



In the Matter of:

**APPLICATION OF THE
DAVIS-BACON ACT TO
CONSTRUCTION OF THE
CITYCENTERDC PROJECT IN
THE DISTRICT OF COLUMBIA**

**ARB CASE NOS. 11-074
11-078
11-082**

DATE: April 30, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner CCDC Office LLC:

Maurice Baskin, Esq., Venable, LLP, Washington, District of Columbia

For the Petitioner Mid-Atlantic Regional Council of Carpenters:

Terry R. Yellig, Esq. and Esmeralda Aguilar, Esq., Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, District of Columbia

For the Petitioner the District of Columbia:

William S.W. Chang, Esq., Morgan, Lewis & Bockius LLP, Houston, Texas; Irvin B. Nathan, Esq., Attorney General for the District of Columbia, Washington, District of Columbia.; Jennifer M. Castor, Esq. and Patrick Allen, Esq., Office of the Attorney General for the District of Columbia, Washington, District of Columbia

For the Respondent Deputy Administrator, Wage and Hour Division:

Roger W. Wilkinson, Esq., Jonathan T. Rees, Esq., Jennifer S. Brand, Esq., and M. Patricia Smith, Esq., United States Department of Labor, Washington, District of Columbia

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge, and Lisa Wilson Edwards, Administrative Appeals Judge.

FINAL DECISION AND ORDER

This case arises under the provisions of the Davis-Bacon Act (DBA), 40 U.S.C.A. § 3141 *et seq.* (Thomson Reuters 2013) and the applicable implementing regulations at 29 C.F.R. Parts 1, 3, 5, and 7 (2012). On June 17, 2011, the Administrator, Wage and Hour Division (the Administrator) determined in a final ruling on reconsideration that the DBA's prevailing wage and labor standards provisions under 40 U.S.C.A. § 3142(a), apply prospectively to the construction of the CityCenterDC project, a mixed-use development project in the heart of downtown Washington, D.C. The Administrator based her coverage determination on the facts and circumstances of this case considered as a whole. Administrative Record (AR) Tab A.¹ The CCDC Office LLC (the Developers), the Mid-Atlantic Regional Council of Carpenters (the Union), and the District of Columbia (D.C. or the District) each petitioned the Board for review of the Administrator's final decision pursuant to 29 C.F.R. Parts 5, 7 (2012).² For the reasons that follow, we affirm the Administrator's final decision that the Davis-Bacon Act's prevailing wage and labor standards requirements apply to the CityCenterDC project.

This case involves a government-private sector partnership initiated by the District to effectuate its vision of a revitalized urban center having city-wide benefits. To implement its vision, and with D.C. City Council authorization and approval, the District entered into an exclusive rights agreement with the Developers for development of the CityCenterDC project, a model urban center on District-owned prime real estate in downtown D.C. Upon D.C. City Council approval, the Mayor conveyed the real estate, which included the site of the outdated and under-utilized old Washington Convention Center, for redevelopment pursuant to the exclusive rights agreement and the parties' master plan. The District and the Developers entered into a series of agreements governing the development of the CityCenterDC project, the construction of which would be undertaken by authority of the District of Columbia. These agreements included a Development and Land Disposition Agreement and several 99-year ground leases for office, residential, and retail use, and provided for the District's ownership of the CityCenterDC improvements upon expiration of the leases.

The District negotiated terms *intended* to serve the public interest through a combination of economic and social benefits including jobs for its residents, affordable housing, retail space for local businesses, significant rental and tax revenue for the District, a public park and other

¹ "AR Tab" refers to the evidentiary record contained in the Administrative Record that the Administrator filed with the ARB. We rely on facts stated by the Administrator and/or background facts that appear to be undisputed.

² CCDC Office LLC is the petitioner in ARB No. 11-074; the Mid-Atlantic Regional Council of Carpenters is the petitioner in ARB No. 11-078; and the District of Columbia is the petitioner in ARB No. 11-082. These three appeals are consolidated for purposes of decision.

public areas, and a multi-block network of pedestrian passageways. In 2005, the then-Deputy Mayor for Planning and Economic Development stated, “This is a downtown project, but the benefits will be felt in every ward of the city through creation of thousands of jobs, hundreds of units of affordable housing, and \$30 million a year in new tax revenues to fund vital city services.” AR Tab V CityCenterDC Press Release (June 7, 2005) (quoting Stanley Jackson, then-Deputy Mayor for Planning and Economic Development). More recently in 2009, the then-Deputy Mayor for Planning and Economic Development in a letter to the Department of Labor regarding the issue of DBA coverage for the CityCenterDC project stated, “The District does not deny that the Project *is intended to benefit the public.*” AR Tab S (emphasis added) Letter from Neil O. Albert, then-Deputy Mayor for Planning and Economic Development to John McKeon, then-Acting Wage and Hour Division Administrator (May 27, 2009).

As part of this public-private partnership, the District negotiated terms that ensure its control over the design and construction of project improvements, including veto authority over any change to the City Council-approved master plan and the Developers’ choice of contractors, and mandating that the Developers maintain the improvements in First-Class condition. Critically, the District has the authority to terminate the RDA and ground leases should the Developers fail to meet project milestones tied to the construction and maintenance of the CityCenterDC site and to the provision of such public benefits as affordable housing. It is this public entanglement of the public-private partnership that is CityCenterDC that distinguishes this case from the usual private-sector development project requiring city approval and leads us to conclude that the District contracted for construction of a public work that is carried on directly by its authority to serve the interest of the general public. While we recognize the private economic benefits the project achieves, the private aspects do not subordinate the public benefits of CityCenterDC, a project envisioned by, negotiated for, contracted for, and constructed and maintained directly by authority of the District, the landowner.

BACKGROUND

A. Facts

In 2000, the Mayor of the District of Columbia sought to redevelop approximately ten acres of District-owned real estate located in downtown Northwest Washington, D.C., at the site of the old Washington Convention Center. The District formulated a plan for the project to be “the heart of an active, mixed-use development corridor.” See AR Tab FF. The Mayor’s task force recommended that the District redevelop the site into a mixed-use urban neighborhood. The District government refined these goals and drafted a Request for a Development Partner (RFP). The RFP sought a master developer for a public-private partnership to strategically develop the site consistent with the District’s plan. *Id.* The D.C. City Council approved the RFP in 2002 and the District issued it. As part of the RFP, the District issued “Envisioning the Site: A Preliminary Design Guideline.” See AR Tab FF. The Developers submitted a proposal and the Mayor selected the Developers for negotiation of an exclusive rights agreement. With the approval of the D.C. City Council, the Mayor subsequently conveyed the land for redevelopment purposes. AR Tabs U, V, FF, GG, HH. In May 2005, again with approval and authorization

from the D.C. City Council, the District and the Developers entered into an Exclusive Rights Agreement and Land Disposition Agreement (ERA). AR Tab FF. The ERA states that the “Development Agreement shall address the extent to which Davis-Bacon Act requirements apply to the construction of the Improvements,” *id.* at 72, but the agreement did not specifically address application of DBA wages, AR Tab Z.

In 2007, the District and the Developers entered into an Amended and Restated Development Agreement and Land Disposition Agreement (RDA). AR Tab Z. The ERA and the RDA called for execution of a separate ground lease for each category of use for the CityCenterDC project. AR Tab Z at 60-61. The District entered into three 99-year ground leases with the Developers: one for office use (AR Tabs W, KK); a second for residential rental use (AR Tab X); and a third for retail use (AR Tab Y). Under these leases, the Developers are responsible for the costs of development, operation, site maintenance, and payments to the District, including an annual base rental payment of \$2 million and an annual participating rental payment of twenty-five percent of net operation income over certain return thresholds for each property type. *See* AR Tab W at 9-16, Tab X at 9-15, Tab Y at 9-16. The RDA, ERA, and ground leases provide for retail space for small or disadvantaged local businesses, residential properties for affordable housing, employment opportunities for District residents, and the creation of a park and a central plaza for public use. AR Tabs W-Z, KK at Schedule 16. The RDA requires that the Developers construct or cause the construction of the project “in accordance with the Master Plan” approved by the District, and gives the District authority over the particulars of the design documents, the Developers’ selection of general contractors, and any changes to the Master Plan. AR Tab Z at 31, 47, 50, 53-56. The RDA gives the District the authority to terminate the leases for various “Events of Default” including any failure by the Developers to meet specific construction milestones, to build the agreed-upon number of affordable housing units, or to abide by the terms negotiated by the District and its authority to control project design, construction, and maintenance.³ AR Tab Z at 44-46, 82, 83. The leases also require that the Developers maintain the improvements throughout the 99-year lease term in a condition comparable to other office buildings in Washington, D.C. that satisfy “First-Class Standards.” AR Tab W at 20, 36, 49-55. The RDA states that the District as landlord, retains ownership of the land. AR Tab X at 64. The agreement states that the District will acquire ownership of the improvements at the expiration of the lease periods when the Developers, as tenants, “will peaceably and quietly yield up and surrender possession to Landlord of the Leased Premises and all Improvements and other properties herein provided to be the property of Landlord on termination hereof without disturbance or molestation thereof.” *Id.*

³ These “Events of Default” refer to certain “Milestone Events” not being achieved by a certain date, including construction commencement and completion. AR Tab Z at 44, 45, 82, 83.

B. Wage and Hour Division's August 30, 2010 Determination

In April 2009, the Union requested a ruling from the Department of Labor's Wage and Hour Division on whether the DBA applies to construction of the CityCenterDC project.⁴ AR Tab T.

On August 30, 2010, the Chief, Branch of Government Contracts, Wage and Hour's Division of Enforcement Policy (Branch Chief), notified the Union that the DBA did not apply to the project. AR Tab K at 3. Relying on an opinion of the Office of Legal Counsel (OLC), 18 U.S. Op. Off. Legal Counsel 109, 1994 WL 810699, at 11 n.10 (May 23, 1994), attached to All Agency Memorandum (AAM) No. 176 (June 22, 1994), the Branch Chief determined that DBA requirements "can apply to lease-construction contracts but that such a determination 'likely will depend on the details of the particular arrangement.'" *Id.* at 2.

The Branch Chief applied the OLC's factors to the facts of the CityCenterDC project and concluded that the DBA did not apply given the contractual arrangements set out in the project.⁵ The Branch Chief first determined that the length of the three 99-year ground leases weighed against application of the DBA because "private developers have the long-term leasehold interest and the District will not be able to put improvements to government use until the leases expire." AR K at 3. The Branch Chief next determined, however, that the "extent of the District's involvement in the City Center project 'weighs in favor of the application of the DBA,'" finding that the "District has considerable authority as to what is to be built and by whom." *Id.* Third, the Branch Chief found that greater use will be for "private purposes during the period of the ground leases" and that this weighed against application of the DBA. *Id.* Fourth, the Branch Chief determined that the costs of construction would not be fully paid by the Developers' lease payments to the District and that this weighed against DBA coverage. *Id.* at 4 (stating that "[t]ypically, this factor is applied to property that the government has sold to a developer prior to construction and for the use of which the government makes lease payments to the developer

⁴ The record shows that the Union raised this DBA coverage issue directly with the parties on numerous occasions prior to formally requesting in April 2009 a ruling from the Department of Labor. AR Tab T.

⁵ The 1994 OLC opinion that the Branch Chief relied on states that determining whether to apply the DBA to lease-construction contracts requires review of various factors, including "length of the lease, the extent of government involvement in the construction project [such as whether the building is being built to government requirements and whether the government has the right to inspect the progress of the work], the extent to which the construction will be used for private rather than public purposes, the extent to which the costs of construction will be fully paid for by the lease payments, and whether the contract is written as a lease solely to evade the requirements of the Davis-Bacon Act." AR Tab K Branch Chief Ruling at 3 (Aug. 30, 2010)(quoting 1994 OLC Opinion, 1994 WL 810699 at 11 n.10).

post-construction.”). Finally, the Branch Chief found that the contract agreements between the District and the Developers were not made to avoid DBA application. *Id.* at 4. The Branch Chief informed the parties of their right to request reconsideration of the ruling. *Id.*

C. Union’s October 29, 2010 Reconsideration Request

After obtaining an extension of the 30-day deadline for seeking reconsideration, the Union sought reconsideration on October 29, 2010, of the Branch Chief’s August 30, 2010 determination. The Union argued, (1) that Wage and Hour determined that the CityCenterDC project is not a public building or work by relying on factors that have “little bearing on the unique facts of this case,” and (2) that the project is a “public work” as defined in 29 C.F.R. § 5.2(k) since its construction is “carried on directly by authority of” the District of Columbia and serves “the interest of the general public.” AR Tab H; *see also* Tabs I, J. The Developers and the District opposed the request for reconsideration.

D. Wage and Hour Division’s June 17, 2011 Final Ruling

The Administrator issued a final ruling on June 17, 2011, determining that the DBA applied to the project. AR Tab A. The Administrator stated that the Union based its request for reconsideration on “relevant details concerning the public benefits that will result from the project, including evidence that the project is expected to raise substantial tax revenue for public services and create well over 1,000 jobs for District residents through a ‘First Source’ employment commitment required by the District, as well as evidence that the project will provide affordable housing and create new public amenities such as parks, streets and sidewalks.” *Id.* at 3. The Administrator noted the Developers’ and the District’s objections to reconsideration, contending that the project does not fall within the DBA’s scope because it “is not carried on by the direct authority of the District,” and that the request for reconsideration was procedurally deficient. *Id.*

The Administrator determined that the Union’s reconsideration request was timely because the Union filed it within the extension of time that the Administrator granted the Union. *Id.* at 3. The Administrator determined that contrary to the Developers’ argument, the Union’s reconsideration request did not require a showing of newly discovered facts or law. *Id.* (stating that “there is no requirement that a request for reconsideration of an intermediate [Wage and Hour Division] ruling raise new matters of fact or law.”) The Administrator also rejected the Developers’ contention of “irreparable harm if reconsideration is granted,” *Id.* at 3 n.1, and determined that “DBA regulations provide for the Developers to be compensated for any increase in wages resulting from this ruling,” *Id.* (citing 29 C.F.R. § 1.6(f)).

The Administrator concluded that the DBA applied to the CityCenterDC project. The Administrator observed that the analysis “focuses on the regulatory definition of ‘public building or public work’ and related case law, rather than on the specific factors mentioned in the 1994 OLC Opinion and AAM No. 176.” *Id.* at 4. The Administrator indicated that the specific factors set out in the 1994 OLC Memo are not applicable in their entirety to the CityCenterDC project

“because it involves a long-term lease of government land to private developers rather than the more typical context where a governmental body transfers title to a private entity to have improvements built and obtains a lease to put the constructed improvements to governmental use.” *Id.* at 4. The Administrator stated that the facts set out in the 1994 OLC Opinion “remain fully applicable in the typical government leasehold context,” but that even applying the OLC factors, the “Davis-Bacon requirements apply . . . because, based on our further evaluation of the record evidence reflecting the myriad public benefits arising from the project, we would conclude in particular that the third factor identified in AAM 176 – ‘the extent to which the construction will be used for private rather than public purposes’ – weighs decisively in favor of Davis-Bacon coverage.” *Id.*

Turning to the regulations, the Administrator found that the CityCenterDC Project satisfied each requirement to implicate DBA coverage. The Administrator determined that the contract agreements between the District and the Developers are for “construction” within the meaning of the DBA because “construction” was more than an incidental part of the lease agreements. *Id.* at 4-5 (citing several factors supporting this conclusion). Next, the Administrator ruled that the nature of the CityCenterDC project met the definition of “public work” pursuant to 29 C.F.R. § 5.2(k) (defining “public building” or “public work” to 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.”) The Administrator determined that the CityCenterDC project satisfied the first prong of 29 C.F.R. § 5.2(k) because under the terms of the contracts, the District retains “considerable authority as to what is to be built, when, and by whom.” *Id.* at 6. The Administrator observed that the District “in this case will directly exercise its authority over the construction under the terms of the ground leases, the development agreements, and the master plan, which will collectively provide the District with direct authority regarding both what will be built and how it will be maintained during the lease terms.” *Id.* at 6 n.4. Based on these facts, the Administrator determined that the “City Center project will be carried on by the District’s direct authority” within the meaning of 29 C.F.R. § 5.2(k).

Further, based on the totality of circumstances, the Administrator found that the CityCenterDC project satisfied the second prong of Section 5.2(k) because the project “will serve the interest of the general public.” *Id.* at 6-7. The Administrator found that the District’s various public space design requirements for the project would benefit the public, including “reconstruction of 10th and I streets, a network of pedestrian scaled alleys, and new park of about 1.5 acres on the northwest corner of the site, and a new central plaza of about 1/3 acre in which there will be a multi-use event/entertainment space with sufficient area to accommodate 500 people.” *Id.* The Administrator further found that “application of District legislation to the project underscores its public nature,” including local legislation “enabl[ing] the City Center project” and requirements that the District satisfy local law requirements “for disposing of public property in a manner that should serve the best interests of the District.” *Id.* (citing D.C. Code Ann. 10-1202.15a and D.C. Code Ann. 10-801(b)). The Administrator further observed that twenty percent of for-rental and for-sale housing units would be “affordable housing,” “a total of nearly 200 units.” *Id.* at 6. The Administrator noted that aspects of the contracts described the

purpose of the project as “to transform a large area of currently underutilized land in Downtown DC into a bustling and exciting community.” *Id.* at 6-7 (citing Masterplan Design Guidelines, Old Convention Center Site, Washington, D.C. dated September 18, 2006, p. 6). The Administrator noted that the District “cited increased tax revenue as a principal reason for supporting the project and has estimated that the project will generate up to \$930 million in tax revenue in the first 30 years alone.” *Id.* at 7. Based on this “evidence of the myriad public benefits associated with the City Center project,” and appreciating the “mix of public and private benefits,” the Administrator concluded that the project “sufficiently ‘serve[s] the interest of the general public’ to constitute a ‘public work.’” *Id.* at 7.

Finally, the Administrator determined that the DBA would apply to the CityCenterDC project prospectively. Specifically, the Administrator stated that based on “the particular circumstances of the case, including the start of construction on April 4, 2011, it is in the public interest to apply the DBA requirements and obligations . . . prospectively, starting with the first pay period week immediately following the date of this final ruling.” *Id.* at 8.

JURISDICTION AND STANDARD OF REVIEW

The scope of the jurisdiction of the Administrative Review Board (ARB or Board) includes review of the Administrator’s coverage determinations. *See In the Matter of Alcatraz Cruises LLC Dispute Concerning Applicability of the Service Contract Act to Contract No. CC-GOGA001—5*, ARB No. 07-024 (Jan. 23, 2009) (ARB reviewing “Wage-Hour Administrator determination that National Park Service contracts for ferry transportation services to and from Alcatraz Island were concession contracts covered under the [Service Contract Act].”); *see also In the Matter of Arbor Hill Rehabilitation Project, Albany NY*, WAB No. 87-04 (Nov. 3, 1987) (ARB predecessor agency, Wage Appeals Board, reviews Administrator’s coverage determination stating that the “Board has jurisdiction to hear and resolve appeals from final decisions involving wage determinations as well as other controversies relating to coverage.”). The ARB’s review of the Administrator’s final ruling under 29 C.F.R. § 5.13 in Davis-Bacon Act cases is in the nature of an appellate proceeding and the Board “will not hear matters de novo except upon a showing of extraordinary circumstances.” 29 C.F.R. §§ 7.1(e), 7.9. 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 her to implement and enforce the DBA. *William J. Lang Land Clearing, Inc.*, ARB Nos. 01-072, -079; ALJ Nos. 1998-DBA-001 through 006 (ARB Sept. 28, 2004)(citing *Miami Elevator Co.*, ARB Nos. 98-086, 97-145; slip op. at 16 (Apr. 25, 2000)).

It is well-established that the final determination of Davis-Bacon Act applicability is that of the Secretary of Labor alone. *North Georgia Bldg. Const. Trades Council v. Goldschmidt*, 621 F.2d 697, 701-702 (5th Cir. 1980). “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. Feb. 24, 1997).

DISCUSSION

Turning to the appeals before us, the District and the Developers urge us to reverse the Administrator's determination in her final ruling that the CityCenterDC project is a "public work" within the meaning of the DBA and its implementing regulations. The Developers also contend that the District of Columbia did not enter into a "contract" "for construction" within the statutory and regulatory meaning, and that to apply the DBA would violate the United States Constitution's taking clause. The Carpenters Union urges us to uphold the Administrator's decision that the DBA applies here, but seeks reversal of the Administrator's decision to apply the DBA requirements and obligations prospectively only.

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

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, and/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.

(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.A. § 3142(a), (b). To be covered under the Davis-Bacon Act, the contract must be in excess of \$2,000 and for "construction, alteration, and/or repair, including painting and decorating, of public buildings and public works." 40 U.S.C.A. § 3142(a). The purpose of the DBA's minimum 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).

The Department of Labor promulgates the DBA's labor standards provisions. 29 C.F.R. Part 5. Under these 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,” transporting materials and supplies to or from the building, work by the employees of the construction contractor or subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work by persons employed by the contractor or subcontractor. 29 C.F.R. § 5.2(j)(1).⁶ 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” or the District of Columbia “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 this regulatory definition, the DBA covers a work, such as the CityCenterDC project (which includes buildings and improvements) where shown that: (1) there is a “contract;” (2) the contract is “for construction;” and (3) the construction is for a public building or public work. We apply this statutory and regulatory scheme to resolve the question of DBA coverage before us.

B. The Contract Agreements Between The District And The Developers Constitute “Contract[s]” “for Construction” Within The Meaning Of The DBA

The Developers argue that the District is not a party to any “contract” “for construction.” The regulatory definition of “construction” is all-encompassing and includes “[a]ll types of work done on a particular building or work at the site thereof . . . by laborers and mechanics employed by a construction contractor or construction subcontractor . . .” 29 C.F.R. § 5.2(j). A contract is “for construction” within the meaning of the DBA if “more than an incidental amount of construction-type activity” is involved in its performance of a covered contract. *In the Matter of Crown Point, Indiana Outpatient Clinic*, WAB No. 86-33, slip op. at 4 (June 26, 1987) (citing *In the Matter of Military Housing, Fort Drum, New York*, WAB No. 85-16 (Aug. 23, 1985)). *Crown Point*, WAB 86-33, *aff’d sub nom., Building and Construction Trades Department, AFL-CIO v. Turnage*, 705 F. Supp. 5 (D.D.C. 1988). Moreover, contracts “for construction” are not limited to contracts entered into with a construction contractor; it is sufficient that the contract merely “call[] for the construction of a public work.” 1994 OLC Op., 1994 WL 810699 at 4. Thus, lease agreements that provide for such construction have been held to qualify as contracts “for construction” within the meaning of the DBA. *See, e.g., In the Matter of Phoenix Field Office, Bureau of Land Mgmt.*, ARB No. 01-010, slip op. at 8-9 (June 29, 2001); *Fort Drum*, WAB 86-33, at 4-5.

⁶ Section 29 C.F.R. § 5.2(j), provides, in pertinent part: “The terms *construction, prosecution, completion, or repair* mean the following: (1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work . . . by laborers and mechanics employed by a construction contractor or construction subcontractor . . .”

The lease contracts between the District and the Developers fall squarely within the DBA's definition of a construction contract. Indeed, the RDA and ERA are prime contracts that "incorporate[] . . . a master plan agreed to by the District and the developers that provide[] detailed specifications and other requirements for the construction of the City Center project." AR Tab K Branch Chief Ruling at 1 (Aug. 30, 2010). In accordance with RDA and ERA requirements, the District "entered into . . . three 99-year ground leases for the purposes of developing the site in accordance [with the master plan.]" AR Tab A Administrator's Final Ruling at 2 (June 17, 2011). These ground leases are, if not prime contracts since the District is a signatory, "subcontract[s] . . . let under the prime contract." 29 C.F.R. § 5.2(h). Indeed, each of the three leases require substantial construction of improvements for office, residential, and retail use, including office buildings, condominiums, and retail stores as well as the infrastructure to support them, AR Tabs W, X, Y, bringing them well within the broad definition of "construction" set out in 29 C.F.R. § 5.2(j). Moreover, the subcontracts for specific work on CityCenterDC emanate from the RDA and ERA, and from the three lease agreements. The 1994 OLC Opinion made clear that "the fact that a contract is a lease is not the sole determinative factor in deciding whether that contract is also a contract for construction within the meaning of the Davis-Bacon Act." 1994 OLC Op. at 3 (determining that "[t]he words 'contract . . . for construction . . . of public buildings or public works' do not plainly and precisely indicate that a contract must include provisions dealing only with construction. Rather, the plain language would seem to require only that there be a *contract*, and that one of the things required by that contract be *construction of a public work*." (emphasis added). Since the 1994 OLC opinion, it is well-settled law that a *lease* that calls for more than incidental construction can qualify as a contract for construction under the DBA. See *In the Matter of Phoenix Field Office, Bureau of Land Mgmt.*, ARB No. 01-010, at 10-11; see also *Otero County Hosp. Assoc. d/b/a Gerald Champion Memorial Hosp.*, ARB No. 99-038, slip op. at 18 (July 31, 2002) and cases cited therein.

Despite this well-settled law, the Developers argue to us on appeal that the District has not entered into any "contract" "for construction" because its contracts are with a developer not a construction contractor and the Developers *themselves* are not obligated to construct any structure. But as the Administrator responds, "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." Administrator's Response Brief at 21.

Given the terms of the RDA and the ERA and the subsequent 99-year lease agreements that the District entered into to facilitate construction of CityCenterDC, the Administrator's ruling (and supporting reasons) that the contracts in dispute here fall within the meaning of construction contracts under the DBA was consistent with statutory authority and applicable law.

C. The CityCenterDC Construction Project Constitutes A “Public Work” Within The Meaning Of The DBA

For the CityCenterDC project to constitute a “public work” under the DBA, the construction of the project’s improvements must be “carried on directly by authority of” the District and “serve the interest of the general public.” 29 C.F.R. § 5.2(k). The Developers and the District argue that application of the DBA to the CityCenterDC project is error because the project is not a “public work” as the improvements are privately funded, privately owned, and privately occupied for the 99-year lease term. The District argues that the *primary purpose* of the CityCenterDC project is to benefit private economic interests, and that the public benefits are incidental. The Carpenters Union, however, agrees with the Administrator’s ruling that the leases are contracts for construction of a “public work” to which the DBA applies. The Administrator urges the Board to uphold the Administrator’s final ruling.

While certainly CityCenterDC will create private benefits, the Administrator properly determined that the project falls within the regulatory definition of a “public work” based on her conclusion that the project is being undertaken pursuant to the District’s direct authority as well as her numerous findings of public aspects of the project and the immense public benefits that flow from this project.

Again, the definition of “public work” contains two prongs, which are that the building or construction project (1) be carried on “directly by authority of or with funds of a Federal agency” and (2) “serve the interest of the general public.” 29 C.F.R. § 5.2(k). As to prong one, we agree with the Administrator’s assessment that construction will be carried on directly by authority of the District since the terms of the ground leases, the development agreements, and the Master Plan collectively provide the District with authority over what will be built and how it will be maintained during the lease terms. AR Tab A at 6 n.4. The project’s construction “is carried on directly by authority of” the District given that it passed enabling legislation authorizing redevelopment of the site and is a signatory to the prime contracts (ERA and RDA) and the three lease agreements that embody the terms for construction and incorporate the project’s master plan. Moreover, but for the District’s agreement to lease the land upon which the CityCenterDC project is being built, the effort to transform this District real estate would not be taking place. The District’s Mayor conveyed this prime, downtown real estate for the purpose of redevelopment, and the D.C. City Council approved that redevelopment. The District’s authority includes requiring that the Developers construct or cause construction of improvements that meet with the terms of the Master Plan as approved by the D.C. City Council. The District also has authority over design particulars, over the Developers’ selection of general contractors, and over any changes to the Master Plan it negotiated. AR Tab Z at 31, 47, 50, 53-56. The District can terminate these leases in case of default, which includes any failure by the Developers to meet construction deadlines or to build a certain quantity of affordable housing units, or to abide by the terms negotiated by the District of Columbia exerting control over project design, construction, and maintenance. AR Tab Z at 44-46, 82, 83. Given these facts, the Administrator properly determined that the DBA covers the CityCenterDC project because project construction

“is carried on directly by authority of” the District of Columbia, as required by 29 C.F.R. § 5.2(k).

ARB precedent supports this conclusion. In *Crown Point*, the WAB held that construction of a Veterans Administration (V.A.) outpatient clinic on private land by a private developer was “carried on directly by authority of” the V.A. where “[t]here is no evidence of record that a private developer would undertake the project without the assurances of the Federal agency” and “no such project was contemplated but for” the V.A.’s solicitation “and the guarantee of a long rental period.” *Crown Point*, WAB 86-33, slip op. at 5. Similarly, in *Fort Drum*, the construction of military housing on private land by a private developer was held to be carried on directly by authority of the Department of Defense (DOD) where DOD selected the contractor, Congressional approval of the contract was required, and the housing to be built was required to meet DOD specifications. *Fort Drum*, WAB 86-33, slip op. at 9-10. Admittedly these decisions differ from the present case in that both involved government funding of the development of private land by a private developer and government occupancy upon construction of the facilities, whereas this case involves no government funding of the development of public land by a private contractor and no government occupancy during the terms of the leases. Nevertheless, we agree with the Administrator’s assessment of the import of these cases, namely that “all reflect the bedrock fact that construction is carried on directly by authority of the government where, as here, construction is specifically authorized by, and would not occur without, government contracting through agreements that prescribe what is to be built and by whom.” Administrator’s Response Brief at 26.

As for prong two of the definition of “public work,” the facts and circumstances of this case support the Administrator’s finding that the CityCenterDC project “serve[s] the interest of the general public.” 29 C.F.R. § 5.2(k). The Developers’ and the District’s argument that the project’s public benefits are “incidental” to its primary purpose, namely private economic gain, misconstrues the regulatory provision and is also belied by the facts as found by the Administrator.

First, the Developers and the District each argue that to qualify as a public work the project’s primary purpose must be to benefit the public interest. Neither the DBA’s provisions nor its implementing regulation at 29 C.F.R. § 5.2(k) defining “public work” require a showing that benefitting the public interest is the construction project’s primary purpose. Rather, that regulation refers to construction of a work that “serve[s] the interest of the general public” and does not impose a “primary purpose” requirement. 29 C.F.R. § 5.2(k). Moreover, the District and the Developers assert incorrectly that the ARB or its predecessor agency, the WAB, adopted a “primary purpose” test. While it may be true that in *Phoenix Field Office*, *Crown Point*, and *Fort Drum*, the respective projects primarily benefitted the public, in none of these decisions did either Board embrace a “public work” requirement that the project’s primary purpose be to serve the general public’s interest. In *Phoenix Field Office*, the ARB reviewed the WAB’s decisions in *Crown Point* and *Fort Drum*, as well as the United States Court of Appeals for the Sixth Circuit’s decision in *Peterson v. United States*, 119 F.2d 145 (6th Cir. 1941), and concluded that to constitute a DBA-covered “public work” it was only necessary to demonstrate that the project

in some manner “serve[s] the public interest.” The ARB noted, for example, that in *Fort Drum* the WAB held that the fact that a privately owned facility initially leased to the U.S. military was ultimately to be converted to private use “does not diminish the ‘public’ nature” of the facilities that were to be constructed. *Phoenix Field Office*, ARB No. 01-010, slip op. at 10, quoting *Fort Drum*, WAB 86-33, slip op. at 11.⁷

The fact that the Developers are driven by private economic gains in this case does not undermine the fact that there are significant public benefits that inure to this commercial development project. The Administrator found, based on contractual and other documentary evidence in the record, that the CityCenterDC project includes construction of a park and central plaza for public use, the reintroduction of 10th and I streets, sidewalks, alleys, and walkways for pedestrians, a percentage of residences built for and designated as affordable housing, a percentage of new employment opportunities to be provided District residents, and substantial revenues to the District.⁸ The Administrator discussed these substantial and continuing economic gains to the District throughout the lease terms, during which terms the District maintains distinct authority over the course of the CityCenterDC project with its public benefits. AR Tab A at 6, 7; *see also supra* at 5-8. Indeed, the CityCenterDC project was the result of the District’s strategy to replace an out-dated and underused convention center with a thriving urban center that would be “the heart of an active, mixed-use development corridor.” *See* AR Tab FF. Given this record, the Administrator was well within her discretion to find that the facts presented here show that the CityCenterDC project serves the interest of the general public which, as demonstrated, is all that our precedent and applicable law requires.

In sum, the Administrator’s findings that the agreements at issue are “contract[s]” “for construction” are consistent with the Act and regulations. More specifically, the Administrator’s reasons for her decision satisfy the DBA requirements that construction of CityCenterDC improvements is “carried on directly by authority of” the District and the project “serve[s] the interest of the general public.” Therefore, in this case the DBA’s prevailing wage rates and labor standards provisions apply to the CityCenterDC project as a matter of law.⁹

⁷ The *Peterson* decision is similarly unavailing to the position the District and the Developers take. Nowhere in that decision did the Sixth Circuit articulate a “primary purpose” test for the DBA.

⁸ We do not decide any constitutional issue as it is a matter outside our jurisdiction. *See* Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012).

⁹ The District and the Developers argue that the Administrator’s final ruling should be reversed because it resulted from the Union taking a position on reconsideration that was inconsistent with its initial position. The Union based its initial position on the five-factors set forth in the OLC opinion as well as the regulation at 29 C.F.R. § 5.2(k). AR Tab T. In support of its later request for reconsideration, the Union contended that those five-factors have “little bearing on the unique facts

D. The Administrator Was Within Her Authority To Apply DBA's Prevailing Wage Requirements To Wages Paid Following Her June 17, 2011 Determination

The Administrator stated in her June 17, 2011 determination on reconsideration:

Finally, in response to the Developers' request that WHD not apply the DBA retroactively to the project, we conclude that in light of the particular circumstances of this case, including the start of construction on April 4, 2011, it is in the public interest to apply the DBA requirements and obligations to the City Center project prospectively, starting with the first pay period immediately following the date of this final ruling. However, all existing, relevant contracts, obligations, and other agreements will have to be amended, as necessary, in accordance with the DBA.

AR Tab A at 8. The Union contends that the Administrator erred in applying the DBA starting with the first pay period following her June 17, 2011 determination because under 29 C.F.R. § 1.6(f), prevailing wages apply as of "the beginning of construction," or April 4, 2011, in this case, and that the Administrator has no discretion to apply the prevailing wage requirements any differently. Alternatively, the Carpenters Union argues that the Administrator's decision requires further explanation. The Developers assert that the DBA should not apply to contracts issued prior to the Administrator's June 17, 2011 final ruling. The Administrator asserts that the Administrator acted within her authority in determining that the prevailing wage requirements apply to wages to be paid after her final ruling on reconsideration.

When construction began on April 4, 2011, the Carpenters Union's October 29, 2010 request for reconsideration of the Branch Chief's August 30, 2010 determination was pending. That August 2010 determination stood until reversed by final ruling in June 2011, and it is undisputed that during that time, construction of improvements at the CityCenterDC project began April 2011. The regulation at 29 C.F.R. § 5.14 provides:

The Secretary of Labor^{10]} may make variations, tolerances, and exemptions from the regulatory requirements of this part and those

of this case" and again relied on 29 C.F.R. § 5.2(k). AR Tab H at 1. The Administrator concluded that the difference between these positions "was primarily one of emphasis, and a comparison of the two documents certainly does not support (and, in fact, undermines) the Developers' contention that the [Union] engaged in a 'stratagem' of advancing flatly inconsistent positions for perceived advantage." Tab A at 3 (footnote omitted). We agree with the Administrator's assessment and reject as meritless the procedural challenge to the Union's request for reconsideration.

¹⁰ The term "Secretary" includes the Secretary of Labor, the Deputy Under Secretary for Employment Standards, and their authorized representatives. 29 C.F.R. § 5.2(a).

of parts 1 and 3 of this subtitle whenever the Secretary finds that such action is necessary and proper *in the public interest* or to prevent injustice and undue hardship. Variations, tolerances, and exemptions may not be made from the statutory requirements of any of the statutes listed in § 5.1 [including the DBA] unless the statute specifically provides such authority.

29 C.F.R. § 5.14 (emphasis added). *See also* 29 C.F.R. § 5.13 (“All questions relating to the application and interpretation . . . of the rules contained [in 29 C.F.R. Parts 1, 3, and 5, and] of the labor standards provisions . . . [of the DBA] . . . shall be referred to the Administrator for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative.”). The regulations provide authority for the Administrator to make a variance from any regulatory requirement where she finds that such action is necessary and proper “in the public interest.”¹¹ In this case, the Administrator declined to apply the DBA’s prevailing wage requirements to wage payments preceding her June 17, 2011 final decision. Rather, the Administrator took into consideration “the particular circumstances of the case, including the start of construction on April 4, 2011” and found that it is “in the public interest to apply the DBA requirements and obligations . . . prospectively, starting with the first pay period week immediately following the date of this final ruling.” AR Tab A at 8. The Administrator’s ruling, interpreting the regulatory rules and focusing on the *particular circumstances* of this case, is consistent with the “public interest” requirement of Section 5.14, and is a reasonable exercise of her authority to implement and enforce the DBA. Some circumstances described in the Administrator’s letter are particularly persuasive in our view to justify a “prospective” effective date for the DBA wage rates. For example, the confusion over the application of the 1994 OLC Opinion that the Administrator found was “not entirely applicable” in this case. AR Tab A at 4. Historically, the application of the DBA to “leases” was a complex issue. Undoubtedly, the Administrator considered as a factor her reversal of the Branch Chief’s August 2010 determination on the coverage issue. No circumstance by itself would convince us that the Administrator properly exercised her authority. In fact, we find this question to be a close question. But considered as a whole, we cannot say that the Administrator abused the authority the regulations provide. Accordingly, we affirm the Administrator’s decision to apply the DBA’s prevailing wage and labor standards requirements starting with the first pay period immediately following her June 17, 2011 final ruling.

¹¹ In exercising the statutory authority to pass implementing regulations, *see* 40 U.S.C.A. § 3145, for the DBA, the Secretary has passed several regulations allowing for variances and exceptions under the DBA for the “public interest” or “to prevent injustice or undue hardship.” *See* 29 C.F.R. §§ 1.6(g) (effective date may be changed if it is “necessary and proper in the public interest to prevent injustice or undue hardship”); 5.14 (similar); 5.15(c) (“tolerances” for “public interest”); 5.15(d) (“variations” for “equitable” distribution of funds).

Further, the Union relies on the provisions of 29 C.F.R. § 1.6(f) to support its argument that the Administrator committed reversible error or exceeded the bounds of her discretion in this regard. We do not, however, find that regulation applicable to the coverage issue before us.¹² Finally, we reject the Developers' assertion that the DBA should not apply to any contract issued prior to the Administrator's June 17, 2011 final ruling. As set forth above, the Administrator's exercise of authority was permissible in this case. Moreover, both the Developers and the District recognized that the DBA potentially applied to the construction of the improvements at CityCenterDC. AR Tab Z.

CONCLUSION

For the foregoing reasons, we hold that construction of improvements at the CityCenterDC project is subject to the Davis-Bacon Act's prevailing wage and labor standards provisions, which apply as of the first pay period following the Administrator's June 17, 2011 determination. Accordingly, the Administrator's June 17, 2011 final ruling is **AFFIRMED**. Given this decision, we need not address the District's request for oral argument or the Carpenters Union's motion to expedite.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

¹² The issue of the party liable for any increase in labor costs resulting from our disposition is not ripe for decision and is not properly before us.