GAO
United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-198084

June 16, 1980

Ms. Carin Ann Clauss
Solicitor of Labor

Dear Ms. Clauss:

We refer to the letter of March 12, 1980, from the Solicitor of Labor, transmitting for comment a copy of proposed amendments to the Department of Labor's (DOL) regulations, parts 1, 4 and 5, title 29, Code of Federal Regulations (CFR), dealing with the Davis-Bacon Act, 40 U.S.C. § 276a (1976), and the Service Contract Act, 41 U.S.C. § 351, et seq. (1976).

Due to the continuing study by our Office of the administration of the Service Contract Act, we will not comment on the proposed amendments to the regulations pertaining to that act. We will confine our comments to a legal discussion of certain proposed amendments in part 5.

Section 5.2(1) of the proposed amendments provides in connection with the applicability of the Davis-Bacon Act, that:

> "(1) The 'site of the work' * * * includes adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the 'site' because of its proximity.
>
> "(2) Fabrication Plants, 'mobile factories,' batch plants, borrow pits, job headquarters, tool yards, etc., are part of the 'site of work' provided they are dedicated exclusively, or nearly so, to performance of the contract and are so located in proximity to the actual construction location that it would be reasonable to include them."

Thus, under proposed section 5.2(1) Davis-Bacon Act, coverage would extend to work performed on property near the actual site of the work, such as borrow

pits, job headquarters, etc., which are used by the construction contractor in the performance of the contract work.

As you know, we have held that the act does not apply to offsite work, even though performed in the immediate community of the construction site. Sweet Home Stone Company, et al., B-185020, December 22, 1976, 76-2 CPD 519; 43 Comp. Gen. 84 (1963). In the cited 1963 case we examined the language and legislative history of the act and found that its coverage extended only to work physically performed on the construction site. We noted that while the Congress was well aware that some work on a construction project was regularly perfomed offsite, no attempt was made to bring this portion of the work under the act. Id. at 89-90. Thus we concluded in the 1963 case that a supplier who moved its sand operation from the construction site to a privately owned location about 3 miles from the construction area could not be said to be evading the act. We recognized, however, "that instances might be found in which 'across the street' construction would be questionable." Id. at 90. See also B-152214, August 10, 1964.

Thus we have recognized that "across the street" construction activities might be covered by the act. Proposed section 5.2(1) would extend the act to offsite construction activities which are dedicated exclusively (or nearly so) to performance of the contract and are located in close proximity to the actual construction site. Arguably, some of the activities covered by section 5.2(1) are not merely "across the street" activities. However, we realize that it is not always easy to distinguish between "across the street" and other types of offsite construction activities. Under the circumstances, we believe section 5.2(1) reasonably defines the term "site of the work" and we do not object.

Proposed section 5.5(a)(2) would allow the withholding from contract funds of an amount sufficient to make restitution to underpaid workers from contracts other than the contract under which Davis-Bacon Act violations occurred--in other words, a right

of cross-withholding. Proposed section 5.5(b)(3) would permit the same withholding in connection with violations of the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327, et seq. (1976).

As the Solicitor points out, this proposed regulation follows the suggestion made to the Acting Solicitor in B-177556, March 29, 1973. We believe that a cross-withholding procedure provided by regulation and contractual provision is not contrary to the Davis-Bacon Act and CWHSSA, and indeed is consistent with the remedial purposes of those acts.

Proposed section 5.5(a)(9) expands DOL's jurisdiction under the "Disputes concerning labor standards" clause, required to be included in Federal construction contracts, in that it provides that "Disputes arising out of labor standards provisions of this contract shall not be subject to the general disputes clause of the contract" and it enlarges the number of parties to a dispute to include not only the contractor and the contracting agency, but also DOL, subcontractors, and employees or their representatives. We have no objection.

Proposed section 5.12(a)(2) would render any contractor or subcontractor debarred under the Davis-Bacon Act ineligible to be awarded subcontracts by contractors having contracts with the Government. Proposed section 5.5(a)(10)(ii) is a required contract clause prohibiting the prime contractor from subcontracting with any individual or firm debarred under the Davis-Bacon Act. We have no objection.

We have no further comments at this time.

Sincerely yours,

Milton J. Socolar
General Counsel