U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WASHINGTON, D.C. 20210

July 9, 1973

MEMORANDUM #113

TO: All Government Contracting Agencies of the Federal Government and the District of Columbia

SUBJECT: Opinion Letter - June 13, 1973

In accordance with our policy of keeping contracting agencies advised of current interpretative positions relating to the various Government contract labor standards statutes, we are attaching a copy of a recent definitive opinion on "assemblers" under the Walsh-Healey Public Contracts Act which should resolve all major questions on this issue.

Warren D. Landis
Assistant Administrator

Attachment

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This is in reply to your letter of March 27, 1973, requesting an interpretation regarding the qualifications of an assembler as a manufacturer within the meaning of the Walsh-Healey Public Contracts Act.

The problem basically arises because of the separate category, "assembler" within section 26(d) of R & I No. 3 dealing with "manufacturer." Although a plain reading of the explanatory language for "assembler" could lead one to conclude that any assembling qualifies a bidder as a manufacturer, the provision has not been interpreted that way by opinion or administrative decision.

It has been our consistent position that an assembler must first qualify as a manufacturer within the meaning of 41 CFR 50-201.101 and ASPR 12-603 before he is eligible for award of a Government contract in the performance of which he performs principally, or exclusively, assembling operations. That is, first an assembler must be a person or firm who owns, operates or maintains a factory or establishment that produces (i.e., manufacturing operations) on the premises the materials required under the contract.

Two significant administrative opinions support this view. In Brentwood Radios, Inc., PC-553, affirmed by the Administrator, the argument that assembling of connectors and crank assemblies with minimum effort and equipment qualified the bidder as a manufacturer under section 26(d) was rebuffed as follows:

> "Confident that the Act and Regulations defining a manufacturer contemplate something more than the occasional and isolated

> performance of such a simple assembly operation on but two Government contract items of a sundry nature, as disclosed by the record in this case, I have concluded that the corporation cannot justifiably be regarded as a bona fide manufacturer, even of such items, qualified to do business with the Government. Except for the negligible amount of time expended by the two officers of the corporation on such assembly operation over seven years of corporate existence, the corporation has at no time engaged in any other assembly or manufacturing operations for the Government and in no civilian production at all."

The "something more" required of an assembler was earlier clearly spelled out in John F. Noble Company, PC-184, affirmed by the Administrator, wherein a bidder performed some hauling, surfacing, and assembling of pallets produced elsewhere. The hearing examiner's answer to respondent's position that this effort made him an assembler and therefore qualified to receive a contract was "not well taken." After citing the definition of assembler in the regulations, the hearing examiner concluded that "[i]t is clear that the assembler must also be a manufacturer."

Thus, it is clear that an assembler must first qualify as a manufacturer within the definition at section 26(a) of R & I No. 3 before he is eligible for award of a Government contract for furnishing supplies, articles or equipment. In the case of a firm newly entering into manufacturing, as is the case of the firm cited in your letter, certain other factors must be taken into consideration. The firm must show that the manufacturing activity in question has not been set up solely to produce on the one Government contract and then terminate its operations (Circular Letter 1-58) as well as demonstrating that its lease and arrangements for space, equipment and personnel are not contingent upon its receipt of the Government contract (Circular Letter 8-61). In effect, the firm must have established arrangements on a continuing basis for production of the desired goods to the Government.

Thus, in the instant case, if the firm can overcome the hurdles of a newly entering manufacturer, it must then also demonstrate that it can qualify as a section 26(a) manufacturer albeit it may only be performing assembling operations on the contract for which it has bid. It does not appear to us from the information contained in your letter that the firm could possibly meet the test for a manufacturer, given the limited amount of equipment,

personnel and space at its disposal (assuming that it could even overcome the tests for a newly entering manufacturer which determination we cannot venture an opinion on, given the limited information provided in the letter). We do not feel that our analysis of this problem should be necessarily directed to whether the assembling operations are, in terms of input in time or dollars and cents, or in terms of what the Government wants, a significant or insignificant portion of the contract work in a particular situation. The determination must rest on whether the bidder has demonstrated in the past, or could reasonably be said to have in the future with the facilities at its disposal, an independent ability to perform on the contract by fabricating alone the item called for by the Government. That is to say, could this bidder produce on its premises the same or related component parts which it would assemble into the finished product or ship elsewhere for assembly into the same or a like product? If it has, or if it could, then it meets the tests of a manufacturer and the fact that it is acting as an assembler only in a given case, and that activity in the given case is minimal at best, should be immaterial.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division