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F. Phillips
9 Nov 78

DECISION



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

FILE: B-185020

DATE: December 28, 1978

MATTER OF:

[Wage rate coverage of offsite work under
Federal-Aid Highway Act of 1956, as amended]

DIGEST:

1. Although GAO has declined to render decisions regarding enforcement issues in number of cases involving Davis-Bacon related acts, it has rendered legal opinions on similar matters when presented by members of Congress on basis of its general jurisdiction to audit accounts of disbursements of appropriated funds and to investigate and report to Congress all matters relating to the receipt, disbursement and application of public funds.
2. Sweet Home Stone Company et al., B-185020, December 20, 1976, 76-2 CPD 519, holding that Davis-Bacon Act does not provide wage coverage for offsite work, does not apply to Federal-Aid Highway Act situations.
3. Allegation that Secretary of Labor has no power under Federal-Aid Highway Act to require Federal Highway Administration (FHWA) to follow Labor's position on wage application to offsite work is mooted by FHWA decision, with Department of Transportation knowledge, to follow position.
4. Decision to apply wage rates to offsite facilities was incorrect, since legislative history shows that, when Federal-Aid Highway Act was being considered for passage, expressed intention was that wage rate requirement apply "At the initial construction place only."
5. Department of Labor contention that its position as to application of wage rates to offsite work should be treated as presumptively correct because of representations made at 1962 Davis-Bacon hearings and passage 6 years later of amendment to Highway

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Act without action on representations is not accepted in view of absence of amendment following congressional committee recommendation after 1962 hearings that DavisBacon Act be amended to conform to Labor's position.

The primary issue for consideration here is whether the wage rates determined by the Secretary of Labor in accordance with the Davis-Bacon Act, 40 U.S.C. § 276a (1970), are applicable to off-site work performed in connection with construction on highway projects on the Federal-aid systems under the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. § 101 (1976).

In Sweet Home Stone Company et al., B-185020, December 22, 1976, 76-2 CPD 519, we stated that the Davis-Bacon Act does not provide wage coverage for work off the site whether by contractors, subcontractors or materialmen even though performed in the immediate community. By a memorandum dated May 11, 1977, the Acting Chief Counsel, Federal Highway Administration (FHWA), advised the regional offices of the Sweet Home decision. By a letter dated June 13, 1977, to the General Counsel, Department of Transportation (DOT), the Solicitor of Labor requested that DOT not follow the Sweet Home decision. By a memorandum dated July 8, 1977, the Acting Chief Counsel of FHWA advised the regional offices that the May 11, 1977, memorandum was rescinded and that FHWA will follow the position of the Department of Labor that offsite work on Federal-aid projects is subject to wage rates prescribed under 23 U.S.C. § 113.

By letter of July 8, 1977, to our Office, the Associated General Contractors of America complained about FHWA's decision not to apply the Sweet Home decision to Federal-aid projects covered by 23 U.S.C. § 113. Subsequently, similar complaints were received from the counsel for Warren Brothers Company, Reno Construction Company, Inc., L.P. Cavett Company, United Asphalt Corporation, and St. John Trucking Company. There has also been congressional interest in the matter.

Turning to the immediate complaint, while it is true that our Office has declined to render decisions in a number of situations similar to the present case for the reason that the acts involved conferred no special functions or duties upon our Office, B-144075, October 13, 1960; B-155301, December 17, 1964; B-155188, February 3, 1965; Abreen Corporation, B-184226, August 1, 1975, 75-2 CPD 102, we have rendered legal opinions on similar matters in response to questions presented to us by members of Congress on the basis of our general jurisdiction to audit accounts of disbursements of appropriated funds and to investigate and report to Congress all matters relating to the receipt, disbursement and application of public funds (31 U.S.C. § 53 (1976)). See, e.g., B-147847, April 11, 1962. See, also, 49 Comp. Gen. 59 (1969). Therefore, there is authority for us to consider the complaints.

One of the principal allegations of the complaints is that the Sweet Home decision applies to 23 U.S.C. § 113 because of the reference therein to the Davis-Bacon Act. In that regard, 23 U.S.C. § 113 states:

"(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the initial construction work performed on highway projects on the Federal-aid systems, the primary and secondary, as well as their extensions in urban areas, and the Interstate System, authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of August 30, 1935, known as the Davis-Bacon Act (40 U.S.C. § 267a [sic])."

In our view, the reference to the Davis-Bacon Act is only with respect to the Secretary of Labor determining what the wage rates shall be. While reference is made to portions of the legislative history of the Federal-Aid Highway Act speaking of the act "extending" the Davis-Bacon protection to federally assisted construction, it has been our view that Congress intended to "extend" the protection of the Davis-Bacon Act only to the extent of providing prevailing wage rates. See decisions cited by the Department of Labor, supra, in connection with jurisdiction. Thus, the reference to the Davis-Bacon Act in 23 U.S.C. § 113 does not make the Sweet Home decision applicable.

Another principal allegation is that the Secretary of Labor has no power under 23 U.S.C. § 113 to require FHWA to follow the Department's position on wage application to offsite work. The Department of Labor cites 41 Op. Atty. Gen. 488 (1960) to the effect that the authority of the Secretary of Labor under Reorganization Plan No. 14 extends to the labor standards provisions of 23 U.S.C. § 113. However, we believe that the contentions in that regard are mooted by the fact that the Department of Labor "requested" DOT to follow its view and that FHWA, with the knowledge of DOT, charged with wage enforcement under § 113, has made a decision to follow it.

However, as the complainants have indicated, no matter who decided to apply the wage rates to off-site facilities, that decision was incorrect. In that regard, when the Federal-Aid Highway Act of 1956 was being considered for passage in the Senate, Senator Chavez, speaking for the committee in charge, indicated that the wage rate requirement applied "At the initial construction place only" and "to the construction, not to the materials." The Senator stated further, "That provision does


not apply to a place 60 miles away which might furnish some material for the initial construction." 102 Cong. Rec. 10967 (1956). The Department of Labor contends that its position as to the application of the wage rates to offsite work should be treated as presumptively correct because of representations it made at the 1962 hearings on the administration of the Davis-Bacon Act before the Special Subcommittee on Labor of the Committee on Education and Labor and the passage 6 years later of an amendment to the Highway Act to extend its application to the entire Federal-aid highway program and to exempt certain apprentices and trainees without other action. In that regard, the Department of Labor states that at the 1962 hearings Congress was advised of the Department's interpretation of "site of the work," of our position that we did not have direct jurisdiction and of the Attorney General opinion in 41 Op. Atty. Gen., supra.

What was being addressed at the hearings was "site of the work" under the Davis-Bacon Act and not "initial construction work" nor Senator Chavez' limitation under the Highway Act. Moreover, it was the recommendation of the congressional committee conducting the hearings that language be added to the Davis-Bacon Act to make it clear that the act will apply to offsite work. As the Department of Labor states, "When Congress amended section 113 * * *, it took no action to clarify its intent." In the face of the congressional committee recommendation, the absence of action can be construed as withholding of approval of the Department of Labor position. Thus, we do not consider that the Congress by its inaction in 1968 intended to approve the Department of Labor position to the exclusion of the specific limitation laid down by Senator Chavez in 1956.

We view the Senator's statements, a significant part of the legislative history, as indicating a Congressional intention to limit application of the wage rates to the specific site of construction and

to exclude nearby material source sites. Therefore, we conclude that the application of the wage rates beyond the initial construction place is not contemplated by the provisions of § 113. Cf. The Cage Company of Abilene, Inc., B-188119, B-187665, June 13, 1978, 57 Comp. Gen. _____, 78-1 CPD 430, and decisions cited therein.

We recognize that the Department of Labor does not agree with our views in the matter. However, unlike the situation in direct Federal procurements, the Federal-Aid Highway Act conferred no special functions or duties upon our Office with regard to "Davis-Bacon" requirements. Moreover, none of the parties to contracts entered into pursuant to the Act is an agency of the Federal Government. Therefore, claims under the Act are not subject to settlement by our Office. This being the case, coupled with the interest that the Department of Labor has in the administration of the Act under Reorganization Plan No. 14 of 1950, we are of the view that Congress should enact clarifying legislation if it disagrees with the Department of Labor position.


Acting Comptroller General
of the United States

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