**In the Matter of:**

**FORREST M. SANDERS,** **ARB CASE NO. 05-107**

**PETITIONER,** **DATE: November 30, 2007**

**v.**

**ADMINISTRATOR, WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For Petitioner:***
**Forrest M. Sanders, *pro se*, Billings, Montana**

***For Respondent Administrator, Wage and Hour Division:***
**Roger W. Wilkinson, Esq., Ford F. Newman, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor*, Washington, D.C.**

## DECISION AND ORDER OF REMAND

Forrest M. Sanders claims that work he performed on a road construction project while employed by Asphalt Supply and Services, Inc. (ASSI) was subject to the minimum wage provisions of the Davis-Bacon Act (DBA or the Act).[1] The Administrator of the United States Department of Labor's Wage and Hour Division

[1] 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003). The regulations that implement the Act are found at 29 C.F.R. Parts 1 and 5 (2007).

(Administrator) held that Sanders was not entitled to DBA wages. Sanders requested that we review the Administrator's decision. We vacate the decision and remand.

## BACKGROUND

### 1. The Legal Framework

The DBA applies to every contract of the United States in excess of $2,000 for construction, alteration, or repair, including painting and decorating, of public buildings or public works in the United States.[2] It requires that contractors pay a minimum wage to the various classifications of mechanics or laborers whom they employ.[3] The Administrator determines these minimum wages and publishes them as "Wage Determinations."[4] The minimum wage rates contained in the wage determinations derive from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements.[5] "Prevailing" wages are wages paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area.[6]

### 2. Chronology of Events

In September 2001, the Bureau of Indian Affairs (BIA) awarded ASSI a contract to supply mineral aggregate from a pit located in Yellowstone County, Montana. The aggregate was to be used on a Federal highway construction project that the BIA was building on the Crow Indian Reservation.[7] ASSI employees were to convey rocks from the pit to a crusher, crush the rocks, test and sample the rocks, and then stockpile the aggregate in the size the contract specified.[8] ASSI employed Sanders on the Crow Reservation project to operate a front end loader to strip topsoil from the ground covering the pit.[9] The ASSI contract did not contain DBA minimum wage provisions or a wage determination.

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2 40 U.S.C.A. § 3142(a).

3 *Id.*

4 29 C.F.R. Part 1.

5 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

6 *See* 29 C.F.R. § 1.2(a)(1).

7 Tab I.

8 Tab B at 1.

In February 2002, the Tribal Employment Rights Office (TERO) for the Crow Tribe contacted the BIA on behalf of the ASSI employees working on the Crow Reservation project. TERO contended that ASSI employees should be paid DBA wage rates.[10] BIA's contracting officer responded that because the contract with ASSI was a supply contract and not a construction contract, the DBA did not apply.[11] BIA terminated the ASSI contract for default on May 3, 2002.[12]

After requesting that the Department of Labor and BIA order ASSI to pay him wages conforming to DBA rates, but receiving no satisfaction, Sanders wrote to the Administrator requesting a written final ruling as to whether the work he had performed for ASSI was subject to DBA prevailing wages.[13] The Administrator issued a final determination on June 3, 2004. She found that "the contract between the BIA and ASSI was not a contract for construction of a public work, as the only requirement was for the supply and preparation of mineral aggregate."[14] Such a supply contract, the Administrator ruled, is subject to the Walsh-Healey Public Contracts Act, not the DBA.[15] Consequently, the Administrator ruled that the work Sanders performed for ASSI on the Crow Reservation road project was not subject to the prevailing wage provisions of the DBA.[16] Sanders petitioned the ARB to review the Administrator's final determination.[17]

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[9] Sanders's "Appeal of Administrator's Adverse Decision Not Granting Prevailing Wage" (Sanders Appeal) at 3.

[10] Tab H.

[11] *Id.*

[12] Tab K.

[13] Tab D.

[14] Tab B at 2.

[15] Employees covered under the Walsh-Healy Act, 29 U.S.C.A. § 201 *et seq.* (West 1998), must be paid in accordance with the minimum wage requirements of the Fair Labor Standards Act, 41 U.S.C.A. § 35 *et seq.* (West 2000).

[16] Tab B at 2.

[17] *See* 29 C.F.R. § 7.9(a) ("Any party or aggrieved person shall have a right to file a petition for review with the Board (original and four copies), within a reasonable time from any final decision in any agency action under part 1, 3, or 5 of this subtitle.").

## JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations.[18] The Board's review of the Administrator's rulings is in the nature of an appellate proceeding.[19] We assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.[20] The Board generally defers to the Administrator as being "in the best position to interpret [the DBA's implementing regulations] in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside."[21]

## DISCUSSION

### 1. Relevant Law

As we have already indicated, the DBA applies to Federal contracts for the construction of public buildings or public works. The Act requires employers to pay mechanics and laborers "employed directly on the site of the work" the local prevailing wage rates as determined by the Secretary of Labor.[22] "Construction" means "[a]ll types of work done on a particular building or work at the site thereof, including work at a facility which is dedicated to and deemed a part of the site of the work within the meaning of section 5.2(l) of this part by laborers and mechanics employed by a construction contractor or construction subcontractor."[23] "Construction" includes

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[18] 29 C.F.R. § 7.1(b)(2007). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[19] 29 C.F.R. § 7.1(e).

[20] *Miami Elevator Co. & Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (Apr. 25, 2000). *See also Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (May 11, 2000); *Dep't of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 16 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351 *et seq* (West 1987)), *citing ITT Fed. Servs. Corp. (II)*, ARB No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (Aug. 28, 1992).

[21] *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

[22] 40 U.S.C.A. § 3142(a), (c)(1).

[23] 29 C.F.R. § 5.2 (j)(1).

"[m]anufacturing or *furnishing of materials*, articles, supplies or equipment *on the site of the building or work.*"[24] "Site of the work" is defined as follows:

> (1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;
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> (2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section;
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> (3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.[25]

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[24] 29 C.F.R. § 5.2 (j)(1)(iii) (emphasis added). *See also* 29 C.F.R. § 5.2(i) ("Building" and "work" "generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work," "*unless* conducted in connection with and *at the site of* such a building or work.) (emphasis added).

[25] 29 C.F.R. § 5.2(l). This regulation became effective on January 19, 2001, before the BIA's Crow Indian road construction project began, and, therefore, applies here. *See* 65 Fed. Reg. 80,268 (Dec. 20, 2000).

As noted earlier, ASSI furnished the crushed aggregate from the mineral pit, and Sanders worked at that pit while employed on the Crow Reservation road project. Therefore, ASSI, and thus Sanders, engaged in DBA construction and Sanders is entitled to DBA wages if that pit was part of the site of the Crow Reservation road project. The pit was part of that site if it was dedicated exclusively, or nearly so, to the performance of the road project and if it was adjacent or virtually adjacent to the road project.[26]

**2. The Parties' Arguments**

In her June 3, 2004 final determination, the Administrator found that the pit used for the BIA's Crow Reservation road project had been "established prior to the contract work in question, and has been previously used by the State of Montana and other local entities for other projects in the area."[27] Sanders argues that the Administrator erred in so finding. He contends that the pit was located one mile from the road that BIA was building and "was never previously mined for any reason and was particularly never disturbed for the purpose of producing gravel for any road job."[28] Though he does not cite 29 C.F.R. § 5.2(l), the relevant regulation here, Sanders in effect argues that the pit was part of the site of the Crow Reservation road project because it was both "dedicated exclusively" for the performance of that project and because it was located virtually adjacent to that project.[29] Thus, says Sanders, because he worked at the pit while employed on the Crow Reservation project, he is entitled to DBA wages.

The record supports this argument. According to a BIA official, the information that the BIA had previously given to the Administrator (and upon which she based her final determination) was erroneous and that "the gravel pit at question was in fact a virgin pit dedicated exclusively to the Crow Indian Reservation project."[30] The Administrator argues that even though the pit may have been "dedicated exclusively" for the road project, the record is "conflicting and unclear" as to whether the pit was "adjacent or virtually adjacent" to the road project. The record contains evidence that the pit was "situated approximately 1,000 to 1,500 yards off the main road."[31] On the other hand, the Administrator points out, the pit was approximately 160 acres in size, which might mean

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[26] 29 C.F.R. § 5.2(l)(2) applies to mineral pits. *See Ball, Ball & Brosamer, Inc.,* WAB No. 90-18, slip op. at 10 (Nov. 29, 1990) (applying site of the work definition to a "sand and gravel pit" that provided sand, gravel and other aggregates).

[27] Tab B at 1.

[28] Sanders Appeal at 2-3.

[29] Sanders appears before us pro se.

[30] Tab N at 1.

[31] *Id.*

that Sanders worked much further than 1,000-1,500 yards from the road project. If that were the case, the Administrator contends, Sanders did not work virtually adjacent to the road project and thus would not be entitled to DBA wages.[32]

**3. The Administrator did not consider whether the pit where Sanders worked met the definition for "site of the work."**

The Administrator's June 3, 2004 final determination denied Sanders's claim for DBA wages because she found that ASSI employees were not engaged in construction work on the Crow Reservation road but were only preparing and supplying the mineral aggregate. But contractors who furnish materials do engage in construction, and thus must pay DBA wages, when their activities occur on the site of the building or work. Thus, 29 CFR § 5.2(l), which defines "site of the work," is relevant here. While the Administrator obliquely referred to section 5.2(l) when she found, because of erroneous information, that the pit was built and used before the road project began (and thus was not "dedicated exclusively" for the Crow Reservation project), she did not expressly discuss and apply that regulation. As a result, the Administrator's final determination is not consistent with the regulations that implement the DBA.[33] Moreover, the record contains evidence that the pit was dedicated exclusively to the Crow Reservation road project and that the pit was, arguably, adjacent to that project.

Therefore, we vacate the Administrator's final determination and remand the case to the Administrator to determine whether Sanders worked on the site of the Crow Reservation road project and is therefore entitled to DBA wages. The Administrator should make findings, supported by evidence, whether the pit where Sanders worked was built exclusively for the Crow Reservation road project and whether it was adjacent or virtually adjacent to the project. We observe that in promulgating the "site of the work" definition at section 5.2(l), the Administrator "did not propose to define the terminology 'adjacent or virtually adjacent,' leaving this question to be determined on a case-by-case basis, given that the actual distances will vary depending upon the size and nature of the project in question."[34] The "site of the work" definition should be applied "with common sense and some flexibility."[35] Furthermore, the Administrator has stated that the Board's decision in *Bechtel Constructors Corp.*, ARB No. 95-045A (July 15, 1996), "provides an excellent example" and "considerable guidance on how the amended [site of the work] definition will be applied by the Department."[36]

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[32] Administrator's Statement at 10-11.

[33] *See Miami Elevator,* slip op. at 16.

[34] 65 Fed. Reg. at 80,270.

[35] 65 Fed. Reg. at 80,272.

## CONCLUSION

The Administrator's June 3, 2004 final determination that the work Sanders performed for ASSI at the pit used for the Crow Reservation road project was not subject to the prevailing wage provisions of the DBA is unreasonable because she did not discuss or apply the definition for "site of the work" at 29 C.F.R. § 5.2(l). Therefore, we **VACATE** the final determination and **REMAND** this matter to the Administrator with instructions to proceed in a manner consistent with this opinion.

**SO ORDERED.**

**OLIVER M. TRANSUE**
**Administrative Appeals Judge**

**DAVID G. DYE**
**Administrative Appeals Judge**

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[36] *Id.* In *Bechtel*, the DBA-covered construction project at issue consisted of the construction of 330 miles of aqueduct and pumping stations. Temporary batch plants located up to one half mile from each of the pumping stations under construction were built to provide concrete for the project. The Board considered whether the batch plants were located at the "site of the work." The Board noted that "it is the nature of construction, *e.g.*, highway, airport and aqueduct construction, that the work may be long, narrow and stretch over many miles" and, therefore, concluded that "[w]here to locate a storage area or batch plant along such a project is a matter of the contractor's convenience and is not a basis for excluding the work from the DBA." *Bechtel*, slip op. at 7. And after examining aerial photographs, a map of the project, and the nature of the construction, the Board found that "work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project." *Id*.