U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

December 14, 1962

MEMORANDUM A 24 41

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

FROM : E. Irving Manger
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

DB-31 130(b)-3

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

November 28, 1962

The Honorable R. F. Keller
General Counsel
U. S. General Accounting Office
Washington 25, D. C.

Re: T. L. James & Co., Inc.
W. R. Aldrich Co.
Contract DA-34-066-ENG-5278
Amarillo AFB, Texas
Your Reference: B-147602
Our File: E-59-465

Dear Mr. Keller:

Reference is made to your letter and to the subsequent discussions between representatives of our respective Offices regarding the contract minimum rates applicable to workers engaged in the installation of electrical (Orangeburg) fiber conduit at Amarillo Air Force Base under the above-captioned contract.

You will recall that, upon receipt of a complaint from IBEW Local Union No. 602 of Amarillo, Texas, an investigation was conducted by the Corps of Engineers, the contracting agency here involved. This investigation, including an extensive area practice survey, established that the work in question was compensable at not less than the minimum wage rate contained in the contract for electricians and their bona fide apprentices.

In your letter, you state that "[i]n the absence of any evidence that the duct installation called for mechanical skills or techniques possessed only by qualified electrical workers, it appears the requirement that the work of loading, hauling, placing, joining and installing be performed by mechanics classified as electricians is predicated

solely upon a prevailing local practice." You therefore request our views regarding the matter to assist in discharging your "wage adjustment responsibilities under the act".

The Davis-Bacon Act provides that "...the minimum wages to be paid various classes of laborers and mechanics... shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work...[in the locality]... in which the work is to be performed...". By virtue of the above statutory language, the Secretary is required to specify the classification of work for which each wage rate is determined to prevail on such projects, as well as the wage rate itself (Comptroller General Decision No. B-132044, June 10, 1957). The authority to predetermine wage rates for specified classifications of work necessarily presupposes that the Secretary has the authority and the obligation to recognize the kind of work comprised by the classifications he specifies in his wage predeterminations. Without such authority, the Secretary's wage predetermination would be meaningless, and the express intent of Congress in enacting the Davis-Bacon Act would be nullified.

The issue as to what work falls within a given predetermined classification becomes most important when the Contracting Officer is faced with a compliance judgment in the course of contract performance as to whether a particular laborer or mechanic is being properly paid for the actual work he is performing. In the T. L. James case, for example, the Contracting Officer was called upon to decide whether contract labor standards compliance was met when the contractor paid workers installing Orangeburg electrical duct the contract rate for laborers, when claims had been made that such work in the Amarillo area was generally recognized as work falling within the ambit of the electricians' craft. To decide this question, it became necessary for the contracting agency involved to make a detailed area practice study since, as the wage rates may vary from locality to locality, so too may the craft content differ in various areas, depending on the actual practices or standards prevailing in the area on projects of a character similar.

On the basis of the local labor standards, that is, the practices found to be definitely prevailing for this type of work in the Amarillo area, the Contracting Officer and this Office concluded that the installation of Orangeburg duct fell within the kind of work comprising the contract classifications of electricians and electricians' apprentices.

The question of skill or individual training involved does not appear material to the issue. In any given work classification, the ability of the individual mechanics will vary. Likewise, in any skilled craft, there will be included work items which, viewed apart and by themselves might appear to be of an unskilled labor nature, but which historically and actually are recognized in the industry generally as component elements of the particular trade.

We would like to emphasize, however, that the contract classification and rate applicable to this type of work if done in another area, or even if done in the Amarillo area at a time subsequent to the time involved in the T. L. James case, could well result in a determination that such work would fall within other contract classifications, such as lineman, groundman, pipelayer or laborer, depending on the local labor standards established by the actual area practices.

We appreciate your concern in this matter and trust that the foregoing explanation serves to clarify the problem presented in your correspondence. Meanwhile, you are assured that we shall continue to make every effort to accurately reflect the classifications and corresponding wage rates prevailing in the areas where we are required to make predeterminations, and to assist the contracting agencies in meeting their and our mutual enforcement obligations by requiring payment at the appropriate contract rate for the particular classifications of work performed in those areas by the laborers and mechanics covered by the Davis-Bacon Act.

Yours sincerely,

Charles Donahue
Solicitor of Labor

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

# *Memorandum* # 51

TO : Earl Street, Regional Attorney
Dallas, Texas

DATE: June 24, 1963

FROM : E. Irving Manger
Associate Administrator

SUBJECT: Brown & Root, Inc.
Lake Pearl Sand & Gravel Company, Inc.
La-Tex Marine Services, Inc.
and Others
Contract No. DA-16-047-CIVENG-60-41
Louisiana
File Nos. E-61-132, E-63-305 & 306

Reference is made to your recent memorandum and to the report furnished by the Corps of Engineers, U. S. Army, regarding the application of the Davis-Bacon Act, the Eight Hour Laws and the labor standards provisions of the captioned contract to work performed at certain "off-site" facilities in the general area of the covered construction project. Specifically, you request our ruling as to whether the furnishing of sand and gravel, here involved, is the work of a subcontractor or a materialman. If the latter, these activities would not be subject to the labor standards provisions applicable to the project work.

From the record furnished, it appears that on August 10, 1959, the Corps of Engineers awarded to Brown & Root, Inc., a contract for the construction of "Old River Lock" in Pointe Coupee Parish, Louisiana. Brown & Root, in turn, entered into an arrangement with Lake Pearl Sand & Gravel Company, Inc., on October 5, 1959, whereby the latter firm agreed to furnish the sand and gravel as required for concrete items under the prime contract.

Ultimately, the materials thus furnished by Lake Pearl were obtained from three sources. Sand was produced by Central Sand & Gravel Company, Inc., at its plant, known as "Paradise Pit", and was thence trucked, by Coco Brothers, Inc., to the construction site for stockpiling. Gifford-Hill and Company, Inc., produced the fine aggregate (3/4") at its Turkey Creek plant. This material was also transported by Coco Brothers to the project site for stockpiling. The work performed by these recognized producers of sand and gravel at these two facilities, which previously served and continued to serve the general public, is clearly the work of materialmen and is not, therefore, covered by the labor standards provisions applicable to the project work.

Lastly, the coarse aggregate (1 1/2") required by the prime contract was produced at the so-called Stephens-Big Rock Pit by Central Sand & Gravel Company, Inc., for the Big Rock Corporation and later by Big Rock, itself,

under arrangements with Lake Pearl. The pit, which is located some 65 miles from the lock under construction, was obtained by Central on June 30, 1959. On that date, Stephens Gravel Company, Inc., assigned to Central its leases, under which it occupied the premises comprising the pit, and conveyed to that firm, the buildings, vehicles, tools and equipment situated thereon, for which the assignee agreed to pay the sum of $125,000.00, in addition to operational royalties. A note evidencing this indebtedness was secured by a mortgage on the property thus conveyed. The record indicates further that the Big Rock Corporation assumed Central's rights and obligations under this conveyance when it took over the operations at the pit.

Sales to the public from this facility apparently continued following acquisition of the pit by Central and by Big Rock. While it appears that such sales were substantially curtailed once these producers began furnishing materials for the covered work, this merely evidences the production demands made upon a materials supplier and is not inconsistent with our finding that the activities of these two firms at the Stephens-Big Rock Pit constitute those of a materialman.

Deliveries from this facility to the project site continued through the spring of 1960 without apparent difficulty, but by July of that year it appeared that Lake Pearl had trouble fulfilling its purchase order requirements with Brown & Root. The latter firm, being advised of arrears on the mortgage payments and fearing the collapse of this activity and the consequent interruption in the flow of aggregate to the lock, called the parties together. On July 2, 1960, they entered into an agreement under which Big Rock dedicated its facilities and equipment to the furnishing of aggregate for this project, at a guarantied rate of production. Moreover, Brown & Root obtained the right to supplement this "off-site" work or take it over completely, with its own forces or with those of others, if performance continued in an unsatisfactory manner.

The parties performed under this agreement until the middle of July when Big Rock ceased production at the pit. As a result, Brown & Root negotiated the additional agreements of August 3, 1960. Under their terms, Lake Pearl subleased and arranged to operate the Stephens-Big Rock Pit, having agreed to pay rent to Big Rock and royalties to Stephens. Brown & Root, in turn, advanced to Lake Pearl approximately

$24,000.00 which was thereupon paid to Stephens to cover arrears in mortgage payments on the pit, vehicles and equipment. Accordingly, Lake Pearl agreed that it would place, at the pit, supervisors who were satisfactory to the prime contractor. All parties agreed that should Lake Pearl default in their obligations, Brown & Root, or its designee, would have the right to operate the pit for the period of time necessary to fulfill the requirements of the original purchase order.

It appears that on November 2, 1960, in accordance with the provisions of the July and August agreements, Brown & Root removed Lake Pearl and placed La-Tex Marine Services, Inc., its subsidiary, in complete control of the Stephens-Big Rock Pit, to produce the remaining coarse aggregate requirements for the covered project. La-Tex, in turn, engaged various independent trucking firms, including Coco Brothers, Inc., on a day-to-day basis to haul material from this pit to the construction site. This operation by La-Tex lasted approximately three months, having terminated on February 15, 1961, when the Corps of Engineers granted Brown & Root permission to change sources of supply. We are further advised that the prime contract was completed in December of 1962.

The agreements of July 2, 1960, and August 3, 1960, do not appear to alter the performance required of Lake Pearl under the purchase order of October 5, 1959. They merely reaffirmed those original obligations (Brown & Root, Inc. v. Richard Coco, et. al., W. D. La., Civil Action No. 8166, Interpleader Phase -- Gifford-Hill v. Brown & Root, Inc., et. al., October 11, 1962). Accordingly, that firm's performance as a materialman continued unchanged.

It appears, moreover, that La-Tex undertook the production of aggregate at the Stephens-Big Rock Pit, until an alternate source of materials could be obtained, only after all reasonable alternatives were exhausted and then only to the extent deemed necessary to assure fulfilment of the terms set forth in the original purchase order of October 5, 1959. Under such circumstances, these interim activities of La-Tex are not deemed sufficient to constitute the work of a subcontractor. Accordingly, the individuals employed by La-Tex at the Stephens-Big Rock Pit are not covered by the contract labor standards provisions applicable to the project work.

Since these provisions do not apply to the work performed at the "off-site" facilities here involved, they are considered inapplicable, as well, to the activities of the independent trucking firms engaged in the transportation of materials from these facilities to the construction site (Opinion of the Solicitor, DB-22, March 12, 1962).

Your copy of the Corps of Engineers report is returned, as requested. Kindly advise us when action, consistent with this opinion, has been taken.

Attachments