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DECISION

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

FILE: B-201631 DATE: July 17, 1981

MATTER OF: Granite Construction Company

DIGEST:

1. Contract Work Hours and Safety Act underpayments are not for determination by GAO.

2. Reference to "subcontractor" in clauses in prime contract indicating that Davis-Bacon wages are applicable to "subcontractor" employees is not controlling, since legislative history indicates that place where work is performed is important; therefore, whether someone performed as "subcontractor" is not material to ascertainment of status of its employees for coverage purposes.

Granite Construction Company (Granite), the prime contractor on Bureau of Reclamation, Department of the Interior, contract No. 6-07-DC-71440, for construction of Mt. Elbert Forebay Dam and Reservoir, Fryingpan-Arkansas Project, Colorado, contends that it is not liable for the wage underpayment made by a second-tier subcontractor and requests payment of the $830.26 furnished to our Office from contract withholdings for distribution to the aggrieved employee.

Of the $830.26 withheld, $745.20 represents Davis-Bacon Act, 40 U.S.C. § 276a et seq. (1976), underpayments and $85.06 represents Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327 et seq. (1976), underpayments.

Granite relies upon J. W. Bateson Co., Inc., et al. v. United States ex rel. Board of Trustees of the National Automatic Sprinkler Industry Pension

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Fund et al., 434 U.S. 586 (1978), to support its contention that it is not responsible for the underpayments made by the second-tier subcontractor. The CWHSSA underpayments are not for our determination. Electrical Constructors of America, Inc., B-188306, December 19, 1977, 77-2 CPD 479. We will consider Granite's contention only to the extent that it bears upon the Davis-Bacon withholding.

The Bateson case held that employees of a second-tier subcontractor were not protected by the contractor's Miller Act, 40 U.S.C. § 270a et seq. (1976), payment bond. The bond is for the protection of those who have a direct contractual relationship with either the prime contractor or a subcontractor. It is a substitute for a mechanics lien not recognizable by the Government. The court found support for its conclusion in a statement in the legislative history of the Miller Act that Congress intended the scope of protection of a payment bond to extend no further than to sub-subcontractors.

We are not aware that Congress sought to impose similar limitations on the rights of laborers and mechanics under the Davis-Bacon Act, which is a wage standards provision. The legislative history of the Davis-Bacon Act indicates that the purpose of the act is to protect by fixing a floor on wages the labor standards of local mechanics and laborers whose wages might be depressed by an influx of lower paid workers to perform Government construction. See United States v. Binghamton Construction Co., Inc., 347 U.S. 171 (1954).

In 43 Comp. Gen. 84 (1963), we considered a contention similar to that made by Granite that the definition of "subcontractor" as applied under the Miller Act should apply to the Davis-Bacon Act. We pointed out that the applicability of the Davis-Bacon Act is governed by the direction in section 1 of the act, 40 U.S.C. § 276a(a) (1976), that "the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work" no less than the minimum wages specified in the contract.

We stated that the definition of the term "subcontractor" must be derived from the language and legislative history of the direction that minimum wages are to be paid to "all mechanics and laborers employed directly upon the site of the work." We reviewed the legislative history and found that "[w]ith obvious aforethought the legislators utilized a physical distinction based upon the precise location where the work was being performed to shut off both responsibility for the payment of, and protection afforded through, minimum wage conditions of performance." In light of this distinction, we concluded that whether someone performed as a "subcontractor" was not material to the ascertainment of the status of its employees for coverage purposes.

We recognize that the requirement in section 1 of the Davis-Bacon Act to pay mechanics and laborers no less than the minimum wages specified in the contract is directed to the contractor or "his" subcontractor. However, since, as indicated above, the legislative history of the act shows that a geographical test of coverage was intended, we do not construe the personal pronoun "his" as an intended limitation. This view is reinforced by the later provision in 41 U.S.C. § 276a(a) (1976) that there may be withheld from the contractor so much of accrued payments as may be necessary to pay the underpaid laborers and mechanics employed by the contractor or "any" subcontractor.

Although in the 43 Comp. Gen. decision we held that the work performed by employees 3 miles from the construction area is not work subject to the minimum wage provisions of the Davis-Bacon Act (see also Sweet Home Stone Company et. al., B-185020, December 22, 1976 76-2 CPD 519), in B-198084, June 16, 1980, in a letter to the Solicitor of Labor commenting on proposed regulations, we concluded that the act could extend to offsite construction activities which are dedicated to the performance of the contract and are located in close proximity to the actual construction site. In the immediate case, we note that the second-tier subcontractor was hauling from a Government rock quarry opened exclusively for use in the prime contract being performed several miles away. In the circumstances, it is appropriate to include the quarry as a part of the site of the work.

The "Davis-Bacon Act" clause in the labor standards provisions of the prime contract states that all mechanics and laborers employed directly upon the site of the work shall be paid wage rates specified in the contract regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and laborers and mechanics. The "Withholding of Funds" clause in the labor standards provisions of the prime contract authorizes the contracting officer to withhold from the prime contractor so much of accrued contract payments as is necessary to pay laborers and mechanics employed by the contractor or any subcontractor on the work the full amount of wages required by the contract.

Since, as indicated above, it is not material whether someone performed as a "subcontractor," but rather where the work was performed, the reference to "subcontractor" in the clauses in the prime contract indicating that the Davis-Bacon wage rates are applicable to "subcontractor" employees is not controlling. Consonant with that view, in performing our disbursement function under the Davis-Bacon Act, it is our regular practice to consider prime contract clauses concerning liability for wage underpayments applicable to subcontractors below the first tier where their work is considered to be performed upon the site. We know of no court decision holding that the Davis-Bacon Act is to be otherwise construed.

In the circumstances, we conclude that the holding in the Bateson case is not applicable to the immediate situation. Granite's claim for payment of the $830.26 withheld is therefore denied.

Milton J. Socolar

Acting Comptroller General
of the United States

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

DIVISION OF FINANCIAL AND
GENERAL MANAGEMENT STUDIES

Z-2823643

The Comptroller General:

We are forwarding the file pertaining to the apparent violations of the Davis-Bacon Act, 40 U.S.C. 276a, and the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 et seq., by L. A. Griffith Trucking, Inc., Lower-tier subcontractor to Granite Construction Co., which performed work under Department of the Interior contract No. 6-07-DC-71440 at Mt. Elbert Forebay Dam and Reservior, Fryingpan-Arkansas Project, Lake County, Colorado.

Details of the violations and administrative recommendations concerning debarment are contained in the attached investigative report and Department of Labor transmittal letter.

We propose with your approval to disburse to the underpaid employee the amount of $830.26 currently on deposit. Our proposal and the matter of whether the contractor's name should be placed on the debarred bidders list for violations under the Davis-Bacon Act is forwarded for your considerations and instructions.

For further information, please contact Mr. Ken Schutt on extension 53218.

Chief, Payment Branch

Indorsement

B-201631-O.M. July 17, 1981

Associate Director, AFMD-Claims Group

Returned. Since the contractor does not dispute the wage underpayment, but only the liability for it, which, in the attached decision, we have concluded the contractor has for Davis-Bacon underpayments and we do not determine underpayment under the Contract Work Hours and Safety Standards Act, the $830.26 withheld by the contracting agency should be disbursed to the aggrieved employee in accordance with established procedures.

The Department of Labor recommends against debarment of the contractor and its subcontractors because of the relatively unsubstantial nature of the violations and the financial difficulties of the subcontractor who underpaid the employee. Given those reasons and the legitimate controversy concerning the application of the Davis-Bacon Act, we concur in the recommendation.

Milton J. Socolar
Acting Comptroller General
of the United States

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