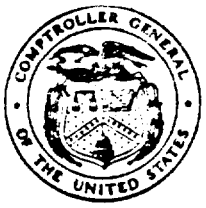
DECISION



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

FILE: B-209979 **DATE:** August 31, 1983

MATTER OF: MBS Maintenance, Inc.

DIGEST:

Subcontractor requesting to be removed from debarred bidders list, who submitted statement from one employee explaining reason for underpayment of wages, has not submitted evidence sufficient to overcome corroborated statements by other employees that they had been underpaid.

Mr. Michael Lewkowicz, president of MBS Maintenance, Inc. (MBS), requests reconsideration of the February 1, 1983, debarment of himself and MBS for violation of the Davis-Bacon Act, 40 U.S.C. § 276a (1976).

By way of background, there follows a brief history of the events leading up to the debarment. Army contract No. DACA51-79-C-0072, for the construction of the Physical Science Laboratory at the Picatinny Arsenal, Dover, New Jersey, was awarded to Juno Construction Corporation (Juno) on May 18, 1979. The contract contained the provisions and stipulations required by section 1 of the Davis-Bacon Act, 40 U.S.C. § 276a (1976), a portion of which requires that laborers and mechanics employed in the performance of the contract be paid a prevailing wage rate as determined by the Secretary of Labor. Wage decision NJ78-3009 dated April 21, 1978, was included in the contract. Section 3(a) of the Davis-Bacon Act, 40 U.S.C. § 276a-2(a) (1976), authorizes the Comptroller General to debar for a period of 3 years any firms or persons found to have disregarded their obligations to employees. Also, the contract contained a requirement that the contractor submit on a weekly basis a certified copy of the firm's payrolls to the contracting agency, the certification to affirm that the payrolls are correct and complete, and that the wage rates paid are not less than those contained in the wage determination.

On July 9, 1979, Juno awarded a subcontract to MBS for the electrical work. The president of MBS, Mr. Michael Lewkowicz, signed an acknowledgment that the above-mentioned provisions were incorporated into the subcontract.

On May 5, 1980, the resident engineer at Picatinny Arsenal received a letter of complaint from a former MBS employee who alleged that employees were not being paid for all hours worked. A labor standards investigation was initiated. An examination of MBS's records which were made available to the district labor advisor, the official who conducted the investigation, revealed certain irregularities. First, it was discovered that on 12 separate occasions, employees were paid biweekly rather than weekly as required by the Davis-Bacon Act. Second, the records indicated that several unexplained deductions had been made from the wages of certain employees. However, with the exception of one $30 deduction, plausible explanations were given for these deductions. Also, discrepancies in the number of hours worked were discovered. For example, according to earnings statements and corresponding checks, two employees were paid for 63 hours over two pay periods. However, the certified payrolls indicated that for these two pay periods, the two employees had worked and were paid for 70 hours' work. Also, in connection with another employee, the firm's records indicated that the employee did not receive payment for one pay period. The firm's records also gave the addresses of several employees whose addresses were not given on the payrolls. The Army's district labor advisor attempted to contact these employees by certified mail and received responses from two employees. Both of these employees claimed to have been paid $16.03 per hour (which exceeds the required Davis-Bacon wage rate for electricians of $15.57) for a 35-hour workweek, but that they had actually worked 40 hours.

On October 29, 1980, the district labor advisor interviewed the three complainants mentioned above and obtained sworn statements from each of these employees. All three employees stated that they worked in excess of 40 hours per week, but were only paid for 35 hours. Also, one of the complainants stated that he had worked with another electrician, allegedly an undocumented alien, who allegedly only received $3.75 per hour.

The Army's district labor advisor visited Picatinny Arsenal on November 5, 1980, and talked to the Corps of Engineers' project inspector, who stated that two employees had informally complained to him that they were working 8 hours per day, but were only being paid for 7 hours. According to the project inspector, neither of the employees would submit a written complaint. We note that one of these employees did subsequently submit a written complaint. Also, the project inspector stated that he observed an unidentified Russian-speaking worker, alluded to in the statement of one of the above-mentioned complainants, and had attempted to interview the worker, but was unable to do

so because of the worker's inability to comprehend English. In regard to the two employees, we note that according to the chief of the security office at Picatinny Arsenal, MBS had scheduled work for the weekend of January 19-20, 1980, and according to the project inspector, MBS had done some work on the project during that weekend. However, for that week, MBS's payrolls indicated that the only two employees who worked on the project were the two employees who had informally complained to the project inspector, and that they had only worked 35 hours during the week. No overtime was indicated on the payrolls. According to the district labor advisor, it was determined that one of the employees had worked on that weekend.

By letters of November 20, 1980, and February 24, 1981, the prime contractor, Juno, was advised that as the result of a labor standards investigation, it was determined that MBS had underpaid five workers a total of $7,118.07 in violation of the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327, et seq. (1976), and that liquidated damages in the amount of $30 had been assessed for the CWHSSA violations. Juno was requested to make restitution to these employees. Juno failed to respond to this letter. In accordance with standard procedures, the Department of the Army withheld $7,148.07 from amounts due Juno under the contract. See 40 U.S.C. § 276a(a) (1976). Of this amount, $7,118.03 was forwarded to the General Accounting Office to cover Davis-Bacon underpayments totaling $6,676.71, CWHSSA underpayments totaling $411.36, and a $30 unauthorized deduction from one of the employees' wages, which is a violation of the Copeland Act, 40 U.S.C. § 276c (1976), and implementing regulations, 29 C.F.R. part 3 (1982).

Also, in accordance with established procedures, a labor standards investigation report was forwarded, with a recommendation that debarment sanctions be imposed against MBS and its president, Michael Lewkowicz, to the Department of Labor (DOL) for its consideration. DOL concluded after a review of the investigation file that the failure by MBS to pay the employees in question constituted a disregard of its obligations to its employees under section 3(a) of the Davis-Bacon Act. By registered letter of February 26, 1982, the Deputy Administrator of DOL's Wage and Hour Division advised MBS in detail of the nature and extent of the labor standards violations charged against MBS and offered MBS an opportunity to submit a written rebuttal. MBS was also advised that if it so desired, it could, after submitting a written reply, present evidence at a proceeding before an

administrative law judge as outlined in section 5.6(c)(1), part 5 (1982), of DOL's regulations (29 C.F.R. § 5.6(c)(1)). MBS submitted a letter of rebuttal dated March 11, 1982.

In its rebuttal letter, MBS stated that its workers only worked 35 hours per week and that no overtime had been worked. MBS did state, however, that some of the workers had to put in extra time to make up for coming to work late, leaving early and taking too long for lunch. MBS admitted that on occasion, it did pay on a biweekly basis rather than a weekly basis, explaining that this was due to lack of funds since the prime contractor had not promptly paid MBS. Since it appeared from MBS's response that it disagreed with the investigation's findings, DOL, by letter of June 14, 1982, offered MBS an opportunity, under section 5.11(b) of DOL's regulations, for a hearing before an administrative law judge to determine the amount of the underpayments and whether a debarment recommendation would be appropriate. This letter was returned by the Postal Service as "unclaimed." This letter had been addressed to the address given on the letterhead of MBS's letter of rebuttal. DOL's New York regional office attempted to hand-deliver the letter, but found that the post office box had been discontinued and that MBS had vacated its last known address and left no forwarding address. DOL then forwarded the entire record to our Office with a recommendation that MBS and its president be debarred. On the basis of the Davis-Bacon Act violations, coupled with the falsification of its payrolls, our Office concluded that MBS had not shown good faith in complying with the Davis-Bacon Act and the contractual provisions. MBS and its president, Michael Lewkowicz, were placed on the debarred bidders list on February 1, 1983.

In the latter part of March 1983, our Office was informally contacted by Mr. Lewkowicz, who inquired as to what the the procedures were to have his name and MBS's name removed from the debarred bidders list. Mr. Lewkowicz was advised that he would have to submit a written request to be removed from the list and furnish sufficient evidence to overcome the evidence of record on which the debarment was based.

In a letter dated April 17, 1983, mentioned above, Mr. Lewkowicz requested that he and MBS be removed from the debarred bidders list. Enclosed with this letter was a sworn statement from his brother, who had been employed by MBS on the Picatinny Arsenal project. This statement explained that several workers, including himself, had for a period of 3 months failed to report to work on time, using

the excuse that they were in another building since work on the project was performed in several buildings. According to this statement, when these employees were caught, instead of firing them, MBS gave them a chance to make up the hours which they had not worked, but for which they had been paid. In this regard, it would appear that requiring employees to work without compensation to make up for past wage payments for which they did not work would be an unauthorized withholding in violation of the Copeland Act, as well as the Davis-Bacon Act. See 40 U.S.C. § 276a(a) (1976) and 29 C.F.R. part 3.

We have reviewed the evidence of record and it is our view that our Office had sufficient basis for debarment, even when the additional evidence is considered. Therefore, the request by Mr. Lewkowicz that his name and MBS's name be removed from the dabarred bidders list is denied.

for Milton J. Socolar
Comptroller General
of the United States