



**In the Matter of:**

**PAPER, ALLIED-INDUSTRIAL,  
CHEMICAL AND ENERGY WORKERS  
INTERNATIONAL UNION  
AND LOCAL NO. 8-652,**

**ARB CASE NO. 04-033**

**DATE: November 30, 2005**

**Dispute concerning the applicability of the  
Davis-Bacon Act (DBA) and/or  
McNamara-O'Hara Service Contract Act  
(SCA) to work associated with Decision  
Number 03-005, rev. 1: Disposal Facility  
Modifications (Phase One) and Decision  
Number 03-008: Disposal Facility Materials  
Handling (Phase Two) at the Idaho Engineer  
and Environmental Laboratory, Idaho Falls, ID.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For Petitioner:***

**Philip H. Potter, Esq., Washington, D.C.**

***For Respondent Administrator, Wage and Hour Division:***

**Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,  
Howard M. Radzely, Esq., U.S. Department of Labor, Washington, D.C.**

***For Intervenor Building and Construction Trades Department, AFL-CIO:***

**Terry R. Yellig, Esq., Sherman, Dunn, Cohen, Leifer & Yellig, P.C.,  
Washington, D.C.**

***For Intervenor International Union of Operating Engineers:***

**Elizabeth A. Nadeau, Esq., International Union of Operating Engineers,  
Washington, D.C.**

**FINAL DECISION AND ORDER**

The Administrator of the U. S. Department of Labor's Wage and Hour Division decided that workers engaged in excavation and reclamation work on a federal hazardous waste cleanup project should be paid wages according to the Davis-Bacon Act (DBA)<sup>1</sup> rather than the McNamara-O'Hara Service Contract Act (SCA).<sup>2</sup> The DBA applies to federal construction contracts while the SCA applies to federal procurement contracts. Paper, Allied-Industrial, Chemical and Energy Workers International Union and Local No. 8-652 (collectively PACE) represent the workers presently performing the excavation and reclamation work under a contract with the United States Department of Energy that pays them wages according to the SCA. PACE asks us to review the Administrator's final determination that DBA wages apply. We affirm the Administrator's final determination.

### BACKGROUND

The Idaho National Engineering and Environmental Laboratory (INEEL) is a United States Department of Energy (DOE) facility, consisting of over 890 square miles, and is involved in nuclear energy research. As a result of this research, soil at the facility became contaminated, necessitating cleanup work under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>3</sup> For part of the cleanup work, the DOE's INEEL facility contracted for a two-phase CERCLA project consisting of: 1) the construction of a new disposal cell or facility for contaminated soil and waste, and 2) the excavation and disposal of contaminated soil from various sites at the facility over a ten-year period.

At issue here is the excavation, disposal, and subsequent reclamation work. *See* DOE Decision Number 03-008, INEEL CERCLA Disposal Facility Soils Handling, Tab C, Attachment B. The reclamation of the affected sites was to be accomplished by backfilling and grading the excavated areas with new, uncontaminated soil and reseeding and revegetating the sites.

In preparing the contracts for the CERCLA project, DOE classified the disposal cell work as construction, thus governed by the DBA. It classified the excavation and reclamation portion of the project as constituting service activity, subject to the SCA. Although the Department of Labor's (DOL) Wage and Hour Division Administrator (the Administrator) had issued a memorandum opining that elaborate landscaping work, standing alone, can constitute DBA construction work, the DOE determined that the landscaping work was too trivial a part of the overall excavation project to be considered construction work.

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<sup>1</sup> 40 U. S. C. A. § 3142, *et seq.* (West 2005).

<sup>2</sup> 41 U. S. C. A. § 351(a), *et seq.* (West 1987).

<sup>3</sup> 42 U.S.C.A. § 9610 (West 2005).

In early May 2003, prior to the date that bids for the excavation work were due, the International Union of Operating Engineers (IUOE) and the International Brotherhood of Teamsters (Teamsters) requested that the Administrator investigate and reclassify the excavation work as DBA construction. Meanwhile, in June 2003, DOE awarded contracts to perform the excavation work to service workers that the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) represents. Work on the project began in September 2003.

After completing the investigation that the IUOE and Teamsters requested, the Administrator issued a final determination in December 2003. She concluded that because the excavation work entailed significant earth moving and reclamation, thus elaborate landscaping, the DBA covers such work. PACE asks that we review the Administrator's final determination. The Administrator has responded, urging us to affirm her decision. Similarly, as interested parties, the IUOE and the Building and Construction Trades Department, AFL-CIO, (BCTD) have filed *amicus* briefs, requesting that we affirm the Administrator.

### **JURISDICTION AND STANDARD OF REVIEW**

The Administrative Review Board (ARB) has jurisdiction over this dispute. *See* 40 U.S.C.A. §3142; Reorganization Plan No. 14 of 1950, 5 U.S.C.A. Appendix (West 1996) (delegating to the Secretary of Labor responsibility for developing government-wide policies, interpretations and procedures to implement the Davis-Bacon Act and the Related Acts). *See also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. §§ 7.1 and 7.9 (2005).

The proceedings before the ARB are appellate in the nature, and the Board will not hear matters de novo except upon a showing of extraordinary circumstances. 29 C.F.R. § 7.1(e). The Board acts as fully and finally as might the Secretary of Labor concerning the matters within its jurisdiction. 29 C.F.R. § 7.1(d). It will assess the Administrator's rulings to determine whether they are consistent with the statute and regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act. *Miami Elevator Co.*, ARB Nos. 98-086/97-145, slip op. at 16 (Apr. 25, 2000), *citing Dep't of the Army*, ARB Nos. 98-120/121/122 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351-358). The Board generally defers to the Administrator as being "in the best position to interpret those rules in the first instance . . . and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside." *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). *See also Laborers Int'l Union*, ARB No. 04-011, slip op. at 2 (Apr. 29, 2005).

## DISCUSSION

### 1. The Legal Framework

The DBA applies to every contract of the United States in excess of \$2,000 for construction, alteration, and/or repair . . . of public buildings or public works in the United States. 40 U.S.C.A § 3142(a). It requires prime contractors and subcontractors to pay, at minimum, prevailing wage rates to all laborers and mechanics that perform work on such federal public construction contracts. The Administrator predetermines these prevailing wages according to the location of the work and then publishes them as “Wage Determinations.” 40 U.S.C.A § 3142(b); 29 C.F.R. Part 1, § 1.3. Significantly, the DBA itself does not prescribe a method for determining prevailing wages, leading one court to observe that the statute “delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.” *Building & Constr. Trades’ Dep’t, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983). Indeed, “the substantive correctness of wage determinations is not subject to judicial review.” *Dep’t of the Army*, slip op. at 25 (citing cases). Rather, courts limit review to “due process claims and claims of noncompliance with statutory directives or applicable regulations.” *Id.*, quoting *Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979).

The SCA, on the other hand, applies to all Federal service procurement contracts in excess of \$2,500 into which the United States enters, “the principal purpose of which is to furnish services in the United States through the use of service employees . . . .” 41 U.S.C.A. § 351(a); 29 C.F.R. § 4.104. The SCA requires the Secretary of Labor to determine minimum wage and fringe benefit rates for the service employees. The Administrator is charged with the responsibility for implementation. 29 C.F.R. § 4.3(a). Section 7(1) of the SCA expressly exempts from its provisions any contract of the United States “for construction, alteration and/or repair . . . of public buildings or public works.” 41 U.S.C.A. § 356(1). As explained in the Department of Labor’s regulations, the SCA’s legislative history “indicates that the purpose of the provision is to avoid overlapping coverage of the two acts by excluding from the application of the [SCA] those contracts to which the [DBA] is applicable and in the performance of which the labor standards of that Act are intended to govern the compensation payable to the employees of contractors and subcontractors on the work.” In other words, the Department’s regulations explain, “[t]he intent of section 7(1) is simply to exclude from the provisions of the Act those construction contracts which involve the employment of persons whose wage rates and fringe benefits are determinable under the [DBA].” 29 C.F.R. § 4.116(a) (citations omitted).

The Secretary of Labor promulgates rules to implement both the DBA and the SCA. *See* 29 C.F.R. Parts 4, 5.

## 2. The Administrator's Final Determination

The Administrator issued her final determination on December 15, 2003. She noted that DOE took the position that since the excavation work at issue is analogous to demolition work that is performed without any further follow-on construction work performed at the site, the SCA applies. And the Administrator also noted that DBA regulations provide that demolition work without follow-on construction of a public building or public work is not subject to the DBA. *See* 29 C.F.R. § 4.116(b); *see also* parallel Federal Acquisition Regulations at 48 C.F.R. § 327.301 (2005).

But the Administrator rejected DOE's demolition analogy and determined that the DBA covers the excavation work. Relying upon the DBA's implementing regulations, the Administrator found that "construction" of a public work includes "excavating, clearing and landscaping." *See* 29 C.F.R. § 5.2(i)-(k); *see also* parallel Federal Acquisition Regulations at 48 C.F.R. § 22.401. She also cited the Wage and Hour Division's All Agency Memorandum (AAM) No. 155, which instructs contracting agencies regarding "the application of the [DBA] to hazardous waste cleanup contracts that require elaborate landscaping activities or substantial excavation and reclamation work."<sup>4</sup> The excavation work here involved a much larger area, with even more significant earth moving and reclamation, than the work that was the subject of AAM 155. Therefore, the Administrator stated that the DBA covers "landscaping," not only when it is performed in conjunction with other construction work, but when it also involves "elaborate" activities, such as "substantial" reclamation or excavation of contaminated soils, it may constitute construction of a public work "standing alone."<sup>5</sup> Final Determination at 2-5.

## 3. PACE's Arguments

PACE petitions the Board to review the Administrator's final determination, challenging her conclusion that the work involving the excavation of contaminated soil from various sites at the DOE's INEEL facility and the reclamation work at the same affected sites constitutes DBA construction. PACE argues that the DOE reasonably and permissibly relied upon relevant, properly promulgated Federal and DOE acquisition regulations in concluding that the SCA covers the excavation and reclamation work at the INEEL facility.

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<sup>4</sup> AAM 155 was issued on March 25, 1991. On November 18, 1996, the Administrator reissued AAM 155 as AAM 187 to provide guidance with respect to proper application of the DBA and SCA to hazardous materials cleanup contracts.

<sup>5</sup> The DBA applies to those portions of principally SCA service contracts that involve "substantial" construction that can be "separated" or "segregated" from the rest of the other work. *See* 29 C.F.R. § 4.116(c)(2).

Under the Federal Acquisition Regulations at 48 C.F.R. § 327.301, which parallels the DBA's implementing regulation the DOL issued at 29 C.F.R. § 4.116(b), a contract for "demolition" work "may be" covered by the DBA if it is followed by construction of a public building or work at the same location. Otherwise the DBA is inapplicable. The DOE reasoned that the excavation and reclamation work at the INEEL facility is analogous to a "demolition" of a building and refilling the resulting hole that is not followed by any further construction of a public building or work at the same site or location. Although AAM 155 opines that elaborate landscaping work, standing alone, can constitute DBA construction work, the DOE determined that the landscaping work in this case was too trivial a part of the overall excavation and reclamation project to be considered construction work.

In addition, the DOE relied on its own published procurement regulation that it uses as a guideline in making DBA coverage determinations. That regulation states that the DBA does not cover "[d]econtamination, including . . . scraping to remove contamination; removal of contaminated soil" and "resurfacing" that is "an integral part of the decontamination activity." 48 C.F.R. § 970.2204-1-1(a)(7). Therefore, relying on sections 327.301 and 970.2204-1-1(a)(7), the DOE classified the excavation and reclamation activities as SCA service work. *See* Tab E, DOE-ID Labor Standards Committee Issue Paper.

While the Administrator's determination and the DOL's regulations at 29 C.F.R. §§ 4.116(b) and 5.2(i)-(k) state that excavation and reclamation work "may" be considered construction work, PACE argues that they also indicate that such work may be considered "demolition" work with no follow-on construction that the SCA covers. *See* 29 C.F.R. § 4.116(b); Final Determination at 4. Indeed, the DOL's regulations implementing the SCA at 29 C.F.R. § 4.130 hold that the SCA covers "landscaping (other than construction)" work. PACE also contends that AAM 155, upon which the Administrator relied, merely provides non-binding guidance without any statutory authority for such a conclusion, whereas the DOE reasonably and permissibly relied upon relevant Federal and DOE acquisition regulations that were properly promulgated with an opportunity for notice and comment. Finally, PACE points to the fact that the excavation and reclamation work at the INEEL facility is part of a principally ongoing service maintenance contract and that the DOE has used service workers for decontamination work in the past.

Thus, PACE argues that the DOE reasonably and permissibly concluded that the SCA covers excavation and reclamation work. It contends that even if the Administrator reasonably concluded that such work constitutes construction, nevertheless the DOE's classification of the excavation and reclamation activities as SCA service work was just as reasonable. Consequently, in light of the overall factual and regulatory context here, PACE argues that we should defer to the DOE's determination that the SCA covers such work. PACE's Brief at 3, 5, 18-21, 23-27; Rebuttal Brief at 4-13, 15-18.

#### 4. DOL Has The Primary Authority To Interpret The DBA.

Contrary to PACE's contention, the Secretary of Labor, not DOE, has the primary authority to decide whether the DBA applies to the excavation and reclamation work. PACE argues that as the contracting agency, the DOE's determination that the SCA covers such work deserves deference. To support its argument that the DOE determination deserves deference, PACE relies on Comptroller General opinions concluding that contracting agencies have the authority to determine whether the DBA applies and that DOL opinions, such as AAM 155, have advisory force only. *See* 50 Comp. Gen. 807, 808-809 (1971); 44 Comp. Gen. 498 (1965); 40 Comp. Gen. 565, 570 (1961).

But, as a matter of law, the Secretary of Labor and the DOL have primary authority to interpret the DBA. *See Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 98-164, ALJ No. 96-DBA-33, slip op. at 7-8 (ARB Oct. 19, 1999) (the Secretary of Labor and the DOL have preeminent authority to determine worker classification issues under the DBA). As previously noted, the DBA requires contractors on federal construction projects to pay laborers and mechanics locally prevailing wage rates as "determined by the Secretary [of Labor] to be prevailing." 40 U.S.C.A. § 3142 (b). And under Reorganization Plan No. 14 of 1950, the Secretary of Labor is authorized to establish "standards, regulations, and procedures" that contracting agencies must follow. 5 U.S.C.A. Appendix. Furthermore, regulations that implement the DBA emphasize the DOL's central role in making enforcement determinations. For instance, all federal construction contracts must include a clause specifying that disputes over the DBA labor standards requirements will be referred to the DOL for decision and will not be subject to the general disputes clause of the contract. *See* 29 C.F.R. § 5.5(a)(9). The Federal Acquisition Regulations similarly mandate that labor standards disputes are reserved to the DOL for decision and are outside the normal contract disputes clause of a construction procurement contract. *See* 48 C.F.R. § 52.222-14. In addition, the regulations prescribe that the Administrator's DBA rulings and interpretations "shall be authoritative." *See* 29 C.F.R. § 5.13.

Thus, both this Board and its predecessor, the Wage Appeals Board, have repeatedly emphasized that when interpreting DBA labor standards questions, the contracting agencies and their officers have no ability to make an authoritative determination. This power is reserved to the Secretary and her designees. *Thomas*, slip op. at 7-8; *The Law Co., Inc.*, ARB No. 98-107, slip op. at 11 (Sept. 30, 1999); *Dick Enters., Inc.*, ARB No. 95-046A (Dec. 4, 1996); *Swanson's Glass*, WAB No. 89-20 (Apr. 29, 1991); *More Drywall, Inc.*, WAB No. 90-20 (Apr. 29, 1991); *Atomic Energy Comm'n*, WAB No. 67-06 (Apr. 8, 1967).

Moreover, not only have the ARB and the Wage Appeals Board held that the DOL has such preeminent authority, but in a May 1994 Opinion that the Justice Department's Office of Legal Counsel (OLC) published, the Attorney General also recognized that "the primary responsibility for interpreting" the DBA lies with the DOL.

*Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, 18 U.S. Op. Off. Legal Counsel 109, 123 (May 23, 1994). The Justice Department's OLC specifically stated that they did not regard the decisions of the Comptroller General as controlling. *See* 18 U.S. Op. Off. Legal Counsel at 117.<sup>6</sup>

Therefore, we reject PACE's argument that we should defer to the DOE's determination.

## **5. The Administrator's Final Determination Is Reasonable.**

Having determined that the DOL has the primary authority to decide whether the DBA applies to the excavation and reclamation work, we must review the Administrator's decision to determine if it is consistent with the DBA and its implementing regulations and is a reasonable interpretation of the statute. *See Miami Elevator Co.*, slip op. at 16; *Titan IV Mobile Serv. Tower*, slip op. at 7.

In concluding that the DBA applied to the excavation and reclamation work, the Administrator relied upon DBA implementing regulations. Specifically, she points out that "construction" of a public work includes "excavating, clearing and landscaping." *See* 29 C.F.R. § 5.2(i)-(k).

The Administrator also relied on the guidance provided in AAM 155, which the DOL forwarded to all contracting agencies, regarding the DBA's application to hazardous waste cleanup contracts. AAM 155 instructs contracting agencies that "landscaping," as defined under the DBA's implementing regulations at 29 C.F.R. § 5.2(i), is DBA-covered construction not only when it is performed in conjunction with other construction work, *see e.g.* 29 C.F.R. § 4.116(c)(2), but also "standing alone" if it involves "elaborate" landscaping activities such as "substantial" reclamation or excavation of contaminated soils. The Wage and Hour Division Administrator publishes All Agency Memoranda to assist and provide guidance to contracting agencies in the use of wage determinations and to assure that proper wages are paid to the workers as intended by the DBA. *See generally Almeda-Sims Sludge Disposal Plant*, WAB No. 78-13, slip op. at 9-10 (Jan. 5, 1979). The DOL is charged with interpreting the DBA and has inherent authority to issue interpretive rules in All Agency Memoranda, such as AAM 155 and AAM 187, informing the public of the standards it intends to apply in exercising its discretion. *In re The United States Army with respect to Application of All Agency Memorandum No. 157 under Administration of the Davis-Bacon and Related*

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<sup>6</sup> While recognizing that the "principal authority for bringing about the consistent administration" of the DBA lies with the DOL, the OLC's opinion also notes the authority of the Attorney General, under Executive Order No. 12146, to ultimately resolve legal disputes between executive branch agencies. 18 U.S. Op. Off. Legal Counsel at 122-123. Thus, the "Attorney General, at the request of appropriate officials, has the authority to review the general legal principles underlying certain of the [Secretary of Labor's] decisions under the [DBA]." 18 U.S. Op. Off. Legal Counsel at 123.



*Acts*, ARB No. 96-133, slip op. at 8-9 (July 17, 1997). Therefore, the Administrator properly relied on the past guidance provided in AAM 155 in determining that the DBA covers the excavation and reclamation work.

We find that the Administrator reasonably relied upon DBA implementing regulations and past DOL guidance in making her determination. That determination is consistent with both the plain language of section 5.2(i)-(k) and with the DOL's past determinations as reflected in AAM's 155 and 187. Furthermore, the Administrator fully explained why the DBA applies. Therefore, we must defer to the Administrator's determination.

## **6. The Administrator Has The Authority To Issue A DBA Wage Determination.**

In early May 2003, before bids for the excavation and reclamation work were due, the IUOE and the Teamsters requested that the Administrator investigate the DOE's decision to apply the SCA rather than the DBA. Then, in June 2003, DOE awarded the excavation and reclamation work to service workers whom PACE represents. The project began in September 2003. The Administrator issued her final determination in December 2003.

PACE argues that even if the Administrator properly determined that the DBA covers the INEEL excavation and reclamation work, she had no authority to replace the SCA wage rates with the DBA rates once the contract for the work had been awarded and the work had begun. PACE's Rebuttal Brief at 18-21. But we hold that the Administrator properly exercised her authority to issue a DBA, rather than a SCA, wage determination to cover the excavation and reclamation work at issue.

DBA regulations permit the Administrator to incorporate proper DBA wage determinations in covered contracts after a contract is awarded and after work begins. The rule permits the Administrator to issue a wage determination after contract award or after the beginning of construction if the agency 1) has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the DBA, or 2) has used a wage determination which clearly does not apply to the contract, or 3) has incorporated the wrong wage determination in the contract because of an inaccurate description of the project or its location. 29 C.F.R. § 1.6(f). *See* 47 Fed. Reg. 23,646-23,647 (May 28, 1982). If any of the above criteria are satisfied, the contracting agency shall either terminate and resolicit the contract with the valid wage determination or incorporate the valid wage determination retroactive to the beginning of construction. *Id.*

PACE relies on *Universities Research, Inc. v. Coutu*, 450 U.S. 754, 761 n.9 (1981) and a Comptroller General's opinion at 40 Comp. Gen. 565 (1961). But in *Coutu*, the Supreme Court declined to address whether the Secretary of Labor has authority to retroactively award prevailing wages. And the Comptroller General's opinion is not on

point. Besides, both of these authorities predate promulgation of section 1.6(f). *See Farmer's Branch*, WAB No. 90-19, slip op. at 2 (May 17, 1991).

So long as at least one of the specified criteria under section 1.6(f) is met, the Administrator has the authority to issue a DBA wage determination to cover the excavation and reclamation work in this case, even after the contract was awarded using SCA wage rates and the work had begun. We find that since the DBA applies to the work at issue and that since the DOE failed to incorporate a DBA wage determination in the contracts pertaining to that work, section 1.6(f)'s first criterion has been met. Therefore, the Administrator had authority to substitute the DBA wage rates for the SCA rates even after the contracts were awarded and the work had begun. *See Farmer's Branch*, slip op. at 2-3.

#### **CONCLUSION**

The Administrator has primary authority to determine when the DBA applies. She also had the authority to substitute a DBA wage determination for a SCA wage determination even after a contract is awarded and work has begun. Since she exercised that authority reasonably, and her decision that the DBA applies to the excavation and reclamation work is consistent with the DBA, implementing regulations, and past practice, we **DENY** PACE's petition for review and **AFFIRM** the December 15, 2003 final determination.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeal Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**