

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

August 5, 1963

MEMORANDUM # 55

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

FROM : E. Irving Manger *EIM*
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 enforce-
ment 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-40

DB-40

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175a(2)

June 25, 1963

Mr. Harold F. Blasky
Deputy General Counsel
Office of the Chief of Engineers
Department of the Army
Washington 25, D. C.

Re: ENGGC-K

Dear Mr. Blasky:

This is in response to your correspondence concerning the coverage under the Davis-Bacon Act of certain exploratory drilling in northwestern Montana.

The question of coverage concerning the drilling in question is covered in Situation A of the enclosed memorandum, dealing generally with the application of the Davis-Bacon Act to drilling work.

Yours sincerely,

Charles Donahue
Solicitor of Labor

Enclosure

APPLICATION OF THE DAVIS-BACON ACT TO DRILLING WORK IN VARIOUS SITUATIONS

SITUATION A

Bids are solicited for exploratory drilling. The drilling is for the purpose of obtaining data to be used in engineering studies and planning for a multi-million dollar dam and reservoir. The project has not been authorized by the Congress. No construction funds have been appropriated. The precise location of future construction cannot be determined pending completion of extensive engineering studies. The drilling of the holes is to obtain core borings. The holes are presumably abandoned or filled in following the obtaining of the core borings.

The Davis-Bacon Act applies to all Government contracts exceeding \$2,000 for the "construction, alteration, and/or repair" of Federal public buildings or "public works". The application of the Davis-Bacon Act to a contract for the drilling work described above would seem to turn upon whether the contract is one for "construction" of a "public work(s)" within the meaning of the Act.

The test of whether the contract calls for "construction" seems to be met easily. Drilling, like excavating generally, is usually considered "construction" activity. See 29 CFR 3.2(a) and 5.2(f).

The critical question therefore appears to be whether the holes which would be dug during the course of the exploratory drilling would be "works" within the statutory term "public works".

The word "works" in the term "public works" would seem to refer to improvements, such as buildings, canals, or roads, rather than to progress or activity. Consequently, mere digging would not appear to be within the term, because it relates to an activity as distinguished from a product or improvement. Also, the holes themselves, which are opened to obtain cores and which are subsequently to be filled in or abandoned, would not appear to be "works", because they would not seem to be improvements. The products sought by the digging are the cores of earth and not the holes themselves.

This interpretation is consistent with judicial and administrative interpretations of the term "public works" under the Act of August 1, 1892 (secs. 1 and 2, 27 Stat. 230), a former Eight Hour Law, and the term as used in its singular form under the Miller Act (40 U.S.C. 270a). Cf. Ellis v. U. S., 206 U. S. 246 (1907); U. S. for the use of Noland v. Irwin, 316 U. S. 23 (1942); 26 Op. A. G. 30 (1906); and 34 Op. A. G. 257 (1924).

SITUATION B

Soil samples are taken prior to or during construction for the construction contractor, for example, for the purpose of setting foundations.

Soil boring contracts are considered covered by the Davis-Bacon Act if they may be fairly characterized as being directly related and incidental to, or an integral part of, the actual construction process. This to be distinguished from the situation where such contracts are for the mere formulation of engineering plans and specifications, designs, and the conduct of site investigations. The latter activities are regarded as preliminary work, and not as part of the construction process. It affects the construction work without being a part of it. Cf. Letter of August 2, 1962, from the Secretary of Labor to the President of the Ohio Society of Professional Engineers concerning the application of the Davis-Bacon Act concerning analogous situations involving survey work.

SITUATION C

A contract calls for the making of a hole for use as a ventilating shaft, water wells, etc.

Under the rationale for Situation A, we would regard such a contract as one for the construction of "public work(s)" of the United States within the meaning of the Davis-Bacon Act. The digging of the hole itself would be an improvement in this instance.

SITUATION D

A contract calls for ground water investigation, and requires the digging of test holes that are to be designed to permit conversion to water wells in the event the tests at any hole indicate an adequate yield and a production well is desired at the hole location.

Again under the rationale for Situation A, we would regard such a contract as one for the construction of a "public work(s)" of the United States under the Davis-Bacon Act.

We do not consider the fact that some of the holes that would be dug would not be used ultimately as water wells as defeating coverage. We consider it enough if there is an expectation that the holes may be used as water wells. See: Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88; Bear Creek Mining Company v. Wirtz, WH Cases 922 (1963).

SITUATION E

A contract calls for the plugging of oil or gas wells and the removal of above-ground equipment in connection with the construction of a reservoir on land containing such wells. The performance requires laborers to dismantle the above-ground equipment and pull the tubing. Thereafter special crews place a packer in the hole and rerun the tubing in order to facilitate the placing of a deep cement plug. The tubing is then pulled once more, and intermediate and surface plugs are placed in the hole.

We have held that this work would be covered by the Davis-Bacon Act no matter whether the work is characterized as demolition (the dismantling of the above-ground equipment), or well drilling (the rerunning of the tubing and the replacement of the cement plugs). See the Solicitor's letter dated June 13, 1961, to the Corps of Engineers (DB-6).