In the Matter of:

CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC. ("CHELCO")

ARB CASE NO. 2017-0032

With respect to the applicability of the Davis-Bacon Act, 40 U.S.C. §§ 3141-3148, to the U.S. Government's Solicitation, acting through the Defense Logistics Agency to privatize the electrical distribution system at Eglin Air Force Base

DATE: June 14, 2019

Appearances:

***For the Petitioner Choctawhatchee Electric Cooperative, Inc.*:**
Benjamin L. Willey, Esq.; *Law Offices of Benjamin L. Willey*; Salisbury, Maryland

***For the Administrator, Wage and Hour Division*:**
Nicholas C. Geale, Esq., Jennifer S. Brand, Esq., Jonathan T. Rees, Esq., Sarah Kay Marcus, Esq.; *United States Department of Labor,* Washington, District of Columbia

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges.*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the provisions of the Davis-Bacon Act (DBA), 40 U.S.C. § 3141 et seq. (2006), and the applicable implementing regulations at 29 C.F.R. Parts 1, 3, 5, and 7 (2016).

On January 18, 2017, the Administrator of the U.S. Department of Labor's Wage and Hour Division (the Administrator) determined that the DBA's prevailing wage and labor standards apply to the construction component of Eglin Air Force Base (Eglin AFB)'s electrical system privatization contract. The Choctawhatchee Electric Cooperative, Inc. (CHELCO) petitioned the Administrative Review Board (ARB or Board) to review the Administrator's final ruling pursuant to 29 C.F.R. Parts 5, 7. For the reasons that follow, we affirm the Administrator's final ruling that the DBA's prevailing wage and labor standards apply to Eglin AFB's electrical utility privatization contract.

BACKGROUND

A. Eglin AFB's Privatization Solicitation and Contract Award

On September 28, 2012, the Defense Logistics Agency (DLA) issued a solicitation for the privatization of Eglin AFB's utility systems including its electrical system. At the time of the solicitation, Eglin AFB owned most of its electrical distribution and transmission infrastructure, but four private utilities, one of which was CHELCO, generated the electricity.

DLA's solicitation for privatization asked bidders to identify the capital improvements necessary to bring the electrical system on the base up to industry standards. Administrator's Decision (Admin. Dec.) at 1-2. Proposed upgrades included both Initial System Deficiency Corrections (ISDC) and annual System Deficiency Corrections (SDC).

The privatization solicitation consisted of two parts: a bill of sale for the infrastructure and a utility services contract extending over a fifty-year period. Under the terms of the solicitation, the successful awardee would have the responsibility to own, operate, and maintain the electrical utility and its infrastructure. Eglin AFB would retain access to the utility infrastructure conveyed to the private awardee and ownership of the land beneath it. The McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 6701 et seq. (2011), governs the services contract for the operation and maintenance of the system. On August 29, 2014, DLA amended the solicitation to include DBA requirements for the capital

upgrades involving construction, alteration, or repair of buildings. As amended, the DBA applies to ISDCs, SDCs, and other capital upgrades. Admin. Dec. at 2.

CHELCO submitted its bid on March 5, 2013, and on September 14, 2016, it was awarded the contract to privatize electricity service at Eglin AFB. The privatization contract provided that CHELCO is purchasing the utility from the government using a billing credit in excess of $30 million to be recouped from government fees. The government agreed to pay CHELCO a utility services charge including "operations and maintenance," "renewals and replacements," and "purchase price recovery charge" fees. Admin. Dec. at 2-3. The contract requires $18 million for ISDC projects and capital upgrades, including the construction of a $10 million underground line. Most of the capital improvements fall in the "renewal and replacement" category. Admin. Dec. at 3. Over the fifty-year period, the renewal and replacement fees were estimated to reach $165 million.

On April 22, 2016, CHELCO requested a ruling from the Administrator on the applicability of the DBA in light of the D.C. Circuit's ruling in *District of Columbia v. Dept. of Labor*, 819 F.3d 444 (D.C. Cir. 2016) (hereinafter *CityCenterDC*). Citing *CityCenterDC*, CHELCO argued that the privatization of Eglin AFB's utility was not a "contract for construction of a public work" under the DBA. Instead, CHELCO contended that because the contractor will own the facility and the government will not finance the construction, the contract does not fall within the provisions of the DBA. Even if the contract did involve public funding, CHELCO argued that the lack of government ownership precludes the contract from being a "public work" subject to the DBA.

B. Administrator's Decision

On January 18, 2017, the Administrator determined, contrary to CHELCO's arguments, that the Eglin AFB electric privatization contract was a contract for construction of a public work subject to the DBA. Admin. Dec. at 4. The Administrator identified substantial construction in support of the conclusion that there was more than an incidental amount of construction involved in the performance of the privatization. The Administrator also pointed to extensive government funding, including nonrecurring costs, lump sums, and amortized costs and referenced over $150 million in capital expenditures to be paid over the course of several years. Admin. Dec. at 5. CHELCO now appeals the Administrator's decision to the ARB.

JURISDICTION AND STANDARD OF REVIEW

Contracting agencies "ha[ve] the initial responsibility for determining whether a particular contract is subject to the Davis-Bacon Act," but disputes about such coverage are subject to administrative review by the Department of Labor (DOL). *Univ. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 760 (1981); *see* 29 C.F.R. § 5.5(a); *North Georgia Bldg. Const. Trades Council v. Goldschmidt,* 621 F.2d 697 (5th Cir. 1980). The DOL's review is conducted initially by the DOL's Wage and Hour Administrator, 29 C.F.R. § 5.13, but a decision by the Administrator may be appealed to the ARB, which then renders the final agency decision on the matter. Secretary's Order 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. §§ 7.1, 7.9; *CityCenterDC Project*, ARB Nos. 11-074, -078, -082, slip op. at 8 (ARB Apr. 30, 2013).

The ARB's review of the Administrator's final ruling is in the nature of an appellate proceeding and the Board "will not hear [factual] matters de novo except upon a showing of extraordinary circumstances." 29 C.F.R. § 7.1(e). The ARB will assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA. *William J. Lang Land Clearing, Inc.,* ARB Nos. 01-072, -079; ALJ Nos. 1998-DBA-001, -006 (ARB Sept. 28, 2004)). "In considering the matters within the scope of its jurisdiction," the Board acts "as fully and finally as might the Secretary of Labor." 29 C.F.R. § 7.1(d); *see Griffin v. Reich*, 956 F. Supp. 98, 104 (D.R.I. 1997).

DISCUSSION

A. Davis-Bacon Act's Statutory and Regulatory Framework

The DBA was enacted in 1931 to insure that federal construction projects did not undercut local wages and benefits. As amended, the DBA sets forth the criteria for contract coverage as follows:

> (a) **Application** – The advertised specifications for every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or in the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.
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> (b) **Based on prevailing wage** – The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil division of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.

40 U.S.C. §§ 3142(a), (b). Accordingly, a covered contract must be in excess of $2,000 and for "construction, alteration, or repair, including painting and decorating, of public buildings and public works." 40 U.S.C. § 3142(a). The purpose of the DBA's prevailing wage provisions is "not . . . to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects." *United States v. Binghamton Const. Co.,* 347 U.S. 171, 177 (1954).

Under the DBA's implementing regulations, the term "contract" means "any prime contract which is subject wholly or in part to the labor standards provisions . . . and any subcontract of any tier thereunder, let under the prime contract." 29 C.F.R. § 5.2(h). The term "building or work" includes construction activity that encompasses "without limitation" buildings, structures, and improvements of all types. 29 C.F.R. § 5.2(j). The terms "construction, prosecution, completion, or repair," mean "[a]ll types of work done . . . on a particular building or work." *Id.* Under this definition, work includes "altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site," "painting and decorating," and transporting materials and supplies to or from the building. . . . 29 C.F.R. § 5.2(j)(1). The terms "public building" or "public work" include any "building or work, the construction, prosecution, completion, or repair of which . . . is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency." 29 C.F.R. § 5.2(k). Under these regulatory definitions, the DBA covers a work when it

is demonstrated that: (1) there is a "contract," (2) the contract is "for construction," and (3) the construction is for a public building or public work.

B. The Privatization Contract Agreement between Eglin AFB and CHELCO Constitutes a "Contract" "for Construction" within the Meaning of the DBA

It is effectively undisputed that Eglin AFB's privatization contract involves substantial construction upgrades. The privatization agreement includes large payments for "more than an incidental amount of" alteration and construction in ISDCs, SDCs, and renewal and replacement. Admin. Dec. at 6; *see In re Crown Point, Ind. Outpatient Clinic*, WAB No. 86-33, slip op. at 3 (June 26, 1987), *aff'd sub nom., Bldg. and Constr. Trades Dep't, AFL-CIO v. Turnage*, 705 F. Supp. 5 (D.D.C. 1988); *In re Military Housing, Fort Drum, N.Y.*, WAB No. 85-16 (Aug. 23, 1985).. But this does not end our analysis. When a federal agency enters directly into a contract with a construction firm to construct a public building or public work that the federal government will own, the application of the DBA ordinarily is clear. However, when agencies use other financing or contractual methods for acquiring spaces or structures that will be used for public purposes (e.g., leases), the question of DBA coverage becomes more complicated.

In a 1994 U.S. Department of Justice, Office of Legal Counsel (OLC) Opinion, the OLC considered the question of whether a lease-construction contract, providing for the federal government to lease a property from a private developer who then contracts for construction under the federal government's direction, was covered under the DBA. The OLC concluded that "contracts . . . for construction" for purposes of DBA coverage are not limited to contracts entered into directly with a construction contractor; it is sufficient if the federal contract or lease under which the work is done "call[s] for the construction of a public work." 18 U.S. Op. Off. Legal Counsel 109, 113, 1994 WL 810699, at 4. Opining for analysis on a case-by-case basis, the OLC suggested several factors to assist in determining whether a lease-construction contract requires Davis-Bacon wages. The factors include the length of lease, the degree of federal control over design and construction, the public use of the final project, the extent to which the government's lease payments fully pay for the construction, and the absence of a bad-faith purpose to avoid Davis-Bacon requirements. 1994 WL 810699 at n.10. The OLC opinion also noted that the typical lease-construction contract resembled a public building's "contract . . . for construction" because the federal government required construction designed to its

specifications even though it was not identified as a party to the construction contract itself. The DOL adopted the factors cited in the 1994 OLC Opinion in All-Agency Memorandum 176 (June 22, 1994) (AAM 176).

Analyzing prior cases and the 1994 OLC Opinion, the ARB has affirmed the Administrator's decision that a fifteen-year lease specifying the development and construction of a privately owned building for the U.S. Department of the Interior to use was a "contract . . . for construction" and therefore covered under the DBA. *In re Phx Field Office, Bureau of Land Mgmt.*, ARB No. 01-010, slip op. at 8-9 (ARB June 29, 2001). The ARB considered the public use of the building during the fifteen-year lease significant and discounted the significance of the potential private use of the building after the expiration of the lease. *Id.* at 10. Applying AAM 176's factors, the ARB recognized that the lease payments would pay the full cost of the construction during the first ten years of the building's projected forty-year life span, which the Board identified as a fact which "strongly supports" the Administrator's conclusion that the Department of Interior's lease was a "contract . . . for construction" under the DBA. *Id.* at 11.

In *CityCenterDC*, the ARB rejected an argument that the District of Columbia had not entered into a "contract" "for construction" because the District's contracts were with a developer rather than directly with a construction contractor. Quoting the Administrator, the ARB made the following comment:

> These are precisely the types of arguments that the Board has rejected in decisions such as *Phoenix Field Office, Fort Drum,* and *Crown Point,* all of which make clear that a government lease agreement that 'contemplates construction activity' qualifies as a contract for construction under the DBA even when a government agency is not a party to the contract with the construction contractor.

CityCenterDC Project, ARB Nos. 11-074, -078, -082, slip op. at 11-12 (citations omitted).

The developers and the District appealed the ARB's decision to the United States District Court for the District of Columbia. The district court set aside the ARB's decision, finding that the contract was not a public work. *District of Columbia v. Dep't of Labor*, 34 F. Supp.3d 172 (D.D.C. 2014). The government appealed the district court's decision to the United States Court of Appeals for the D.C. Circuit. Affirming the district court, the D.C. Circuit sharply challenged the

DOL's approach to interpreting the DBA's "contract . . . for construction" language, but reserved a final determination on DOL's lease-construction contract because it concluded that CityCenter was not comparable to a lease-construction contract in several respects. *CityCenterDC*, 819 F.3d 444 (D.C. Cir. 2016).

Following the D.C. Circuit's *CityCenterDC* opinion, the DOL issued All-Agency Memorandum 222 (January 11, 2017) (AAM 222). AAM 222 announces that the WHD will continue to apply the DBA to military privatization projects when those projects call for construction, even though the federal government is not directly a party to the construction contract:

> As another example, DOD is permitted to privatize utility systems (such as systems that generate and supply electric power or treat or supply water), by conveying such systems to a private entity.[1] Such arrangements may include both the government's receipt of the utility system's services, see id. § 2688(c)(l)(B), (c)(2), and "a contribution toward the cost of construction, repair, or replacement of the utility system by the entity to which the utility system is being conveyed," id. § 2688(h). If an arrangement conveying a utility system does indeed contemplate construction and involve public funding for the construction (whether the payments are made directly in exchange for construction or indirectly through, for example, payments for utility services that exceed the cost of the services unrelated to construction), the requirements for DBA coverage will be met.

Id. at 11. The ARB recognizes that the Administrator may issue legislative and interpretive rules to implement the statutes within the Administrator's responsibility, and the Board has held that AAMs are interpretative rules. *In re U. S. Army, All-Agency Memorandum No. 157*, ARB No. 96-133 (ARB July 17, 1997). The Board relies upon or affirms AAMs if they are a reasonable interpretation of the DBA. *Id.* at 7, citing *Patton-Tully Transp. Co.*, WAB Case No. 93-13 (May 6, 1994); *see also In re Cent. Energy Plant*, ARB No. 01-057 (ARB Sept. 30, 2003). AAM 222 applies the factors and reasoning articulated in the 1994 OLC letter, and we conclude that the AAM is a reasonable interpretation of the DBA's coverage position.

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1 The 1998 National Defense Authorization Act permits "conveyances" of utility infrastructure on military bases to distribute the construction costs through privatization and reimbursement. P.L. No. 105-85, § 2812 (1997); 10 U.S.C. § 2888(h).

The issue in the privatization contract in this matter resembles the issue argued in *CityCenterDC* in that Eglin AFB will not be a party to the actual construction contracts to upgrade and improve upon the electrical infrastructure. However, the controversial facts present in *CityCenterDC* are not at issue in Eglin AFB's privatization. In *CityCenterDC*, the District of Columbia *leased to* the private developers and the lease payments went *to* the District of Columbia. Moreover, the factors identified in the 1994 OLC Opinion were not present in *CityCenterDC,* and several factors distinguish the contract under review here: the federal government is heavily if not fully funding the construction upgrades and improvements; Eglin AFB's privatization calls for a fifty-year contract after which time the federal government may reacquire ownership; and the primary use of the privatization contract is for CHELCO to supply electricity to Eglin AFB, a military reservation administered by the federal government. For these reasons, we affirm the Administrator's decision that CHELCO's privatization contract calls for significant and segregable construction and constitutes a "contract . . . for construction" for purposes of requiring DBA wages and benefits.

C. The Eglin AFB Privatization Project Constitutes a "Public Work" within the Meaning of the DBA

As CHELCO's construction upgrades and improvements to Eglin AFB's electrical utility infrastructure do not involve a public building,[2] the issue here is whether CHELCO's construction constitutes a "public work" for purposes of the DBA requirements.

> The term . . . public work includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

29 C.F.R. § 5.2(k). The terms "building or work" include works such as bridges, dams, plants, highways, sewers, railways, airports, excavating, and landscaping. *Id.* § 5.2(i).

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[2] Ownership of the buildings and equipment will have shifted almost entirely to CHELCO, a private entity, under the privatization contract.

In *CityCenterDC*, the ARB determined that CityCenter was a "public work" notwithstanding that it was privately funded, privately constructed, privately owned, and privately used. The ARB reasoned that a work can be a public work for DBA purposes if it serves the public interest, even though the construction was not publicly funded and the government does not own, operate, occupy, or use the final project. The ARB relied upon factors such as the District of Columbia's enabling legislation, the long-term lease (from the District of Columbia to the developers), and the District's control over CityCenter's design, construction, and maintenance. The ARB concluded that the DBA's regulations do not require that a public work "primarily" serve the public in order to be considered a public work to which the DBA applies as long as the public is served in some manner. *CityCenterDC Project*, ARB Nos. 11-074, -078, -082, slip op. at 13-14 (footnotes omitted).

As previously noted, the district court set aside the ARB's decision. Affirming the district court, the D.C. Circuit ruled that a "public work" must contain at least one of two characteristics, determining that the CityCenter project possessed neither: (i) public funding for the construction or (ii) government ownership or operation of the completed facility. *CityCenterDC*, 819 F.3d at 446 n.2, 452-53. The *CityCenterDC* opinion reserved determining whether both characteristics were necessary.

Addressing the gap left by the D.C. Circuit's *CityCenterDC* decision, CHELCO argues that both "public funding" and "government ownership" are *required* for "public works." It thereby urges the Board to resolve a question the D.C. Circuit did not reach.

i. Public Funding of the Construction Upgrades

Like the District of Columbia in *CityCenterDC,* Eglin AFB owns the land beneath the property that is being conveyed. But unlike the District of Columbia in *CityCenterDC,* Eglin AFB is paying for the construction in lump sums under the contract, through utility-charge fees, and through various other payments to CHELCO. The privatization contract provides for financing from Eglin AFB including over $150 million in "replacement and renewables" and large ISDCs and SDCs. Furthermore, the privatization contract specifies that Eglin AFB will reimburse CHELCO's initial billing credit through "purchase price offset" fees which the government will pay to CHELCO.

This case is readily distinguishable from *CityCenterDC* because of the value, the duration, and the variety of federal funding of the work CHELCO has contracted to perform. Therefore, the Administrator's determination that Eglin AFB's contract for privatization included substantial public funding for construction is affirmed.

ii. Government Ownership or Operation of the Completed Facility

CHELCO also urges the Board to conclude that "public work" requires government use or ownership and emphasizes that, by the terms of the contract, CHELCO owns the utility infrastructure and is responsible for its use and maintenance. The Administrator counters that government ownership is not a statutory requirement to be considered a "public work." AAM 222, issued in response to the D.C. Circuit's *CityCenterDC*, advises that the WHD will not treat government ownership as a prerequisite to be considered a "public work" because the "interest of [the] general public" may be met without government "title." AAM 222, at 8, citing 29 C.F.R. § 5.2(k). We note that the factors which can establish government ownership under the DBA extend beyond evidence of title and deed, but can include ownership, occupancy, and use of the final project even in the absence of the federal government being listed as an owner on the relevant legal documents. AAM 222 at 9-10; *CityCenterDC*, 819 F.3d at 452-53. As we stated above, we conclude that AAM 222 is a reasonable interpretation of the DBA's requirements and find no grounds to disturb the Administrator's interpretation of "public work."[3]

[3] The Administrator contends in the alternative that even if federal government ownership is considered a requirement for DBA coverage of a "public work," there are several indicia of federal government ownership present in CHELCO's privatization of the Eglin AFB electrical utility. Although not necessary for the resolution of this matter, we agree. The public entanglement between CHELCO and Eglin AFB under the instant facts is extensive. The utility sits on a closed military base. Eglin AFB retains control through a "web of servitudes and contractual obligations" including control of access to the base, shared access to the base's infrastructure, the federal government's permission to provide utilities to others outside the base, and the federal government's possible reacquisition of the infrastructure after the expiration of the contract. More importantly, the "government use" component of public-work status is met by the fact that the utility's electricity output provides electrical service to Eglin AFB.

CONCLUSION

For the foregoing reasons, the Administrator's determination that that construction and improvements at Eglin AFB under the contract at issue are subject to the Davis-Bacon Act's prevailing wage and labor standards provisions is correct in fact and law and is hereby **AFFIRMED**.

SO ORDERED.