32196

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

FILE: B-217858 **DATE:** September 10, 1985

MATTER OF: Grandstaff Roofing & Sheet Metal Co. - Davis-Bacon Act Debarment

DIGEST:

1. The Department of Labor (DOL) recommended debarment of a contractor for violations of the Davis-Bacon Act because the contractor classified and paid 55 employees as laborers when in fact they were performing the work of roofers. In addition, some of these employees were not paid proper overtime. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Davis-Bacon Act (Act). There were substantial violations of the Act in that the underpayment of employees was grossly careless, if not intentional. The record shows that the contractor was previously investigated on two occasions, similar misclassification violations were disclosed, and DOL had advised the contractor at the conclusion of those investigations on how to properly classify employees.

2. Classification disputes have often been considered by our Office to be "technical violations" of the Davis-Bacon Act which result from inadvertence or legitimate disagreement concerning classification, and do not warrant debarment. However, the evidence in this case shows that the classification violations were "substantial" in that they resulted from gross carelessness or bad faith. Here the contractor had been investigated on two prior occasions for the same violations and proper classification of workers had

been explained on those earlier occasions.

3. Since no funds are available for the payment of the workers involved, the workers have a right to file an action in a United States District Court against the contractor and its sureties, if any, for payment of their wages under section 3(b) of the Davis-Bacon Act, 40 U.S.C. § 276a-2(b) (1982).

The Assistant Administrator, Employment Standards Administration, United States Department of Labor (DOL), by a letter dated December 5, 1984, has recommended that Grandstaff Roofing & Sheet Metal Co. (Grandstaff), and W. A. Grandstaff, individually and as President of Grandstaff, be placed on the ineligible bidders list for violations of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-332 (1982) (CWHSSA). For the following reasons, we concur with DOL's recommendation, and order its implementation. Additionally, as further explained below, since no funds are available for the payment of the workers involved, the workers have a right to file an action in a United States District Court against the contractor and its sureties, if any, under section 3(b) of the Davis-Bacon Act, 40 U.S.C. § 276a-2(b) (1982), for payment of their wages.

Grandstaff performed work under contract number F34650-82-C-0387 for the Department of the Air Force, doing roof repair and related work at Tinker Air Force Base, Oklahoma City, Oklahoma. This contract was subject to the Davis-Bacon Act requirements that certain minimum wages be paid and that the workers be classified properly. DOL's letter states that these requirements were included in the specifications of the contract.

The DOL found as a result of its investigation that during the period of October 1982 to January 1983 the firm failed to pay the required prevailing wage rate to 55 employees who worked on the contract as roofers. In this regard, the firm classified and paid these employes as laborers when in fact they were performing the work of roofers. In addition, some of these employees failed to

receive proper overtime since they were paid overtime at the laborers' rate rather than the roofers' rate. As a result of these violations, back wages were computed for 55 employees in the total amount of $13,309.17. Of this amount, $13,208.66 was for Davis-Bacon Act violations and $100.51 was for CHWSSA violations.

According to the record, Grandstaff refused to pay the back wages, and there are no funds available to the contracting officer out of which the back wages may be paid. In addition to this investigation, DOL records indicate that Grandstaff was previously investigated on two occasions and that similar misclassification violations were disclosed. Mr. Grandstaff was advised at the conclusion of those investigations on how to properly classify employees to comply with the Davis-Bacon requirements.

The DOL notified Grandstaff of the violations with which it was charged by certified letter, dated October 26, 1984, together with an admonition that debarment was possible. Further, Grandstaff was given an opportunity for a hearing before an administrative law judge in accordance with 29 C.F.R. 5.11(b) and 5.12(b) (1984). The DOL has reported to us that while the record indicates that the letter was received, no hearing was requested. After reexamining the record, DOL found that Grandstaff violated the Davis-Bacon Act without any factors militating against debarment. Therefore, DOL recommended that Grandstaff and W. A. Grandstaff, individually and as President of Grandstaff, be placed on the ineligible bidders list for violations of the Davis-Bacon Act which constituted a disregard of obligations to employees under the Act. We concur in this recommendation.

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 which evidence gross carelessness in observing obligations to employees with respect to the minimum wage provisions of the Davis-Bacon Act.

Based on our independent review of the record in this matter, we conclude that Grandstaff Roofing & Sheet Metal Co., and W. A. Grandstaff disregarded their obligations to employees under the Davis-Bacon Act. There were substantial violations of the Davis-Bacon Act in that the underpayment of employees was grossly careless or intentional.

The contractor classified and paid 55 employees as laborers when in fact they were performing the work of roofers. In addition, some of these employees were not paid proper overtime since they were paid overtime at the laborers' rate rather than the roofers' rate. We note that these events occurred despite the fact that, as DOL's letter states, the contract specifications included the Davis-Bacon Act requirements that certain minimum wages be paid and that the workers be classified properly.

The DOL records indicate that the contractor was previously investigated on two occasions, and similar misclassification violations were disclosed. DOL then advised Mr. W. A. Grandstaff at the conclusion of those investigations on how to properly classify employees to comply with the Davis-Bacon Act. While classification disputes have often been considered by our Office to be "technical violations" of the Davis-Bacon Act which result from inadvertence or legitimate disagreement concerning classification, the evidence in this case shows that the violations were substantial. In view of the contractor's prior history, discussed above, we must conclude that his continued failure to classify workers properly resulted from gross carelessness or bad faith in observing obligations to employees with respect to the minimum wage provisions of the Davis-Bacon Act. See Circular Letter B-3368, March 19, 1957. See also Family Construction Co., B-217330, June 7, 1985, 64 Comp Gen. ___.

We observe that section 3(b) of the Davis-Bacon Act, 40 U.S.C. § 276a-2(b) (1982) provides as follows:

> "(b) If the accrued payments withheld under the terms of the contract, as aforesaid are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a-5 of this title, such laborers and mechanics shall have the right of action

> and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds."

Since no funds are available for the payment of the workers involved, the workers thus have a right to file an action in a United States District Court against the contractor and its sureties, if any, for payment of their wages. See Weber v. Heat Control Co., 579 F. Supp. 346 (D.N.J. 1982), affirmed by memorandum op., 728 F.2d 599 (3d Cir. 1984) and cases cited therein. We also observe that while the relevant statute of limitations for insufficient payment suits under the Davis-Bacon Act is generally 2 years, it is 3 years if, as here, the violations were willful. See section 6(a) of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. § 255(a) 1982).

Therefore, we order that the names Grandstaff Roofing & Sheet Metal Co., and W. A. Grandstaff, individually and as President of Grandstaff Roofing & Sheet Metal Co., be included on a list of ineligible bidders to be distributed to all departments of the Government. Pursuant to statutory direction (40 U.S.C. § 276a-2), no contract shall be awarded to them or to any firm, corporation, partnership, or association in which they, or any of them, have an interest until 3 years have elapsed from the date of publication of such list.

Henry R. Wray
Associate General Counsel