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U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

MAR 16 1962

MEMORANDUM # 36

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

FROM: Peter F. Martin
Acting Assistant Solicitor

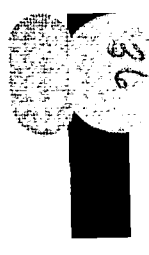
SUBJECT: Opinions on application of the Davis-Bacon and related Acts.

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 Manger, Sayler, Gregory, Taylor
D-B Act
Davis & Bacon



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

March 12, 1962

Mr. E. Irving Manger
Assistant to the General Counsel
Labor Relations
Office of the Chief of Engineers
Department of the Army
Washington 25, D. C.

Re: Eugene Luhr and Company, Prime Contractor
Conrad Weiters Truck Service
Contract No. DA-23-065-CIVENG-61-809
Saddle Dam No. 2
Carlyle Reservoir, Clinton County,
Illinois
E-62-421 and 422

Dear Mr. Manger:

This is in response to the recent inquiry received from your Office, regarding the applicability of the Davis-Bacon Act to truck drivers, employed by the Conrad Weiters Truck Service, who are engaged in the hauling of quarried stone to be used in the construction of Saddle Dam No. 2, Carlyle Reservoir, Kaskaskia River, Clinton County, Illinois. You indicate that the prime contractor has established two separate arrangements for the procurement of stone from the East St. Louis Quarry, which is located about 50 miles from the construction site. These arrangements are restated below:

Plan A - The prime contractor purchases the stone direct from the East St. Louis Quarry at a price per ton, f.o.b. the quarry. Said prime contractor has entered into an informal arrangement with the Conrad Weiters Truck Service, Breese, Illinois, for delivery of the stone at so much per ton. The Conrad Weiters Truck Service regularly hauls stone from this quarry to various other sites designated by the stone company in the regular

course of the trucking firm's business. The truck service considers itself to be a commercial hauler. Under this arrangement with the prime contractor, the truck service hauls the stone from the East St. Louis Quarry to a stock pile site located immediately adjacent to the construction right-of-way limits provided by the Government for construction of this project. This stock pile site was obtained by arrangement between the prime contractor and the present owner of this site. After deposit of this material at this stock pile site, the material is loaded onto equipment of the prime contractor and brought to the dam site area where it is incorporated into the work. The operators and truck drivers moving the material from this stock pile and incorporating it into the work are carried on the prime contractor's payroll and are being paid in accordance with the contract labor standards requirements.

Plan B - The prime contractor has entered into an informal arrangement with the Conrad Weitors Truck Service whereby the the prime pays so much per ton to the said truck service for the stone delivered on and to the construction site. The truck service then purchases the stone from the same quarry and makes the delivery. The stone is dumped by the truck service on the construction site at various stock piles opposite the stations where it is to be used and is incorporated into the work by regular employees of the prime contractor. The trucking service operators do not leave their trucks.

The solution to the questions presented depends upon the application of the term subcontractor, as distinguished from materialman or submaterialman, to the activities of the trucking firm. Neither the Davis-Bacon Act nor

Regulations, Part 5, specifically define the terms subcontractor and materialman, as such. However, Section 5.2(f) of Regulations, Part 5, 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." Accordingly, this Department has traditionally considered the manufacture and delivery of supply items to the work site, when accomplished by bona-fide materialmen serving the public in general, as noncovered activities.

Under Plans A and B, above, stone is purchased from the East St. Louis Quarry. We assume that this is a preexisting facility serving the public in general and not a quarry operation set up to meet the requirements of any particular contract. In this instance, the stone producer operating the quarry would be a materialman and its activities would not be subject to the Davis-Bacon Act. We assume, moreover, that the subject trucking firm 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. Under these circumstances, we have held that where a construction contractor purchases materials which are subsequently delivered to the site of construction by an independent trucking firm, acting for and on behalf of the producer, such deliveries are incident to the sale and purchase of these materials, and the drivers involved are not covered by the Davis-Bacon and related Acts. Typical of this situation is an agreement for the sale and purchase of materials, f.o.b. the construction site.

We see no difference regarding the applicability of the aforementioned laws where, as in this case, the same parties involved in the transaction modify an agreement to provide for f.o.b. "the quarry". It would be anomalous to

say that coverage depends upon the status of title to goods as determined by the law of sales, or upon the rights and liabilities derived therefrom. This would be to disregard the practical aspect of the independent trucking firm's normal business function. Whether or not an agreement for the sale and purchase of materials provides for f.o.b. point of origin or for f.o.b. destination, the question of delivery by an independent hauler is concomitant with the sale and purchase agreement itself, and the drivers who are engaged in this task, and who perform no additional function in connection therewith, do so independently of covered construction activities. In these circumstances, it cannot be said that the Conrad Weiters Truck Service is a subcontractor who has undertaken to perform a specific portion of the work called for by the prime contract. Accordingly, it is our conclusion that its drivers who deliver stone to the construction site pursuant to "Plan A", above, are not covered by the Davis-Bacon Act.

Considering the similar objectives of both Plans cited above, and the fact that these Plans have been used interchangeably under the subject contract, it is our further conclusion that in substance, there is no real distinction and that consequently the drivers of the independent trucker who make deliveries to the construction site in accordance with Plan B, would also not be subject to the requirements of the Davis-Bacon Act.

This opinion is not intended to relieve construction contractors or their subcontractors from the obligations imposed by the Davis-Bacon Act and related statutes where their own employees are themselves engaged in the transporting of materials and supplies, including quarried stone such as here in question, to or from the building or work within the meaning of Section 5.2(g) of Regulations, Part 5.

Yours sincerely,

Charles Donahue
Solicitor of Labor

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

March 2, 1962

Mr. Carl V. Ramey, Director
Compliance Division
Housing and Home Finance Agency
1626 K Street, N. W.
Washington 25, D. C.

Attention: Mr. Robert E. Dwyer
Room 203

Re: Redevelopment of North East
Washington, D. C.
E-62-595

Dear Mr. Ramey:

This is with reference to your informal request for advice as to coverage by the Davis-Bacon and related Acts of certain aspects of demolition work in connection with the above-identified project.

You advise that the contractor on the above-identified project, is paying trash burners and house strippers at the rate of $1.15 per hour, and is paying brick cleaners at the rate of $6.00 per thousand brick cleaned regardless of the time required for cleaning. The contract carries a minimum rate of $2.60 for demolition laborers, with no specific rate for trash burners, house strippers or brick cleaners. To avoid showing employees at rates less than $2.60, the names of persons being paid at the rate of $1.15 or at the brick cleaner's rate of $6.00 per thousand were omitted from the contractor's submitted payrolls.

The contract requires the contractor to demolish the structures and clear the site. The house stripper, who disconnects and removes radiators, sinks, bowls, bath

tubs, refrigerators, water heaters, and electrical fixtures, and loads such material in trucks, is performing an integral part of the work required by the contract, and is entitled to not less than the demolition laborer's rate of $2.60.

The trash burner, who is assisting in clearing the site, is also performing an integral part of the work required by the contract, and likewise is entitled to not less than the demolition laborer's rate of $2.60.

The contractor's obligation, however, to demolish the structures and clear the site does not include the duty to clean the brick for resale.

The cleaning of bricks differs from other activities relating to demolition in that it is an activity apart from, and is performed in addition to, demolition and cleaning the site. The men who do the work are normally not demolition laborers but a separate group who usually confine their work activities to this specific cleaning operation. Because the price of used brick must be sufficiently under the price of new brick to make the purchase of used brick attractive, wreckers keep the price of used brick competitive by having the work done on a piece work basis. This stabilizes their labor costs, and eliminates the need for time keeping and the keeping of cost control records. The brick cleaning is in the nature of a side venture not required by the contract, and not ordinarily performed by construction-type workers. Under the circumstances, it is our conclusion that brick cleaning is not a covered activity and hence persons performing such work would not be entitled to the contract minimum rates predetermined pursuant to the Davis-Bacon and related Acts. The demolition contractor should be advised, however, that the brick cleaning might be subject to the provisions of the Fair Labor Standards Act.

If you have further questions on this matter, do not hesitate to contact us.

Yours sincerely,

Charles Donahue
Solicitor of Labor