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[Questionable Wage Determinations Issued by the Department of Labor for a Bridge Project in Alabama]. HRD-78-128; B-146842. June 20, 1978. Released June 27, 1978. 9 pp.

Report to Charles R. Mitchesll, Secretary to late Sen. James B. Allen; by Gregory J. Ahart, Director, Human Resources Div.

Issue Area: Federally Sponsored or Assisted Income Security Programs: Regulatory Legislation and Wages (1315).

Contact: Human Resources Div.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of Labor.

Congressional Relevance: Sen. James B. Allen.

Authority: Davis-Bacon Act (40 U.S.C. 276(a)).

The Davis-Bacon Act requires that laborers and mechanics employed on Federal construction projects costing more than \$2,000 be paid wages and benefits based on prevailing rates. Wage determinations are set forth by the Department of Labor's Wage and Hour Division. Contractors complained that wage determinations applicable to the Mobile Bay Bridge project in Alabama would have the effect of using heavy construction wage rates for bridge construction. The matter was appealed before the Wage Appeals Board which ruled that the wage determinations did not reflect prevailing wages for similar construction in the area. The Board denied the Wage and Hour Division's motion to reconsider its decision. The new wage survey conducted by the division resulted in lower wage rates for bridge construction work. The State will realize savings in construction costs by use of the lower wage rates. (HTW)



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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

RELEASED 6/27/78

HUMAN RESOURCES
DIVISION

B-146842

June 20, 1978

Secretary to the late
Senator James B. Allen
United States Senate

Dear Mr. Mitchell:

In the letter to the Comptroller General of June 21, 1977, from the late Senator Allen and in subsequent agreements with his office, we were asked to review, and provide a report on, the matters discussed in a May 31, 1977, letter from the Executive Director, Alabama Road Builders' Association, Inc. The Executive Director's letter refers to certain wage determinations issued by the Department of Labor under the Davis-Bacon Act (40 U.S.C. 276(a)) regarding Federal or federally assisted highway construction activities in the State of Alabama.

The Davis-Bacon Act requires that laborers and mechanics employed on Federal construction projects costing more than \$2,000 be paid minimum wage and fringe benefits and that these wages and benefits be based on rates the Secretary of Labor determines as prevailing on similar projects in the area in which the contract work is to be performed. The wages and benefits are set forth in wage determinations issued by Labor. Contracting agencies are required to include the determinations in their construction contracts, including highway construction projects. The Wage and Hour Division in Labor's Employment Standards Administration is responsible for conducting wage surveys and issuing wage determinations under the Davis-Bacon Act.

The Executive Director complained that a Wage and Hour Division area determination, number AL77-1042, issued on April 1, 1977, was arbitrary, irrational, did not reflect the area practice for bridge construction in Alabama, and was an attempt by Labor to raise wage rates in the State. Under the determination the State would in effect have to use heavy construction wage rates rather than the lower highway construction wage rates for bridge construction over navigable waters.

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(20155)

The Executive Director said that the decision would have a drastic effect on Alabama because (1) it would substantially increase the cost of constructing bridges over non-navigable waters, (2) future wage determinations would reflect the higher rates and inflate the basic highway rate determinations, and (3) projects involving the paving of airport runways and taxiways, rest areas, and railroad projects would likewise be affected.

The Executive Director also referred to the Wage and Hour Division's determination, number 77-AL-45, issued for the construction of dual bridges over Mobile Bay on I-65 (Interstate Project No. I-65-1(85)23) which requires the use of heavy construction rates on the span of the bridge crossing the Mobile River. He stated that this project set a precedent for the Wage and Hour Division to use when reviewing future bridge projects.

BACKGROUND

Wage determinations AL77-1042 and 77-AL-45 are applicable to a project awarded by the Alabama State Highway Department under the Federal-aid Highway Act. The State highway department is the contracting agency for Interstate Project No. I-65-1(85)23--which involves construction of dual bridges, costing about \$53 million, over the Mobile River and Little Lizard Creek in Mobile and Baldwin Counties, Alabama.

On December 22, 1976, the State highway department requested permission from the Wage and Hour Division to use highway rates for project I-65-1(85)23. The State highway department furnished wage payment data from an \$80 million interstate highway bridge project over Mobile Bay which was awarded in 1974 with highway wage rates and was still under construction. The project is only 15 miles south of the I-65-1(85)23 project.

On January 25, 1977, the Wage and Hour Division issued wage determination 77-AL-45 which directed the State highway department to use dredging rates for dredging work on the project as set forth in area determination AL76-5090 and the highway construction rates in area determination AL76-1082 for the approach spans and the span over Little Lizard Creek, which is navigable. However, the Wage and Hour Division directed the State highway department to use heavy construction rates in project decision 77-AL-45 for the tied arch center span across the Mobile River, which is also navigable. The heavy construction wage rates are about twice the highway rates.

The Wage and Hour Division subsequently superseded determination AL76-1082 with area determination AL77-1042 dated April 1, 1977. The only difference between the two was in the type of projects which could not use highway rates. The superseded determination contained rates for all highway construction in Alabama except airports. The new determination, AL77-1042, excluded the use of highway rates for construction of (1) airport runways and taxiways, (2) bridges over navigable waters, (3) tunnels, (4) rest areas that include building structures, and (5) railroads. The new determination required contracting agencies to request project wage rates from the Wage and Hour Division when they planned to construct these excluded types of projects.

The then Assistant Administrator of the Wage and Hour Division stated that the new language was added to area determination AL77-1042 because some contracting agencies had incorrectly used published general highway area determinations.

Wage and Hour Division's area determinations apply to certain geographical areas, such as counties or states, and are required to be used on all projects to be constructed in the covered area. They are published in the Federal Register and are in effect until superseded. Project determinations, on the other hand, are issued for a specific project and are effective for 120 days from the date issued.

APPEAL OF WAGE AND HOUR DIVISION'S
DETERMINATION ON PROJECT I-65-I(85)23

The State highway department opened bids for project I-65-1(85)23 on February 4, 1977, and awarded the contract on March 11, 1977, with construction to begin in early April. However, prior to bid openings, on February 2, 1977, five general contractors who bid on the project petitioned the Wage Appeals Board for a review of wage determination 77-AL-45.

The Wage Appeals Board is appointed by the Secretary of Labor to hear and decide appeals concerning questions of law and fact on wage determinations issued under the Davis-Bacon Act and its related acts, such as the Federal-aid Highway Act. The contractors were joined in their appeal by the Alabama State Highway Department and the Alabama Road Builders' Association.

The Alabama groups stated in their appeal that the Wage and Hour Division's determination was arbitrary and capricious because it had no foundation in fact. They said that the extra cost of using heavy construction rates instead of highway rates for the center span work, which comprises about 30 percent of the project, would eliminate a number of highways and bridges planned to be built and hurt employment.

They based their appeal on several factors, including the following:

- Bridges over navigable waters in Alabama, and in particular in Mobile County, have always been built using highway construction wage rates approved by the Wage and Hour Division.
- Heavy construction rates have never been used to build bridges in Alabama.
- Highway rates were used on an interstate highway project which is being built over the same river delta 15 miles to the south of project I-65-1(85)23.
- The determination is inconsistent because it approved heavy construction rates for a portion of the bridge over the Mobile River, which is navigable, and highway rates for the other portion of the bridge, including the portion over Little Lizard Creek which also is navigable.

The petitioners also objected to the fact that the Wage and Hour Division, in determining the wage rates applicable to the project, did not consider wages being paid on an \$80 million bridge (project I-10-1(35)) near the I-65 project in Mobile County and wage rate information from two other bridges constructed in Mobile County. The two other bridges--the Theodore Industrial Terminal Canal Bridge and a bridge over the Intracoastal Waterway at Gulf Shores--are both over navigable waters.

For the purpose of showing past history, the State highway department also advised the Wage and Hour Division of eight other large bridges--ranging in cost from \$3,900,000 to \$16,200,000--that had been built in Alabama between 1969 and 1975 with highway construction rates. The petitioners contended that since these bridges were built at the highway rates, these wage rates should also apply to all of the construction of the I-65 bridge, not just the approaches.

The Wage and Hour Division said it characterized the tied arch center span of project I-65-1(85)23 as heavy construction and issued wage rates which resulted from a survey of various heavy construction projects in Mobile County. Its survey included wage rate information from eight railroad construction projects, nine dock or waterfront construction projects, three industrial site construction projects, one dam repair, three duct bank projects, and a few unrelated miscellaneous projects.

The Wage and Hour Division said it specifically rejected wage data from the I-10 bridge project because it had been awarded using the highway wage rates. The Wage and Hour Division contended that these rates should not be considered in connection with that portion of project I-65-1(85)23 which it characterized as heavy construction and thus it declined to consider the payroll data in its survey.

WAGE APPEALS BOARD RULES AGAINST
WAGE AND HOUR DIVISION

The Wage Appeals Board held a hearing on August 31, 1977, and issued its decision on October 21, 1977. The Board ruled that the heavy construction wage rates issued in wage determination 77-AL-45 for the tied arch span over the Mobile River did not reflect wages prevailing on similar construction in Mobile and Baldwin Counties. The Board said that:

"It appears to the Board that the projects used as a basis for the wage rates determined to be prevailing for the heavy portion of the contract are not projects of a character similar, except in the broadest sense of the term.

"This has particular significance when there are three very similar bridge projects located in Mobile County. With reference to the Department's exclusion of these bridges from the survey, the Department cannot be allowed to disregard wage rate data from the bridges, as the record shows it did with respect to I-10, because it disagreed with the use of the highway wage determination by the State Highway Department. It seems to the Board that when the Department gave contracting agencies the right to obtain the required wage determinations from the Federal Register and to exercise their judgment as to the appropriate schedule for a particular project, the Department should give due weight to the agency's decision.

"Furthermore, it appears to the Board that in this project, as in most bridges, there are elements of both highway and heavy construction contained in the contract. Since the contract falls into a questionable area between heavy construction and highway construction it would have been appropriate for the Department to look to the three bridges recently or currently under construction in Mobile County to determine the prevailing wage rates from them. This would be more consistent with the past practices of the Department with regard to bridges, dams, dredging and flood control projects than to have based its determination on a survey of numerous unrelated and dissimilar heavy construction projects as was done in this case."

In view of the above, the Board directed the Wage and Hour Division to issue a new wage determination on project I-65-1(85)23, to the State highway department as soon as possible. The new determination is to reflect the wage and payment practices found prevailing on bridge construction in Mobile and Baldwin Counties in conformity with the Board's decision.

**BOARD DENIES WAGE AND HOUR'S
APPEAL TO RECONSIDER ITS DECISION**

On December 7, 1977, the Wage and Hour Division filed a motion requesting the Board to reconsider its decision on the basis that (1) the case is moot because the contract had been awarded and construction had begun when the Board considered the case, (2) the Board's action in ruling on the merits of the case lacks any legal basis and is contrary to a well-established legal precedent and prior decisions of the Board, and (3) the Board's decision is contrary to Labor's regulations and Federal procurement principles and it may be viewed as legitimizing the unprecedented and unsettling principle that a wage determination is subject to challenge after contract award.

On January 30, 1978, the Board denied the Wage and Hour Division's motion to reconsider the case. The Board stated that normally it would not consider a petition to review wage rates after a contract has been awarded but it appeared that (1) some general guidance for the future was needed and (2) the wage determination should not be left

standing so as to be considered a precedent for the future or so as to preclude the parties themselves from possibly renegotiating the contract.

The Board stated that the purpose of its order is to have a new determination outstanding, and although it did not and could not direct its use, it did not preclude the parties themselves from making use of the determination if that was possible. The Board said that if the parties can make any use of the corrected wage determination within the restrictions of the Federal procurement statutes, it is their prerogative to do so and they should not be precluded from doing so by the absence of a correct wage determination.

On February 8, 1978, the Wage and Hour Division submitted a request to the Board for clarification of its order denying its motion for reconsideration of its decision. Wage and Hour said it wanted to know how the Board's decision conforms to the Secretary of Labor's regulations permitting modification of a project wage determination only up until the time of contract award.

In its March 6, 1978, reply to the Wage and Hour Division, the Board conceded that it had no authority to take any action with respect to the contract in question and could not order that a corrected wage determination be substituted for one already in the contract. The Board opined, however, that--since the original determination was "clearly erroneous"--a corrected wage determination should be provided to the petitioners to show, as a matter of record, what the wage rates should have been. The Board also concluded that its actions were consistent with Labor's regulations.

NEW WAGE SURVEY IN ALABAMA RESULTS IN LOWER WAGE RATES

Even though it appealed the Wage Appeals Board's decision, the Wage and Hour Division did, as directed by the Board, conduct a new wage survey of bridge construction work in Mobile and Baldwin Counties. During its survey in November 1977, the Wage and Hour Division obtained wage data on two bridges completed in 1976, the Intracoastal Waterway bridge at Gulf Shores in Baldwin County and the Theodore Industrial Canal Bridge in Mobile County, Alabama. Both were built at highway rates. The Wage and Hour Division also obtained data on two other projects involving work for the Army Corps of Engineers in Baldwin County.

As a result of the new survey, the Wage and Hour Division issued a wage determination for bridge construction work in Alabama which contained wage rates considerably lower than its previous determination.

The effect of the new survey is illustrated by the Wage and Hour Division's December 15, 1977, project determination 77-AL-432, which covered the construction of dual bridges carrying interstate highway I-65 over the Middle River, Mifflin Lake, and Tensaw River in the Mobile River Delta, Baldwin County, Alabama. The determination included wage rates for 11 jobs and crafts, and in all cases the rates established were substantially less than those in project determination 77-AL-45. For example, the wage rates for electricians were reduced from \$10.49 to \$5.80 per hour.

In addition, in reviewing the survey data, we found clerical errors in the rates established for carpenters and concrete finishers in project determination 77-AL-432. The carpenter's rate should have been \$4.50 instead of \$5.00 and the concrete finisher's rate \$4.68 instead of \$4.86. After we brought these errors to the attention of Wage and Hour Division officials, they issued a modification to the wage determination with the corrected rates.

LOWER WAGE RATES TO BE USED
ON PROJECT I-65-1(85)23

After the Wage Appeals Board denied its appeal, the Wage and Hour Division issued a new project determination for the Mobile Bay Bridge project, I-65-1(85)23. The determination, 78-AL-75, was issued on March 16, 1978, and contained the same wage rates included in amended project determination 77-AL-432, originally issued on December 15, 1977.

The new rates are substantially lower than those in the original decision (77-AL-45), ranging from \$0.87 to \$5.34 an hour less, as shown in the following table.

<u>Worker classification</u>	<u>Project determination</u>		<u>Amount or decrease</u>
	<u>77-AL-45</u>	<u>78-AL-75</u>	
Carpenters	\$ 9.32	\$4.50	\$4.82
Concrete finishers	9.09	4.68	4.41
Electricians	10.49	5.80	4.69
Ironworkers:			
Structural	9.73	8.86	.87
Reinforcing	9.73	6.00	3.73
Laborers:			
Unskilled	6.00	3.30	2.70
Concrete	None	3.50	None
Powdermen and blasters	None	4.60	None
Piledrivermen	9.59	4.25	5.34
Power equipment operators:			
Cranes	9.77	5.00	4.77
Piledriver operator	9.77	5.10	4.67

On May 2, 1978, the contracting officer for the State highway department told us he is negotiating with the contractor to amend the contract for project I-65-1(85)23 to incorporate wage determination number 78-AL-75. The contracting officer believes that the State will realize some savings in construction costs by use of the new lower wage rates to complete the remaining work on the project.

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The contents of this report were discussed with officials of the Department of Labor, and their views were considered in preparing the report.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days from the date of the report. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,


 Gregory J. Ahart
 Director