



UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-221783

July 29, 1986

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: Occupacia Corporation - Prime Contractor
E. French Enterprises, Ltd. - Subcontractor
Contract No. N62470-80-C-0049
Virginia Beach, Virginia
Your File No. NY-80-19

By letter dated August 28, 1985, you requested that we distribute to a wage claimant funds withheld from Occupacia Corporation, for violations committed by its subcontractor, E. French Enterprises, Ltd. (French) for violations of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982). You also recommended against debarment of French.

At the invitation of Ms. [redacted] of your staff, we are remanding the case to the Division of Contract Standards Operations. Although you have advised our Office by your letter dated August 28, 1985, that back wages were found by your office to be due an employee of the subcontractor in the amount of \$4,380.11, the subcontractor has taken strong exception to this finding but has never been offered an opportunity of a fact-finding hearing. We have been advised by Ms. [redacted] that she believes that the offering of such a hearing would be appropriate in this case.

French performed work as a subcontractor to Occupacia Corporation under contract number N62470-80-C-0049 with the Naval Amphibious Base, Little Creek, Virginia, doing

all fuel piping on piers, head of pier, building 1552 and at the fuel farm, including gas free work and certificates. 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) (1984), the contractor was to submit payroll records certified as to correctness and completeness, specifying for each worker--among other things--hourly rates of wages paid and actual wages paid. These requirements are extended to subcontractors by the provisions found in 29 C.F.R. § 5.5(a)(6) (1984).

The DOL found as a result of a Navy investigation that an employee of the subcontractor French was not paid the required Davis-Bacon Act minimum wages, i.e., was underpaid. Specifically, the investigation revealed that the employee in question was performing work under the subject contract as a pipefitter but was only being paid laborer's wages. The subcontractor French responded that the employee in question performed only unskilled laborer's work on the subject project. French further contends that a full time pipefitter was on site at all times, and that this pipefitter did the skilled work. Further, French alleges that the employee in question was never employed by their firm to perform plumber/steamfitter work. Their evidence was in the form of its daily work diary which was submitted through the prime contractor, Occupacia Corporation. French pointed out that it has a blanket purchase agreement with ABCO Welding and Repair Company to perform all of its welding, burning, and pipefitting operations. French further noted that the owner of ABCO, Jimmie Christensen, performed all of these services, and is salaried. Further, French provided a witnessed statement dated September 18, 1985, signed by President of ABCO Welding and Repair Co., Inc., stating that ABCO performed the pipe welding on seven piers and five fuel tanks for E. D. French Enterprises, Limited, between March 1984 and April 1985. French states that the reason it contracted with ABCO for the above services is that it does not have staff to perform these tasks, and concludes that it "would not have paid someone else for work performed at a price higher than it would have cost to perform it in-house if we had in-house capability already." In view of the above, E. French Enterprises requests that our Office forward all monies withheld in this matter to their company.

In contradistinction to the French version of the facts, the record contains a signed claim submitted by the employee in question stating that during the period of February 5, 1984, to October 28, 1984, he was employed as a pipefitter by E. French Enterprises, Ltd., to work under the subject contract at the Naval Amphibious Base, Little Creek, Virginia Beach, Virginia. Pursuant to the employee's claim an investigation was conducted by the Resident Officer In Charge of Construction. This investigation involved the comparison of payrolls to interviews conducted in August and November 1984. The Navy reports that this comparison, along with the Government Inspector's statement on the August 1984 interview, that the employee had been continuously observed working with tools, was felt to substantiate the employee's claim. The employee's actual hours, as shown on the payrolls, were used by Navy to calculate restitution due. Further, the Navy reports that French has not cooperated in the investigation.

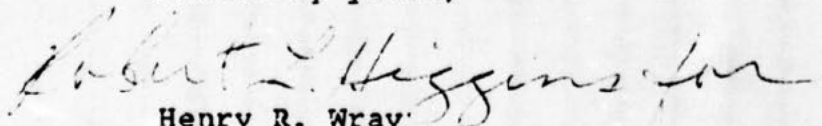
The Davis-Bacon Act provides that the Comptroller General is to debar persons or firms whom he has found to have disregarded their obligations to employees under the Act. 40 U.S.C. § 276a-2. In Circular Letter B-3368, March 19, 1957, we distinguished between "technical violations" which result from inadvertence 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. Substantial violations warrant debarment; technical violations do not. Inadvertence resulting in technical violations is a basis for deciding not to debar under the Davis-Bacon Act. Aguirre Associates, Gudino Brothers and Kalispell Explosive Engineering, B-217808, August 29, 1985.

Based on our independent review of the record, we conclude that these alleged violations if found to have occurred would have been the result of inadvertence only. An employee was allegedly not paid the required Davis-Bacon minimum wages, i.e., was underpaid. The hourly rates of wages paid and actual wages paid shown on the certified payrolls were allegedly incorrect in that they were allegedly less than those required to be paid for the classifications of work performed. There was no falsification of certified payrolls: the certified payrolls were accurate

in that the hourly rates of wages paid and actual wages paid shown corresponded to those actually paid. We conclude that the record does not contain sufficient evidence of intentional--as opposed to inadvertent--violation of the labor standards provisions of the Act to warrant debarment. Therefore, we decline to debar French. We withhold judgment pending the DOL review as to whether any inadvertent violations resulting in underpayment of wages did take place.

Therefore, we are returning your file to you in order to afford DOL an opportunity to offer E. French Enterprises the opportunity to request a hearing to resolve the factual dispute as to whether one of its employees was in fact not paid the required Davis-Bacon minimum wages under the subject contract.

Sincerely yours,


Henry R. Wray
Associate General Counsel

Enclosure

cc: Edgar N. French, Jr., President
E. French Enterprises, Limited
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