U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

MAY 24 1963

MEMORANDUM # 50

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

FROM : E. Irving Manger
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 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

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U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

May 10, 1963

Travis T. Brown, Esquire
4848 Dexter Street, N. W.
Washington 7, D. C.

Dear Mr. Brown:

In response to your recent inquiry as to whether so-called working subcontractors are covered by the Davis-Bacon and related Acts and by the contract labor standards provisions governing work on Federally financed and assisted construction projects, we are enclosing, for your information, copies of our opinion to Mr. Arthur L. Lewis, dated September 27, 1957, which accurately reflects the traditional view of this Department in the matter.

As you know, the Davis-Bacon Act (40 U.S.C. 276a et seq.) requires, in part, that:

> "...the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics..." (emphasis furnished).

These requirements were necessary to counteract certain abuses which arose soon after passage of the original Act. It was found that some contractors who apparently paid the wage prevailing in the locality had, by force, threat or as a condition of obtaining employment, exacted rebates from the workers. Others had their laborers and mechanics form ostensible partnerships and sell their services as though they were in fact subcontractors.

The underscored portion of the 1935 amendments to the Davis-Bacon Act, quoted above, was intended to prevent mala fide partnership arrangements and is not to be interpreted as being applicable to the bona fide subcontractor who may personally perform some work under his subcontract on a covered construction project.

I trust that these views will be of assistance to you.

Yours sincerely,

Charles Donahue
Solicitor of Labor

Enclosures

DB-35 (Enclosure)

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

September 27, 1957

Mr. Arthur L. Lewis, President
H. I. Lewis Construction Company
43 East Main Street
Middletown, Pennsylvania

Dear Mr. Lewis:

This is in response to your recent inquiry concerning payroll requirements on Federal construction work. You mentioned that your firm, as prime contractor on an Army project, had a masonry subcontractor who personally performed all the masonry work with the help of a mason tender. You ask whether the subcontractor must list himself on the certified payrolls covering work performed in his subcontractor capacity.

If this masonry subcontractor is a bona fide subcontractor with an established business, he must list on his certified payrolls all personnel engaged in the contract work, including himself if he performs as a mason, as indicated in your example. However, as owner of the firm, he need only list his name and the notation that he is the owner.

If, as sometimes happens, an individual is called a subcontractor whereas in fact he is merely a journeyman mechanic supplying only his labor, such an individual would not be deemed a bona fide subcontractor and must be carried on the payroll of the contractor as an employee. In this latter case, the employee must be paid at least the determined hourly rate for the work performed and the certified payrolls of the contractor must reflect this information accordingly.

A copy of this letter is being furnished the Corps of Engineers for its information.

If we can be of further assistance, please let us know.

Very truly yours,

Stuart Rothman
Solicitor of Labor

By_____
James R. Beaird
Acting Assistant Solicitor

U. S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington 25

April 20, 1960

Mr. J. L. Sillars
Assistant Treasurer
The Weitz Company, Inc.
406 Fleming Building
Des Moines 9, Iowa

Dear Mr. Sillars:

I must apologize for not having replied sooner to your letter of April 7, but the press of other work prevented me from doing so.

I understand the situation with which you are concerned involves the case of a sole owner or partners to whom you have subcontracted part of the Government work, and that the sole owner or the individual partners, as the case may be, themselves perform journeymen's work on the job site. I quite agree with you that in such a case it would be superfluous for them to carry themselves on their own payrolls and write checks to themselves on their own bank accounts, and that is not what we intended to suggest in our letter of April 4. In that letter I was referring to your payrolls and to checks which would be written by you and delivered to these "laborers and mechanics." In other words, "regardless of any contractual relation which may be alleged to exist between" you as prime contractor and these persons as subcontractors, they remain "laborers and mechanics" within the meaning of the law and are employed in the performance of your contract. Therefore, it becomes your obligation to see that they are properly paid.

As indicated in my letter of April 4, you may properly deduct the amount so paid or charge it against the subcontract price so long as only straight time wages are involved. However when overtime is worked, the extra half time must come out of your pocket, not out of theirs, i.e., not out of the contract price. This is not true, of course, as to any persons employed by the subcontractor. As to them, both straight time and overtime wages are his obligation and it is not your concern if such straight time and overtime wages should add up to more than the contract price which he receives from you, thus causing him to suffer a loss on the contract.

In other words, the subcontractor who himself performs the work of a laborer or mechanic on the project, even though his status as an independent contractor is strictly bona fide, occupies under this law a dual role. He is at one and the same time a laborer or a mechanic who must be carried on your payrolls and paid by you for his work at the predetermined rate. He is also, with respect to the laborers and mechanics whom he employs, an independent employer who must live up to his obligations under the law. Should he fail to do so the primary responsibility would be his, although some liability might devolve under the Miller Act upon you and your bondsman.

I trust that the foregoing clarifies our position. If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

For the Acting Solicitor of Labor

James M. Miller
Assistant Solicitor