DBRA-55

June 3, 1976

This is in reply to your recent letter requesting clarification of certain questions regarding the applicability of the Davis-Bacon Act and the labor standards provisions to principals of a firm who are themselves performing the work of laborers and mechanics on a covered construction project.

In response to your primary question, our position regarding coverage of particular individuals under the Act is derived from a literal reading of the statute which states in part "every contract … shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of work … wage rates not less than those stated in the advertised specifications ..." Unlike a working subcontractor situation which is discussed below, a prime contractor is an individual owner and cannot at the same time be a mechanic or laborer employed by himself.

Therefore, in those situations where the prime contractor is an individual owner who is operating his own bona fide business and performs the work of a laborer or mechanic on the project, he need not pay himself the applicable prevailing wage rate for the classification of work he performed. Likewise, he is not required to submit certified payroll records for himself to the contracting agency.

The above policy would also apply to a prime contractor which is a bona fide partnership consisting of substantially equal partners who each have a voice in the management thereof and share in its profits and losses.

However, where the prime contractor is a corporation or other business association or entity (including a partnership), and the person performing work of a laborer or mechanic on a covered project is a corporate officer, or a comparable representative of the business association involved, such as an ostensible partner whose only contribution to a partnership is his labor, and where the only compensation therefore is wages or a "draw" fixed by the dominant or real partner or partners, such a person must, in addition to being shown on the certified payrolls, together with the type of work performed and the number of hours so worked on the project, be paid not less than the predetermined contract wage rate in the same manner as any other laborer or mechanic performing similar work on the project.

In the case of subcontractors who are themselves performing the work of laborers and mechanics, it is clear that the Congress intended that such individuals performing the work of laborers and mechanics be paid by the prime contractor weekly an amount equal to at least the applicable prevailing wage for the hours worked in the specific classification and be carried on the prime contractor's certified payroll records in accordance with section 5.5(a)(3) of the Regulations, 29 CFR Part 5, subtitle A.

In other words, the subcontractor who is a bona fide independent contractor, who himself performs the work of a laborer or mechanic on a project subject to the Davis-Bacon and Related Acts, may occupy a dual role under this law. In certain situations, he is simultaneously a laborer or a mechanic who must be carried on the prime contractor's payrolls and paid by the prime contractor for his work at not less than the rate predetermined by the Secretary of Labor for that classification of work he performs and also, an employer who must live up to his obligations under the law for any laborers and mechanics he himself may employ.

The above advice concerning the working subcontractor is, however, applicable only under the following standard. While the Act does not apply to bona fide superintendents who engage in the usual nonmanual, managerial, supervisory, and administrative duties related to that occupation, any such employee, including a subcontractor, who devotes more than 20 percent of his time during a work week in performing the duties of a laborer or mechanic, i.e., work of manual or physical nature, whether it be unskilled, semi-skilled, or skilled work of a trade or craft with tolls and equipment, is considered to be a laborer and mechanic and subject to all the provisions of the Act for the periods of time in any work week in which he is so engaged on a covered project. Accordingly, a subcontractor who spends more than 20 percent of his time during a work week performing the work of a laborer or mechanic on a project must be listed on the prime contractor's certified payrolls and paid in accordance with the requirements of the Davis-Bacon Act for that time.

It should be pointed out, however, that where a subcontractor or working superintendent spends more than 20 percent of his time as a laborer or mechanic and records are not kept segregating his laborer's and mechanic's duties from his supervisory duties, he will be deemed to have spent the entire work week as a laborer or mechanic and must be paid the applicable Davis-Bacon rate for the entire week.

Of course, it would be permissible under the Davis-Bacon Act to deduct from the subcontractor's contract payments any straight time wages which the prime contractor has paid to him in accordance with the requirements of the Davis-Bacon Act. However, if the subcontractor himself is performing work under a contract also subject to the Contract Work Hours and Safety Standards Act, which provides for time and one-half over eight hours in a day or 40 hours in a week, overtime payments due him may not be deducted from the subcontractor's contract payments. In essence, when a subcontractor works overtime himself on the project, the extra half time wage payment must come out of the prime contractor's pocket, not out of the subcontractor's contract price.

We hope that this information answers your questions concerning this matter.

Sincerely,

Ray J. Dolan
Assistant Administrator