F. Phillyaw
Proc I

01406

DECISION

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

FILE: B-185020 DATE: December 22, 1976

MATTER OF: Sweet Home Stone Company, Fordice Construction Company, Inc., and Jack Durrett, Contractor

DIGEST:

1. CAO authority is paramount to that of Department of Labor with respect to interpretation of "upon the site of the work" in Davis-Bacon Act.

2. Where distance from quarries to contract job sites ranged from one quarter of a mile to six miles, quarry employees and haulers were not laborers and mechanics performing "on site work" entitled to Davis-Bacon Act coverage.

Counsel for the above parties requested that this Office review the decision of the United States Department of Labor Wage Appeals Board (hereafter referred to as the Board) dated August 14, 1975, in consolidated cases WAB 75-1 and 75-2. The Board affirmed the decision of the Assistant Administrator, Employment Standards Administration (ESA), dated November 26, 1974, wherein it was held that employees of Sweet Home Stone Company (Sweet Home), engaged in quarrying, loading and transporting quarry-run stone from various sites and sold to Fordice Construction Company (Fordice) and Jack Durrett, Contractor (Durrett), were laborers and mechanics engaged in "on site" work under contracts Nos. DACW56-73-C-0235 and DACW56-74-C-0096 performed by Fordice and contract No. DACW56-73-C-0227 performed by Durrett, and were therefore covered by the contract labor standards, specifically the Davis-Bacon Act (40 U.S.C. § 276a, et seq. (1970)).

The distance from the three quarries to the contract job sites ranged from one quarter of a mile to six miles. The contracting officer determined that the labor standards provisions of the prime contracts were applicable to the quarrying and hauling operations of Sweet Home. The contracting officer found that Sweet Home had made no sales to the general public, stone having been supplied only to the two Government contractors, there was no indication that Sweet Home intended to continue operations at the quarries after it fulfilled the commitment to Fordice and Durrett and in spite of Sweet Home's status, generally, as a commercial supplier, its operations at the subject quarries were not those of a commercial supplier. The

contracting officer determined that since the quarries were operated exclusively for use in connection with the prime contracts and were located in the proximity of the actual construction locations, the operations were on the "site of the work" as defined in section 18-701(b)(2) of the Armed Services Procurement Regulation (ASPR) (1973 ed.). In furtherance of the decision, the contracting officer withheld $21,000, $2,300 and $2,000, respectively, under contracts -0235, -0227 and -0096. The contracting officer's decision was appealed to the Department of Labor. This resulted in the matter being considered by ESA and eventually the Board.

This Office obtained a report on the matter from the ESA Administrator. ESA and counsel for the parties seeking review have joined on several issues. However, only two issues are necessary for the disposition of this case: (1) whether this Office has authority to reverse the "on site" decision of the Board and (2) if so, whether Sweet Home's quarrying and hauling operations are "on site work" covered by the Davis-Bacon Act.

The Davis-Bacon Act provides that every contract shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers "employed directly upon the site of the work" at wage rates not less than those stated in the specifications.

That the authority of this Office is paramount to that of the Department of Labor with respect to the interpretation of "upon the site of the work" in the Davis-Bacon Act was indicated in 43 Comp. Gen. 84 (1963). The authority of this Office is based on section 3(a) of the Act, 40 U.S.C. § 276a-2(a) (1970), which states:

> "(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a-5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. * * *"

However, ESA states that section 3(a) is silent as to whether the contracting officer, the Department of Labor or the Comptroller General is to make the finding of wages due the laborers and

mechanics. ESA states that section 2 of the Act, 40 U.S.C. § 276a-1 (1970), is dispositive of the issue, since it provides that the Government may terminate a contractor's right to proceed with the work where "it is found by the contracting officer" that workers are underpaid. Section 2, however, which is entitled "Termination of work on failure to pay agreed wages; completion of work by Government" in 40 U.S.C. § 276a-1, relates only to the function of contract termination which is, and has traditionally been, part of the contract administration function that the contracting officer performs. Section 3 on the other hand, which is entitled "Payment of wages by Comptroller General from withheld payments; listing contractors violating contracts" in 40 U.S.C. § 276a-2, is a separate section relating to two totally different functions, i.e., payment of underpaid workers and debarment of contractors or subcontractors found to have violated obligations to employees. The Comptroller General is the only official designated in section 3(a) to perform these functions. Therefore, the act vests the Comptroller General with authority to make the finding of wages due in connection with the payments to be made. Moreover, section 3(a) is specific that the Comptroller General is authorized to debar those contractors whom "he" has found to have disregarded their obligations to employees. Either function--consideration for payment or debarment--necessarily requires a determination by this Office of whether the contractor had an obligation to employees under the Act.

Although ESA maintains that this is inconsistent with the decisions in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), and Ventilation Cleaning Engineers, Inc., 54 Comp. Gen. 24 (1974), 74-2 CPD 26, those decisions have no application. Here, unlike S&E, we are dealing with a statute that designates the Comptroller General to perform certain functions. Further, in the present case, there is only a question of law as to the application of the Davis-Bacon Act and not an issue of fact as there was in the Ventilation case as to the number of hours the contractor's employees worked.

Further, as regards the question of whether Sweet Home's quarrying and hauling operations are "on site work" covered by the Davis-Bacon Act, ESA has presented contentions in support of its position that also were considered largely in the 43 Comp. Gen. decision. After a detailed analysis of the terms in the Davis-Bacon Act and the applicable legislative history, it was the conclusion of this Office that the

Act does not provide wage coverage for work off the site whether by contractors, subcontractors or materialmen even though performed in the immediate community. This view was followed in B-152524, May 8, 1964; B-153992, June 25, 1964; and B-154214, August 10, 1964. This Office continues in that view and concludes that Sweet Home's quarry employees and haulers were not laborers and mechanics entitled to Davis-Bacon coverage.

Accordingly, appropriate steps should be taken to effect the release of the money withheld from the contractors.

Deputy Comptroller General
of the United States