Memo #11

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

Memo #11

August 12, 1958

Director, AFMPP-PR-3
Procurement and Production
Office, Deputy Chief of Staff, Materiel
Department of the Air Force
Washington 25, D. C.

Attention: Colonel Treacy

Re: File E-59-153
Air Force Academy
Colorado Springs, Colorado

Dear Sir:

Recently representatives of the Department of the Air Force conferred with members of our Enforcement Branch concerning Davis-Bacon Act coverage questions that had arisen during the construction of the Air Force Academy at Colorado Springs, Colorado. Understandings were reached especially on the general subject of installation of equipment and it was mutually agreed that the principles confirmed and agreed on would be utilized in the construction program under discussion. Subsequent developments recently brought to our attention make it imperative that we call to your attention apparent applications of the agreed principles which, if substantiated, would be definitely not in conformity with our understanding and would violate the requirements of the Davis-Bacon Act and of Regulations, Part 5.

To present the entire picture, so that there will be no further misunderstandings, we would like to refer to a series of communications between Air Force officials at the Academy and Attorney Reid Williams, our representative in Denver, Colorado. Copies of this material are enclosed.

1. On November 13, 1957, Mr. Williams wrote to Colonel T. E. Correll, Contracting Officer, Air Force Academy Construction Company, regarding Contract No. AF 33(038)-12371, in response to Colonel Correll's inquiry as to the applicability of the Davis-Bacon Act to employees of the Mountain States Telephone and Telegraph

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Company employed at the Academy site. Attorney Williams furnished Colonel Correll an opinion which accurately sets forth our views, in which he held the work performed by the telephone firm's employees under this particular contract not subject to the Davis-Bacon Act. The basis for this ruling was properly stated as follows: These employees were engaged essentially in the extension of the distribution system of the Telephone Company rather than in the development or construction of the buildings or facilities of the Academy. A copy of this opinion, with which we completely agree, is enclosed.

2. On March 14, 1958, Mr. Williams wrote to Colonel Winter, U.S.A.F. Director of Procurement, U.S.A.F. Academy, in reply to Colonel Winter's letter of March 10, 1958 and supplementing previous conferences. The subject of this correspondence was the applicability of the Act to a number of contracts for the supplying and installing of a wide variety of equipment at the Academy (then and still under construction). The text of this March 14, 1958, letter was the principal subject of the conference mentioned at the beginning of this letter, which resulted in our mutual understanding as to coverage. However, on review of Mr. Williams' March 14th opinion, we would like to clarify several points.

Mr. Williams and we agree that the delivery of "office desks, files, or the usual miscellany of such office equipment for the use of instructors, students and others would not involve any construction activity." However, Mr. Williams pointed out that the contracts here mentioned included, for example, a trisonic wind tunnel and axial flow compressor demonstrator estimated to run as high as $235,000. The installation of such an item could well involve construction activity covered by the Davis-Bacon Act, as understood in our discussions and as contemplated by Section 12-402 of the Armed Services Procurement Regulations. Likewise, another contract contemplated under this supply and installation category involved "the usual equipment for feeding, housing, and morale and welfare of support personnel and dependents." This latter contract would run into thousands of dollars and would include piping, wiring, gas exhaust fans, plumbing, sheet metal work, and related activities to install kitchen and feeding equipment to provide accomodations for upwards of 2,500 people three times a day. In this connection, information has reached us to the effect that the baker installing the bakery equipment alone has been working at the Academy site for over six weeks on a rush-order basis and is not yet through

with his part of the contract. As Mr. Williams points out in his report to us, the wind tunnel and the kitchen equipment do not constitute the sort of contract work we mutually understand by the terms "installation of furniture, equipment and the like". It is, as Mr. Williams comments, more nearly comparable to the basic plumbing, wiring, and heating contracts than to carrying an office desk into a classroom.

Despite the very definite probability of coverage of the two contracts above described (wind tunnel and kitchen work), we are under the impression that neither of these contracts was considered subject to the Davis-Bacon Act by the Air Material Command, following receipt of instructions from the Air Force Associate General Counsel. We feel sure that the instructions furnished AMC at Wright-Patterson Air Force Base reflected the understandings reached by our respective representatives during the conference on this general problem. We would therefore especially appreciate your checking to ascertain whether the two contracts under discussion were awarded and whether they were made subject to the provisions of the Davis-Bacon Act as seems clearly to be required.

With further reference to Mr. Williams' March 14th opinion, we confirm his view that the cost of installation is not the controlling factor in this type of supply-installation contract regarding coverage under the Act. The total contract cost controls. However, we would like to clarify a point in this connection not sufficiently developed by Mr. Williams. Even though a supply-installation contract exceeds $2000, we are agreed that by no means are all such contracts covered by the Davis-Bacon Act. Coverage, as we clearly understand, would depend upon whether more than an incidental amount of construction-type work were involved. For example, it would appear that the $235,000 wind tunnel and the costly kitchen programs would involve sufficient Davis-Bacon-type activity to warrant coverage of the Act. Again, it should be understood that coverage does not depend essentially on how an Agency views the work, but rather on the nature of the contract work itself.

As previously discussed, while we fully appreciate Mr. Williams' views on the installation of the auditorium seats, and while we realize there is substantial merit to his position, we confirm our position, as given to Messrs. Cox and Patrick that this

work (if done by the seller or manufacturer) would not involve sufficient construction-type activity to render it subject to the Act. If, on the other hand, the employees of the prime contractor installed the seats in the course of their regular work, of course such activity would be covered.

Again, to confirm our views as previously furnished and to clarify Mr. Williams' statement, the current construction status of the Academy is not controlling as to the coverage of supply-type contracts. Mr. Williams expressed a very understandable and practical position; however, for clarification purposes, supply-installation-type contracts must be judged for Davis-Bacon applicability by themselves and coverage will depend on whether more than incidental Davis-Bacon type work is involved.

3. On April 28, 1958, Mr. McLaughlin of the Air Force Academy Construction Agency wrote Mr. Williams regarding the views of Mountain States Telephone and Telegraph Company on why call No. 13 of Contract AF 05(613)5 was not subject to the Davis-Bacon Act.

4. On May 12, 1958, Mr. Williams replied to the April 28th inquiry. The contract involved the removal and relocation of telephone lines. Calls are at the sole option of the Air Force Contracting Officer during the period of the construction of the Academy, because certain telephone lines of the Company will "from time to time interfere with the construction of the Academy and so must be relocated and altered to eliminate such interference." Call 13 covered the removal and relocation of overhead line facilities in Pine Valley to permit construction of a Capehart Housing Project.

As Mr. Williams properly pointed out, the contractor (Telephone Company) could continue to render its utility services without being obligated to do the work called for under this contract, and clearly does the contract work to meet the needs and convenience of the Agency. For that reason, the Air Force is paying the entire cost. Mr. Williams properly reflected our views when he said that this particular work was a public work and covered by the Act. It is not the furnishing of telephone service, - it is the performance of covered construction work required by the Contracting Agency.

5. Despite the above coverage ruling, which we confirm, the Air Force on July 7, 1958, notified Mr. Williams of a June 30, 1958, decision by the Air Material Command that the Davis-Bacon Act was not deemed applicable to calls made under Contract No. 05 (613)5 on the basis that the work is ordinarily provided under the provisions of a telephone service contract as a connection charge.

This June 30th decision does not appear warranted on the facts of this case and it would be appreciated if your Office would promptly initiate action to correct this position. In this connection, it should be noted that Mr. Williams pointed out in his May 12th opinion that steps could be taken under Section 5.6(c) of Regulations, Part 5, to establish appropriate classifications and rates for the line work involved.

In summary, it would be appreciated if prompt measures were taken to correct the misunderstandings apparently existing regarding coverage of supply-installation contracts such as the wind-tunnel and kitchen contracts. It would also be appreciated if instructions were issued to AMC in conformity with Mr. Williams' coverage views on the telephone relocation work. Please let us know when the necessary corrective action has been accomplished.

It is gratifying to see the mutual cooperation evident in the correspondence and conferences between your Academy representatives and our Mr. Reid Williams in working out these difficult labor standards problems. We consider that Mr. Williams has furnished your representatives with excellent opinions in these matters. As clarified in this letter, we fully agree with the views expressed by Mr. Williams and, from our conferences with Messrs. Cox and Patrick, we feel the Air Force and this Department have achieved a degree of mutual understanding in these matters which justifies the efforts we have all expended along those lines. We are sure that you will agree that this progress should be correspondingly reflected in our respective field offices which are directly concerned with the administration of your contracts.

Very truly yours,

Stuart Rothman
Solicitor of Labor

By_____
James R. Beaird
Acting Assistant Solicitor

Enclosure

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

JAN 2 3 1959

Director, AFMPP-PR-3
Procurement and Production
Office, Deputy Chief of Staff, Materiel
Department of the Air Force
Washington 25, D. C.

Attention: Colonel Treacy

Dear Sir:

This is in reply to your letter and enclosures of November 20, 1958, in which you request an opinion, in accordance with Section 5.11 of Regulations, Part 5 (29 CFR, Subtitle A), as to how the Davis-Bacon Act, as amended, 40 U.S.C. 276a, should be applied to Contract AF 08(606)-1156, entered into between the Pan-American World Airways, Incorporated, and the Department of the Air Force at Patrick Air Force Base, Florida. The facts which this Department has received are as follows:

The contract in question is a cost-reimbursement type for managing, operating, and maintaining the Atlantic missile range facilities of the Department of the Air Force at Patrick Air Force Base, Florida, and ancillary range bases, marine bases, and support sites in and outside the State of Florida. The contractor's responsibilities under this contract include such broad and varied activities as planning and programming for range development, supply, operation and maintenance; developing, engineering, fabricating, modifying and installing range instrumentation, communications facilities, and associated equipment; and managing a variety of related functions such as security, fire protection, medical service, messing, billeting, and weather observation.

Although Contract AF 08(606)-1156 contemplated some "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works" within the meaning of the Davis-Bacon Act, the exact nature, scope and location of these work items were not ascertainable at the inception of the contract and generally could not be determined until

specific projects were actually programmed. However, since the contract did contemplate some work covered by the Davis-Bacon Act, the stipulations required by the Act and the Regulations of the Department of Labor were included in the contract.

In administering the requirements of the above mentioned Act and Regulations in connection with this contract, your Department regards the contract as being divisible in nature. As "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works" is programmed, it is deemed to be within the purview of the Act if its estimated cost (including labor and materials) exceeds the $2,000.00 jurisdictional standard of the Act. Current wage determinations are then applied to each covered item. You ask whether this procedure constitutes a proper application of the Davis-Bacon Act to this contract.

Your presentation indicates that if the work under this contract covered by the Davis-Bacon Act could have been predicted and pre-engineered, it would have been contracted for in accordance with your current procurement procedures. Had that been done, there would have been no question but that the Davis-Bacon Act would have applied only to those contracts which were in excess of $2,000.00. It appears to me that an application of the requirements of the Act on such a basis under the contract in question achieves the same basic result and is consistent with the provisions of 40 U.S.C. 276a which indicate that the applicability of the Act in no way hinges upon the method of procurement used by the contracting agency.

In accordance with the above, it is our conclusion that the administrative practices of the Department of the Air Force as described above reflect a proper application of the Davis-Bacon Act under the circumstances of the contract in question.

Very truly yours,

Stuart Rothman
Solicitor of Labor