U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

SPACE EXPLORATION TECHNOLOGIES CORP., FLORIDA STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AND THE UNITED STATES DEPARTMENT OF THE AIR FORCE

ARB CASE NO. 14-001

DATE: JUN 16 2016

With Respect to Applicability of Davis-Bacon Act to Construction at Space Launch Complex-40, Cape Canaveral Air Force Station.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner Space Exploration Technologies Corporation:
Kevin J. McKeon, Esq.; Steven L. Lunsford, Esq.; *Watt, Tieder, Hoffar & Fitzgerald, LLP;* McLean, Virginia; and Thomas E. Weiers, Jr., Esq.; Sewickley, Pennsylvania

For the Respondent Principal Deputy Administrator, Wage and Hour Division:
Mary E. McDonald, Esq.; 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

For Intervenor the Building and Construction Trades Department, American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and its affiliate the Florida State Building and Construction Trades Council, AFL-CIO:
Terry R. Yellig, Esq.; Esmeralda Aguilar, Esq.; *Sherman, Dunn, Cohen, Leifer & Yellig, P.C.;* Washington, District of Columbia

For the Associated Builders and Contractors, Inc. and the National Association of Manufacturers as Amicus Curiae:
Maurice Baskin, Esq.; *Littler Mendelson, PC;* Washington, District of Columbia

***Before*: E. Cooper Brown, *Administrative Appeals Judge;* Joanne Royce, Administrative Appeals Judge; Luis A Corchado, *Administrative Appeals Judge.* Judge Corchado, dissenting.**

ORDER GRANTING MOTION TO REMAND
AND DISMISSING THE APPEAL WITHOUT PREJUDICE

This appeal arises under the labor standard provisions of the Davis-Bacon Act (DBA), 40 U.S.C.A. §§ 3141-3148 (Thomson/West 2005 Supp. 2015) and DBA implementing regulations at 29 C.F.R. Parts 1, 3, 5, and 7 (2015). Petitioner Space Exploration Technologies Corp. (SpaceX) appeals from a final ruling of the Administrator for the Department of Labor's Wage and Hour Division, issued September 10, 2013. The Administrator held that the Davis-Bacon Act applied to a License Agreement by and between SpaceX and the United States Air Force for the construction, establishment, and maintenance of a space launch complex for the support of private commercial and, possibly, federal government space launches. The primary issue raised by SpaceX on appeal before the Administrative Review Board (ARB or Board) is whether the License Agreement constitutes a contract for the construction of a public work within the meaning of the Davis-Bacon Act and its implementing regulations.

Recently, while this appeal was pending before the ARB, the United States Court of Appeals for the District of Columbia Circuit issued a decision addressing Davis-Bacon Act coverage in *District of Columbia and CCDC Office, LLC v. Dep't of Labor,* 819 F.3d 444 (D.C. Cir. 2016) (*CityCenterDC*). The D.C. Circuit Court of Appeals affirmed a District Court decision, *see District of Columbia v. U.S. Dep't of Labor*, 34 F.Supp. 3d 172 (D.D.C. Mar. 31, 2014), in which the lower court reversed the ARB's decision finding DBA coverage in *Application of the Davis-Bacon Act to Construction of the CityCenterDC Project in the District of Columbia,* ARB Nos. 11-074, -078, -082 (ARB Apr. 30, 2013).

In light of the *CityCenterDC* decision, the ARB on April 21, 2016, issued an Order Requesting Supplemental Briefing requesting that the parties to this appeal address, through submission of supplemental briefs, the potential legal and factual implications for this case, if any, of the *CityCenterDC* decision. In response, the Administrator filed a motion requesting remand of this case to the Wage and Hour Division for reexamination in light of the D.C. Circuit Court of Appeals' decision.

In support of the motion to remand, the Administrator asserts that the "facts and legal issues underlying this matter are similar in various respects to those at issue in *CityCenterDC*." Administrator's Motion at 8. For that reason, the Administrator argues, the Wage and Hour Division relied heavily on the ARB's April 30, 2013 decision, including the case authority cited in it, in concluding that the DBA applies to the License Agreement between the Air Force and SpaceX as a covered contract for construction of a public work within the meaning of the DBA. Noting that the D.C. Circuit Court of Appeals' *CityCenterDC* decision reversing the ARB's interpretation of the scope of DBA coverage of public-private partnerships constitutes a federal appellate decision of first impression, the Administrator asserts that *CityCenterDC* may not only affect the Administrator's interpretation of key controlling statutory terms and relevant regulatory provisions having precedential consequences, the D.C. Circuit Court of Appeals' decision may also require the production and evaluation of evidence in the present case that the Administrator did not consider given the Administrator's previous reliance on the ARB case authority. For these reasons, the Administrator moves for a remand of this case to the Wage and Hour Division "for further proceedings to evaluate whether the DBA applies to SpaceX's construction activities at SLC-40 in light of *CityCenterDC*." *Id.*

The Board has taken into consideration SpaceX's arguments in opposition to the Administrator's motion and the arguments in its supplemental brief, as well as the arguments set forth in the supplemental brief of Intervenors North America Building Trades Union and Florida State Building and Construction Trades Council (notwithstanding its late filing), and has further analyzed the *CityCenterDC* decision in relation to the case before us. The Board finds persuasive the Administrator's arguments regarding the potential import of the *CityCenterDC* decision, both for the present case as well as for future cases arising under the DBA, in which the same or similar legal issues may arise. Accordingly, and out of deference to the Administrator for interpretive guidance that this Board and its predecessor agency have generally recognized, the Board grants the Administrator's motion to remand this case to the Wage and Hour Division for further proceedings. Thus, the Board **DISMISSES** the present appeal without prejudice and **REMANDS** the case to the Wage and Hour Division for reconsideration.

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado, dissenting:

For two reasons, briefly explained below, among other reasons, I would deny the Administrator's motion for a remand of all issues as an all-or-nothing approach (viewing all the work at SLC-40 as an indivisible package). First, I am not persuaded that the decision in *CityCenterDC* requires a remand of all issues. A cursory review of the most fundamental differences between this case and *CityCenterDC* demonstrates that the *CityCenterDC* case is distinguishable. The facts in *CityCenterDC* involved vacant land the District of Columbia owns and leased for 99 years to private companies to build and operate residential and commercial buildings accessible to the public. There were no public buildings or facilities on the CityCenterDC vacant land when it was first leased, but private developers then built privately owned buildings. *CityCenterDC*, 819 F.3d at 446. The Labor Department did not argue that the CityCenterDC buildings were "public buildings." *Id.* at 451. Consequently, the appellate court in *CityCenterDC* focused on the definition of "public work," expressly acknowledging that the term "public building" pre-existed the term "public work" in the Davis-Bacon Act and that the words had "some overlap." *Id.* at 447, 451.

In stark contrast to *CityCenterDC*, the federal government in this case granted five-year licenses to permit access to a space launch complex facility on a military base controlled by the United States Air Force. The public cannot freely access the military base. The express purpose of the license was to "share" the space launch complex as directed by the Commercial Space Launch Act, as amended and codified, 51 U.S.C. Chapter 509 (CSLA), passed by the United States Congress. Administrative Record Tab B, License para. 3 (Shared Use). Federally owned buildings, radio towers, utilities, infrastructure, among other things, existed on the complex when the licenses were executed. The federal government could terminate the license at any time with sufficient notice. The federal government assisted in the SpaceX launches into outer space. These are only some of the differences that make this case entirely different from the *CityCenterDC* case.

Second, given the age of this case, I prefer that the Board settle as many issues as possible rather than remand this case on all of the issues. With all due respect, our brief remand order provides little guidance to the parties and only perpetuates the overly narrow focus on the License and Commercial Space Operations Support Agreement (Operations Agreement) as *the* instruments that allegedly constitute the "contract for construction" with little hope of resolving any parts of the wage dispute any time soon. The License and Operations Agreement grant SpaceX permission to enter the military base and SLC-40 complex, share the launch pad, and demolish and construct buildings and structures with proper approvals. But these agreements do not ultimately require or govern specific construction work. It seems that the proper focus should be a project-by-project analysis of the specific work to be done on SLC-40, the contracts that authorize such work, and whether the federal government can be considered a "party" to those contracts. I do not understand how a party can lawfully demolish or substantially alter a federal building (e.g., administrative buildings that fall within the definition of "Launch Property" in the Operations Agreement), a facility (vertical launch tower), or a structure (e.g., National Aeronautics and Space Administration radio tower) without the federal government being a party to such contract. Arguably, a presumption should arise of DBA coverage when workers demolish or alter a federal building or federal facility unless the federal government is truly a passive participant and/or it has no substantive interest or shared purpose in the construction. Moreover, the CSLA seems to create a public-private partnership between the federal government and licensees of its space launch facilities. *See* 51 U.S.C. § 50901 et seq. The CSLA expressly describes one of the purposes of the Act as follows:

> to facilitate the strengthening and expansion of the United States space transportation infrastructure, including the enhancement of United States launch sites and launch-site support facilities, and development of reentry sites, with Government, State, and private sector involvement, to support the full range of United States space-related activities.

51 U.S.C. § 50901(b)(4); *see also* 51 U.S.C. § 50903(b)(2). When you combine the purposes of the CSLA with the terms of the License, the Operations Agreement, and the verbal or written agreements for construction on federal buildings and structures, does the federal government satisfy the meaning of "party" in the DBA? Does the CSLA cloak the federal government with the status of an intended or incidental third party beneficiary to the construction work on its

buildings, structures, and military base? In the context of this unique case, the term "party" needs further legal analysis.

The remand of the DBA coverage issue in this case at this time is significant. The holding in *CityCenterDC* pertaining to leases of vacant land has already bored one escape tunnel under the DBA, but allowing federal agencies to also bypass the DBA through five-year licensing agreements will convert the escape tunnel into a sinkhole under the DBA, allowing private parties to pay less than prevailing wages to demolish and substantially alter federal buildings through temporary licensing agreements. My hope is that this matter does not linger much longer.

LUIS A. CORCHADO
Administrative Appeals Judge