U. S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington 25, D. C.

March 30, 1959

MEMORANDUM # 12

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

From: Stuart Rothman
Solicitor of Labor

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 copies of two recent opinions on this same general subject which we are sure will be of further assistance to you.

Enclosures

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U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

February 26, 1959

Mr. E. Manning Seltzer
Chief, Legal Division
Office of Chief of Engineers
Department of the Army
Washington 25, D. C.

Re: CE(Tinker AFB, Oklahoma)
ENGAC-601
Our files E-59-777 and 778

Dear Mr. Seltzer:

This is with further reference to your letter and enclosures of January 9, 1959, in which you request an opinion, in accordance with Section 5.11 of Regulations, Part 5 (29 CFR, Subtitle A), as to the applicability of the Davis-Bacon Act, 40 U.S.C. 276a, to certain employees of the Ellsworth Brothers Trucking Company, a firm currently active under several of your contracts at Tinker Air Force Base, Oklahoma. The facts regarding this matter are as follows:

Peter Kiewit Sons Company is the prime contractor under contracts DA-34-066-eng-5417, 5500, and 5502 at this installation. The cement required by these contracts was purchased by the prime contractor from the Ideal Cement Corporation at Ada, Oklahoma, f.o.b. cars at Ada. Since truck loading facilities were not available at Ideal's plant, the cement was loaded into rail cars and moved to a siding for further reloading into trucks. The prime contractor entered into an agreement with the Ellsworth Brothers Trucking Company to haul this cement, approximately 93,500 barrels, from the rail siding to the prime contractor's batch plant or storage bins at the Air Base.

Your Contracting Officer has held the employees of the Ellsworth Brothers Trucking Company employed in this hauling to be within the coverage of the Davis-Bacon Act. This has been contested by both firms on the ground that the trucking firm is currently operating under a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission, and is

therefore not a subcontractor within the meaning of the Davis-Bacon Act and Section 5.2(g) of Regulations, Part 5.

As you know, Section 5.2(g) of Regulations, Part 5, defines the "construction" and "repair" language of the Davis-Bacon Act as including all types of work done on a particular building or work at the site thereof "including the transportation of materials and supplies to and from the building or work by the employees of the construction contractor or subcontractor."

The term "subcontractor" as it relates to the Davis-Bacon Act and the Regulations, is discussed in detail, in the enclosed copies of our letters of December 26, 1957 to your Office, and of September 26, 1958, to the New Jersey Highway Department. In these letters, the language of the Supreme Court in MacEvoy Co. v. United States, 332 U.S. 102, is quoted as describing a subcontractor as established by usage in the building trades as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen."

While the Department has consistently excluded from coverage certain deliveries of construction material by materialmen, or their trucking services, where such deliveries are incidental to the sale, no such exclusion has been recognized as applicable in the case of a trucking firm which contracts with a construction contractor to perform for the contractor a trucking or hauling service required by the construction contract. The latter appears to be the situation in the case in question. The Ellsworth Company has no contractual relationship whatever with the supplier. Its contract rather runs directly to the prime contractor at Tinker Air Force Base and relates Ellsworth to a specific part of the labor requirements of the prime construction contract. The contract of the Ellsworth Company with the prime construction contractor is not to accomplish a specific, isolated delivery, but to utilize specially constructed trucks to haul 93,500 barrels of bulk cement to a construction site, and in our view renders the Ellsworth Trucking Company a subcontractor within the meaning of the Act and contract requirements, and its truck driver employees within the coverage of the contract labor provisions. Accordingly, after a complete review of the entire record

including the presentations of both firms, we concur in the decision of the Contracting Officer. In this connection, I have been unable to find any basis in law for excluding from coverage an otherwise covered contractor simply because he held a Certificate of Public Convenience and Necessity.

The classification and wage rate applicable to the truck drivers under consideration will, of course, be based on the contract minimums or, if necessary, will be determined in accordance with the provisions of Section 5.6(c) of the Regulations as set forth in the contract.

Very truly yours,

Stuart Rothman
Solicitor of Labor

Enclosures

U. S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington 25, D. C.

March 5, 1959

Mr. E. Manning Seltzer
Chief, Legal Division
Office of Chief of Engineers
Department of the Army
Washington 25, D. C.

See letter of 3-[illegible]
No [illegible]

Re: CE(General)
ENGAC-601

Dear Mr. Seltzer:

This is in further reference to your letter of December 10, 1958, in which you inquire, pursuant to Section 5.11 of Regulations, Part 5 (29 CFR, Subtitle A), as to what specifically must be shown on the certified payrolls required by Section 5.5(a)(3) of Regulations, Part 5. As you know, this matter has recently been discussed with a representative of your Office in connection with the development of a standard payroll form.

Section 5.5(a)(3) of Regulations, Part 5, constitutes, as you know, one of several required contract stipulations. In part, it requires the contractor to submit weekly to the contracting Agency /or, where the Agency is not a party to the contract, to the applicant, sponsor, or owner, as the case may be, for transmission to the Agency/ a certified copy of all payrolls. The phrase all payrolls has reference to the contractor's obligation to furnish copies not only of his own payrolls, but also of payrolls of any subcontractors performing on the contract work.

The specific information which should be included in these certified copies of payrolls includes:

(1) The name and address of each laborer and mechanic engaged on covered work;

(2) The correct classification of each such laborer and mechanic;

(3) The straight and (where applicable) overtime hourly rate of pay for each such laborer and mechanic;

(4) The daily and weekly number of hours worked by each such laborer and mechanic on the covered project;

(5) The deductions made;

(6) The actual weekly wages paid the employees.

In accordance with previous discussions on the employees' address requirement, this is to confirm that the address need be shown only on the first submitted payroll on which the worker's name appears, unless a change of address in the course of the contract work necessitates a second showing of the address.

In reply to your further inquiry relative to the correct reporting of deductions during workweeks in which covered and noncovered work is performed, any deductions made in such weeks must be accurately listed. Arbitrary allocation of deductions, such as withholding taxes is not permissible. As will be noted on the proposed optional-use payroll form, copy enclosed, in weeks involving covered and noncovered work, the contractor should show in one column the gross wages earned on the contract or project covered by the particular submitted payroll; in the second column, he should show the entire gross wages earned by the employee during the workweek, including amounts earned on covered and noncovered work. This arrangement will enable the contractor to show actual weekly deductions made and will obviate the difficulty referred to in your correspondence.

If I may be of further assistance to you in this matter, please let me know.

Very truly yours,

Stuart Rothman
Solicitor of Labor