UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABHE & SVOGODA, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 04-1973 (JR)
	:	
ELAINE CHAO, Secretary, U.S. Department of Labor,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

Plaintiff Abhe and Svogoda, Inc. ("A & S"), a construction company, seeks judicial review of a decision by the Labor Department's Administrative Review Board ("Board") in a dispute arising under the Federal-Aid Highways Act, 23 U.S.C. § 101, et seq., and the Davis-Bacon Act, 40 U.S.C. § 3141, et seq. Three of the four counts of the complaint fail to state a claim on which relief can be granted. The fourth cannot be dismissed without the further briefing contemplated by Rules 12(b) and 56(e) of the Federal Rules of Civil Procedure.

The Davis-Bacon Act requires contractors for federal projects to pay wages at rates not less than those that prevail on similar construction in the given locality, as determined by the Secretary of Labor. 42 U.S.C. § 5310. In 1994 and 1995, A & S entered into three construction contracts with the Connecticut Department of Transportation to clean and paint bridges. The projects received federal funds and were

accordingly subject to the prevailing wage requirements of Davis-Bacon. A & S paid painter's rates to employees who actually painted the bridges, but only the lower carpenter's rate or laborer's rate to employees who performed tasks associated with bridge painting (e.g., decontamination showering, waste cleanup). The Administrator of the Wage and Hour Division found that A & S had underpaid those employees and was liable for back wages. DOL withheld $1.3 million in contract payments from A & S, the amount of the underpayments by A & S and three of its subcontractors. An administrative law judge upheld the Administrator's decision. The Board affirmed the ALJ's decision and, on October 15, 2004, denied A & S's motion for reconsideration.

A & S complains of 1) estoppel, based on representations made by officials of the Connecticut government while acting as agents for the defendant; 2) lack of fair warning of conduct prohibited or required by law or regulation; 3) a procedural due process violation, because the ALJ adopted the post-hearing brief submitted by the Administrator instead of writing his or her own findings of fact and conclusions of law; and 4) arbitrary findings as to "prevailing" practices, because the defendant relied upon an area practice survey of the unionized sector, thereby violating published regulations that (plaintiff asserts) require it to establish prevailing wage rates for every classification. The relief A & S seeks would include

an order directing DOL "to negate the back wage assessments against A & S and its subcontractors and to release to A & S any A & S funds being withheld (currently in excess of $1.3 million dollars) on other projects." Dkt. #1 at 11.

The government moves to dismiss, asserting that plaintiff's suit challenges the correctness of the Board's final determination of the proper classification of workers and wage determinations -- a matter that is not subject to judicial review, U.S. v. Binghamton Constr. Co., 347 U.S. 171, 177 (1954). Only "due process claims and claims of noncompliance with statutory directives or applicable regulations" are reviewable in Davis-Bacon Act cases. Califano v. Sanders, 430 U.S. 99, 109 (1977).[1]

It may be, as the Fourth and Fifth Circuits have held, see Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 761 n.10 (1981), that the practices and procedures of the Secretary are reviewable under the APA notwithstanding the Binghamton rule, see Carabetta Enterprises, Inc. v. Harris, 1979 WL 1907, at *2 (D.D.C. 1979); see also Framlau Corp. v. Dembling, 360 F. Supp. 806, 809 (E.D. Pa. 1973). In this case, however, the relief

[1] The government's motion to dismiss is for lack of jurisdiction, but "jurisdiction" is the wrong rubric for the required analysis. Plaintiff is correct that subject matter jurisdiction is conferred by the Administrative Procedure Act. "Reviewability under the APA is generally not a jurisdictional matter but rather a question of '[w]hether a cause of action exists.'" Federal for American Immigration Reform v. Reno, 93 F.3d 897, 907 n.5 (D.C. Cir. 1996)(Rogers, J., dissenting).

plaintiff seeks is the release or repayment of $1.3 million in withheld contract payments.[2] That substantive demand for relief is not rendered "procedural" by slapping a due process label on it.

Estoppel (Count I) is not a due process claim, but, even if it were, the requested relief -- the imposition of employee classifications and wage levels contrary to the Secretary's determinations -- would be foreclosed by the Binghamton rule. Plaintiff has cited no authority, procedural or otherwise, for the proposition (Count III) that findings of fact must be original.[3] And plaintiff's claim that the Department's findings were arbitrary, capricious, and unsupported by evidence (Count IV) is of course a request for the very judicial review that is not available after Binghamton.

The only one of plaintiff's legal theories that plausibly implicates the Due Process Clause is the "lack of fair warning" claim set forth in Count II. This claim relies on a line of cases, most recently General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995), holding that an agency may not deprive a

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[2] "A & S petitions this Court to . . . [e]nter a judgment declaring that the decisions of the Department are erroneous and unenforceable, and directing the Secretary of Labor to negate the back wages assessment against A & S and its subcontractors and to release to A & S any A & S funds being withheld (currently. $1.3 million) on other projects." Dkt. #1 at 11.

[3] Note, in any case, that the Board's review of the ALJ's decision was de novo.

party of property by imposing liability in the absence of notice, "for example, where the regulation is not sufficiently clear to warn a party about what is expected of it." Id. at 1328. Plaintiff's specific grievance is

> "that the Department arbitrarily and improperly neglected its duty under the APA to publish notice of the specific job duty requirements that were later relied upon to make findings retroactively against A & S. Instead, the Department placed the burden on contractors like A & S to discover, for example, unwritten union work practices which the Department relied on, long after the work was performed, to find A & S in violation of the Act."

Dkt. #9 at 11. In essence, plaintiff alleges that the Department, when deciding to withhold payment from plaintiff, relied on information that plaintiff could not have accessed, nor even known to access, at the time that it made its original wage categorizations for its employees.

When responding to a motion to dismiss, a plaintiff "must set forth sufficient information to suggest that there exists some recognized legal theory upon which relief can be granted." Gregg v. Barrett, 771 F.2d 539, 547 (D.C. Cir. 1985). To do so, plaintiff need only "'adduce a set of facts' supporting [its] legal claims in order to survive a motion to dismiss." Wells v. United States, 851 F.2d 1471, 1473 (D.C. Cir. 1988)(internal citations omitted).

Plaintiff's allegations that it has been deprived of property for failing to comply with procedures of which it was

unaware, and of which it could not have learned through inquiry, would be enough at least to invoke the "fair warning" rule of General Electric. The government responds, however, with a number of mixed fact-law propositions (Dkt. #11-1 at 3-6):

- that Davis-Bacon wage determinations do not contain job descriptions for the classifications they list; job content is determined by locally prevailing practices;
- that A & S knew, or, as an experienced contractor, should have known, to ascertain locally prevailing practices before submitting bids and commencing work on a Davis-Bacon contract;
- that A & S knew or should have known that the wage rate for its contract was derived from the collective bargaining agreement entered into by Painters' District Council 11;
- that, if A & S had contacted the local unions, it would have learned that the prevailing practice in Connecticut is to pay for all work on bridge painting contracts at collectively bargained painters' rates; and
- that, if it could not learn this information through inquiry, A & S could have obtained an

authoritative ruling from the Administrator of the Wage and Hour Division before commencing work. These "matters outside the pleading" need to be supported by affidavit. See Fed. R. Civ. P. 56(e).

The government's motion to dismiss [7] is **granted** as to Counts I, III and IV. It is **denied** as to Count II. Upon the submission of proper support for the factual matters set forth above, however, it will be deemed renewed as a motion for summary judgment as to Count II. Plaintiff may then have the time permitted by the local rules to present all material made pertinent to such a motion by Rule 56.

JAMES ROBERTSON
United States District Judge