DATE: May 25, 1994

CASE NO. 92-DBA-56

IN THE MATTER OF:

A Dispute Concerning the Payment of
Prevailing Wages by:

SECURITY EQUIPMENT, INC.

Prime Contractor

With Respect to Laborers and Electricians
Employed by the Prime Contractor under
Federal Aviation Administration Contract
No. FAA-AIP-3-31-0062-14
(Airside Access Control System)

APPEARANCES

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For the Prime Contractor

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U.S. Department of Labor
Office of the Solicitor
Kansas City, Missouri
For the Secretary

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Reorganization Plan No. 14 of 1950, 64 Stat. 1267; the Davis-Bacon and Related Acts, 40 U.S.C. § 476 et seq.; the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 et seq. and the regulations issued thereunder at 29 C.F.R. Parts 5 and 6. On August 28, 1992, an Order of Reference was issued by the U.S. Department of Labor (hereinafter DOL) which outlined the alleged violations. An Amended Order of Reference was issued on October 16, 1992. The amended Order of Reference was issued to delete any reference in the caption to a proposed debarment of Security Equipment, Inc. (hereinafter SEI). DOL is not seeking debarment in this case. Full underpayments have been withheld from the contract proceeds. (Tr. 10)

The charging letter of the Regional Administrator asserts violations of the labor standards provisions of the Airport and Airway Improvement Act of 1982 as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987. It was determined that SEI had improperly classified as laborers its employees who had been engaged in performing electrician work and, therefore, a violation of the prevailing practice of union contractors in the wage determination area had occurred. DOL concluded that ten individuals were improperly classified as laborers and paid a total wage package of $12.91 per hour or $7.82 below the wage determination electrician rate. Additionally, four individuals were paid overtime compensation at improper rates of pay because of the misclassification. Liquidated damages in the amount of $290.00 were also asserted.

SEI requested a formal hearing concerning the matters raised in the Order of Reference and the Amended Order of Reference. A hearing was held on September 14, 1993 in Omaha, Nebraska at which time each of the parties to this proceeding had full opportunity to present evidence and argument. Both parties filed post-hearing briefs.

The Findings of Fact and Conclusions of Law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties and applicable regulations, statutes and case law. Any exhibit or document admitted as evidence[1] of record has been fully considered in arriving at the decision herein.

The record of this case contains the testimony of nine individuals. I find the testimony of each of those individuals to have been credible.

ISSUE

Whether SEI improperly classified and paid as laborers employees engaged in performing the work of an electrician.

It was stipulated at the hearing that the contractor does not dispute the computations of the Compliance Officer for purposes of determining underpayments. That is true with respect to the basic wage determinations and as to the overtime compensation. The employer acknowledged that in the event the Secretary prevails in this case that the computations shown at Joint Exhibit 5 are correct. (Tr. 7) DOL conceded that it had with-

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[1]In this decision, "ALJX" refers to the Administrative Law Judge’s Exhibits, "JX" refers to Joint Exhibits, and "Tr." to the Transcript of the hearing.

drawn any assertion of liability against SEI for liquidated damages. (Tr. 10) In addition, DOL acknowledges that no debarment was being sought against SEI. (Tr. 14) The parties also stipulated that the amounts shown on the Form WH-56, Summary of Unpaid Wages, (JX 5) are correct so that in the event the employees should have been paid as electricians, then there exists no controversy as to the amounts owed. (Tr. 10)

FINDINGS OF FACT

On August 17, 1990, SEI signed an agreement as the prime contractor with the Airport Authority of the City of Omaha to construct an airside access control system at Eppley Airfield - Omaha, Nebraska. (JX 1) The agreement called for SEI to furnish all materials, equipment and supervision and to perform all labor and services for the installation of the automated access control system. The contract was for $271,715. Article 5 of the contract includes a provision that the contractor will conform to all applicable federal law and regulations. The contract was funded by the FAA and was in excess of $2,000. Therefore, it is subject to the Davis-Bacon and Related Acts and also the Contract Work Hours Safety Standards Act.

There was in effect at the time, a DOL General Wage Decision No. NE90-11. (JX 2 and 3) That Decision was for the state of Nebraska and covered the counties of Douglas and Washington. The Wage Decision established a basic rate of pay for an electrician at $20.73 per hour and a laborer rate of $12.91 per hour. It contains a notation that any unlisted classifications needed for work not included within the scope of classifications listed, may be added after an award only as provided in the labor standards contract clauses. The wage rates to be paid pursuant to NE90-11 were derived from a union wage rate of Local 22 of International Brotherhood of Electrical Workers. (JX 4) The wage rates and fringe benefits adopted by DOL as prevailing for electricians as well as laborers listed in the Wage Decision and related modifications thereto were based upon a collective bargaining agreement of the International Brotherhood of Electrical Workers and also of the Laborers Local 1140 pursuant to a finding that the negotiated rates prevailed on building construction in these two counties of Nebraska. (JX 4) It was stipulated that the work performed by SEI was not work claimed by Laborers Local 1140 in Omaha. (Tr. 10)

The record also contains a copy of the agreement between the Omaha Division, Nebraska Chapter of the National Electrical Contractors Association and Local 22, International Brotherhood of Electrical Workers. (JX 6) The agreement was applicable to the Nebraska counties of Douglas and Washington. The agreement notes that those counties were part of a group agreed upon by the parties to include the areas defined by the Secretary of Labor to

be the appropriate prevailing wage areas under the Davis-Bacon Act to which the agreement applied.

It was also stipulated that SEI had a job description for a security system installer/service technician. (JX 7) The job description contains ten categories of responsibilities including the need to learn and develop installation and service methods through technical manuals, audio-visual tapes, classroom training and on-the-job training. Upon completion of the training exercise, the individual must have been capable of installing and servicing residential and commercial alarm systems according to SEI standards. Those responsibilities would include running wire, mounting panels, detectors, contacts and other devices. The installer/service technician would also be required to check out completed systems for proper and reliable system operation and to ensure that the system complies with applicable codes. The description also required the individual to provide training of the customer personnel to ensure their full knowledge of the equipment operation.

SEI is a Nebraska corporation which started business in 1969 and is non-union. They install electronic security alarm systems. In commercial installations, they install intrusion systems, access control systems, closed circuit television video systems, and associated related auxiliary systems. The company has never employed journeymen electricians. The company employs approximately twenty individuals. They receive essentially on-the-job training.

SEI had an individual who was responsible for bidding the Eppley Airport project. The compensation rate stated in the contract that came closest to the compensation of the SEI staff was that of the labor category. Apparently the type of work involved was also taken into account. (Tr. 126) Sidney A. Meridith, the president of the company, indicated that it was the company attitude that although they work in the electronics and electrical area, that the company did not consider electronics business to be electrical work. (Tr. 126) The bid for the job submitted by SEI was based upon the payment of a common labor rate to the installers. Mr. Meridith testified that his company has never received a protest from any labor organization as to the rate of compensation of his workers in the twenty-five years that the company has been in existence. SEI did perform similar type jobs on two or three other occasions over a period of the last fifteen years and Mr. Meridith testified that the same laborers' rate was paid to his workers on those jobs. SEI had received numerous contracts from electrical contracting companies to perform basically the same work as was performed in this case involving running conduit, mounting field devices, readers, processors and the computers as part of an electrical contract. The electrical contracting companies that gave sub-contracts to SEI employed largely journeymen electricians. (Tr. 138)

For bidding purposes, the brain trust of SEI arrived at a consensus to group their workers into the laborer category because ". . . our people who aren't licensed are trained to be laborers, and then the electricians that we were going to hire to do the electrical work was going to have to be electricians, and that's the way that job was bid." (Tr. 185 and 186) In classifying the workers, SEI had no understanding that the labor classification was tied into a collective bargaining contract. (Tr. 186) It did not appear as though any representatives of SEI gave any consideration whatsoever as to how the employees working under a Davis-Bacon Act contract were to be compensated. (Tr. 186)

Under the contract, SEI was required to install an integrated card access control system. The work activity involved the installation of devices that read encoded cards which were connected to processors in a field which were located near the reader controlling door locks and door contacts. These devices were connected back to a system of controllers that regulated eight to sixteen doors per controller, and the controllers were connected to a computer interface and ultimately to a main frame computer system. Voice recorders were also installed on all incoming phone lines as well as incoming communication lines such as cellular telephones and business radios. Video cameras with pan and tilt functions were installed and a video badging system which generated picture identification was also put in place. This job required the installation of a considerable amount of conduit, wire pulling, card reader installation, door contacts and system connections. The workers used wrenches, hammer drills, conduit benders, and a hack saw. Considerable skill is required in bending and installing conduit and in pulling the wire. These skills were not easily learned. Based upon the job description and the testimony given at trial, it appears as though the workers whose compensation was redetermined performed most of the functions included in the company's job description and as noted above.

John Bourne who was the assistant business manager of the International Brotherhood of Electrical Workers, Local 22 testified concerning the classification of the work performed. A part of his responsibilities as the assistant business manager is to enforce the contract between the National Electrical Contractors Association and employee groups. He also is involved in contract problems including jurisdictional problems between competing groups. Mr. Bourne was in the position of assistant business manager since January 1990. Prior to that time, he was an electrician. Mr. Bourne had worked on occasion in the installation of low voltage card access readers. Low voltage is considered to mean anything below 600 volts. Mr. Bourne testified that the Union claims the work associated with security system card access systems. He was not aware of any type of grievance

activity that had ever been filed against a member of NECA who may have employed as a sub-contractor, a company like SEI.

The record also contains testimony concerning construction projects similar to the one involved here. Most of the projects involved non-union employers who sub-contracted the card access work. Mr. Bourne testified that he was present at one of these job sites and that the journeymen electricians installed the card access system. One other contractor who was a Union employer also contracted with SEI for the installation of a secured card access system, but that journeymen electricians ran the conduit to the boxes. Mr. Bourne testified that this arrangement would have violated the collective bargaining agreement.

CONCLUSIONS OF LAW

The issue in this case relates to the proper classification of the employees of SEI. In an administrative proceeding, the proponent of the Order of Reference, which in this case is DOL, bears the burden of going forward with the evidence. If the complainant meets the initial burden of presenting a prima facie case, then the respondent bears the ultimate burden of proof. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975). An employee who seeks to recover unpaid minimum wages or overtime compensation, has the burden of proving that he performed work for which he was not properly compensated. Anderson v. Mt. Clemens Pottery Co., [11 LC §51,233] 328 U.S. 680, 687-688, 67 S.Ct. 1187, 1192, 90 L.Ed. (1946).

In an administrative hearing, the required standard of proof is a showing by a preponderance of the evidence. Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240 (D.C. 1980) cert. denied, 449 U.S. 834 (1980); Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). The regulations providing the labor standards provisions applicable to Davis-Bacon and Related Acts contracts are very specific as to the wages to be paid employees. (29 C.F.R. § 5.5) All laborers and mechanics working upon the site are to be compensated at rates not less than those contained in the wage determination of the Secretary of Labor. (Section 5.5(a)(1)) The regulations contain pay provisions for workers performing labor in more than one classification. Likewise, they also contain provisions applicable to any class of laborers which is not listed in the wage determination and in which a classification is necessary in order to conform with the wage determination. Additional classifications can be obtained. (Section 5.5(a)(1)(ii)(A)) If the application procedures for obtaining new classifications are unsuccessful, then the regulations also provide for the referral of questions to the Administrator for issuance of a determination. (Section 5.5(a)(1)(ii)(C))

Employees are to be classified and paid according to the work they perform, without regard to the level of skill required. 29 C.F.R. § 5.5(a)(1); Fry Brothers Corporation, WAB Case No. 76-06 (June 14, 1977). Where the applicable wage determination reflects collectively bargained wage rates, the classifications of work used by contractors who are signatory to collective bargaining agreements are to be followed under the wage determination. Fry Brothers, supra; More Drywall, Inc., WAB Case No. 90-20 (April 29, 1991); Trataros Construction Corp., WAB Case No. 92-03 (April 28, 1993). The compensation practices of employers who are not signatories to the collective bargaining agreement make no difference to proper classification on a Davis-Bacon project. Fry Brothers, supra.

The historical rate of compensation paid by SEI to its employees was based upon non-union rates. The parties stipulated in this case that the wage rates for both the electricians and laborers included in the wage determination were derived from union contracts. The SEI job description for a security system installer/service technician required the individual to run wire, mount panels, detectors' contacts and other electrical devices. Completed systems need to be checked for proper and reliable operation. The job description required the individual to make certain that the installed system complied with applicable codes and I assume the reference there is, at least in part, to applicable electrical codes. In reviewing all of the testimony concerning the individual responsibilities associated with the installation of a security system, I find that the responsibilities of the individual installer approximated the work of an electrician rather than a laborer. The assistant business manager of Local 22 testified that the electricians union claims the work associated with security system card access systems. The parties stipulated that the laborers' union makes no claims. The record shows that a considerable skill level is required in installing the security system. All of the workers involved performed the duties outlined in SEI's job description. In view of the above, I conclude that the employees have established a prima facie case of underpayment of compensation based upon misclassification.

SEI argues that the work classification cannot be established simply by a union business agent declaring the work for the union. That contention is probably true excepting the wage determination was based upon a union scale and was in effect at the time the contract here was signed. Employer also argues that the Fry Brothers case has no application since the labor contract proffered as the basis for the classification has no relationship to the classification used by the contractor. That argument is misplaced in that it was incumbent upon the contractor to determine the classification for its employees based upon DOL's wage determination. That obviously was not done in this case. In

fact, the problem here arose as a direct result of the management of SEI failing to take into account that this contract was impacted by the Davis-Bacon and Related Acts. The record shows that the company did have Davis-Bacon Act experience in that it was involved in two to three federal jobs over a period of the last fifteen years. The record shows that in bidding the job that management, instead of investigating the job classification of the individual workers, merely assigned a classification to the SEI employees based upon the compensation rate stated in the wage determination as compared with the compensation paid to the SEI employees. The type of work involved was not taken into account. It was the company attitude that although the work they perform was in the electronics and electrical area that the company did not consider the electronics business to be electrical work. SEI simply did not investigate the Davis-Bacon implications associated with this contract. By misclassifying and underpaying workers, SEI proceeded at its own peril. The Matter of Tele-Sentry Security, W.A.B. 87-43 (June 7, 1989).

Even assuming some ambiguity as to a proper classification, the regulations provide for the obtaining of additional classifications where proper application is made. That procedure was ignored. Even the contract itself contained a statement providing guidelines for unlisted classifications. SEI also argues that the prevailing practice in the area was for electrical contractors to sub-contract out the low voltage installation work to companies such as SEI and that a substantial part of the work was not covered or claimed by the local union. The record shows that the union did claim this work under its collective bargaining agreement and in addition, the correctness of the wage determination in this contract is not open to attack in this proceeding. United States v. Binghamton Construction Co., [25 LC §68,205] 347 U.S. 171, 177, 74 S.Ct. 438, 441 (1954); and see Endicott Johnson Corp. v. Perkins, [6 LC §51,149] 317 U.S. 501, 507, 63 S.Ct. 339, 342, 87 L.Ed. 424 (19--); Perkins v. Lukens Steel Co., [2 LC §17,061] 310 U.S. 113, 128, 60 S.Ct. 869, 877, 84 L.Ed. 1108 (19--). SEI could not arbitrarily reclassify the work to be performed nor redetermine the wage rates to be paid for the classified project services set forth in their payrolls. SEI was required to pay the workers the hourly rates applicable to the project services they performed in the classifications that the wage decision specified. Based upon this record, I conclude that the employees have carried their burden of proving that the work which they performed was not properly compensated.

The parties have stipulated as to the extent of the underpayments in the event that a misclassification has been established. It was agreed that the summary of unpaid wages (JX 5) constitutes the additional compensation owing to each of the workers involved.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the U.S. Department of Labor shall direct the Airport Authority of the City of Omaha to release $21,941.47 withheld on Contract No. FAA-AIP-3-31-0062-14 for distribution to those employees of Security Equipment, Inc. identified in the Department of Labor Form WH-56 based upon underpayments as determined under the Davis-Bacon and Related Acts. Additionally, IT IS ALSO ORDERED that the U.S. Department of Labor shall direct the Airport Authority of the City of Omaha to release for distribution to the four employees of Security Equipment, Inc. the $434.52 withheld based upon violations of the Contract Work Hours Safety Standards Act.

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Rudolf L. Jansen
Administrative Law Judge