



In the Matter of:

Disputes concerning the payment of prevailing wage rates and proposed debarment for labor standards violations by:

ARB CASE NO. 98-164

ALJ CASE NO. 96-DBA-33

DATE: October 19, 1999

THOMAS AND SONS BUILDING CONTRACTORS, Inc., a corporation and JAMES H. THOMAS, individually and as a corporate officer

With respect to laborers and mechanics employed on Contracts No. N62472-90-C-0410 for the Wilmington, Delaware Naval Reserve Center and Contract No. F36629-93-C-0007 for the Pittsburgh Air National Guard

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioners:

J. Robert Steelman, Esq., *Procurement Assistance Corporation, Mount Holly, New Jersey*; James H. Thomas, *pro se*

For the Respondent:

Carol Arnold, Esq.; Paul H. Frieden, Esq.; Steven J. Mandel, Esq.; *U.S. Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

This case arises under the Davis-Bacon Act, 40 U.S.C. §276a *et seq.* (1994) (DBA or Act) and the Department of Labor's implementing regulations at 29 C.F.R. Parts 5, 6, and 7. The Petitioners are a construction company, Thomas and Sons Building Contractors, Inc. (Thomas and Sons), and its president, James H. Thomas.

Thomas and Sons held two roofing contracts with the United States at government facilities in different cities. Both contracts were subject to the prevailing wage requirements of the Davis-Bacon Act. The first contract was for the removal and replacement of the roof at the Naval and Marine Corps Reserve Center at Wilmington, Delaware (the Naval Reserve contract) in 1991. Government Exhibits (GX) 1a and 2. The second was for the repair and replacement of the roofs of the gymnasium and the operations building at the Pittsburgh Air National Guard in Coraopolis, Pennsylvania (the Air National Guard contract), to be performed in 1993 and 1994. GX 21.

At the request of the Navy, the Wage and Hour Division, U.S. Department of Labor (Division), conducted an investigation to determine whether Thomas and Sons had complied with the Act on the contracts. The Division found that workers on the contracts had been misclassified and underpaid, and the matter was referred for hearing before an administrative law judge (ALJ) pursuant to 29 C.F.R. §§5.11 and 5.12 (1999).

On July 30, 1998, the ALJ issued a Decision and Order Finding Violation of Prevailing Wage Determinations and Recommending Debarment (D. & O.), finding that Thomas and Sons had misclassified and underpaid workers and recommending that the Petitioners be debarred. A Petition for Review of the ALJ's Decision and Order subsequently was filed with the Board. We have jurisdiction pursuant to the Act, 40 U.S.C. §276a, and the implementing regulations at 29 C.F.R. §6.34.

The Petition for Review did not challenge the merits of the ALJ's finding that Thomas and Sons misclassified and underpaid its workers, and that the Petitioners therefore should be debarred. Instead, the sole question presented on appeal is a jurisdictional challenge, *i.e.*, whether the ALJ erred when he found that the Secretary of Labor had the authority to decide this labor standards dispute, and therefore denied Petitioners' motions to stay the enforcement proceeding before the ALJ pending the resolution of contract disputes claims that Thomas and Sons had filed against the contracting agencies.^{1/}

BACKGROUND

Under the Act and its implementing regulations, the Department of Labor's Wage and Hour Division issues wage determinations based on the locally prevailing wage rates for laborers and mechanics employed on construction projects throughout the country. *See generally* 29 C.F.R. Part 1. Federal contracting agencies are required to incorporate these prevailing wage schedules into their construction procurement contracts. 29 C.F.R. §5.5.

^{1/} In a rebuttal brief dated November 17, 1998, the Petitioners attempt to raise several additional challenges to the ALJ's Decision and Order. However, the regulations governing appeals to this Board require that "[w]ithin 40 days after the date of the decision" of the ALJ, a petition for review can be filed referring to "the specific findings of fact, conclusions of law, or order at issue." 29 C.F.R. §6.34. The ALJ's Decision and Order was issued on July 30, 1998; therefore, the additional issues first argued in the November rebuttal brief are raised out of time, and we decline to consider them.

Pursuant to regulations implementing the Copeland "Anti-Kickback" Act, 40 U.S.C. §276c (1994), construction contractors performing federal and federally funded construction contracts are required to submit payroll reports to the contracting agency on a weekly basis, and to certify that they are in compliance with the prevailing wage requirements of the Davis-Bacon Act. 29 C.F.R. §§3.3, 3.4. The weekly payroll reports include the name and address of each worker, classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. 29 C.F.R. §3.4.

Both of Thomas and Sons' roofing contracts at issue here incorporated by reference the Wage and Hour Division's General Wage Decisions establishing wage rates and fringe benefits for specific trades in the geographical areas where the Naval Reserve and the Air National Guard contracts were to be performed. These wage determinations included specific wage rates and fringe benefits for roofers and laborers. *See* attachments to GX 1 (Naval Reserve contract) and GX 20 (Air National Guard contract).

The Naval Reserve contract specified the work to be performed as

the complete removal of the existing slag surfaced, built up roof membranes, membrane flashings, metal flashings and insulation down to the structural concrete and steel substrates. The provision of new gravel surfaced, 4-ply glass built-up roof membranes, insulation and bituminous and sheet metal flashings and incidental related work.

GX 1A (The Naval Reserve contract). Similarly, the Air National Guard contract required the contractor to provide

all operations necessary to remove and dispose of the existing membrane, aggregate, insulation, gravel-stop and flashings, vents, roof drains and down spouts. Remove and dispose of asbestos containing roofing material. Install an aggregate coated BUR system with four plies of asphalt coated fibrous glass felts. Provide rosin paper and base sheets nailed to the wood deck. Provide two layers of insulation, roof access hatch, power roof exhausters, protective pads, crickets, down spouts[.]

GX 21, page 4.^{2/}

^{2/} The record in this case shows that the tasks actually performed by the workers at the two sites were consistent with the scope of work described in the contract documents. On the Naval Reserve contract, workers testified that they "prepped" the roof area, put fiber board or insulation down, installed flashings, T. (transcript of hearing) 21-22, 23-26, 36, ripped off the old roof, T. 45-46, 51, cut, ripped and replaced roof sections, rolled plies, installed flashings, and cleaned up on the roof and the ground at the end of the day. T. 57-60. Workers on the Air National Guard contract testified to similar duties: tearing off old rubberoid, paper, tar and insulations, removing the roofing down (continued...)

During a preconstruction conference in 1991, GX-4, the contracting officer on the Naval Reserve contract made it clear to James Thomas and other representatives of Thomas and Sons that the area practice in the construction industry was that "all work being done on a roof was to be performed by roofers," T. 220, and that all workers on a roof were to be considered roofers. *Id*; T. 223. The contracting officer reiterated this point in two other meetings with Petitioners, *i.e.*, that all workers doing work on a roof were to be classified as roofers. T. 228, 231. The contracting officer on the Air National Guard contract similarly discussed the DBA labor standards with Petitioner at a pre-performance conference in 1993 T. 626, 704; GX 22. He explained that Petitioners were required to pay the prevailing rate for specific trades such as roofers. T. 627.

Later, during performance of the contracts, the contracting officers became aware that Petitioners were paying workers who performed roofers' work at the laborers' rate. The certified payrolls for the Naval Reserve contract showed that in many weeks Petitioners listed only laborers working on the project, or only one or two roofers with mostly laborers listed, when roofing work was being performed. GX 5. The certified payrolls for the Air National Guard contract showed a similar practice of misclassifying most workers as laborers during weeks when roofing work was being performed. GX 20.

The contracting officers notified Petitioners that the practice of paying workers performing roofers' duties at the laborers' rate was improper. In these localities, all workers who perform any work on repair or replacement of a roof should be paid at the roofers' rate. *See* GX 6 (Naval Reserve contract); GX-26 (Air National Guard contract). Unable to agree with Petitioners on this issue, the contracting officers withheld funds due under the contracts. GX 7 (Naval Reserve contract), GX-26 (Air National Guard contract). After confirmation from the Department of Labor that any workers involved in the removal of old roofing material and re-installation of new roofing system should be classified and paid as roofers, the Department of the Navy withheld payment of \$10,000 due Petitioners on the Naval Reserve contract until Petitioners submitted evidence that the workers had been properly compensated. GX 10. The Department of the Air Force withheld \$20,000 for the improper classification and wage payments to Petitioners' workers on the Air National Guard contract. GX-32.

The matter was referred to the Office of the Administrative Law Judges for a hearing before an ALJ, pursuant to an Order of Reference from the Administrator of the Wage and Hour Division. The Order of Reference sought back wages for the misclassified employees and debarment of Petitioners. Hearings were held in Philadelphia and Pittsburgh on February 3-4, 1998 and April 28-29, 1998, respectively.

THE ALJ DECISION

²(...continued)

to the subsurface decks, bringing hot tar from the kettle on the ground up to the roof by bucket and crane, rolling plies of paper, laying rubberoid, mopping hot tar, shoveling gravel into the crane bucket to be raised to the roof, spreading gravel on the roof with a machine or a rake, installing flashings and copings, operating the kettle (which heats the tar), and helping with clean up at the end of the day. *See* D. & O. at 25-28 (summarizing worker's testimony on duties performed).

In a detailed and thorough decision, the ALJ found first that Petitioners could not challenge the wage determinations themselves because such challenges may only be made to the Administrator prior to the award of a contract. D. & O. at 38.

Next, following the Wage Appeals Board's decision in *Fry Brothers Corp.*, WAB Case No. 76-06 (June 14, 1977), the ALJ noted that where the wage determination is based on wage rates established by collective bargaining agreements in a locality, the classifications of workers used in the collective bargaining agreements are applicable to all construction contracts performed in that area. He found that the Administrator had proven that all work related to the replacement and repair of a roof in these localities is considered "roofers" work and must be compensated accordingly. The Petitioner's records on both contracts show that there were many days when roofing work was being performed, but the certified payrolls showed either no roofers working or only one or two. The ALJ found that "[Petitioners] made a deliberate and informed choice in misclassifying [their] workers after being repeatedly informed of the area practices requiring that all employees performing work of a nature performed by the named employees, under these contracts, [must] be classified as 'roofers' work." D. & O. at 41.

The ALJ also found that the Department of Labor made "an extraordinary effort" to explain to the Petitioners their obligations to classify workers according to area practice, and also to make clear to Petitioners that being a nonunion contractor did not relieve them of their obligation to follow those area practices. *Id.* In the case of both contracts, the contracting officers raised the misclassification of workers orally with the Petitioners, and also numerous times in writing. *Id.* at 42. The ALJ found that Petitioners had a duty to be certain that their employees were properly classified and that when Petitioners misclassified and underpaid their workers they did so at their own peril of being assessed back wages and debarred. *Id.* at 43.

The ALJ rejected Petitioners' argument that the contracting agencies had an affirmative obligation as part of the bid solicitation to advise Thomas and Sons of the particular area practices that would be relied upon regarding classification of employees on the roofing projects. The ALJ noted that the Federal Acquisition Regulations (FARs) place the burden on the government contractor to classify and pay workers appropriately. D. & O. at 44. The ALJ held that "[i]t is not unreasonable for a contracting agency to rely on a roofing contractor to adhere to labor laws and to know, based on area practice, which of his employees must be classified as a laborer, sheet metal worker, painter, or roofer." *Id.* at 45.

The ALJ adopted the back wage calculations of the Department of Labor wage specialist, with the exception of the wage computation for two employees on the Naval Reserve contract who worked as "kettlemen" and who were entitled to a smaller difference in back pay. D. & O. at 46. As to the Air National Guard contract, the ALJ found that since Petitioners did not keep accurate records of the hours worked by many employees in each classification, they were entitled to payment at the roofers' rate. *Id.* at 46. The ALJ found that Petitioners owed \$5,643.88 in back wages on the Naval Reserve contract and \$27,079.07 on the Air National Guard contract. *Id.*

In connection with the debarment issue, the ALJ found that Petitioners had ample notice of the area practice that all workers performing work on the repair and replacement of a roof must be

classified as “roofers.” Certainly, by the time of the Air National Guard contract, which was later in time than the Naval Reserve contract, Petitioners were on notice that they must ascertain and follow the area practice. The ALJ found that Petitioners made no “legitimate effort” to determine the area practice, and he rejected their arguments that they could have relied on the contracting agencies’ advice or remained unaware of this requirement until explicitly notified of it. He also rejected Petitioners’ argument that as a nonunion contractor it did not have to follow an area practice based on the craft assignments of unionized contractors under collective bargaining agreements. *Id.* at 47. The ALJ concluded that Petitioners were guilty of more than negligence; quoting *L.T.G. Construction Co.*, Wage Appeals Board (WAB) Case No. 93-15 (Dec. 30, 1994), the ALJ found that their conduct evidenced “an intent to evade or a purposeful lack of attention to a statutory responsibility.” He concluded that Petitioners “intentionally misclassif[ied] and underpa[id]” their workers, which justified debarment. D. & O. at 48.

Petitioners also raised a broader challenge to the ALJ’s authority to decide the case. With regard to the worker classification issue, the Petitioners asserted that the contracting agencies’ failure to provide more information about worker classification as part of the procurement contract constituted a “defective or ambiguous specification or a misrepresentation” (D. & O. at 40) which properly should be resolved by the contracting officers and the Armed Services Board of Contract Appeals (ASBCA) through the contract claims dispute process, and not by the Labor Department through a Davis-Bacon Act enforcement proceeding. The ALJ disagreed with Petitioners’ analysis, *id.*, finding that the classification issue properly was before the Department. D. & O. at 45.^{3/} This last holding by the ALJ is the only issue that Petitioners appealed to the Board in their Petition for Review. *See* note 1, *supra*.

DISCUSSION

The Davis-Bacon Act provides that all covered contracts

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. §276a(a). The regulations implementing the Act require certain clauses to be included in every covered contract, including a clause providing that:

^{3/} Based on these theories, during the course of the litigation the Petitioners moved that the ALJ stay the Labor Department proceeding pending resolution of Thomas and Sons’ contract claims against the contracting agencies. The ALJ denied the motions.

Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

29 C.F.R. §5.5(a)(9). Clauses containing similar language were included in each of the procurement contracts involved here. *See* GX 24, ¶ 10.

In their Notice of Appeal (Petition for Review) of the ALJ decision, Petitioners contested only the ALJ's decision that he had jurisdiction to decide the case, and therefore was not compelled to stay the Labor Department proceeding while Thomas and Sons litigated a contract claim against the contracting agencies. The Petitioners advance this line of argument in favor of reversing the ALJ decision: (1) The classification matters (*i.e.*, the alleged failure of the contracting agencies to inform Thomas and Sons of the specific local trade classification practices) implicates defects in the procurement contracts; (2) Claims stemming from procurement contract disputes are covered by the disputes clause of the contracts; (3) The Labor Department and the Armed Services Board of Contract Appeals have "dual jurisdiction" over the worker classification issues in this case; and (4) The ALJ therefore should not have decided the case, but instead should have stayed the proceeding pending the resolution of Petitioners' contract claims by the contracting officer or ASBCA. *See generally* Petition for Review. We join the ALJ in rejecting this argument.

The preeminent authority of the Secretary of Labor (and the Labor Department) to determine worker classification issues under the Davis-Bacon Act is well-established. Under the Act, contractors on federal construction projects are required to pay laborers and mechanics locally prevailing wage rates as "determined by the Secretary [of Labor] to be prevailing." 40 U.S.C. §276a. Under Reorganization Plan No. 14 of 1950, it is the Secretary of Labor who is authorized to establish "standards, regulations, and procedures" that must be followed by the contracting agencies. 5 U.S.C. Appendix.

The Labor Department's central role in making enforcement determinations is emphasized in federal regulations. The Secretary has the sole authority to issue prevailing wage determinations under the Act, and the correctness of the wage determinations are not subject to judicial review. *United States v. Binghamton Construction Co., Inc.*, 347 U.S. 171, 177 (1954). The regulations implementing the Davis-Bacon Act expressly require all federal construction contracts to include a clause specifying that disputes over the DBA labor standards requirements will be referred to the Labor Department for decision, and will not be subject to the general disputes clause of the contract. 29 C.F.R. §5.5(a)(9).^{4/} The Federal Acquisition Regulations similarly mandate that labor standards disputes are reserved to the Labor Department for decision, and are outside the normal contract

^{4/} Thomas and Sons' Naval Reserve and Air National Guard contracts each included such provisions.

disputes clause of a construction procurement contract. 48 C.F.R. §52.222-14. Both this Board and its predecessor, the Wage Appeals Board, repeatedly have emphasized that when interpreting Davis-Bacon labor standards questions, the contracting agencies and their officers have no ability to make an authoritative determination; this power is reserved to the Secretary and her designees. *The Law Company, Inc.*, ARB Case No. 98-107 (Sept. 30, 1999), slip op. at 11; *Dick Enterprises, Inc.*, ARB Case No. 95-046A (Dec. 4, 1996); *Swanson's Glass*, WAB Case No. 89-20 (Apr. 29, 1991); *More Drywall, Inc.*, WAB Case No. 90-20 (Apr. 29, 1991); *Arbor Hill Rehabilitation Project*, WAB Case No. 87-04 (Nov. 3, 1987); *Tollefson Plumbing and Heating*, WAB Case No. 78-17 (Sept. 24, 1979); *Metropolitan Rehabilitation Corp.*, WAB Case No. 78-25 (Aug. 2, 1975).

The authority of the Secretary to interpret the labor standards questions also has been recognized by the adjudicators of government contracts disputes. In *Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425 (Fed. Cir. 1991), a case strikingly similar to the matter before us, the classification dispute also involved whether all employees who worked on a roof as part of a roofing contract must be classified and paid as roofers. The contracting officer withheld funds due under the contract because of alleged underpayment of certain employees at the lower laborer's rate rather than the higher roofer's rate. The contractor appealed to the Board of Contract Appeals which dismissed the portion of the claim that dealt with the wage rates and classification of workers. The court of appeals affirmed, holding that

the essence of [the contractor's] complaint relates to the wage rate it had to pay all workers doing roofing work, and the listing of job categories and wage rates in the contracts is surely one of the labor standards provisions. The dispute here thus 'aris[es] out of' the labor standards provisions of the contracts, and the Disputes provisions require that it be resolved by [the Department of] Labor.

925 F.2d at 1429. *See also Nello L. Teer Co. v. United States*, 348 F.2d 533, 536-38 (Ct. Cl. 1965), *cert. denied* 383 U.S. 934 (1966) (agreeing with Corps of Engineers Claims and Appeals Board that interpretation of wage determination was solely within the province of the Secretary of Labor).

In short, relevant precedent plainly affirms the Secretary's (and the ALJ's) authority to determine the correct trade classifications for Thomas and Sons' employees on the Naval Reserve and Air National Guard contracts. Furthermore, because the question presented in this matter arises out of the labor standards provisions of the contracts, it is not subject to the general contract disputes clause of the procurement contracts. It was fully appropriate for the ALJ to deny Petitioners' motions to stay the proceeding below, and to issue his determination in the case.

Accordingly, the Petition for Review is **DENIED**. The remedies ordered in the ALJ's Decision and Order (D. & O. at 48-49) are **AFFIRMED**. It is further **ORDERED** that Petitioners'

names be transmitted to the Comptroller General for placement on the list of persons and firms ineligible for award of any contract or subcontract of the United States or the District of Columbia for a period of three years. 40 U.S.C. §276a-2; 29 C.F.R. §5.12(a)(2).

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member