

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



MAR 25 1991

MEMORANDUM NO. 155

TO: ALL CONTRACTING AGENCIES OF THE FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

**FROM: *John R. Fraser*
JOHN R. FRASER
Acting Administrator**

SUBJECT: Application of the Davis-Bacon Act to Hazardous Waste Cleanup Contracts

To promote consistency throughout the federal contracting community, I am attaching a copy of a letter concerning the application of the Davis-Bacon Act to hazardous waste cleanup contracts that require elaborate landscaping activities or substantial excavation and reclamation work.

Please review your agency's procedures to ensure that they comport with Department of Labor policy.

Attachment

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MAY 31 1990

**Mr. Henry Longest II
Director, Office of Emergency
and Remedial Response
United States Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20460**

Dear Mr. Longest:

The Department of Labor (DOL) has been requested to rule on the applicability of the Davis-Bacon Act (DBA) to the removal of hazardous waste at the Bunker Hill Superfund Site in Kellogg, Idaho.

As we understand the facts in this case, on March 1, 1987, the Environmental Protection Agency (EPA) entered into Contract No. 68-01-7334 with Riedel Environmental Services, Inc. (Riedel) to conduct the removal of oil, petroleum, and other hazardous substance releases pursuant to section 311 of the Clean Water Act and section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), in the 24 states and territories designated as EPA Zone Four. This emergency removal contract is one year in length with a Government option to extend the effective period three (3) additional one-year periods. The McNamara-O'Hara Service Contract Act (SCA) labor standards provisions and SCA Wage Determination No. 82-69 (Revision-3), which is updated with the exercise of each option, are incorporated. Under the terms of the contract, cleanup efforts for a hazardous waste site within EPA Zone Four are undertaken only upon the issuance of a delivery order authorizing the specific removal activity. Depending on the location of the hazardous substance release and its proximity to populated areas, the contract requires Riedel to respond to a release or threatened release within two to twenty-four hours of the receipt of a written or oral delivery order unless otherwise specified by the delivery order.

In the instant case, Delivery Order No. 7334-10-014 was issued on April 26, 1989 requiring Riedel to begin the orderly removal and disposal of soils contaminated with lead and other heavy metals from selected residences within the Bunker Hill site. The contractor was obligated to be on the site by June 5, 1989, 40

days from the date of the Delivery Order, and to complete the cleanup activities by April 24, 1990, one year from the effective date of the Delivery Order. At the time this Delivery Order was issued, SCA Wage Determination No. 82-69 (Revision-5) was included in Contract No. 68-01-7334 and applied to the work performed.

We have been advised that under Delivery Order No. 7334-10-014 Riedel was required to excavate and remove contaminated soils a maximum of 12 inches in depth over an area covering some 60 residences. The excavated soils were loaded into dump trucks and transported to a temporary storage area pending identification of a permanent disposal site. Riedel was also required to replace the excavated soils with non-contaminated dirt, resod the area and replace shrubbery. We understand that approximately \$2,000,000 was obligated from the Superfund for this delivery order.

As you know, DBA applies to "every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." Section 5.2(j) of Regulations, 29 CFR Part 5, defines the terms "construction, alteration or repair" to "mean all types of work done on a particular building or work at the site thereof" Section 5.2(i) of Regulations, Part 5, defines "building" and "work", in pertinent part, as follows:

The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types such as bridges, dams, . . . , drilling, blasting, excavating, clearing, and landscaping (emphasis added). * * *

The term "landscaping" as used in these regulations includes not only such activities as planting trees, shrubs or lawns when performed in conjunction with other construction work (e.g., the erection of a building or other structure), but also includes elaborate landscaping activities such as substantial earth moving and the rearrangement or reclamation of the terrain that, standing alone, are properly characterized as the construction,

1
Substantially equivalent definitions of "construction" and "building" or "work" have been incorporated into the government-wide Federal Acquisition Regulations at 48 CFR 22.401.

alteration, or repair of a public work. Substantial excavation of contaminated soils followed by restoration of the environment, such as required for the cleanup of the Bunker Hill site, constitutes "construction work" within the meaning of the DBA and the implementing Regulations, Part 5.

SCA, which was incorporated into Contract No. 68-01-7334 and applied to the work performed at Bunker Hill, is applicable to federal contracts, the principal purpose of which is to furnish services through the use of service employees. Pursuant to section 4.116(c)(2) of Regulations, 29 CFR Part 4, the provisions of both SCA and DBA are applicable to contracts involving construction and service work where such contracts are principally for services and where:

- (1) The contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at the contract date that a substantial amount of construction work will be necessary for the performance of the contract.
- (2) Such construction work is physically and functionally separate from and, as a practical matter, is capable of being performed on a segregated basis from the other work required by the contract.

While Contract No. 68-01-7334 may be determined to be principally for services within the meaning of SCA, the excavation and restoration work required by Delivery Order No. 7334-10-014 constitutes a substantial and segregable amount of construction work to which the Davis-Bacon (DB) labor standards provisions and DB wage determination are applicable. We understand that the work performed under Delivery Order No. 7334-10-014 has been completed, but that an additional 70 sites in the Bunker Hill area are targeted by EPA for removal actions similar to that undertaken pursuant to Delivery Order 7334-10-014. In this regard, please take the necessary steps pursuant to section 1.6(f) of Regulations, 29 CFR Part 1, to ensure that the DB stipulations and the applicable DB wage determination are incorporated into Contract No. 68-01-7334 and applied to any subsequent delivery orders where those delivery orders require substantial and segregable construction work.

The issue of the construction work performed at Bunker Hill has raised additional questions regarding application of the federal labor standards statutes to emergency removal contracts for other EPA zones, nationwide. We understand that your agency determines the applicability of SCA or DBA to a Superfund project based on whether the response activity constitutes "emergency removal" or

"remedial action" as defined by CERCLA. In meetings held in 1981 and 1985 to discuss application of the labor standards statutes to Superfund projects, EPA and DOL reached an agreement that SCA, DBA, and the Contract Work Hours and Safety Standards Act (CWHSSA) were applicable to hazardous waste cleanup contracts that were "remedial" in nature because, as represented to DOL, those contracts were principally for services and involved substantial and segregable construction work. At those meetings, EPA and DOL also agreed that SCA and CWHSSA applied to "emergency removal" contracts. However, the agreement was predicated on EPA assurances that emergency removal contracts did not require construction work within the meaning of the DBA, or that any construction work performed during the cleanup was so closely related to the service work that it could not be performed separately. Contrary to this understanding, we have become aware that individual delivery orders, such as the Bunker Hill delivery order, are being issued where those delivery orders require construction activity that is clearly substantial and segregable from any service activity performed by the contractor pursuant to its contractual obligation to provide emergency removal services within hours of a hazardous substance release. As previously stated, the construction work performed under such a delivery order is subject to the DBA provisions by virtue of the language of the statute and the implementing regulations. The nature of the work is the determinative factor in deciding DBA or SCA coverage and not whether such work is accomplished pursuant to an "emergency response" contract or a contract for "remedial action."

In addition to the foregoing, a question has been raised regarding the propriety of applying a "regional" rather than "locally prevailing" SCA wage determination to a delivery order issued under an emergency removal contract where the cleanup work was planned and where the place of performance was known at the execution of the contract or option period. In view of the numerous concerns raised and the national economic and environmental impact of these Superfund contracts, we are requesting a meeting with your agency and other agencies who contract for hazardous waste cleanup under CERCLA to discuss the current procurement policies and procedures and the application of the various labor standards statutes and wage determinations to those contracts. In addition, we are requesting your agency to review the current hazardous substance removal contracts to ensure that the DB labor standards stipulations and wage determination are incorporated and applied to any substantial and segregable construction work being performed under the contracts. Please provide us with a report of your actions in this matter, including your actions in the Bunker Hill operation, as soon as possible.

If you have additional questions or require assistance in this matter, please do not hesitate to contact us.

Sincerely,

A handwritten signature in cursive script, appearing to read "S. D. Walker".

Samuel D. Walker
Acting Administrator