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U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON 25

October 15, 1962

MEMORANDUM # 41

TO : AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29
CFR, SUBTITLE A, PART 5.

FROM : E. Irving Manger *EM*
Associate Administrator

SUBJECT: Opinions on application of the Davis-Bacon and related
Acts.

Enclosed with previous covering memoranda, copies of opinions on the application of the Davis-Bacon and related Acts were furnished you for information and guidance in your enforcement programs under those Acts.

We are now enclosing a copy of a recent opinion on this same general subject, which we are sure will be of further interest and assistance to you.

Enclosure

cc: Messrs Saylor, Taylor, Gregory, Davis + Dist
D-B Act

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October 8, 1962

Mr. R. L. Tollefsen
Secretary and General Counsel
Douglas Oil Company of California
Douglas Oil Building
816 West Fifth Street
Los Angeles 17, California

Re: Application of the Davis-Bacon Act
to "Oil Spreading" Activities involved
in the Construction of Roads and
Aircraft Runways at Navy Installations,
California
Our Files: E-61-676 thru 686

Dear Mr. Tollefsen:

Reference is made to our previous correspondence regarding the application of the Davis-Bacon Act to "oil spreading" activities undertaken by your firm in connection with the delivery of "road oils" to various covered construction projects.

As you know, the Davis-Bacon Act, 40 U.S.C.276a, applies generally to contracts for the construction, alteration, and/or repair of public buildings or public works. It provides that contractors or their subcontractors shall pay all laborers and mechanics, employed directly upon the site of the work, minimum wages which are based upon those determined by the Secretary of Labor to be prevailing in the area.

Specific definitions of the terms "subcontractor" and "materialman" are not to be found in the Davis-Bacon and related Acts, nor in the regulations pertaining thereto. Furthermore, there are no exemptions specified in those laws and regulations concerning the "materialman", as such. However, Section 5.2(f) of Regulations, Part 5(29 C.F.R.,

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Subtitle A), does set forth that: "The manufacture or furnishing of materials, articles, supplies or equipment... is not a 'building' or 'work'" within the meaning of the Davis-Bacon and related Acts or of the regulations, "unless conducted in connection with and at the site of such a building or work...or under the Housing Act of 1949 in the construction or development of the project."

In accordance with the foregoing, this Department has considered the manufacture and delivery of supply items to the work site, when accomplished by bona fide materialmen, to be noncovered activities. On the other hand, where a materialman, as an adjunct to the furnishing of supplies, also undertakes to perform for and take from a prime contractor a specific part of the labor or material requirements of the latter's original contract, he would ordinarily be considered a subcontractor (MacEvoy v. United States, 332 U.S. 102 (1944)) and the work thus performed would be covered by the provisions of the Davis-Bacon Act.

An examination of the record in this case discloses that Douglas Oil is recognized as a bona fide supplier of liquid bituminous products and, as such, customarily transports them to those places designated by its customers. It is your view that the status of Douglas Oil as a supplier is not affected by the "oil spreading" activities it undertakes upon delivery of these materials to a construction site. Specifically, you state that the spraying of liquid bituminous products upon the roads under construction is a further step in the delivery process, being incidental thereto, and does not constitute the work of a subcontractor. To reach a decision in this key issue, it is necessary to examine the use of these materials in road construction and the technique employed in their on-site application.

We are here concerned with liquid bituminous products as used in prime, tack and seal coating. Prime, when applied to soil or an aggregate base, seals the surface upon which it has been placed and provides a bond for subsequent

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layers of pavement; tack serves as a bonding agent between these layers, and seal coating, over which aggregate is spread, provides a protective seal for the wearing surface of the road.

While in all cases the materials must be applied uniformly, the rate of application may vary from .15 to .40 of a gallon per square yard. It appears that in most instances the contracting agencies will specify the rate in a particular case to the nearest hundredth of a gallon and it is not uncommon for Government contracts to require that the actual rate applied come within five percent of the rate specified. The reason for strict adherence to these specifications is apparent since an insufficient application will cause the material to lose its characteristics as a bonding agent, and an excessive application will cause "bleeding" which undermines the structure of a road and creates slickness on its surface.

In the cases here involved, the products are delivered to the construction site in tank trucks of the supplier. Attached to the rear of these vehicles is a piece of equipment known as a spray bar. The liquid materials are applied to road surfaces, in lanes between 8 and 12 feet wide, through evenly spaced nozzles in the bar. The rate of application itself is controlled by three factors: the pressure in the pumps, the size of the nozzle openings in a given piece of equipment, and the speed of the truck carrying the spray bar over the road surface. Equipment control ranges between .05 to 2.0 gallons per square yard with five percent accuracy.

In order to distribute these materials with proper bonding characteristics, they are heated, in accordance with specifications, to temperatures between 275 and 350 degrees Fahrenheit, achieving pressures between 25 to 75 pounds per square inch. In this state, the "oils" are inflammable and care must be used in their handling.

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To fulfill the requirements imposed by contracting agencies in regard to the rate of application and in observance of the safety regulations which are imposed in the handling of these materials, the personnel employed in the spreading work must be skilled in the performance of their tasks. The bootman operating the spray bar must be able to read and interpret gauges and make proper adjustments before the spraying begins, and the driver of the truck must maintain a constant speed throughout the course of his "run". These skills must be synchronized to assure a uniform spread of the desired quantity. Mistakes are critical. Where errors in application are made, they must be remedied, in most cases, by scarification and by a repetition of the application procedure. It would appear that on-the-spot corrections, such as blotting, are undesirable even in the rectifying of slight mistakes.

In view of the need for strict adherence to specifications established by contracting agencies, and by reason of the special equipment used and the skills required in connection therewith, it is our finding that the spreading of "oil" by the Douglas Oil Company, such as here involved, is a concomitant of the construction process itself and as such constitutes the performance of a part of the labor requirements of the original contracts. We therefore consider such work to be that of a subcontractor. The laborers and mechanics engaged in these activities perform an essential part of the construction work required by the prime contracts and are entitled to the benefits of the Davis-Bacon Act as incorporated in the contracts in question.

In view of the novel and unusual aspects of the coverage question presented by your petition, and the practical difficulties which would be involved in any retroactive enforcement of this ruling, we are advising the Federal contracting agencies concerned that we would have no objection to their making this decision effective as of the date of this ruling.

Yours sincerely,

Charles Donahue
Solicitor of Labor