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

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June 8, 1956

Mr. Charles A. Horsky
Covington & Burling
Union Trust Building
Washington 5, D. C.

Dear Mr. Horsky:

This is in reply to your letter and enclosures of March 23, 1956, submitted on behalf of the National Sand and Gravel Association and requesting our views concerning the applicability of the Davis-Bacon Act to employees of sand and gravel firms engaged in furnishing materials for use in work done under Federal construction contracts. The underlying factual basis you present for opinion is as follows:

> A prime contractor for construction work on a government warehouse entered into a contract with a second firm for the furnishing of ready-mixed concrete for use in the construction. The concrete was to be mixed at the site by the concrete firm. The concrete firm entered into an agreement with a third firm, a sand and gravel company, to furnish all of the sand and crushed rock needed for the concrete used for the job, delivered at the concrete mixing machines located on the construction site. Neither the concrete firm nor the prime contractor had any control over performance of the contract to furnish sand and crushed rock, except to specify the rate and place of delivery.
>
> The sand and gravel firm produced the sand and crushed rock at its existing operation (excavation or dredging operation, which included a crushing and screening plant) and delivered the material to the construction site with its own trucks and truck drivers. The sand and rock was dumped by the drivers into stock piles on the site alongside the concrete mixing machines.

Rulings and opinions are requested on the following questions:

1. Is the sand and gravel firm a subcontractor or a materialman within the meaning of the Davis-Bacon Act?

2. If the sand and gravel firm is a materialman, do the predetermined rates established under the Act apply to the truck drivers who deliver the sand and crushed rock to the site?

3. Would the result on either question 1 or question 2 above be different if the facts varied successively in any one of the respects noted below, but remained otherwise the same: (The emphases below are yours)

   a. The sand and rock were required to be crushed and screened by the sand and gravel firm or otherwise graded so as to meet specifications as to size contained in the prime contract, and were delivered to the site subject to rejection by the construction engineer for the concrete firm or the prime contractor if not in accord with specifications?

   b. The sand and gravel firm opened a temporary operation near the construction site and installed portable machinery near, but not on, the construction site for the express purpose of fulfilling its contract to furnish sand and crushed rock for the particular construction project?

   c. The truck driver employees of the sand and gravel firm hauled the sand and crushed rock at intervals so that each load was dumped directly into the concrete mixing machines at the site and not into stock piles?

   d. The contract of the sand and gravel firm was with a paving subcontractor for crushed rock to be used as such in constructing macadamized parking areas and driveways around the warehouse, and was dumped by the truck drivers at points specified by the paving contractor, spaced over such areas, from which points it was spread by employees of the paving contractor in the course of construction?

   e. The contract of the sand and gravel firm to furnish the sand and crushed rock was with the prime contractor which was also the concern producing the ready-mixed concrete at the site?

   f. The sand and gravel firm did not produce the sand or crushed rock itself but procured them from another sand and gravel company which made delivery from its own operation directly to the construction site?

g. The sand and gravel firm produced the sand and crushed rock but contracted with and paid independent owner-drivers of trucks or a trucking firm to haul them from its operation to the construction site?

h. The sand and crushed rock furnished by the sand and gravel firm were delivered by it to the central plant of the ready-mixed concrete firm, which was away from the construction premises, and was used in preparing concrete mixed at the plant or en route to the construction site?

i. The hauling of the sand and crushed rock from the operation of the sand and gravel firm was done by a trucking firm under a separate contract with and paid for by the ready-mixed concrete firm or was done by truck drivers employed by the concrete firm?

The Davis-Bacon Act (40 USC 276(a) et seq.) applies to every contract in excess of $2,000 to which the United States or the District of Columbia is a party for construction, alteration, and repair, including painting and decorating of public buildings and public works of the United States within certain geographical limits.

Reorganization Plan No. 14 of 1950, accepted by the United States Congress, directed the Secretary of Labor, in the interest of coordination of administration and consistency of enforcement of various Federal labor laws, to promulgate rules, regulations and procedures to be binding upon all the Federal agencies primarily responsible for the enforcement of these laws. Pursuant thereto, the Secretary of Labor issued Regulations, Part 5, effective July 1, 1951.

While the Davis-Bacon Act guarantees labor standards and wage benefits for laborers and mechanics, it applies only to contractors and subcontractors and not to materialmen. I agree with you that the solution to the questions presented rests generally upon the application of the terms contractor or subcontractor as distinguished from materialman or submaterialman. Coverage of and wage benefits to employees in the instant situation flow automatically from our conclusions on these points.

We assume that the sand and gravel firm referred to in the basic question is a separate legal entity with independent substantial investment in facilities and equipment, and an independent business organization and

operation, exercising a requisite degree of independent initiative, judgment and foresight required for the success of an independent operation with like opportunities for profit or loss and including that nature and degree of control utilized by a principal. Granted these facts, and provided that the operation is more than a trucking service for the prime contractor or batching subcontractor and is not exclusively restricted to the performance of the delivery operation alone, it is my opinion that the sand and gravel firm in the basic factual presentation is a materialman. Your basic factual position indicates otherwise, but, should the operation be a mere trucking service for the prime contractor or batching subcontractor, or be exclusively restricted to the performance of a delivery operation alone, the sand and gravel firm would be a subcontractor transporting materials and supplies to or from the work by the employees of a construction contractor or subcontractor. (Section 5.2(g) (29 Subtitle A, CFR). In other words, the delivery operation would not then be incidental to the sale of materials as expressed in the Solicitor's Opinion of September, 1942, cited in your brief, because the sand and gravel firm, as a trucking subcontractor, would thus be performing part of the work called for by the contract.

Concerning Question No. 2, it is my opinion that the Davis-Bacon Act is not applicable to a materialman and, consequently, the payment of prevailing wage rates to truck drivers employed by the materialman would not be required by Federal law.

Question No. 3 proposes separate factual changes to the basic question, thus presenting a series of hypothetical sub-questions. The following answers thereto are predicated on the fundamental reasons stated above, and assume that each sub-question does not include in its factual changes to the basic question any of the facts contained in the preceding sub-questions:

a. The Davis-Bacon Act does not apply to employees of the sand and gravel firm which crushes and screens sand and rock or otherwise grades them to meet specifications as to size contained in the prime contract and delivers them to the site subject to rejection by the Construction Engineer for the concrete firm or the prime contractor if not in accord with specifications, provided the tests otherwise established herein are met.

b. The exclusive nature of the operation described in this sub-question contemplates construction work called for by the contract and represents construction contract performance ordinarily performed by a prime construction contractor or subcontractor and not by a materialman. The Act would thus apply in this instance.

c. The Davis-Bacon Act does not apply to the truck driver employees of the sand and gravel firm simply because each load was dumped directly into the concrete mixing machines at the site and not into stockpiles.

d. On the facts presented in this sub-question, no coverage is established, unless the sand and gravel firm is an affiliate of, or controlled by the paving contractor. Projection of the opinion on this point to include employees of separate "establishments" of the contractor, therefore, would not be valid. For example, if the sand and gravel "firm" is a separate "establishment" of the construction or paving construction contractor or subcontractor, the truck drivers would be employees of the construction con-contractor or subcontractor for purposes of the Act.

e. Employees of the sand and gravel firm furnishing sand and crushed rock to the prime contractor which was also the concern producing the ready-mixed concrete at the site would not be covered by the Davis-Bacon Act, provided that the tests otherwise stated herein are met and that the caution outlined in subparagraph (d) above is also taken to avoid a projection of this opinion beyond this point to include employees of separate "establishments" of the one contractor.

f. It is difficult to understand the type of work or service performed by the first sand and gravel firm in this question. The procurement of materials from another sand and gravel firm which delivers from its own operation directly to the construction site, would seem to make a materialman of the furnisher of materials if the word "its" is given its common meaning. In other words, since the first sand and gravel firm performs no customary materialman function, no coverage question as to it is presented, and the second firm is a materialman not covered by the Davis-Bacon Act.

g. This question deviates from the materialman-subcontractor problem otherwise presented. It therefore must be answered alternatively. If the sand and gravel firm is a bona fide materialman within the tests previously outlined, the truck owner-drivers would not be entitled to the benefits of the Act. As employees they would be employees of a materialman. As independent contractors, they would be sub-materialman.

On the other hand, if the sand and gravel firm is performing work as a construction subcontractor, then the individual truck owner-operator is an employee of the construction subcontractor and is entitled to the predetermined wage scale regardless of any contractural relationship alleged to exist. (Sec. 3(a) 40 USC 276, et seq.). The sand and gravel firm must pay the prevailing wages, including overtime where applicable, and also include the employees on the submitted payrolls as required by Regulations, Part 5.

An individual who owns more than one truck, and operates one of them is in the same position as truck fleet owners, and may be a trucking subcontractor under the gravel firm construction subcontractor, in privity as to contract work performance with the prime contractor. In such event the trucking subcontractor must conform to all of the Federal labor laws and must in turn submit weekly payrolls as required by Regulations, Part 5. Caution is again directed to the provisions of Sec. 3(a) of the Davis-Bacon Act (supra) which provides that prevailing wages must be paid to all laborers and mechanics "regardless of any contractual relationship alleged to exist."

h. The Davis-Bacon Act would not apply to the employees of the independent sand and gravel firm delivering purchased sand and crushed rock to the central plant of the independent ready-mixed concrete firm located away from the construction premises and used in preparing concrete mixed at the plant or en route to the construction site.

i. The employees would be covered as employees of a construction subcontractor and entitled to the Act's benefits in accordance with the previously cited Solicitor's Opinion of July, 1942.

I am sure we both realize that these are hypothetical questions. If the facts in a given situation vary from those answered herein, I feel sure that you realize there would be an immediate need for the subsequent submission of requests for opinion on such points.

Thank you for the excellent brief which you provided in support of your position. I have found it very helpful in resolving these problems.

Very truly yours,

Stuart Rothman
Solicitor of Labor