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Part I

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-219039

November 22, 1985

Sylvester L. Green, Director
Contract Standards Operations
U. S. Department of Labor
Room S3518
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Green:

Subject: T. H. Conklin & Son, Inc.
Virginia Beach, Virginia
Contract No. N62470-83-C-5028
Your File No. VA-85-19

By a letter dated April 8, 1985, you requested that the General Accounting Office disburse funds withheld from T. H. Conklin & Son, Inc. (T. H. Conklin), for violations of the Davis-Bacon Act, 40 U.S.C. § 276a to 276a-5 (1982). As to whether T. H. Conklin should be placed on the ineligible bidders list for these violations, you concluded that in view of the circumstances, the Department of Labor (DOL) was taking no further action.

T. H. Conklin performed work under contract N62470-83-C-5028 with the Department of the Navy (Navy) doing repairs to piers and quaywalls at the Naval Amphibious Base, Little Creek, Virginia Beach, Virginia. This contract was subject to the Davis-Bacon Act requirements that certain minimum wages be paid. Further, pursuant to 29 C.F.R. § 5.5(a) (1985), the contractor was required to pay these wages based upon the classification of work actually performed--except for certain apprentices and trainees not involved here.

The DOL found as a result of an investigation that T. H. Conklin failed to properly classify its employees and pay the proper overtime compensation. The investigation concluded that T. H. Conklin owed five employees \$9,000.46 in back wages. When advised of these violations, T. H. Conklin made restitution to the employees who could be

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located. Funds representing the wage underpayment due to the one employee who could not be located were deposited with our Office. Both you and the Navy concluded that in view of the circumstances, no further action was necessary. For the reasons that follow, we concur that T. H. Conklin should not be debarred.

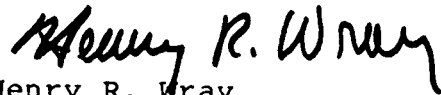
The Davis-Bacon Act provides that the Comptroller General is to debar persons or firms whom he has found to have disregarded their obligations to employees under the Act. 40 U.S.C. § 276a-2. In Circular Letter B-3368, March 19, 1957, we distinguished between "technical violations" which result from inadvertence or legitimate disagreement concerning classification, and "substantial violations" which are intentional as demonstrated by bad faith or gross carelessness in observing obligations to employees with respect to the minimum wage provisions of the Davis-Bacon Act. Legitimate disagreement concerning classification is a basis for deciding not to debar under the Davis-Bacon Act.

Based on our independent review of the record in this matter, we conclude that there was legitimate disagreement concerning classification. Four employees were initially classified and paid as "Air Tool Operators." Another employee received 50 percent "Dockbuilder's" wage and 50 percent "Air Tool Operator's" wage. The record supports a finding that four of these five employees were primarily performing "Dockbuilder's" work with only a small part of their time spent working as "Air Tool Operators." The other employee worked 3 hours a week as a "Tug Boat Operator" and 2 hours a week as a "Mechanic" with his remaining hours devoted to "Air Tool Operator" work. There is no evidence that these partial misclassifications were intentional. We particularly note that T. H. Conklin paid restitution to the four employees who could be located. The firm also furnished corrected payroll reports and agreed to future compliance with the labor standards provisions. The record does not contain sufficient evidence of willful violation of the labor standards provisions of the Act to warrant debarment. Therefore, we decline to debar T. H. Conklin.

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Further, we find no reason to object to the payment of the wage claimant involved. Accordingly, the funds on deposit with our Office--\$116.28--will be disbursed to the wage claimant in accordance with established procedures.

Sincerely yours,



Henry R. Wray
Associate General Counsel

cc: T. H. Conklin & Son, Inc.
725 Oxbow Drive
Virginia Beach, Virginia 23464