U.S. Department of Labor

U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street - Suite 900
Cincinnati, Ohio 45202

DATE ISSUED: August 29, 1991

CASE NO.: 90-DBA-15

IN THE MATTER OF:

Proposed debarment for labor standards
violations by:

U.S. FLOORS, INC.
90-DBA-15
Prime Contractor

PETER COLEMAN, Individually
and as President

VALENTINA COLEMAN, Individually
and as Vice-President

With respect to laborers and mechanics
employed by the contractor under Contract
No. F33601-85-C0370 (Floor Renovation,
Bldg. 5) at Wright-Patterson AFB, Ohio

APPEARANCES:

Phil B. Hammond, Esq.
Hammond & Tellier, P.C.
Phoenix, Arizona
For the Prime Contractor and the Officers

Benjamin T. Chinni, Esq.
U.S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For the Secretary

BEFORE: RUDOLF L. JANSEN

Administrative Law Judge

DECISION AND ORDER

This case arises under the Davis-Bacon Act, as amended, (40 U.S.C. Section 276a et seq.), the Contract Work Hours and Safety Standards Act (40 U.S.C.. Section 327 et seq.), and the regulations issued pursuant thereto at 29 C.F.R. Parts 5 and 6. The Administrator of the Wage and Hour Division, U.S. Department of Labor, Employment Standards Administration, (hereinafter DOL), issued an Order of Reference on November 1, 1989 which determined that U.S. Floors, Inc., its President, Peter Coleman, and its Vice President, Valentina Coleman, disregarded their obligations to employees within the meaning of the Davis-Bacon Act and, therefore, should be debarred. Attached to the order of Reference was the Administrator's charging letter which itemized underpayments and compensation to various classes of laborers and carpenters employed on the project.

The charging letter determined that the contractor had failed to pay prevailing wage rates, failed to pay the correct overtime rate for hours worked in excess of 40 per week, and had submitted falsified payroll records. The Wage and Hour Division Investigator determined that nine employees of the contractor had been underpaid $45,034.97 in basic wages and $2,145.90 in overtime compensation. The total back wages amounted to $47,180.87. It was determined that some carpenters who were required to be paid $19.90 per hour were paid between $7.50 and $12.50 per hour and that laborers who were to be compensated at the rate of $16.24 per hour were paid between.$6.00 and $9.50 per hour.

Following the investigation by the Wage and Hour Division, $33,525.96 was withheld from the unpaid balance due the contractor which was later distributed to the underpaid employees. Additionally, the contractor also paid the difference between the withheld amount and the amount due for distribution to the employees so that at the time of the hearing of this case, all of the underpaid amounts of back wages had been satisfied.

The hearing in this case was held on January 17, 1991 in Dayton, Ohio. Each of the parties had full opportunity to present evidence[1] and argument.[2] The Findings of Fact and Conclusions of Law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. Any exhibit or document admitted as evidence of record has been fully considered in

[1] The record of this case was left open to receive the deposition of Kenneth R.Goodman. (Tr. 15) It was submitted on June 28, 1991 as an attachment to the company's original brief. The deposition is received as Respondent Post Hearing Exhibit 1. (RPHX 1)

[2] In this Decision, Plaintiff (PX) refers to the exhibits of U.S. Department of Labor, Respondent (RX) refers to the exhibits of U.S. Floors, Inc. and Peter and Valentina Coleman, and "Tr." refers to the Transcript of the hearing.

arriving at the decision herein. The parties were directed to file simultaneous post-hearing original briefs on April 30, 1991 and simultaneous reply briefs by May 15, 1991. Each of the parties complied with those filing deadlines.

ISSUE

The single issue is whether U.S. Floors, Inc., Peter Coleman, President, and Valentina Coleman, Vice-President, should be placed on the Comptroller General's ineligible list for receiving federal government contracts for a period not exceeding three years from the date of publication.

FINDINGS OF FACT

U.S. Floors, Inc. is a corporation having its main office located in Phoenix, Arizona. The company engages in the installation and repair of primarily hardwood flooring. Peter Coleman is the President of the corporation and Valentina Coleman who is his wife, is the Vice-president. On August 30, 1985, Valentina Coleman executed a contract for the repair/refinish of wood flooring in a building located at Wright Patterson Air Force Base, Ohio. The agreed initial contract price was $195,748.00. (PX 4) Two subsequent contract modifications agreed to by Peter J. Coleman as President raised the total contract price to $320,858.58. (PX 4) The contract and amendments included a Wage Determination which provided the wages to be paid various classes of employees including carpenters and laborers. The contract also contained provisions specifying overtime compensation as provided by the Contract Work Hours and Safety Standards Act.

Robert A. Kunz who is a Compliance Officer with the Respondent testified concerning his investigation of the contractor. He commenced his investigation in the middle of April of 1987 and contacted Peter J. Coleman, in the middle of May 1987. (Tr. 31-34) Mr. Coleman initially advised Mr. Kunz that he had not paid his employees hourly rates but that they were paid on "group piece-rates". The rate was based upon the amount of square footage which had been completed upon a weekly basis. (Tr. 35) He also indicated that two sets of records were maintained, one in his office in Phoenix, Arizona and another set of completed records were provided to the U.S. Air Force which indicated that he had paid wages which were consistent with the amounts shown in the wage determination. (Tr. 35)

In his initial contact with Mr. Coleman, Mr. Kunz requested that he produce the records demonstrating the actual wages paid to his employees. Mr. Coleman refused to produce the records and withheld production until November 4, 1987. Mr. 36-43) Following receipt of Mr. Coleman's records, Mr. Kunz prepared his summary of unpaid wages for the nine individuals involved. That summary determined underpayments in the amount of $45,034.97. (Tr. 45; PX 6) A summary was also prepared for overtime work which determined underpayments in the amount of $2,145.90. (PX 8) Mr. Kunz also obtained copies of the certified payrolls which had been submitted by the contractor to the U.S. Air Force and he concluded following his investigation that the certified payrolls

were, in fact, not accurate. (Tr. 61, 62) The certified payrolls simply did not reflect the rates of compensation actually paid to the employees noted. (PX 9) The payrolls were signed by Valentina Coleman, as Vice-president of the contractor.

Mr. Kunz concluded that the employees who used tools of the trade such as devices to pry up the flooring, devices to fit the wooden block, devices to lay down the flooring and other tools, were considered to be carpenters. The employees who did not use tools, in other words, those who were carriers of equipment or supplies, or those who cleaned up the premises were considered to be Group 2 Laborers. (Tr. 65, 66) He was not aware of a wage classification for a hardwood floor layer or hardwood floor mechanic. (Tr. 66)

The Respondent produced the testimony of Donald Perkins who was a supervisor with the company on the Wright Patterson job. Mr. 94, 95) Mr. Perkins has sixteen years experience within the construction industry practically all of which was spent in installing flooring. (Tr. 95) He testified at length concerning the job at Wright Patterson AFB. It consisted of two parts. The initial part consisted in sanding and refinishing existing tongue and groove hardwood flooring in one area of the building. The second part of the job was the removal of existing industrial wood block which was approximately two by five inches each. (Tr. 95, 96) The building involved was approximately three hundred thousand square feet of which a portion of the space was used for office cubicles for management personnel. A few areas had dust sensitive equipment which had to be environmentally controlled, and another part of the building was used for manufacturing parts either for existing aircraft or for prototypes to be used in areas such as the shuttle missions. Some of that activity was under very high security. (Tr. 96, 97) The contract did not cover refinishing the entire area under roof but rather two hundred thousand to two hundred and fifty thousand square feet of the entire structure. A portion of the job dealt with tearing off and replacing and a part of the job was refinishing existing flooring.

Mr. Perkins testified that the wage determination carried no designation for the wood finishers' position. (Tr. 99) The removal of existing flooring was simply a labor function which was performed primarily by use of a crowbar. (Tr. 100) That was not a skilled position. The finishing of the existing flooring included the operation of a scarifier which was used to remove approximately the top quarter inch of the floor in order to eliminate any metal chips or other debris which had lodged itself in the wood and to remove any grease that was on the floor. (Tr. 100) Following the removal of the top quarter inch of the existing flooring, a belt driven drum sander was used to achieve a smoothness of the wood over which was applied a polyurethane. The polyurethane is a varnish-like finish. Approximately three coats had to be applied. (Tr. 101) In the areas of the building where the old flooring was removed and replaced with new flooring, the surface area would then have to be prepared in order to receive the new flooring. All of the old adhesive had to be removed and the concrete roughed-up in order to get a good bond with the new flooring. Once the flooring was installed, it also had to be sanded and polyurethane applied.

Mr. Perkins also described problems which they had with the Air Force in that they were not permitted to work upon larger areas of the flooring at a single time. Smaller areas were designated which took more time to complete. (Tr. 102) He also described problems with vapors from the polyurethane which caused employees within the building to become dizzy or experience headaches which affected their performance. (Tr. 103) The contract called for working hours to be from Monday through Friday between the hours of 7:30 a.m. and 5:00 p.m. (RX 23) Mr. Perkins 'testified that the Air Force requested that they apply the polyurethane after 5:00 p.m. during the week or possibly on Saturday when there was nobody in the building. Mr. 104) Arrangements had to be made with the proper authorities to work outside of normal working hours. (Tr. 105) Working outside of normal hours caused a delay in the time when the entire job could be completed. (Tr. 106)

Peter Coleman requested an extension of the work period for the contract from the Contract Administrator on September 22, 1986. (RX 2) He noted the reason for the delay was that they were unable to realize anticipated production because allowable work areas had been reduced. That contention was consistent with the testimony of Mr. Perkins.

On September 19, 1986, Peter J. Coleman requested permission from the Contract Administrator to work outside of regular work week hours on all of the remaining Saturdays of the contract. (RX 1) As a basis for the request, Mr. Coleman indicated that the number of shop workers that would normally be exposed to the fumes of the polyurethane finish would be reduced. On October 7, 1986, the Contract Administrator requested that the polyurethane floor sealant only be applied during non-duty hours. (RX 3) Apparently a temporary arrangement was worked out on October 7, 1986, whereby the hours were altered for the application of the polyurethane finish, but in a letter from Mr. Coleman, he indicated that his production would fall by an approximate twenty-five to thirty percent. (RX 4) By letter dated October 17, 1986, Mr. Coleman requested relief from the change in work hours either in the form of increases in available work areas or additional compensation for the loss in production that they had experienced. (RX 5) On October 27, 1986, Mr. Coleman made a request for compensation for the additional cost of approximately thirty-one thousand dollars plus ten percent overhead and ten percent profit adjustment for a total of $37,510.00 because of the adjustment to the original contract. (RX 6)

A February 2, 1987 memorandum indicates that telephone agreement was made between Peter Coleman and the Contract Administrator to install flooring in one area of the building at no additional charge to the government and to work on Saturdays. The Saturday work was also to be at no additional cost to the government. (RX 7) A February 6, 1987 memorandum from the Air Force extended the period for completing the job, but also denied additional compensation due to the loss of efficiency as a result of the work hour change. The memorandum indicated that the Air Force could not verify the estimated twenty five percent loss figure nor could they justify the one thousand dollar per week additional cost which was quoted by Mr. Coleman. The memorandum indicated that no increase could be approved based upon the earlier October 27, 1986 letter. (RX 8) This memorandum would seem to allow for the later submission of data establishing the

basis for both the estimated twenty-five percent loss and the one thousand dollar additional weekly cost. In subsequent letters of March 18, 1987 and April 22, 1987, Peter J. Coleman attempted to work out some arrangement with the Air Force to establish the losses which they incurred due to the change in work hours. (RX 10, 11) The Air Force, finally on September 9, 1987, denied the request for additional compensation. (RX 16) Only approximately ten to fifteen percent of the total work performed on this contract was done outside of normal working hours. Tr. 122)

The contractor also took the deposition of Kenneth R. Goodman. Mr. Goodman had worked on the project at Wright Patterson from July 1986 until June 1987. (RPHX 1) Mr. Goodman began as a floor mechanic and later became superintendent of that project. He was requested by the contractor to make a wage survey of the hourly rates that were paid in the Dayton, Ohio area. He surveyed five different employers in the Dayton, Ohio area who did hardwood flooring by contract and determined basic wages for the flooring employees in non-union contracts.

CONCLUSIONS OF LAW

The standard for debarment in a Davis-Bacon Act proceeding is set forth in the regulations at 29 C.F.R. Section 512 (a)(2), which reads in part as follows:

> In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment . . . .

This standard is applicable to the present case since the wages were paid under a Davis-Bacon Act contract.

In an administrative hearing, the proponent of the Order of Reference, in this case the DOL bears the burden of going forward with the evidence. If DOL meets the initial burden of presenting a prima facie case, the respondent then bears the ultimate burden of proof. Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25 (7th Cir. 1975). In an administrative hearing, the required standard of proof is a showing by a preponderance of the evidence. Sea Island Broadcasting Corp. of S.C. v. F.C.C., 627 F.2d 240 (D.C. Cir. 1980), cert. denied, 449 U.S. 834 (1980); Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984).

The appropriate standard in a Davis-Bacon Act case is to determine whether those sought to be debarred have disregarded their obligations to employees. This record evidences the fact that prevailing wage rates were not paid to nine employees of the company. Acknowledgment has been made of that fact since the company paid $45,034.97 in underpayments as determined by the Compliance Officer. The record also

discloses that the certified payrolls were falsified in order to give the appearance that prevailing rates of compensation had been paid. The Compliance Officer testified that the company also did not pay proper fringe benefits as required by the wage determination. Standing alone, the submission of falsified payroll records and the failing to pay the predetermined wage rate is a disregard of the company's obligations to their employees within the meaning of Section (3)(a) of the Act. Marvin E. Hirchert dba M. & H. Construction Company, WAB Case No. 77-17 (Oct. 16, 1978), C.M. Bone, WAB Case No. 78-4 (June 7, 1978). I find the circumstances of this case to be aggravated in that a duplicate set of books and records was maintained by Peter Coleman. Those records lend substance to the argument that the underpayments were clearly willful in nature and support a contention that the "death penalty" should be administered. I also note that Peter Coleman had refused initially to cooperate with the Compliance Officer by providing his own books and records which established the actual compensation paid. Those records were withheld approximately six months and I suspect tended to slow the investigation. The records were ultimately used in the Compliance Officer's computation of wage underpayments. The record also establishes that this company and the Colemans had considerable experience in performing on Davis-Bacon Act jobs and were well aware of the wage rate requirements. In other words, they knew what they were doing.

Valentina Coleman signed the original contract with the U.S. Air Force and Peter Coleman signed the two amendments to the contract. Additionally, Valentina Coleman also signed all the certified payrolls. It is well established that underpayment of employees, coupled with falsified payrolls, constitutes disregard of obligations to employees under Section (3) (a) of the Davis-Bacon Act. G & O General Contractors, WAB Case No. 90-35 (Feb. 19, 1991). I have no discretion to preclude debarment upon finding underpayments and falsified payrolls in violation of the Davis-Bacon Act. Congress employed a bright line test which I have no legal authority to supercede. Trademark Construction Company, WAB Case No. 89-02 (Mar. 29, 1991). Additionally, under the Davis-Bacon Act provision is made for only a debarment period of three years. Bob's Construction Company, Inc., WAB Case No. 87-25 (May 11, 1989).

The contractor offers a variety of arguments as to why debarment is not appropriate in this case. It is contended that several factors exist which would tend to mitigate the application of the debarment penalty. A contention is made that the Compliance officer had placed the company employees in an improper category for determining back wages. It was suggested that the wage rates applied were not the prevailing wages for the type of work involved in this contract. DOL does not contend that the contract involved here contained a wage determination for hardwood floor mechanics or hardwood floor mechanic helpers. However, this record contains no evidence that the company made any effort to challenge the existing wage determination at the time that the contract was executed or at its implementation. It is too late to challenge a wage determination once the contract has been executed. 29 C.F.R. Section 1.6(c). Regardless of that, in arriving at his computations, the Compliance officer merely computed back wages based upon representations contained within the certified payrolls offered by the company. The payrolls classified the employees and it was those classifications which were used by the Compliance Officer.

The company contends that the Federal Acquisition Regulations (FAR) found at 48 C.F.R. Part 1, Sections 1 - 52 are applicable to this debarment proceeding. Those regulations allow for the consideration of mitigation factors prior to a determination on the debarment decision. DOL contends that the regulations simply do not apply to these cases. Following a review of the FAR regulations and also the regulations relating to Davis-Bacon Act cases, I find no authority for the application of the FAR regulations to these matters. Therefore, I summarily reject based upon the application of the law as noted above any contention by the company that mitigating factors can be considered in applying either the full or a reduced penalty in debarment proceedings under this Act. The company also argues that an accord and satisfaction was entered into by DOL which now prevents the imposition of the debarment sanction. No legal authority has been cited for that proposition. The legal concept of accord and satisfaction is clearly contractual in nature. Under that concept there is an agreement between parties by which one accepts an agreed performance by the other in discharge of a contested obligation of that party.

> An accord is an agreement by one party to supply or perform and by the other to accept, in settlement or satisfaction of an existing claim, something other than what was actually due.

Chesapeake & Potomac Tel. Co. v. United States, 654 F.2d 711 Ct. Cl., 1981). The parties must arrive at a meeting of the minds and the consideration must be stated. The party asserting an accord and satisfaction as a defense must establish every element. Harmonay, Inc. v. Bink's Manufacturing Co., 597 F. Supp. 1014 (S.D.N.Y. 1984), aff'd, 762 F.2d 990 (2nd Cir. 1985).

This record contains no agreement evidencing an understanding between DOL and the company concerning the company's satisfaction of the underpayments in wages. That in itself should serve to defeat the application of the doctrine in this case. The record contains a statement from company's counsel indicating that the company is satisfying the underpaid wage obligation upon its own volition and in order to give impetus to DOL's concluding that debarment is not applicable in this case. However, the record offers no evidence that any type of agreement was reached between the two parties which evidenced an understanding that the full amount of back wages would be paid in exchange for some type of favorable treatment by DOL. The doctrine of accord and satisfaction is not applicable under these circumstances.

Finally, the company contends that if debarment is found to be applicable, then it should only relate to U.S. Floors and to Valentina Coleman and not to Peter Coleman. I summarily reject that contention. The evidence shows that Valentina Coleman signed the certified payrolls and that Peter Coleman was a signatory to the two amendments to the original contracts. Peter Coleman also maintained a second set of books and records which properly evidenced the compensation paid to the underpaid employees. The second set of books and records was not provided to the Compliance Officer until approximately six months following the initial request. This company had been in business for a period of years prior to the execution of the contracts in this case and they were involved and

had, in fact, completed numerous government contracts similar to the one in question here prior to the problems which have given rise to this proceeding. Mr. Coleman was apparently the President of the company during that entire time. Therefore, his experience was significant, and I believe he knew exactly what he was doing when he decided that certain employees should be underpaid on this job.

Based upon the foregoing, I find that U.S. Floors, Inc., Peter Coleman, individually and Valentina Coleman, individually, knowingly violated the provisions of the Davis-Bacon Act and attempted to conceal the underpayment of wages through falsification of records and other means. These acts clearly constitute a "disregard of obligations" under Section (3)(a) of the Act warranting a debarment of three years.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that U.S. Floors, Inc., Peter Coleman and Valentina Coleman, be subject to the ineligibility of Section (3) (a) of the Davis-Bacon Act for a period of three years.

RUDOLF L. JANSEN
Administrative Law Judge