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Report to the Chairman, Subcommittee on Military Installations and Facilities, Committee on Armed Services, House of Representatives

January 1989

THE DAVIS-BACON ACT

Applicability to Supply Contract at Defense Depot, Tracy, California

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The Honorable Ronald V. Dellums
Chairman, Subcommittee on Military
Installations and Facilities
Committee on Armed Services
House of Representatives

Dear Mr. Chairman:

This report is in response to your request and later discussions with your office, asking us to determine whether the Defense Logistics Agency (DLA), in the Department of Defense, complied with the provisions of the Davis-Bacon Act when awarding a $4.2 million contract in August 1986. The contract was for the supply and installation of a mechanized, integrated system for material handling at the Defense Depot in Tracy, California. DLA considered the contract to be a supply-type contract rather than a construction-type contract. Thus, DLA did not include in the contract the prevailing area wage rates to be paid to employees, as required by the Davis-Bacon Act for federal construction contracts.

Results in Brief

The Davis-Bacon Act requires that employees working on federal construction contracts be paid, at least, prevailing area wage rates. Similarly, the Walsh-Healey Act requires that employees working on federal contracts involving the manufacture or furnishing of materials, supplies, or equipment be paid, at least, prevailing minimum wages. Both the Department of Labor's regulations and the Department of Defense's requirements in the Federal Acquisition Regulations (F.A.R.) require that prior to awarding the Tracy contract, DLA had to make a determination as to which specific labor law applied.

DLA officials determined that the (1) Tracy contract was mainly for acquisition and installation of equipment, (2) construction work was only a minor part and incidental to the essential purpose of the contract, and (3) construction work could not be segregated from the work required under the contract. DLA, therefore, procured the system using labor standards and wage rate provisions in the Walsh-Healey Act.

GAO has consistently ruled that the contracting agency with the responsibility to award, administer, and enforce federal contracts—such as DLA in the case of the Tracy contract—has the initial discretion and

responsibility for determining which act applies—Davis-Bacon or Walsh-Healey—to supply and construction contracts. Our review of the contract and discussions with DLA and Labor officials revealed nothing to indicate that DLA abused its discretionary power in applying the labor standards and wage rate provisions of the Walsh-Healey Act rather than those of the Davis-Bacon Act.

Labor has the authority to issue a Davis-Bacon wage determination if the contracting agency—such as DLA—fails to include such a determination in a contract that Labor believes is required to contain prevailing wages in accordance with the Davis-Bacon Act. After the Tracy contract was awarded, Labor questioned whether or not the Davis-Bacon Act applied. However, Labor and DLA did not resolve the matter, and Labor did not issue a Davis-Bacon wage determination for this contract.

Background

The Davis-Bacon Act (40 U.S.C. 276a to 276a-5 (1982)) covers every contract over $2,000 (to which the United States or the District of Columbia is a party) for construction, alteration, or repair of public buildings or public works. The act specifies the minimum wage rate for wages to be paid to various classes of workers. The act also provides that these minimum wages (including fringe benefits) be based on the wages determined by the Secretary of Labor to be the prevailing wages for the following: corresponding classes of laborers and mechanics employed on projects that are similar in character and in the same locality in which the contract is to be carried out.

The Walsh-Healey Act (41 U.S.C. 35 to 45 (1982)) provides similar minimum labor standards for supply contracts. It protects those workers employed on federal contracts over $10,000 that are for supply, manufacture, and furnishing of materials, supplies, or equipment. Contractors covered by the act must pay wages, not lower than the minimum wages determined by the Secretary of Labor to be the prevailing minimum wages in the area in which the materials, supplies, or equipment are to be manufactured or furnished.

Under the Davis-Bacon and Walsh-Healey acts, contracting agencies are responsible for (1) reviewing any proposed contract involving construction or supply activities and (2) determining which act's prevailing wage rate and other requirements should apply and be included in the contract. Labor has issued regulations governing use of the wage rate requirements for the Davis-Bacon Act (29 C.F.R. parts 1 and 5(1988)) and the Walsh-Healey Act (41 C.F.R. 50-201(1988)). In addition, Defense

has issued regulations implementing the acts' requirements in F.A.R., which now are codified at 48 C.F.R. part 222(1987). F.A.R. provides uniform acquisition policies and procedures for all executive agencies.

Both Labor's regulations and F.A.R. provide that the contracting agency and its contracting officers have the responsibility for

- determining whether Davis-Bacon or Walsh-Healey is applicable to any federally funded contracts in excess of the amounts specified in the acts and
- including in the contracts with the specified amounts the applicable wage rates (including fringe benefits) determined by Labor to be prevailing in the contract area.

Labor's Davis-Bacon regulation (29 C.F.R. 1.6(f)) provides, however, that Labor may issue a wage determination after the awarding of a contract or after the beginning of construction. Labor may take such action if the contracting agency has (1) failed to incorporate a wage determination in a contract required to include prevailing wage rates under the Davis-Bacon Act or (2) used an erroneous wage determination. Labor stated that this regulation was issued to help ensure that wage determinations are included in all contracts covered by the Davis-Bacon Act.

At Labor, the Wage and Hour Division in the Employment Standards Administration (ESA) is responsible for administering labor laws such as the Davis-Bacon and Walsh-Healey acts. In Defense, DLA is responsible for contract administration services, including awarding of construction, supply, and service contracts in support of military services and other defense units. DLA activities are carried out by its primary field activities, including six supply centers—one of which is the Defense General Supply Center (DGSC) in Richmond, Virginia—and four depots, one of which is the Defense Depot in Tracy.

In your request, you stated that your attention has been brought to allegations that DLA may be (1) awarding contracts in such a way as to avoid the terms of the Davis-Bacon Act and (2) refusing to segregate contracts by "purchase" (supply) or construction, regardless of the work involved, and awarding only supply contracts.

In the particular case under review, DLA awarded a contract for the supply (installation) of a mechanized, integrated system for material handling at the Defense Depot in Tracy. The Subcommittee received allegations that Davis-Bacon requirements were not met, even though

the work included substantial construction—modification of the warehouses at the depot.

Labor questioned DLA's failure to use Davis-Bacon rates in the Tracy contract; Labor stated that the installation and relocation of equipment and electrical items at the depot appear to be subject to the Davis-Bacon Act because a substantial and segregable amount of construction work would be involved. Because of Labor's assertions and its request that this matter be looked into, DLA and DGSC reviewed the award of the Tracy contract and concluded that the Davis-Bacon Act was not applicable to the contract.

Objectives, Scope, and Methodology

In discussions with your office, we agreed to review DLA's support for its position that the Tracy contract was not subject to the Davis-Bacon Act.

We did our work at the Washington headquarters of both Labor and Defense. At Labor, we (1) reviewed pertinent records on the Tracy contract maintained by the Wage and Hour Division and (2) discussed Labor's actions on the contract with responsible division officials. At Defense, we (1) reviewed pertinent DLA records, including a copy of the DGSC solicitation for the Tracy work and the Tracy contract, and (2) discussed the contract with Defense and DLA headquarters officials and those at DGSC.

We also reviewed the Davis-Bacon and Walsh-Healey acts and the relevant Labor regulations and Defense requirements in F.A.R. for procuring supply and construction. Our work was done primarily from April to September 1988 in accordance with generally accepted government auditing standards.

DLA's Award of the Tracy Contract

On February 10, 1986, DGSC issued a solicitation (No. DLA 410-86-R-2933) requesting offers for a contractor to supply and install a mechanized, integrated system for material handling in warehouses 16 and 17 at the Defense Depot in Tracy. Before issuing the solicitation, DGSC, following F.A.R. then in effect, had to make a determination as to which specific labor law applied.

DGSC determined that the contract involved the supply and installation of equipment. Thus, DGSC concluded that the labor standard provisions of the Walsh-Healey Act and F.A.R. applied. The standard Walsh-Healey

clauses were, therefore, included in the solicitation rather than those of Davis-Bacon.

Although the Walsh-Healey Act requires Labor to determine the prevailing wages in the area of the contract, Labor has not issued a wage determination under this act since 1964. In a 1964 decision, the U.S. Court of Appeals ruled that (1) wage determinations issued were subject to the Administrative Procedure Act and (2) interested parties had the right to inspect records on which the determinations were based.[1] Labor maintains that it would not permit such inspection because the wage determinations were made on the basis of confidential information. Labor has not issued any wage determinations under the Walsh-Healey Act since the court decision.

Without these wage determinations, employees working on contracts subject to the Walsh-Healey Act must be paid at least the minimum wages, currently $3.35 per hour, specified in the Fair Labor Standards Act of 1938. These wages would be lower than the Davis-Bacon Act wage rates, which are generally based on higher prevailing construction wages and fringe benefits in the area.

On August 20, 1986, after considering offers from various contractors and firms, DGSC awarded a contract totaling $4,239,850 to E. C. Campbell, Inc., a firm in Woodbridge, Virginia. The contract was to supply and install the mechanized, integrated system for material handling at the Tracy Depot. The contract included labor standard provisions of the Walsh-Healey Act.

Union and Labor Question Award of the Tracy Contract Under the Walsh-Healey Act

In January 1987, the director of research for the United Brotherhood of Carpenters and Joiners of America union wrote to the administrator of the Wage and Hour Division, requesting assistance to require DLA to retroactively include provisions for the prevailing wage protection of the Davis-Bacon Act in the Tracy contract. According to the director's letter, it was clear from the specifications and the "inherent requirements" of the conveyer installation that there was a substantial amount of construction involved.

The administrator of the Wage and Hour Division, in a May 5, 1987, letter to the Office of Counsel in DLA's headquarters, pointed out the requirements of Labor's regulations on the applicability of the Davis-

[1]Wirtz v. Baldor Electric Company, 337 F.2d 518 (D.C. Cir. 1964).

Bacon Act. According to the administrator, the Davis-Bacon Act is not applicable to installation when it is incidental to the furnishing of supplies or equipment under a supply contract; but the act and its regulations do apply if a substantial and segregable amount of construction, alterations, or repair work is required for such installation at the job site. The letter listed equipment and electrical items to be installed and relocated at the Defense Depot in Tracy, stating that this appears to involve a substantial and segregable amount of construction work. Thus, even if the procurement was predominately for supplies, the administrator stated, it appears the installation work required under the contract would constitute construction work, which should be subject to the Davis-Bacon Act.

DLA's Basis for Not Including Davis-Bacon Act Provisions in the Tracy Contract

According to DLA's acting associate counsel for contracts in a June 16, 1987, letter to the Wage and Hour Division Administrator, DGSC determined that the Davis-Bacon Act was not applicable to the Tracy contract, and DLA concurred with this determination. A letter from a DGSC counsel, attached to the DLA response, stated that (1) the contracting officer, after consultation with counsel, determined that the Davis-Bacon Act was not applicable to the contract and (2) DGSC's review of the contract supports this conclusion.

The basis for DGSC's determination, as summarized in the letter, follows:

"Subject contract is not for the construction, alteration, or repair of a public building or public work. The purpose of the contract is to acquire one contract line item consisting of personal property to be installed in existing buildings. The contract does not contemplate new construction or reconstruction of the buildings, nor does it contain specific requirements for substantial amounts of construction work. The contract requires installation of the mechanized material handling integrated system to be acquired. In order to install the system and have it properly operating, certain minor repairs or alterations of the building would be required, such as repairs of floor cracks, installation of wire tracks and interior electrical wiring. No dollar estimate exists with regard to the repair/installation aspect of the contract. Since we view this as an integral part of the system to be acquired, no separate estimate of its dollar value was obtained.

"However, compared with the scope of the contract, it is very clear that such repair/installation work is not only a minor part of the entire contract, but it is also incidental to the essential purpose of the contract, i.e., the acquisition of equipment. The contract does not contemplate any construction other than what's necessary to accommodate the installation of the supplies being acquired into the two existing warehouses. Such work is not physically and functionally separate from the other

work required by the contract, since its only purpose is to allow for the proper operation of the supplies being acquired. Being such an integral part of the project, none of the installation/repair work is capable of being performed on a segregated basis from the other work required by the contract.

". . . Prior to issuance of the request for proposals the contracting officer made a good faith determination that the Davis-Bacon provisions were not applicable to subject procurement. None of the prospective offerors nor the Department of Labor objected to the failure to include the Davis-Bacon provisions prior to award. The contract has now been awarded and is expected to be performed by 24 October 1987. In our opinion, the Department of Labor's objection comes too late considering the extent to which the contract has already been performed."

The DGSC letter also questioned whether the failure to include the Davis-Bacon Act provisions and applicable wage rates, even assuming they properly should have been included, could be corrected retroactively by contract amendment.

In response, the administrator of the Wage and Hour Division, in a September 21, 1987, letter, cited Labor's regulation in 29 C.F.R. 1.61(f); it states that if an agency has failed to include Davis-Bacon Act stipulations or a wage determination in a contract that should have included them, after contract award or after construction had begun, the administrator may issue a wage determination for incorporation in the contract. In such circumstances, the administrator's letter stated, the agency shall either (1) terminate and resolicit the contract, using the valid wage determination, or (2) through a supplemental agreement or a change order, incorporate the valid determination retroactive to the beginning of the contract, provided the contractor is compensated for any increases in wages resulting from such change.

In the case of the Tracy contract, the administrator concluded that Labor could not determine from the information in the DLA letter whether the Davis-Bacon provisions should or should not have been included in the contract. The administrator requested a report from DLA that would (1) describe the specific work involved in the supply (installation) of the "automated retriever and storage system" and (2) contain DLA's best estimate of the cost of the installation work, number of hours of work involved in the installation, and relative percentage of the cost of the installation work required under the contract compared with total contract cost.

Officials from Labor (including ESA and the Wage and Hour Division) and Defense (including DLA and DGSC) met in October 1987 to discuss the

Tracy (and other similar) contracts. According to an ESA official, DLA and DGSC provided some specifics on the Tracy contract and agreed to provide Labor (1) the drawings, specifications, and cost estimates on the Tracy contract and (2) a response to Labor's September 21 letter.

According to an ESA official, after the October meeting, Labor staff again orally requested the information from a DLA official (and a Department of Army representative at the meeting). But as of December 1, 1988, DLA had not provided the information. The ESA official said that Labor has made a reasonable effort to elicit the necessary information to resolve the matter, but DLA and DGSC have not been as cooperative and forthcoming as they should have been in providing the information. A Wage and Hour Division official told us that Labor does not have the authority to compel DLA to respond to its request.

According to DLA officials, Labor officials were told that the information presented in DLA's June 16 letter and at the October meeting was all of the information DLA had on the contract; DLA officials considered the matter closed.

GAO Position

Since as early as 1965, GAO has ruled consistently that the contracting agency that must award, administer, and enforce the contract has the primary responsibility for determining whether (1) a contract should be considered as one principally for construction or for supplies (including equipment and installation) and (2) the Davis-Bacon Act provisions should or should not be included in the contract.[2]

DLA determined that the Tracy contract was mainly for supply (installation and equipment) and the construction work involved was (1) only minor and incidental to the contract's essential purpose and (2) not segregable from the contract work required. DLA, therefore, procured the system under the Walsh-Healey Act and determined that Davis-Bacon Act requirements were not necessary.

On the basis of our review of the contract and discussions with DLA and Labor officials, we found (1) DLA's determination was within the DLA contracting office's discretion and authority and (2) nothing to indicate DLA abused its discretionary power in applying Walsh-Healey Act rather than Davis-Bacon Act wage provisions.

[2]See, for example, Dynalectron Corporation, 65 Comp. Gen. 290 (1986); Hero, Inc., 63 Comp. Gen. 117 (1983); 44 Comp. Gen. 498 (1965).

During its review after the Tracy contract was awarded, Labor questioned whether the Davis-Bacon Act applied. However, Labor and DLA did not resolve the matter, and Labor did not issue a Davis-Bacon wage determination for this contract.

As requested by your office, we did not obtain agency comments on a draft of this report. We did, however, discuss its contents with Labor and Defense officials, and their comments have been included where appropriate. In addition, as agreed with your office, unless you publicly announce its contents earlier, we plan to distribute this report 7 days after its issue date. At that time, we will send copies to the Secretaries of Labor and Defense and other interested parties and will make copies available to others as requested.

The major contributors to this report are listed in appendix I.

Sincerely yours,

Linda G. Morra
Associate Director

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