch, Altus Air Force Base, Oklahoma, requested, pursuant to 31 U.S.C. § 74 (1970), an advance decision concerning the payment of a claim by Mark Construction Company (hereafter referred to as the contractor).

The contractor was the prime contractor on a construction contract (contract F34612-76-90046) at the above-mentioned Air Force Base. On July 21, 1976, the contractor was notified by the contracting officer that it must comply with Department of Labor (DOL) memorandum No. 123. This memorandum stated that according to the requirements of the Davis-Bacon Act, 40 U.S.C. § 276a (1970), if any officers or the owner of a subcontractor firm work as laborers or mechanics, the prime contractor must pay them an amount at least equal to the applicable prevailing wage for the specific classification of work which they perform, and that the prime contractor must list them on his certified payrolls. The memorandum did, however, provide

that any amount paid to the subcontractor pursuant to the requirements of the Davis-Bacon Act could be deducted from the subcontractor's contract payments.

DOL memorandum No. 123 also provided that if the subcontractor performs work on a contract which is, as in this case, subject to the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 et seq. (1970) (CWHSSA), the subcontractor must be paid time and one-half for work performed in excess of 8 hours a day or 40 hours in a week. However, unlike wage payments under the Davis-Bacon Act, the prime contractor was not allowed to deduct the extra one-half time wage payments from the subcontractor's contract payments. The contractor complied with DOL memorandum No. 123 for the period July 21, 1976, to September 8, 1976. On August 30, 1976, DOL memorandum No. 125 was issued withdrawing DOL memorandum No. 123. DOL memorandum No. 125 did, however, continue the application of the Davis-Bacon Act coverage mentioned in DOL memorandum No. 123.

On September 8, 1976, the contractor notified the Air Force that it was ceasing to comply with DOL memorandum No. 123. On January 14, 1977, the contractor submitted a claim in the amount of $1,306.14 for costs incurred in complying with the memorandum. The amount of the claim represented the amount expended by the contractor to cover the extra one-half time wages, payroll taxes and insurance not deducted from subcontractor's contract payments.

It is the Air Force's position that the contractor has a valid claim, but that there is no known contract provision authorizing payment of same.

While it appears that there is no contract provision which authorizes payment of the contractor's claim, we, nevertheless, believe that the claim should be paid. The contractor acted in good

faith and paid the extra cost as required by the first memorandum, a cost which was not anticipated at the time its bid was submitted. Moreover, while DOL did not specifically admit that DOL memorandum No. 123 was in error concerning the CWHSSA coverage, the fact that the memorandum was canceled indicated that, at the very least, DOL felt that the CWHSSA provisions should not have been included in DOL memorandum No. 123.

Under the circumstances, we would have no objection to an increase in the contract price to cover payment of the contractor's claim. B-169755, October 9, 1970.

R.F. Keller

Deputy Comptroller General
of the United States