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U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

JUN 20 1962

MEMORANDUM # 38

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

FROM : James R. Beaird
Assistant Solicitor

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

cc: Messrs Monga, Saylor, Gregory, Saylor
D-B Act

DB-25

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

June 1, 1962

131-f

Mr. C. Franklin Daniels
Assistant Commissioner
Multifamily Housing Operations
Federal Housing Administration
Washington 25, D. C.

Re: Boston Gas Company
Charles River Park "A" Inc.
FHA Project No. 023-32001-R
Charles River Project
Boston, Massachusetts
File Nos B-62-704 and 705

Dear Mr. Daniels:

This is in response to your inquiry of February 13, 1962, regarding the applicability of the labor standards provisions of the National Housing Act, as amended, to construction work performed by employees of the Boston Gas Company at the above project.

The work in question apparently involved the installation of underground gas lines, leading from transmission mains located under streets abutting the project site, along easements within the site and continuing through the foundation walls of the new buildings under construction. Evidently, no work was done by the Boston Gas Company inside the buildings, except to cap the installed pipes on the interior side of the foundation walls.

This work was performed by the utility company in order to furnish gas service to customers within the project and was accomplished without cost to Charles River Park "A" Inc., the project Redeveloper. Moreover it appears that the "services" thus installed are owned by the Boston Gas Company, their cost, both in labor and materials, having been capitalized on the books of the firm. It would therefore appear that the work in question is excluded from any evaluation of "replacement cost of the property" for mortgage insurance purposes, within the meaning of Section 220 of the National Housing Act.

Whether or not the employees of a public utility, who perform construction-type work in connection with Federal and Federal-aid projects, are covered by the labor standards laws applicable to such projects will

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depend upon the nature of the contracts involved and the work performed thereunder. This Department has held that where a public utility, in furnishing its own materials and equipment, is in effect extending its utility system, the work performed is not subject to the aforementioned laws. The same conclusion would apply where the utility company may contract out this work of extending its utility system. Where, however, the utility company agrees to undertake a portion of the construction of a covered project (i.e., the installation is to become the property of the project sponsor), such work would be subject to the labor standards requirements of the construction contract, notwithstanding its performance by a public utility.

On the basis of the above facts, it is our conclusion that the work here involved constitutes the extension of a gas utility system by the utility company and is not, therefore, the construction of a part of the captioned project. Accordingly, such work would not fall within the coverage of the labor standards provisions of the National Housing Act.

Thank you for your continued cooperation in these matters of mutual concern.

Yours sincerely,

Charles Donahue
Solicitor of Labor

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON

May 8, 1962

The Honorable John F. Shelley
House of Representatives
Washington 25, D. C.

Dear Congressman Shelley:

This is in reply to your letter of April 3, 1962, with which you enclosed a brief prepared by the Ninth Vice Presidential District of the International Brotherhood of Electrical Workers. The brief represents the position of several California labor organizations on certain problems which have arisen in the application of the Davis-Bacon Act to missile site projects.

The dispute occasioned by the omission of the Davis-Bacon provisions from the Bendix Corporation contract at Camp Roberts, California, is a good frame of reference for discussion of the brief, since this dispute involves the two essential problems in this area. As the brief sets forth, the Army Contracting Officer, in letting the Bendix contract, concluded that the Davis-Bacon Act was not applicable to the work to be performed. Consequently, he did not include a Davis-Bacon clause in the contract. Upon inquiry by the IBEW and others, this Department investigated the matter. In our opinion, as reflected in our November 30, 1961, ruling to the Department of the Army (Exhibit 3A of the brief), a considerable portion of the contract work in question constituted construction-type activities subject to the Davis-Bacon Act. The Army, however, relying on an earlier opinion of the Comptroller General, considered the administrative decision of the Contracting Officer as not being reversible. (Exhibit 14 of brief).

With respect to the first issue, namely, the applicability of the Davis-Bacon Act to supply-type

contracts (such as the Bendix contract in question), it has been the traditional position of the Department that, if more than an incidental amount of construction-type activity is involved in the installation phase of the contract, the Act would generally apply to the latter work. In this connection, your attention is respectfully called to Rulings and Interpretations No. 3 issued under the Walsh-Healey Public Contracts Act, Part 1, Section 6, entitled "Contracts Involving Construction"; and to our April 16, 1962 decision issued to the Department of the Air Force regarding the applicability of the Davis-Bacon Act to certain work scheduled under the Minuteman Missile Facilities contract at Malmstrom Air Force Base, Montana (copies enclosed).

As you can appreciate, the question of coverage of the Davis-Bacon Act to many work items under the missile and space programs can often present very difficult factual and legal problems. However, over the past year or two, on a case-by-case basis, we have been able to work out many of these difficulties (after consultations with the parties in interest), and usually on a basis satisfactory to all parties concerned. As a result of this series of decisions, the most recent of which is the Minuteman decision (a copy of which is enclosed), we have succeeded in developing a growing pattern of guidelines in this area to serve the procurement agencies and to effectively achieve general compliance with the labor standards requirements of the Davis-Bacon Act.

In developing what we consider realistic and appropriate guidelines on Davis-Bacon applicability in the missile and space area, we have worked closely with the Department of Defense and with the Office of the Comptroller General, and are continuing to do so. In this way, we hope and are striving to develop procurement regulations which will accurately define the authority of the Contracting Officer and the coordinating authority vested in this Department by virtue of Reorgani-

zation Plan No. 14 of 1950, in questions of coverage of the Davis-Bacon Act. By this joint effort, it is our purpose to clarify issues such as the second one here involved, namely, whether a Contracting Officer's decision on applicability of the Davis-Bacon Act is reversible. Thus far, I am pleased to advise that our cooperative efforts with Defense and the General Accounting Office have progressed very satisfactorily. All three agencies fully realize the importance of the issues under study, and the necessity for appropriate clarification of our respective obligations in the general area.

With respect to the report previously submitted to me by the Missile Site Public Contracts Advisory Committee in this general area of Davis-Bacon applicability, this is to advise that all interested parties have been afforded full opportunity to comment on this report and the recommendations made by the Committee. The entire record so constituted will be considered, together with all other data available to the Department, to assist us in developing with the above-mentioned agencies adequate and appropriate procurement regulations on the applicability of the Davis-Bacon and related Acts especially in the missile and space field.

I can assure you that we shall continue to make every effort to fulfill our obligations under the Davis-Bacon and related Acts and to assure full compliance therewith on the part of the procurement agencies.

Since we have several copies of the IBEW brief, I am returning the one enclosed with your inquiry.

If I can be of further assistance at any time, please let me know.

Yours sincerely,

Secretary of Labor

Enclosures