U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

**PHOENIX FIELD OFFICE,
BUREAU OF LAND MANAGEMENT**

ARB Case No. 01-010

DATE: June 29, 2001

In re: Lease Contract No. NCL-990099 awarded by the U.S. Department of Interior, Bureau of Land Management, for a Field Office and Storage Building at 21605 N. Seventh Ave., Phoenix, Arizona[1]

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[2]

Appearances:

For the Petitioner:
Robert Doyle, *Associate Director, Business and Fiscal Resources, U.S. Department of the Interior, Bureau of Land Management, Washington, D.C.*

For the Administrator:
Leif G. Jorgenson, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

For Intervening Interested Party Building and Construction Trades Department, AFL-CIO:
Terry R. Yellig, Esq., *Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.*

DECISION AND ORDER

In this case, we review whether the prevailing wage requirements of the Davis-Bacon Act (40 U.S.C.A. §276a (West 1986)) apply to the construction of a privately owned building and storage facility built for the Interior Department's Bureau of Land Management (BLM) pursuant to a 15-year lease. In a final decision issued August 14, 2000, the Wage and Hour Administrator concluded that the project was covered by the Davis-Bacon Act. BLM petitioned for review before this Board. For the reasons discussed below, we concur with the Administrator's analysis and conclusion, and deny the Petition.

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[1] This case has been recaptioned to simplify citation.

[2] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

BACKGROUND

In April 1998 the Bureau of Land Management issued a solicitation inviting bids for a leased facility in Phoenix, Arizona. *See generally* Solicitation Package, Administrative Record (AR) Tab D. BLM identified the solicitation as a 15-year lease, with a "firm" lease period of 10 years, *i.e.*, the government could terminate the lease after the first 10 years. *Id.* at 13. The solicitation specified precisely the geographic boundaries of the area within Phoenix that would be acceptable to BLM, and described the size and architectural design of the project with significant, particularized detail:

> (a) BLM has a requirement for approximately 19,000 square feet of rentable space.
>
> Offers must be for space located in a quality building of sound and substantial construction . . . have potential for efficient layout, and be within a square footage range for a minimum of 18,475 to a maximum of 19,000 occupiable square feet of office and warehouse space, comprised of the following:
>
> Office Space: A minimum of 11,975 to a maximum of 12,000 occupiable square feet.
>
> Fire Support Space: A minimum of 1,400 to a maximum of 1,500 occupiable space.
>
> Warehouse Space: A minimum of 5,100 to a maximum of 5,500 occupiable space.
>
> Wareyard: 70,000 square feet.
>
> Secured Parking Spaces: 41 secured and covered parking spaces for government vehicles to be included within the 70,000 square foot wareyard.
>
> A total of 95 parking spaces comprised of:
>
> 20 spaces for visitors
> 75 spaces for employees
>
> (b) The design of the space offered should demonstrate modern architectural design. The designer is challenged to create a unique solution responsive to the program, setting and context of the project.
>
> The facade of the building shall be of high quality, durable material acceptable to the Contracting Officer. The massing of the building should be varied and offer architectural relief. The building should

> be compatible with its surroundings. Overall, the building should project a professional and aesthetically pleasing appearance including an attractive, well defined main entrance.
>
> • Metal buildings and/or metal building exteriors are not acceptable
>
> • Metal architectural panels are not acceptable.

Id. at 11.

Even when issuing the solicitation, BLM recognized that the construction work required for the project might be covered by the Davis-Bacon Act, with the solicitation including the following clause:

> Before award, a review of the apparent low offer will be conducted to determine if the provisions of the Davis-Bacon Act are applicable. If so, all offerors will be provided with an opportunity to revise their offered amounts to include the provisions of the Davis-Bacon Act.

Id. at 15.

From the offers received, BLM decided to award the lease contract to Federal Builders, LLC, which proposed to build a new facility to meet BLM's needs.

The agency proceeded to examine the Davis-Bacon Act coverage issue. In 1994, the Wage and Hour Administrator had issued All Agency Memorandum (AAM) 176, which addressed the application of the Davis-Bacon Act to "buildings constructed and/or altered for lease by the Federal government" in light of various opinions of the courts and the Wage Appeals Board, as well as a May 1994 Opinion published by the Justice Department's Office of Legal Counsel (discussed *infra*). Relying on the AAM 176 materials, on February 8, 1999, BLM's procurement branch issued a formal "Findings and Determination" in which the agency concluded that the Davis-Bacon Act did not apply to the new building. AR Tab G. The contract was awarded to Federal Builders on February 10, 1999.

In October 1999 BLM was contacted by CANDO (California-Arizona-Nevada District Office), a "non-profit, labor management contract compliance organization concerned with the payment of prevailing wages to workers employed on public works contracts," making a FOIA request for a copy of BLM's "Findings and Determination." AR Tab F. BLM promptly provided the requested materials. AR Tab G. After reviewing BLM's analysis, CANDO contacted the Wage and Hour Division's San Francisco office, challenging BLM's determination that the Phoenix project was not subject to Davis-Bacon Act coverage. AR Tab E. The coverage question was referred to the Division's headquarters office in Washington, D.C. *Id.*

The Division contacted BLM, requesting additional information about the project. AR Tab C. BLM responded in February 2000, providing the contract documents. In a cover letter addressed

to the Division, BLM explained its view that the construction work required under the Phoenix office/warehouse lease project was not covered by the Davis-Bacon Act. AR Tab D. The Wage and Hour Administrator disagreed, and on August 14, 2000, issued a final decision letter finding that the BLM's Phoenix field office project was subject to the Act. AR Tab A. This appeal followed.

JURISDICTION

We have jurisdiction under the Davis-Bacon Act, 40 U.S.C.A. §276a; Reorganization Plan No. 14 of 1950, 5 U.S.C.A. Appendix (West 1986) (assigning to the Secretary of Labor responsibility for developing government-wide policies, interpretations and procedures to implement the Davis-Bacon Act and the Related Acts); and 29 C.F.R. §§7.1(b), 7.9 (2000).

SCOPE OF REVIEW

The Board's review of decisions issued by the Administrator is in the nature of an appellate proceeding, and the Board "will not hear matters de novo except upon a showing of extraordinary circumstances." 29 C.F.R. §7.1(e). We assess the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act. *Miami Elevator Co.*, ARB Nos. 98-086/97-145, slip op. at 16 (Apr. 25, 2000) (citing *Dep't of the Army*, ARB Nos. 98-120/121/122 (Dec. 22, 1999), under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. §351 *et seq*. (1987)).

DISCUSSION

In this Discussion, we review first the legal context in which this case arises, *i.e.*, the statute, regulations, and decisional background. We then turn to the specific arguments raised by the parties in this case.

A. Legal context.

The Davis-Bacon Act provides that

> (a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town,

> village, or other civil subdivision of the State in which the work is to be performed . . . .

40 U.S.C.A. §276a(a). When a Federal agency enters directly into a contract with a construction firm to construct a public building or public work that will be owned by the Federal government, the application of the Act ordinarily is clear. However, when agencies use other financing or contractual vehicles for acquiring spaces or structures that will be used for public purposes (*e.g.*, leases), the question of Davis-Bacon coverage becomes more complicated.

Our predecessor agency, the Wage Appeals Board, first examined the application of the Davis-Bacon Act to leased facilities in *Military Housing, Ft. Drum, New York*, WAB No. 85-16 (Aug. 23, 1985) ("*Ft. Drum*"). In that case, the Department of Defense (DOD) had invited proposals to build between 600-800 housing units for military personnel and their families. The houses would be built by private developers on private land, and the developers would retain title to the properties. However, the homes would be built to government specifications, and the government would lease them for a term of 20 years.

The question of Davis-Bacon coverage was raised, and the Deputy Administrator of the Wage and Hour Division determined that the Act did not apply to construction of the leased housing. The building trades unions appealed.

Before the Board, both DOD and the Deputy Administrator asserted that the leases were not covered by the Davis-Bacon Act, making two major arguments: (1) that the leases were not "contracts for construction" within the terms of the Act; and (2) that the leased buildings were not "public buildings" under the Act because they were privately owned and on private land, and therefore ultimately might not revert to public use. In a detailed analysis, the Wage Appeals Board rejected both arguments.[3] With regard to the first, the Board observed that the Deputy Administrator's argument:

> assumes that, in order for the construction of . . . [the military] housing to be covered by the Davis-Bacon Act, the principal purpose of the contract to lease must be to construct a public building of the United States. That is an incorrect assumption. It has been the traditional position of the Department of Labor that if more than an incidental amount of construction-type activity is involved in the performance of a government contract, the Davis-Bacon Act is applicable to that work. [C]f. Secretary of Labor Op. No. DB-24 (May 8, 1962); Department of Labor, Rulings and Interpretations No. 3 issued under the Walsh-Healey Public Contracts Act. (Where more than an incidental amount of construction-type activity is involved in a supply-type contract, the Davis-Bacon Act is applicable to the former work).

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[3] The Board's decision was issued by a 2-member majority. Member Stuart Rothman filed a separate concurrence.

> A review of the RFP clearly indicates that the Department of the Army's contract to lease contemplates construction activity. Not only is the developer required to submit a detailed construction design of the housing units to be built that conforms to detailed specifications described in the RFP, but he is also subject to cancellation or termination of the contract or assessment of liquidated damages, if the units are not constructed or completed on time. Moreover, the RFP expressly provides that the developer must permit government representatives, agents, and employees access to the right of entry onto the premises of the housing units before, during and after construction for the purpose of monitoring, observing, making inquiries and taking samples of materials for testing necessary in order for the gover[n]ment to evaluate the units.

Ft. Drum, slip op. at 9-10.

The Board also rejected the Deputy Administrator's view that privately owned structures could not be "public buildings of the United States" under the Davis-Bacon Act:

> In 1947, the Department of Labor promulgated a definition of "public building" in the regulations implementing the Davis-Bacon and related acts. The definition remains the same today and it states:
>
> > The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. 29 CFR §5.2(k).[4]
>
> This definition appears to paraphrase the holding in *Peterson v. U.S.*, 119 F.2d 145 (6th Cir. 1941).[5] The *Peterson* case held that relocation of privately-owned railroad trackage in connection with a flood control project was a "public work" and the following general principles were set out:

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4 Remarkably, this 1947 regulatory definition has survived unchanged for more than 50 years. *See* 29 C.F.R. §5.2(k) (2000).

5 *Peterson* involved the scope of coverage of the Heard Act, the predecessor to the modern-day Miller Act, 40 U.S.C. §270a *et seq.*, requiring contractors that perform work on "public buildings" and "public works" of the United States to post payment bonds. The coverage language of these two bonding statutes closely parallels the coverage language of the Davis-Bacon Act.

> The term "public work" as used in the [Heard A]ct is without technical meaning and is to be understood in its plain, obvious and rational sense. The Congress was not dealing with mere technicalities in the passage of the Act in question. "Public Work" as used in the [A]ct includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds. 119 F.2d at 147.
>
> The Supreme Court in *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23, 24 (1942) broadly defined "public work" to include "any project of the character heretofore constructed or carried on either directly by the public authority or with public aid, to serve the public interest," and held that the Miller Act applied to a library built with federal funds for a private college, Howard University. In *Irwin*, the court abandoned its earlier proposition that similar bonding requirements in the Heard Act were applicable only when title passed to the government upon partial payment but not when title remained in the contractor until after completion. . . . The *Irwin* decision relied upon the *Peterson* case.

Id. at 11-13 (footnotes omitted). The *Ft. Drum* Board similarly was unmoved by the argument that the housing units might lose their "public character" at the expiration of the Army's 20-year lease and revert to private uses in the hands of their private owner/developers:

> [A]ny structure constructed pursuant to the direct authority of a Federal agency, or with Federal funds, for the public benefit, may well be converted to a private use at some time in the future. The fact that the Department of the Army is only assured of the use and benefit of the Ft. Drum housing for 20 years does not diminish the "public" nature of these structures.

Id. at 17.

The question of Davis-Bacon coverage of leased construction was revisited by the Wage Appeals Board in *Outpatient Clinic, Crown Point, Indiana*, WAB No. 86-33 (June 26, 1987) (*Crown Point*), involving a privately-owned building constructed to Veterans Administration (VA) specifications as part of a 15-year lease arrangement. Using essentially the same analysis applied in the *Ft. Drum* case, the Board majority similarly concluded (a) that the lease contemplated substantial construction activity and therefore was a "contract for construction" within the terms of the Davis-Bacon Act, and (b) that the VA clinic was a "public building" within the Secretary's definition at 29 C.F.R. 5.2(k).

The Board's 1987 *Crown Point* decision met with opposition within the Executive Branch. In June 1988, the Justice Department's Office of Legal Counsel (OLC) issued a legal opinion to the Veterans Administration in which OLC concluded that the Wage Appeals Board had erred, and that

there was "nothing in the language of the statute to suggest that it was meant to extend beyond construction contracts to leases."[6] *Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, 12 U.S. Op. Off. Legal Counsel 89 (June 6, 1988) ("*1988 OLC Opinion*") at 94. Nonetheless, the Wage Appeals Board's decision finding the project covered by the Davis-Bacon Act was affirmed on appeal. *Building and Construction Trades Dep't, AFL-CIO v. Turnage*, 705 F.Supp. 5 (D.D.C. 1988).

The Justice Department's OLC revisited the "leased construction" question in 1994, and concluded that the 1988 OLC opinion was erroneous. In a detailed analysis reviewing (a) the historical development of the Davis-Bacon Act, (b) prior decisions of the Attorney General and (c) case law before the courts, Labor Department and Comptroller General, OLC concluded that "the determination whether a particular lease-construction contract is a 'contract . . . for construction of a public building or public work' within the meaning of the Davis-Bacon Act will depend upon the details of the particular agreement." *Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, 18 U.S. Op. Off. Legal Counsel 109 (May 23, 1994) ("*1994 OLC Opinion*") at 124. "To regard all lease-construction contracts as outside the scope of the Davis-Bacon Act is contrary to the plain language of the Act: many such leases are in fact contracts that call for the construction of a public work. The difficulty is in determining whether a particular lease is really a contract for construction of a public building or public work, or just a contract to secure the use of private premises on a temporary basis." *Id*. at 113.

The Wage and Hour Administrator forwarded the 1994 OLC Opinion to procurement agencies as an attachment to AAM 176, accompanied by copies of the Wage Appeals Board's *Ft. Drum* and *Crown Point* decisions and the district court's decision in *Building and Construction Trades Dep't, AFL-CIO v. Turnage*. In her guidance memo to the agencies, the Administrator quoted the following text from the 1994 OLC Opinion:

> . . . [F]actors to be considered in determining whether a lease/construction contract calls for construction of a public building or public work may include "[the] length of the lease, the extent of government involvement in the construction project [such as whether the building is being built to Government requirements and whether the Government has the right to inspect the progress of the work], the extent to which the construction will be used for private rather than public purposes, the extent to which the costs of construction will be fully paid for by the lease payments, and whether the contract is written as a lease solely to evade the requirements of the Davis-Bacon Act."

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[6] The particular term used in the 1988 OLC Opinion – "construction contracts" – is not actually found in the text of the Davis-Bacon Act itself. Although the distinction is subtle, it can be argued that the statutory language – "contract[s] . . . for construction, alteration, and/or repair . . . of public buildings" – has broader application than the term "construction contracts." At the very least, courts and the Labor Department repeatedly have construed the "contract[s]. . . for construction" text under the Davis-Bacon Act and the Miller Act (and its predecessor) as extending beyond what are viewed narrowly as "construction contracts."

AAM 176 at 2, quoting *1994 OLC Opinion* at 11 n.10.[7] In sum, both the Labor and Justice Departments share the view that the question whether a structure acquired by the Federal government through lease or other non-traditional financing is covered by the Davis-Bacon Act must be answered by examining the full context of the transaction.

Finally, we note that Federal regulations play a role in this issue. As noted above, for more than 50 years it has been the Labor Department's view that a covered public building or work "includes building or work, the construction, prosecution, completion or repair of which . . . is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public *regardless of whether title thereof is in a Federal agency*." 29 C.F.R. §5.5(k) (emphasis supplied). In addition, under the Secretary's regulations contracting agencies are directed to include Davis-Bacon provisions in "any contract in excess of $2,000 which is entered into for the actual construction, alteration and/or repair . . . of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution . . ." 29 C.F.R. §5.5(a). And under the Federal Acquisition Regulations, contracting agencies must include Davis-Bacon wage rates in nonconstruction contracts involving some construction work when "[t]he contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the Davis-Bacon Act" which is "physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract." 48 C.F.R. §22.402(b)(ii), (iii) (2000).

B. Application of these principles to the BLM's Phoenix field office project.

Against this legal backdrop, it is clear that the BLM's Phoenix field office lease with Federal Builders is a "contract . . . to which the United States . . . is a party, for construction . . . of [a] public building" within the meaning of the Davis-Bacon Act, and therefore subject to the Act's prevailing wage requirements. The contract contemplates substantial new construction activity for the public's benefit, *i.e.*, BLM's occupancy for an extended period.

BLM offers a series of arguments opposing Davis-Bacon coverage, but we find each of them unpersuasive.

One argument relates to the length of the lease term. BLM notes that the 1994 OLC Opinion states that a building constructed pursuant to a (hypothetical) 99-year lease by a Federal agency would be covered by the Davis-Bacon Act. Juxtaposing this *very* long hypothetical lease with the much shorter 15-year lease of the Phoenix facility, BLM asserts that the field office lease falls outside the range of coverage contemplated by the 1994 OLC Opinion and AAM 176. But in seizing on the hypothetical reference to a 99-year lease, BLM removes the statement from its full context:

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[7] Although not quoted by the Administrator in AAM 176, this footnote in the 1994 OLC Opinion ends by with OLC's summary observation that "we further believe that the fact that a novel financing mechanism is employed should not in itself defeat the reading of such a contract as being a contract for construction of a public building or public work." *Id.*

> While the public generally has an undeniable interest in paying as little as possible for the construction of public works, the purpose of the Davis-Bacon Act was precisely to subordinate that interest to the extent necessary to set minimum wage standards for such construction work. If an agency decides to construct a public work – not just acquire a privately-owned building – that agency cannot evade the purposes of this country's labor laws by clever drafting. This does not mean that construction related to any lease is "construction, alteration and/or repair" of a public work within the meaning of the Act – but neither can the "plain language" of the Act be read as declaring that *a 99-year lease of a brand new building* that would never otherwise have been built is not the construction of a public work. The answer in any particular case will depend on the facts.

1994 OLC Opinion at 116 (emphasis supplied). Thus the reference to a "99-year lease" was not offered by OLC as a "standard" by which to judge Davis-Bacon coverage, but as a relatively extreme illustration used to make the unremarkable point that long-term leases of custom-built facilities are a common technique used by enterprises (including governments) to acquire new buildings. The lease at issue in the *Ft. Drum* case was for a term of 20 years; in *Crown Point*, 15 years (with an additional 5-year option). The term of the BLM's Phoenix lease is 15 years, with the right to terminate after 10 years. This slightly shorter term is a difference merely in degree, not in substance.

Another argument relates to the fact that upon the conclusion of the lease term, the Phoenix building may no longer be used by the Government. BLM declares that "Most of the buildings that BLM vacates at the end of a lease term are used for commercial activities such as car sales or heavy equipment sales," and that "Over the [40 year] life of the building, the use of the building will be for private use much more than public use." BLM Petition at 2, 3. Here again, our focus must be on the substantive use of the property under the contract itself, because the "ultimate" use of the property – which is largely a matter of speculation – is of little decisional significance. After all, even a building directly constructed and owned by the Federal government may be relinquished at some point, as the Wage Appeals Board explicitly noted in the *Ft. Drum* case. *See* p. 8, *supra*. To paraphrase the *Ft. Drum* Board, the fact that BLM is only assured of the use and benefit of the Phoenix field office for 15 years does not diminish the "public" nature of this structure.

Similarly, BLM attempts to raise doubt whether the Phoenix lease is a "contract for construction" by distancing itself from control over the construction activity, arguing that its contract with Federal Builders merely expresses various performance goals for the leased structures without establishing particular specifications. We disagree. Davis-Bacon coverage does not depend on the contracting agency exercising complete authority over the building that will be leased; indeed, in its *Ft. Drum* decision the Wage Appeals Board determined that the Act applied to a lease construction contract even while explicitly recognizing that the developers had some flexibility with regard to building design, materials and equipment. *Ft. Drum* at 15. But BLM's argument on this point also fails because it conflicts with the record in this case: the contract with Federal Builders includes extensive materials that are best described as construction specifications for the project (plus

attachments). *See* AR Tab D, Lease Contract at 63-97. In addition, we note that BLM specifically reserved the right to make construction inspections of the project. *Id.* at 97.

With regard to whether BLM entered into a lease arrangement in order to evade Davis-Bacon coverage – one of the criteria identified by the Administrator and OLC as a possible concern – the agency argues before this Board that its solicitation for leased space in Phoenix did not *require* offerors to construct a new facility, and that one offeror submitted a proposal to lease existing space to the agency. Because new construction was not a prerequisite for winning the lease competition, BLM contends that the lease therefore is not a "contract for construction." This argument fails, for several reasons. A first problem is procedural: as the Administrator correctly notes, this argument was not raised directly to the Administrator below, and there is nothing in the Administrative Record before us to support the assertion that any "nonconstruction" alternative was available for meeting BLM's needs. But more importantly, the question of Davis-Bacon coverage must focus in a practical manner on the contract actually chosen by the agency, not on a range of hypotheticals. In this case, BLM opted for a contract that required the lessor to build a new facility for BLM's use; it is unnecessary for us to speculate about the myriad other ways in which BLM could have acquired space.[8]

Finally, we note that the stream of lease payments from the Federal government on the Phoenix field office will substantially pay for the cost of the facility. Indeed, BLM acknowledges that the developer would not have been able to obtain private financing for the project without being able to demonstrate to lenders that the cost of the project would be substantially recouped from the lease itself:

> The building to be constructed is in a community where the current market conditions indicate that the rental of the space subsequent to the government moving out will not be difficult. However, despite the currently strong market the successful offeror is forced to recoup the major portion of the construction costs during the firm [*i.e.*, 10-year] term of the lease. Proposals which generate more risk than this by allowing a longer payback period are extremely difficult or impossible to finance.

[BLM] Findings and Determination, AR Tab G. In our view, the fact that BLM will essentially pay almost the full cost of construction during the first 10 years of the building's 40-year useful life strongly supports the Administrator's conclusion that the BLM lease is a contract for construction of a public building under the Act and regulations, even though title does not vest in the Federal government. 29 C.F.R. §5.2(k).

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[8] As an aside, we share the Administrator's skepticism that any existing facility could meet BLM's needs without significant alteration, in light of the detailed specifications listed in the solicitation. Therefore, even if construction of a *new* facility was not mandated under the lease, it appears likely that the lease of an *existing* facility would have required substantial "alteration" to the building – alteration that also have been covered under the Davis-Bacon Act. *See* 40 U.S.C. §276a(a).

In summary, we find the circumstances of the BLM's lease of newly-constructed facilities in Phoenix, Arizona, to be similar in all material respects to the leases considered by the Wage Appeals Board in the *Ft. Drum* and *Crown Point* cases. The lease is a contract for construction of a public building, and therefore subject to the Davis-Bacon Act. The Petition for Review is **DENIED.**

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member