



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20540

B-215847

November 26, 1985

The Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

This letter amplifies and updates previous advice to your staff and responds to your request of June 5, 1984, and the request of former Representative Donald J. Albosta, Chairman of the Subcommittee on Human Resources, House Committee on Post Office and Civil Service, concerning our review of the Department of the Interior's application in 1984 of Office of Management and Budget (OMB) Circular No. A-76 to certain Bureau of Reclamation job classifications at the Hoover Dam.

OMB Circular No. A-76 provides that certain federal jobs should be contracted to private sector commercial sources if the projected cost advantage to the federal government is at least 10 percent of the in-house personnel related cost for the performance period. The rate of wages for Hoover Dam employees is negotiated yearly by Reclamation and the employees' union, the American Federation of Government Employees (AFGE). These negotiations are governed by, among other things, section 15 of the Boulder Canyon Project Adjustment Act, as amended, (43 U.S.C. § 618n (1982)), which specifies that all laborers employed in the operation of the Hoover Dam shall be paid not less than the prevailing rate of wages for similar work in the locality of the dam project. Representative Albosta questions whether the negotiated wage rate for Hoover Dam custodial and vehicle, equipment and plant maintenance employees is equivalent to the prevailing wage rate contemplated by section 15. If this is the case, he questions whether commercial contract bids could ever be submitted which achieve the cost advantage under OMB Circular No. A-76 for the federal government of at least 10 percent of the in-house personnel related cost without violating the minimum wage rate contemplated by section 15.

As we have advised your staff, and as further discussed in the enclosure to this letter, it appears that the wage rates received by some employees at Hoover Dam exceeded those apparently regarded by Reclamation as the minimum rates contemplated by section 15 of the Boulder Canyon Project

Adjustment Act. In this regard, section 15 of the Act anticipates only a rate floor under which any negotiated wage rate may not fall. Where the negotiated wage rate sufficiently exceeds the minimum floor rate, or where at least theoretically the cost of employing a commercial contractor may for other reasons be sufficiently lower than using in-house personnel, the application of OMB Circular No. A-76 to the work of custodial and maintenance employees at Hoover Dam is consistent with section 15 of Boulder Canyon Project Adjustment Act, as amended.

As you are aware, the application of the A-76 process to the Hoover Dam custodial employees resulted in the services not being contracted out in 1985, nor will the activity be contracted out for 1986. You may also be aware that during the A-76 process the Secretary of the Interior never formally announced a prevailing wage rate determination under section 15 for custodial employees at the Hoover Dam. Instead, Reclamation informally accepted as an indication of the section 15 wage rate the prevailing wage rate determination issued by the Department of Labor pursuant to section 2(a) of the Service Contract Act of 1965, as amended. 41 U.S.C. § 351(a)(1982).

In some cases, large differences may exist between the wage rate Reclamation and AFGE negotiated and the prevailing rate established by Labor under section 2(a) of the Service Contract Act. With regard to the custodial employees, for example, Labor's wage rate, at least until February 1985, was significantly less than the wage rate Reclamation included in its OMB Circular No. A-76 bid and the rates it accepted for custodial employees effective January 1984 and 1985 as part of the collective bargaining process. The large differences between the custodial wage rates established by Labor and those used by Reclamation may have been attributable to Reclamation's collective bargaining process and to the fact that Reclamation and Labor rely on surveys of wage rates for similar but not identical occupational descriptions in areas with overlapping but different boundaries.

Today, as explained in the enclosure, the differences in rates for custodial employees are not so large. Nevertheless, the OMB Circular A-76 process may still be applied in the future to the custodial employees at Hoover Dam. In this event, and if the employees disagreed with Reclamation's use of the Labor Department's wage rate as an indication of the prevailing wage rate under section 15, section 15 may be invoked to require the Secretary of the Interior to issue,

subject to the concurrence of the Secretary of Labor, a final prevailing wage rate determination. In addition, if employees believe that the Service Contract Act wage rate determination is not reflective of the prevailing wage rate, Labor's regulations permit affected parties to submit information demonstrating that the determination should be modified. 29 C.F.R. §§ 4.51, 4.55 (1985). To the extent the existing wage rates at Hoover Dam approximate or are determined to be the prevailing rate either under section 15 or 41 U.S.C. § 351(a), or under both, the likelihood of commercial contractors submitting bids that provide the cost advantage described in OMB Circular No. A-76 would become increasingly remote.

I trust this amplification of the advice you received is responsive to your needs. Should you or your staff require further clarification, you may wish to contact my Associate General Counsel, Richard R. Pierson, on 275-2888.

Sincerely yours,

Hilton J. Forster
for Comptroller General
of the United States

Enclosure

HOOVER DAM OMB A-76 PROCESS

BACKGROUND

OMB Circular No. A-76, (Aug. 4, 1983), reprinted in 48 Fed. Reg. 37,111, 37,113 (1983), requires federal agencies to conduct a cost comparison review of all in-house commercial activities to determine whether in-house operation of, or commercial contracting for, the activity would be less costly to the federal government. As part of the cost comparison process, agencies must conduct a management study and develop an in-house government bid for the activities under review. The Circular requires contract performance prices to be supported by a "firm bid or proposal" in response to a solicitation for bids or proposals. Activities performed in-house with government resources which can be performed by private sector commercial sources for at least 10 percent below the in-house personnel related cost for the performance period should be converted to commercial contract performance.

Section 15 of the Boulder Canyon Project Adjustment Act (Act), as amended, requires laborers employed in the operation of the Hoover-Dam to receive "not less than the prevailing rate of wages * * * for work of a similar nature in the locality of the project." 43 U.S.C. § 618n (1982). Although the Department of the Interior did not announce a prevailing wage rate determination for these employees, no one, to our knowledge, has asserted that the wages paid under the collective bargaining agreements with AFGE are "less than the prevailing rate of wages . . . for work of a similar nature in the locality of the project." Reclamation officials informally advised us that it has relied on the Secretary of Labor's minimum wage rate determinations under section 2(a) of the Service Contract Act of 1965, as amended, as a measure of the prevailing wage rate under section 15 of the Act.^{1/}

The Bureau of Reclamation's "laborer (custodial)" employees at the Hoover Dam are covered by collective bargaining

1/ Section 2(a) of the Service Contract Act of 1965, as amended, provides that unless exempted, every contract (or bid specification) in excess of \$2500 for the furnishing of services to the United States shall contain a provision specifying the minimum monetary wages to be paid employees performing the contracts. The Secretary of Labor is required to make such minimum wage determinations in accordance with "the prevailing rates for such employees in the locality * * *." 41 U.S.C. § 351(a) (1982).

agreements between the American Federation of Government Employees (AFGE) and Reclamation's Lower Colorado Dam Project Office (Reclamation).^{2/} The AFGE-Reclamation General Agreement specifies that rates of pay for covered employees shall be determined by an AFGE-Reclamation negotiating committee and that negotiations "shall be guided by the principle of prevailing practices of like activities within the locality of the Project." The General Agreement also indicates that Reclamation's Project Manager retains the right to determine the number of employees and whether to contract out work. The parties have informally agreed since 1980 that laborer (custodial) employees will receive pay comparable to that received by similar employees of the Los Angeles Department of Water and Power (LADWP), which is one of Reclamation's contractors operating the Hoover Dam.

A negotiated wage rate beginning at \$7.80 per hour for Reclamation's laborer (custodial) employees at Hoover Dam, effective during 1984, reflected the wage rate received by the LADWP maintenance laborers at Hoover Dam. In preparing for the 1984 wage rate negotiations, Reclamation had conducted a survey of wage rates in the Las Vegas, Boulder City and Hoover Dam communities, and thereafter proposed a pay rate for its laborer (custodial) employees of \$7.63 per hour, the same rate received by LADWP custodial employees. The AFGE responded by proposing the wage rate of \$7.80 that LADWP maintenance laborers received, and this was accepted by Reclamation for 1984.

On December 6, 1983, however, Reclamation had asked the Department of Labor, in accordance with section 2(a) of the Service Contract Act of 1965, as amended, to issue a minimum prevailing wage rate determination to be included in the OMB Circular No. A-76 solicitation for bids for Hoover Dam custodial services. On February 14, 1984, the Wage and Hour Division, Employment Standards Administration, Department of Labor, issued wage determination No. 84-67, which established the minimum hourly rate of pay for custodial services at the Hoover Dam at \$6.59 per hour. This determination was based on a survey of wage rates for workers in the Department of

^{2/} The discussion and conclusions set out in this enclosure, while referring primarily to only the custodial positions, are generally applicable to Reclamation's motor vehicle, heavy equipment, and power plant maintenance employees at the Hoover Dam.

Commerce's standard janitorial occupational classification who are located in Clark and Nye Counties, Nevada.

As a result of the OMB Circular No. A-76 management review in mid-1984, the job classification "laborer (custodial)" was split into two new classifications: custodial and laborer. The wage rate Reclamation calculated for its in-house bid for the custodial classification begins at \$7.63 per hour, and the minimum laborer's wage rate is \$7.80 per hour, effective January 1, 1985. Reclamation's in-house custodial bid was determined by reviewing its survey of wage rates in the Boulder City, Las Vegas, and Hoover Dam communities, and then adopting the surveyed LADWP custodial wage rate for the in-house bid. Because the bids Reclamation received from private companies did not provide a cost advantage to the federal government of at least 10 percent of the in-house personnel related cost, the activity was not contracted out and is being performed in-house in 1985 by federal employees at the negotiated wage rate effective in January 1985, which was the \$7.63 rate established by Reclamation's bid.^{3/}

On February 7, 1985, the Wage and Hour Division issued wage rate determination No. 80-335, raising the minimum custodial pay rate to \$7.11 per hour. The new wage rate was determined with reference to Labor's survey of wage rates for workers in the Department of Commerce's standard janitorial occupational classification in Clark and Nye Counties, Nevada. Reclamation did not prepare an in-house bid for 1986 custodial work, and bids for private contractors were not solicited.

^{3/} With regard to the vehicle and equipment maintenance employees, we were informed on October 23, 1985, by Mr. Larry Schulz, OMB Circular A-76 Coordinator, Bureau of Reclamation, that the OMB Circular No. A-76 management review process was complete and private bids will not be solicited because the activity involves less than ten full time employees. Interior also informs us that no further OMB Circular No. A-76 review is contemplated with regard to power plant maintenance employees until a Bureau of Reclamation task force completes a study defining service activities in the area.

ANALYSIS

Representative Albosta's letter indicates that, according to information brought to his attention, custodial employees at the Hoover Dam may be exempt from Reclamation's OMB Circular No. A-76 activities by virtue of the minimum wage rate provision of section 15 of the Act. The minimum statutory wage rate has been set, according to this view, by an AFGE-Reclamation Agreement requiring wages for custodial workers to equal the rate of pay received by comparable workers of the LADWP. Thus, an in-house bid or a commercial contract under OMB Circular No. A-76 cannot be issued at a wage rate lower than the negotiated rate custodial employees receive because this latter rate constitutes the prevailing wage rate within the meaning of section 15 of the Act. According to this argument, custodial employees are purportedly exempt from the OMB Circular No. A-76 process because a rate of pay lower than the negotiated rate cannot be established and therefore the requirement of OMB Circular No. A-76, that commercial contract prices provide a cost advantage to the federal government of at least 10 percent of the in-house personnel related cost, cannot be met.

Initially, we note that the Secretary of the Interior has not independently calculated a prevailing wage rate for custodial employees under section 15 of the Act. As noted earlier, however, Reclamation has used for this purpose minimum wage rate determinations under section 2(a) of the Service Contract Act of 1965, as amended. The legal standard used in section 2(a) of the Service Contract Act of 1965, as amended, is virtually the same standard set out by section 15 of the Act, and minimum wage rate determinations for custodial employees have been issued under section 2(a) by the Secretary of Labor. Therefore, for purposes of addressing whether the OMB Circular No. A-76 cost comparison process is consistent with the provisions of section 15 of the Act, we accept Reclamation's use of Labor's section 2(a) minimum wage rate determination as an assurance that Reclamation pays its custodial employees no less than the prevailing wage rate contemplated by section 15 of the Act.

No law of which we are aware requires that the negotiated wage rate for custodial employees not exceed the prevailing wage rate contemplated by section 15 of the Act. The AFGE-Reclamation General Agreement states that negotiating committees "shall be guided by the principle of prevailing practices

of like activities within the locality of the project" when establishing the terms of the Agreement, but the committees are not limited under the Agreement to establishing minimum prevailing wage rates equivalent to those calculated under section 2(a) of the Service Contract Act of 1965, as amended, or under any other law. They may negotiate amounts which exceed minimum statutory wage rates. Interior informs us that it is not unusual for differences to exist between minimum wage rates calculated under section 2(a) and negotiated wage rates.

Labor established the section 2(a) minimum wage rate for janitorial employees at \$6.59 per hour (effective February 14, 1984). By contrast, the 1984 AFGE-Reclamation agreement established the negotiated wage rate for custodial employees at \$7.80 per hour, effective January 1, 1984, and at \$7.63 per hour for 1985. The significant differences between the section 2(a) minimum wage rate of \$6.59 per hour and the negotiated wage rate in this case suggest that, under certain circumstances, the requirement of OMB Circular No. A-76 that commercial contract prices provide a cost advantage to the federal government of at least 10 percent of the in-house personnel related cost could be satisfied.^{4/}

Today, the difference between the new janitorial wage rate of \$7.11 established by Labor and the \$7.63 rate used by Reclamation is not as great as in the past. Current differences, and perhaps past differences as well, may be attributable to Reclamation's collective bargaining process and to the fact that Reclamation and Labor rely on surveys of wage rates for apparently similar but not identical occupational descriptions in areas with overlapping but different boundaries. For instance, Labor based its 1984 and 1985 section 2(a) wage rate determinations on a Bureau of Labor Statistics' survey of wage rates for the janitorial occupational classification in Clark

^{4/} Also, at least theoretically, circumstances could arise where commercial contract prices are submitted which are at least 10 percent lower than the in-house personnel related cost but the contract prices include wage rates that are equal to or minimally above the existing prevailing wage rate. In this event, the activity may be contracted out if other elements of the contract price are set low enough so that the cost advantage requirement is satisfied despite little or no disparity in the wage rates.

and Nye Counties, Nevada. Reclamation, on the other hand, accepted as part of the collective bargaining process in 1984 the wage rate applicable to LADWP maintenance laborers employed at the Hoover Dam. Reclamation's A-76 in-house bid, which the custodial employees accepted as the 1985 wage rate, was based on Reclamation's survey of wage rates of custodial employees in the Las Vegas, Boulder City, and Hoover Dam communities.

CONCLUSION

The negotiation of wage rates in excess of the minimum rate of pay contemplated by section 15 of the Act is not proscribed by law, and is consistent with both the collective bargaining agreement between custodial employees and Reclamation, and their informal agreement specifying the use of Los Angeles Department of Water and Power wage rates as a basis for negotiating custodial wage rates. In this case the negotiated rates of pay significantly exceeded, at least until February of 1985, the minimum rate of pay used by Reclamation. Thus, it did not appear unlikely that the OMB Circular No. A-76 requirement that commercial contract prices provide a cost advantage to the government of at least 10 percent of the in-house personnel related cost might have been satisfied. Such likelihood, however, becomes more remote if the wage rate for 1986 is determined to be either the prevailing wage rate under section 15 or under section 2(a) of the Service Contract Act of 1965, as amended, or under both.

Should a dispute arise as to the prevailing wage rate under section 15, the Secretary of Interior can resolve such disputes by issuing, subject to the concurrence of the Secretary of Labor, a final prevailing wage rate determination. 43 U.S.C. § 618n (1982). In addition, if employees believe that the wage rate determination under the Service Contract Act is not reflective of the prevailing wage rate, Labor's regulations permit affected parties to submit information demonstrating that the determination should be modified. 29 C.F.R. §§ 4.51, 4.55 (1985). To the extent the wage rates at the Hoover Dam approximate or are determined to be the prevailing wage rates either under section 15 or 41 U.S.C. § 351(a), or under both, the likelihood of commercial contractors submitting bids that provide the cost advantage described in OMB Circular A-76 would become increasingly remote.