



In the Matter of:

**OTERO COUNTY HOSPITAL
ASSOCIATION d/b/a GERALD
CHAMPION MEMORIAL HOSPITAL**

ARB CASE NO. 99-038

DATE: July 31, 2002

In re: Contract No. F29651-H-0001
at Gerald Champion Memorial Hospital,
Alamogordo, New Mexico

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

R. R. (Dick) Flowers, Jr., Esq., *Fairfield, Farrow, Flowers, Pierson & Strotz,*
Albuquerque, New Mexico, Norman D. Bloom, Esq., *Fettinger, Bloom & Quinlan,*
Alamogordo, New Mexico

For the Respondent:

Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Eugene
Scalia, Esq., *United States Department of Labor, Washington, D.C.*

For the Intervenors:

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

FINAL DECISION AND ORDER

In this matter, we review a December 29, 1998 final ruling issued by a designee of the Administrator, Wage and Hour Division (the Administrator), holding that construction of the Gerald Champion Regional Medical Center (the Medical Center)¹ – a privately-owned hospital facility – was subject to the prevailing wage labor standards provisions of the Davis-Bacon Act (DBA or the Act), 40 U.S.C.A. § 276a *et seq.* (West 2001). The Administrator determined that

an agreement entered into by the United States Air Force (USAF) and the Otero County Hospital Association, doing

¹ At the time this matter was filed with the Board, construction of the Medical Center had not been completed.

business as Gerald Champion Memorial Hospital (the Association or Petitioner), was “a contract in excess of \$2,000 . . . for construction . . . of public buildings or public works of the United States . . .”

The Association petitioned the Board for review of the Administrator’s final ruling. The Building and Construction Trades Department, AFL-CIO and the New Mexico Building and Construction Trades Council, AFL-CIO (Intervenors) filed appearances in this matter and have participated as interested persons or parties within the meaning of the Board’s regulation at 29 C.F.R. § 7.12 (2001). For the reasons given below, we reverse the Administrator’s final determination and grant the Petition for Review.

BACKGROUND

Factual History of this Matter

The National Defense Authorization Act for Fiscal Year 1998

The starting point of this prevailing wage labor standards dispute was passage by the United States Congress of Section 743 of the National Defense Authorization Act for Fiscal Year 1998 (the Authorization Act), 105 P.L. 85, 111 Stat. 1629. Pursuant to the Authorization Act, Congress authorized the USAF to enter into an “agreement” with the Association. Under the terms of the Authorization Act, the USAF would be able to “furnish health care services to eligible individuals” at the Medical Center, which was to be a newly-built medical services facility located in Alamogordo (Otero County), New Mexico. Administrative Record (AR) Tab B at 1. The provisions of the Authorization Act further contemplated that the medical facility would be “constructed and equipped, in part, using funds provided by the Secretary [of the USAF] under the agreement.” *Id.* Section 743(c)(1) of the Authorization Act (entitled “Availability of funds for construction and equipping of facility”), provides that of the funds authorized for “operation and maintenance for the Air Force, not more than \$7,000,000 may be used by the Secretary of the Air Force *to make a contribution toward the construction and equipping of the medical resource facility* in the event that the Secretary [of the USAF] enters into the agreement . . .” *Id.* at 2 (emphasis supplied). The Authorization Act specified that in return for the USAF’s contribution of funds, the Association would agree to provide health care services to eligible USAF personnel (*i.e.*, active and retired USAF service members and their dependents) and that the types of care and costs to the USAF would be included in the agreement.

The Agreement

On September 30, 1998, the USAF and the Association entered into the agreement that was contemplated by the Authorization Act. The “agreement” was denoted as “Contract No. F9651-98-H-0001.” AR Tab F at p. 1. The stated purpose of the agreement was to establish the “fundamental

framework” by which the USAF and the Association were to operate in “sharing medical services/resources” at the new Medical Center; provide treatment for eligible beneficiaries; and pay for the medical care and services.² The agreement specified that the Association would “retain title to all facilities, property and equipment.” *Id.* at 2. Under the agreement, qualified USAF medical personnel were to be provided access to use the Medical Center and these military medical personnel would be granted privileges to practice at the Medical Center on the same terms and conditions as other members of the medical staff. Additionally, the Medical Center was to furnish all types of health care and services to eligible beneficiaries that were then currently provided to non-Department of Defense beneficiaries and forward a complete summary of all active duty medical records on a weekly basis. The USAF also was to have liaison representation on hospital committees. *Id.* at 3-4.

Under the clause of the agreement which established the Federal government’s financial obligations, it was agreed that “[t]he Air Force will provide services in a medical resources facility [the Medical Center], to be constructed by [the Association] and to be equipped, in part, using \$7,000,000 in funds provided by the Air Force.” *Id.* at 4-5. This financing clause further specified that the “*funds provided by the Air Force shall be deposited by [the Association] in a special trust account and shall be used solely for the purchase of equipment and no more than \$2,000.00 of construction services, incidental to the installation of such equipment.*” *Id.* at 5 (emphasis supplied). The “Monitoring” clause of the agreement required the Association to submit annually a detailed report of how the \$7,000,000 from the USAF is spent in equipping the new facility until such time as the \$7,000,000 has been expended. *Id.* at 7.

Under the agreement, USAF beneficiaries were to be provided medical services at the discounted rate of “37% off billed charge”³ effective as of the transfer of the \$7,000,000 from the USAF to the Association. AR Tabs F and H. The agreement further specified that the USAF payment of \$7,000,000 would be offset by the savings from the discounted billed charges within seven years of the Medical Center becoming operational, and that the Association would reimburse any remaining difference between the \$7,000,000 and the cumulated savings at that time. *Id.* In addition, if the USAF unilaterally terminated the agreement prior to the expiration of seven (7) years, it had the right to recover any remaining balance of the \$7,000,000 not offset by savings from the provision of discounted services by the Medical Center to the USAF. The Association could terminate the agreement after giving ninety (90) days notice, and had to reimburse the unrecovered amount of the USAF’s contribution within thirty (30) days of termination. If the Medical Center were unable to provide the services called for in the agreement for more than two days, it would have to meet with the USAF contracting officer to define alternative services. If the Medical Center were to lose accreditation by the Joint Commission on Accreditation of Healthcare Organizations or state licensure, the USAF had the right to recover a “pro-rata amount based on the time remaining” in the

² Eligible beneficiaries of medical services under the agreement are “active duty uniformed personnel and their dependents, retired uniformed personnel and their dependents, survivors of deceased active duty or retired uniformed personnel, bona fide dependent parents and parents-in-law, and in [*sic*] any other individual eligible for medical and dental care under Title 10, Chapter 55, United States Code.” AR Tab F at p. 2.

³ The agreement defines and caps charges using 1997 baseline charges. AR Tab F at §§ 5.3.4, 5.3.5.

15-year period. AR Tab F at 7. (The agreement, including the provision of medical services at a discount, was to run for a period of 15 years.)

The agreement was to enable the USAF to downsize its medical facilities located at the nearby Holloman Air Force Base (AFB), thereby saving operational, maintenance and repair costs at the USAF hospital facility. AR Tab H at 2.

During the process of soliciting the agreement, the USAF determined that the labor standards provisions of the Act were inapplicable on the basis that the USAF “has limited the use of the grant to the purchase of equipment and no more than \$2,000 of construction services incidental to the installation of such equipment.” AR Tab E. As a consequence, DBA contract labor standards provisions were not included in the agreement.

Request for ruling by the Wage and Hour Division and New Mexico Proceedings

Dissatisfied with the USAF’s position that the construction of the Medical Center was not covered by the Act’s prevailing wage provisions, several New Mexico labor organizations requested a ruling on application of the DBA from the Administrator of the Wage and Hour Division. Meanwhile, an official of the New Mexico Department of Labor (the New Mexico Department) issued a “wage decision,” which made construction of the hospital project subject to the New Mexico Public Works Minimum Wage Act (the State’s Act), a prevailing wage statute modeled after the DBA.⁴ See Petition for Review (Pet. for Rev.) at 2. The Association appealed this New Mexico Department of Labor determination to the New Mexico Labor and Industrial Commission (the New Mexico Commission).

On November 25, 1998, the New Mexico Commission issued a decision and order reversing the earlier coverage determination. See Pet. for Rev. at 3, Exhibit (Ex.) D. This decision and order denying coverage under the State’s Act was based on its determination that the Association is not a political subdivision of the State of New Mexico and that, therefore, the State’s Act was not applicable. In addition, the New Mexico Commission concluded that the Association’s use of industrial revenue bonds was not evidence that the Medical Center project had any “public” aspect to it; the funding from the USAF did not convert a private corporation – the Association – into a political subdivision of the State of New Mexico; and “the contract between the Air Force and [the Association] is not a contract for construction services.” Pet. for Rev., Ex. D at 12, 14, 16. The New Mexico Commission made the further Conclusion of Law that the “contract between the Air Force and [the Association] is a contract for [the Association’s] provision of medical services at a discounted rate in return for an advance payment of Seven Million Dollars (\$7,000,000) . . .” *Id.* at 16. On appeal, the New Mexico State District Court affirmed the New Mexico Commission’s ruling on the grounds that neither the State nor a political subdivision thereof was a party to the contract or project. See *State ex rel. New Mexico Building and Construction Trades Council v. Otero County Hospital Association d/b/a Gerald Champion Memorial Hospital*, No. D-0101-CV-98-2180 (Apr. 27, 1999). Addendum to Petitioner’s Reply to Statement of the Administrator in Opposition to Petition for Review, Ex. J.

⁴ Such state prevailing wage statutes are generally referred to as “Little Davis-Bacon Acts.”

The Administrator's Ruling

On December 29, 1998, the Administrator issued the final ruling in this matter, determining that construction of the Medical Center was subject to the prevailing wage provisions of the Act. The Administrator found that the agreement was a contract, “as evidenced by the language in the solicitation and the agreement,” and that the purpose of the agreement was “to enable construction of the medical facility.” AR Tab A at 2. The Administrator also determined that the Medical Center was a “public building or public work,” within the meaning of the Act because it was intended to benefit “both the Air Force personnel and the general public in the Alamogordo area.” *Id.* at 2-3. Further, the Administrator noted that the work of installing equipment, which was specifically provided for under the agreement, comes within the United States Department of Labor’s regulatory definition of the DBA statutory term, “construction.” *Id.*

The USAF participated in the proceeding below before the Wage and Hour Division, but has not appeared in the matter on appeal now before the Board. The Administrator rejected the USAF position that the agreement was not subject to the terms of the DBA because the agreement specifically limited use of its funding for installing equipment to no more than \$2,000 (which is the dollar amount threshold limit for coverage by the Act). In order to determine whether the monetary threshold under the Act is reached, stated the Administrator, the appropriate inquiry is “whether the total cost of the construction contract or project exceeds the \$2,000 coverage threshold,” and not whether the amount of Federal government funds set aside or used for construction exceeds \$2,000. *Id.* at 3. Finding that the total cost of the Medical Center construction was to exceed \$25,000,000, the Administrator concluded that the dollar threshold for coverage under the Act had been exceeded.

JURISDICTION

The Administrative Review Board has jurisdiction over this dispute pursuant to Reorganization Plan No. 14 of 1950, 5 U.S.C.A. Appendix (West 2001)(delegating to the Secretary of the United States Department of Labor the responsibility for developing government-wide policies, interpretations and procedures to implement the DBA and its so-called Related Acts⁵); Secretary’s Order 2-96, 61 Fed. Reg. 19,978 (May 3, 1996), and 29 C.F.R. §§ 7.1(b), 7.9 (2001).

SCOPE OF REVIEW

The proceedings before the ARB are 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) (2001). 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) (2001)

⁵ Numerous Federal statutes authorizing funding, loans and grants to facilitate construction of various types of projects incorporate the DBA’s prevailing wage labor standards provisions. *See* 29 C.F.R. § 5.1 (2001).

ISSUES

The Board considers the following issues raised in this decision.

1. Whether the doctrine of collateral estoppel (or issue preclusion) requires this Board to adopt the New Mexico Commission's determination that the agreement between the USAF and the Association is not a contract for construction.
2. Whether the agreement between the USAF and the Association is a "contract" within the meaning of the Act.
3. Whether the agreement between the USAF and the Association is a contract "for construction" under the Act.

DISCUSSION

- I. *The legal doctrine of collateral estoppel does not preclude the Board from ruling on the issue of whether construction of the Medical Center was subject to the Act.*

Prior to considering the legal merits of whether construction of the Medical Center was subject to the Act's prevailing wage labor standards provisions, the Board must first determine a threshold issue. The Association raises the preliminary argument that the doctrine of collateral estoppel (issue preclusion) requires this Board to give preclusive effect to the findings and conclusions of law of the New Mexico Commission. For the following reasons, we conclude that the doctrine of collateral estoppel or issue preclusion does not apply here.

As noted in the "Background" section of this decision, the New Mexico Commission determined that under New Mexico's Little Davis-Bacon Act, "the contract between the Air Force and [GCMH] is not a contract for construction services." Pet. for Rev., Ex. D, *Otero County Hospital Ass'n, Inc. and Robins & Morton, Inc. v. State of New Mexico ex rel., New Mexico Dep't of Labor and Industrial Division*, Case No. OT99-270B (Nov. 25, 1998), Finding of Fact No. 65 at 9. Petitioner argues that this finding by the New Mexico administrative agency requires application of the doctrine of collateral estoppel and precludes the ARB from finding that the USAF/Association agreement was a contract for construction of a public building or public work within the meaning of the DBA and therefore subject to the DBA prevailing wage labor standards provisions.

The doctrine of collateral estoppel does not apply here because the doctrine can only be used to bind a party to the prior litigation. See *United States v. TDC Management Corp.*, 24 F.3d 292, 295 (D.C. Cir. 1994) ("If a disputed issue of fact was 'actually litigated and necessarily decided by a final disposition on the merits' in a prior litigation between the same parties, the parties are collaterally estopped from relitigating that issue in a subsequent proceeding.") (emphasis supplied). See also *II Davis, Administrative Law Treatise*, § 13.4 at 262 (1994) ("The law that a nonparty is not bound by an adjudication continues, but the law has changed on the question whether a nonparty may claim the benefits of an adjudication.") (emphasis supplied). The fact that the Administrator

had no opportunity to and did not participate in the State of New Mexico's administrative and court proceedings acts as an absolute bar to the Association's claim.

Even if the Board were to ignore the fact that the Administrator was not a party to the State of New Mexico's administrative agency and court proceedings, we would still conclude that the legal criteria prerequisite to a successful claim of collateral estoppel have not been established by the Association. Collateral estoppel (or issue preclusion) may be invoked against a party in a particular matter only if three criteria are met.⁶

First, "the same issue 'must have been actually litigated, that is, contested by the parties and submitted for determination by the court.'" *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986). Although both the Federal and State laws provide in general terms for the payment of prevailing wages under "contracts" for "construction," the language of the statutes is not identical and they have different bodies of governing precedent. Neither the New Mexico Commission nor the State district court purported to interpret the DBA in their respective rulings. Thus, the issue of whether the contract was a "contract for construction" under the DBA was not actually litigated in the New Mexico proceedings.

Second, the issue to be precluded by collateral estoppel must have been "necessary to the outcome of the first action." *McLaughlin v. Bradlee*, 803 F.2d at 1202, quoting *Parklane Hosiery Co. v. Short*, 439 U.S. 322, 326 n. 5 (1979). In the State of New Mexico proceedings, we see the determinative legal issue as whether the legal instrument actually authorizing physical construction of the Medical Center between the Association and the prime contractor was a contract which included as a party "the state or any political subdivision thereof . . ." The New Mexico Commission determined that the Association was neither the "state" nor a "political subdivision" and that the State prevailing wage statute did not, therefore, apply to construction of the Medical Center. See *Otero County Hospital Ass'n*, Case No. OT99-270B at Conclusions of Law Nos. 11-17. Thus, the New Mexico Commission's further conclusion that the contract between the USAF and the Association was not a contract for "construction services" was not necessary to resolution of the case.⁷

Finally, in order to successfully invoke the doctrine of collateral estoppel, preclusion of litigation of the contested issue in the second matter must not constitute a basic unfairness to the

⁶ In the Tenth Circuit, four criteria must be met: 1) the issue previously decided is identical with the one presented in the action in question, 2) the prior action has been finally adjudicated on the merits, 3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 687 (10th Cir. 1992). Those criteria are not met in this case as noted in the discussion *supra*.

⁷ We note that the State of New Mexico District Court's affirmance of the New Mexico Commission's decision dealt only with the issue of whether a "state or political subdivision thereof" was a party to the contract or project. *State ex rel. New Mexico Building and Construction Trades Council v. Otero County Hospital Association d/b/a Gerald Champion Memorial Hospital*, No. D-01010CV 98-2180 (1999). Thus, it is clear that this was the dispositive issue in the New Mexico proceedings.

party sought to be bound by the first determination. *Montana v. U.S.*, 440 U.S. 147, 153 (1979). The Administrator had no opportunity to present arguments in either the New Mexico Commission proceeding or in the district court. Moreover, adoption of the collateral estoppel argument in this case would likely subject the Administrator's enforcement of the nationally applicable DBA to the vagaries of litigation in dozens of state forums, a result unfair to the Wage and Hour Division, as well as impeding uniform policy and administration of the Act. As a consequence, this criterion is not met.

For these reasons, the Board rejects Petitioner's assertion that under the doctrine of collateral estoppel the New Mexico state proceedings should operate to prevent the Board from determining Federal DBA coverage in this matter. We therefore proceed to examine the merits of the Administrator's final ruling that construction of the Medical Center is subject to the prevailing wage requirements of the Act.

II. *The agreement between the Association and the USAF was not covered by the labor standards provisions of the DBA because it was not a "contract in excess of \$2,000 . . . for construction . . . of public buildings or public works"*

1. *The Legal Criteria for Coverage Under the Davis-Bacon Act*

The Act sets forth the legal criteria for DBA coverage:

The advertised specifications for every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed

40 U.S.C.A. § 276a(a)(West 2001) (emphasis supplied). Thus, the statutory requirements which must be met to support the Administrator's determination that the Act applies to construction of the Medical Center are: 1) there must be a "contract;" 2) the contract must be of an amount of \$2,000 or more; 3) the contract must be "for construction;" and 4) the construction must be of a public

building or public work. *Id.* We will proceed to examine the agreement at issue to determine whether it meets these criteria.⁸

2. *The agreement between the USAF and the Association is a contract.*

The Association first argues that the agreement was not, in fact, a contract and that the DBA should, therefore, not be applicable. We agree that the clear language of the DBA precludes application of the Act in the absence of a “contract.” However, we do not agree that the joint characterization by the USAF and the Association of the agreement as something other than a contract⁹ is determinative of this question.

There is some dispute between the Association and the Administrator and Intervenors as to whether the agreement must meet the requirements of a “procurement contract,” or whether it need only meet the requirements for a contract under traditional contract law, in order to be a contract for purposes of the Act. We note that on its face the statutory language of the Act does not restrict the Act’s coverage to procurement contracts. Moreover, the purposes of the Act differ from those of the Federal Grant and Cooperative Agreement Act which is cited by the Association as support for its contention that the term “contract” means a procurement contract (as opposed to a grant or cooperative agreement). *See* Federal Grant and Cooperative Agreement Act (FGCAA), 31 U.S.C.A. § 6303 (West 1983). However, it appears that the agreement would qualify as a contract under either interpretation.

A procurement contract is to be used when “the principal purpose of the instrument is to acquire (by purchase, lease or barter) property or services for the direct benefit or use of the United States Government.” *Trauma Service Group, Ltd. v. United States*, 33 Fed. Cl. 426, 429 (1995), quoting the FGCAA, 31 U.S.C.A. § 6303(1).

The record in this matter plainly demonstrates that the USAF is acquiring the use of a medical facility and the provision of discounted medical services for active and retired military personnel and military-related dependents. The USAF’s payment of \$7,000,000 will procure provision of discounted medical services for the life of the agreement.

⁸ Because we determine that the agreement is not a “contract for construction” we do not reach the issue of whether it is a contract for construction of a “public work” or “public building.”

⁹ The Association argues that the agreement here is not a contract because it bears a letter H, which is used for agreements. *See* Petitioner’s Reply to Statement of the Administrator in Opposition to the Petition for Review (Pet. Reply) at 3, No. 4, citing 48 C.F.R. § 204.7003. However, we note that the regulations cited by the Association are procurement regulations, and use the term “agreement” for a variety of instruments which could be considered contracts, *e.g.*, leases (which this Board has held may be contracts for construction, *see* discussion *infra*). We also note that the regulations pertaining to public contracts describe a “government contract” and a “Federally assisted construction contract” as an “agreement.” 41 C.F.R. § 60-1.3. The Association further suggests that the agreement here is not a contract because the USAF has determined that it is a grant. Pet. Reply at 5, No. 10, referencing Ex. I (memorandum dated February 8, 1999, from the USAF Office of General Counsel to the Wage and Hour Division). The Association also implies that the agreement here is a cooperative agreement. *See* Pet. Reply at 3, No. 3.

In addition, we note that the USAF used the standard format for a procurement contract, numbered the document as a procurement instrument,¹⁰ and included standard contract clauses for a procurement contract.¹¹ Moreover, the agreement repeatedly refers to itself as a contract, *e.g.*, “obligations under this contract” (Sec. 3.1), “this contract” (Secs. 5.6, 7.1, 7.2, Part II), “termination of the contract” (Sec. 7) and has numerous references to “the Contractor” and the “Contracting Officer.”

Applying traditional contract law concepts, there is no question that the agreement is a contract: each party is obligated to take certain action in return for specified consideration. A “contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” ARTHUR LINTON CORBIN *ET AL.*, CORBIN ON CONTRACTS, §1.3 (Rev. Ed. 1993). The USAF agreed to provide \$7,000,000 in return for the Association’s making certain facilities and services available to USAF medical staff, and providing health care services to military and related personnel at a discounted rate. Although there are clauses permitting either party to terminate the contract, it is clear that as long as the Association retains USAF funds, it is obligated to provide services at the discounted rate, to make available certain facilities and services to USAF medical staff, and to use the funds in the manner specified. The USAF is similarly bound. In addition to the USAF’s payment of \$7,000,000, USAF medical treatment facility personnel must furnish certain information to the Association, make required contacts with the Association, meet Association credentialing and insurance requirements, and comply with Association standards, in consideration of the Association’s provision of discounted services and making the services and facilities available.

Accordingly, we conclude that the USAF/Association agreement is, in fact, a contract.

¹⁰ The USAF itself repeatedly denoted the Medical Center agreement as a “contract.” *See* AR Tab. F at 1, 2, which is a copy of Standard Form 33, generally used by Federal agencies for entering contracts. The USAF denies that the agreement was a contract, but has neither appealed the Administrator’s final determination nor appeared as an interested person in this proceeding. *See* Pet. Reply, Ex. I (a memorandum dated February 8, 1999, from the USAF Office of General Counsel to the Wage and Hour Division). In that communication, the USAF General Counsel stated that the contracting agency denoted the agreement as a “contract” because it was “the appropriate legal instrument to implement Section 743 [of the Authorization Act], since the Air Force is to receive discounted services from the hospital . . .” *Id.*

¹¹ Part II of the agreement incorporates by reference various clauses required by the Federal Acquisition Regulations (FAR), *e.g.*, use of disadvantaged and women-owned small business concerns, convict labor, affirmative action for disabled veterans and veterans of the Vietnam era, affirmative action for handicapped workers, mandatory information for electronic funds transfer payment, restrictions on certain foreign purchases, and the Buy American Act. The absence of references to the FAR regulations and the Buy American Act has been cited as evidence that an agreement was not intended to be a procurement contract. *See Trauma Service Group*, 33 Fed. Cl. at 429. Their presence is evidence that the agreement is a procurement contract.

3. *The contract must be in the amount of \$2,000 or more.*

Petitioner also contests the Administrator's determination that the contract at issue exceeds \$2,000 (which as noted above is the threshold amount required for a contract to be eligible for coverage by the Act). In support of this contention, Petitioner notes that the USAF funding has been limited so that the amount of Federal monies expended for construction services related to the installation of equipment will not exceed the \$2,000 statutory threshold. Moreover, the Association argues that it would be in breach of the agreement if it were to utilize more than \$2,000 of the USAF funding for construction, and that the "funds provided by the [USAF] are in a trust account that is not commingled with other money." Petitioner's Reply to Statement of the Administrator at 4. The Administrator argues that the \$7,000,000 represents a significant share of the total cost of the construction project, and that

even if the federal funds are primarily limited to the purchase of equipment, the installation of \$7 million worth of equipment will most certainly require more than \$2,000 of construction services. Thus, clearly there was more than an incidental amount of construction type activity necessary to complete the performance of the agreement, and therefore, Davis-Bacon should apply.

Statement of the Administrator at 16.

The Administrator also contends it is proper to focus on the total cost of the overall construction project anticipated by the contract (which the Administrator contends is the construction of the Medical Center), not the amount of federal funds designated for construction purposes. Statement of the Administrator at 15.

We do not reach a separate determination on the merits of this argument, given our conclusion below that the agreement is not a contract for construction.

4. *The USAF/Association contract is not a contract "for construction" within the meaning of the Act.*

Having determined that the agreement between the USAF and the Association is a "contract" within the meaning of the Act, we now consider whether this agreement was a contract "for construction." For the following reasons, we conclude that the contract between the USAF and the Association was not a contract "for construction" and that the Administrator therefore erred in ruling that the Medical Center construction was subject to the Act.

The DBA's Implementing Regulations

The Act does not define the term "construction." The United States Department of Labor regulation which defines the term "construction," 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 dedicated to and deemed a part of the site of the work . . . by laborers and mechanics employed by a construction contractor or construction subcontractor . . ., including without limitation --
 - (i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;
 - (ii) Painting and decorating;

* * *

The clear language of this regulation specifies that the term “construction” as used in the Act includes all work performed by laborers and mechanics in the creation of a building or work of the United States.

On its face, the record before us does not support a conclusion that the USAF required any construction-type activity (other than the minimal amount designated for equipment installation costs) in its contract with the Association. Except for the limited funds for equipment installation, the \$7,000,000 from the USAF may only be expended for equipment, and if the cumulated savings from the discount on services are less than the \$7,000,000, that amount is accordingly reduced. Moreover, there are no contract terms, which specify construction requirements. However, we examine the question further, taking into account pertinent interpretative guidance issued by the Administrator and other relevant authorities.

Interpretative All Agency Memorandum No. 176

In order to provide guidance to contracting agencies on the question of whether particular agreements may constitute contracts subject to DBA coverage, the Administrator issued All Agency Memorandum (AAM) No. 176 (June 22, 1994), which addressed the application of the Act to “buildings constructed and/or altered for lease by the Federal government . . .” We apply this guidance to the instant case because it addresses whether an agreement which on its face is not a contract for construction, nonetheless comes within the terms of the Act. This Wage and Hour Division directive included the following instructions:

[F]actors to be considered in determining whether a lease/construction contract calls for construction of a public building or public work may include “[the] 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.”

AAM No. 176 at 2, quoting 18 U.S. Op. Off. Legal Counsel 109, 119 n.10.

Under a contract for construction of a building, the government obtains the building for all of its useful life. Thus, a lengthy contract term (*e.g.*, equivalent to the building’s useful life) may indicate that the contract is one for construction. Applying this first factor, the length of the agreement, we find that although the USAF/Association arrangement for use of the Medical Center is contemplated to run for 15 years, the USAF contribution of \$7,000,000 is expected to be recovered within seven years through the Association’s provision of discounted medical services to the designated USAF personnel and dependents. Any portion of the USAF contribution not so recovered is to be reimbursed to the USAF within 60 days of the end of the seven-year period. *Id.* The analysis under this factor therefore weighs against the contract being a contract for construction, since the term is much shorter than the Medical Center’s reasonably expected useful life.

Under a contract for construction of a building, the government determines the specifications for the building and assures itself that those requirements are met. Thus, contract terms, which detail construction specifications for the building and provide for Federal government inspections of construction progress may indicate that the contract is one for construction. The second factor contained in AAM No. 176 (the extent of government involvement in the construction project, *i.e.*, whether the building is being built to Federal government requirements and whether it has the right to inspect the progress of the work) weighs clearly on the side of finding that the USAF/Association agreement is not a contract “for construction.” This contract contains no provisions specifying construction requirements for the hospital facility. The USAF has no right under the agreement to inspect the progress of the construction project. Nor does the USAF have a right to accept or reject the hospital construction project upon its completion by the Association.

Additionally, the Federal government did not and will not acquire any title or ownership interest in either the Medical Center or its medical equipment. Moreover, it does not have a right of refusal under which it may gain title after the agreement terminates. The contract between the USAF and the Association specifically provides that the Association will “retain title to all facilities, property and equipment.” AR Tab F at 2.

AAM No. 176’s third factor is directed at whether the contract is a contract for construction of a public work or public building. Since we have determined that it is unnecessary to reach this issue, we do not conduct an analysis under this factor. *See supra*, footnote 8.

The fourth factor cited in AAM No. 176 is the extent to which the contractor (or developer) will be fully reimbursed its expenses by the lease payments. Under a contract for construction of a building, the contract payment is the amount paid for the creation of the building. Thus, paying an

amount equivalent to or greater than the cost of construction may indicate that the contract is a contract for construction. We conclude that analysis under this factor, too, is contrary to a finding that the USAF/Association contract is “for construction.” The USAF is only providing \$7,000,000 (the vast majority of which is for the purchase of hospital equipment and all of which is to be recovered through the provision of discounted medical services) when the Medical Center is anticipated to cost more than \$27,000,000. The City of Alamogordo, New Mexico, alone, was expected to incur more than \$17,000,000 of indebtedness through issuing revenue bonds for construction of the hospital. Thus, the Association will not be reimbursed for its construction expenses by the payment under the agreement.

The final factor for consideration under AAM No. 176 is whether an agreement is written in a manner other than in the form of a traditional construction contract “solely to evade the requirements of the Davis-Bacon Act.” Intervenors note the fact that the USAF specifically restricted the use of the \$7,000,000 to the purchase of equipment, earmarking an amount not to exceed \$2,000 (the dollar amount establishing the coverage threshold for the DBA) for actual construction, *i.e.*, the installation of the medical equipment to be purchased with USAF funds for use in the Medical Center facility. Intervenors refer to the USAF restriction on use of the funds as a “blatant attempt” to avoid application of the Act. Intervenors’ Statement at 21. The Administrator’s final determination advised the USAF that its action “presents disturbing evidence of your agency’s effort to avoid or circumvent the required application of important labor standards protection to this contract.” AR Tab A at 3.

The record does not establish the motivation of the parties for negotiating the agreement as it is presented to us. However, we cannot ignore the totality of the terms of the agreement solely on the basis that the USAF set aside an amount for construction (*i.e.*, installation of equipment) which is just below the jurisdictional amount which triggers coverage by the Act.

Therefore, considering the factors set forth in AAM No. 176, the agreement does not qualify as a “contract for construction.”

Prior Decisions of the Wage Appeals Board¹² and This Board

We next consider the body of case law pertinent to this issue. In support of their position that this agreement is a contract for construction, the Administrator and Intervenors have cited to previous decisions of this Board’s predecessor, the Wage Appeals Board (WAB), holding that “if more than an incidental amount of construction-type activity is involved in the performance of a government contract, the Davis-Bacon Act is applicable to that work.” *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), *aff’d sub nom., Building and Construction Trades Department, AFL-CIO v. Turnage*, 705 F. Supp. 5 (D.D.C. 1988). The contracts in those cases were found to be “contracts for construction” because they contained terms specifically requiring very substantial construction activities. That is not the case here.

¹² Prior to establishment of the Administrative Review Board in 1996, the Wage Appeals Board was the office responsible for issuing final agency decisions under the DBA and its Related Acts.

In *Fort Drum*, the WAB found that construction was more than an incidental element of contracts for lease of military housing where the request for proposals for the contracts required that the housing be built to Army specifications, that government representatives have right of entry throughout the construction period for purposes of monitoring and testing to evaluate the units, that the government have first right of refusal to acquire title on expiration of the lease term, and that the developer be subject to cancellation of the contract or liquidated damages if the units were not constructed on time. Similarly, in *Crown Point*, the WAB concluded that a contract between the Veterans Administration (VA) and a developer for the lease of an outpatient-clinic was a “contract for construction.” In *Crown Point*, the Solicitation for Offer [of the contract] required that the building for the clinic be constructed in accordance with VA specifications and that the developer submit to the VA the name and experience of the proposed construction contractor (with the bid), evidence of the award of the construction contract within 15 days of award, preliminary plans and working drawings, issuance of a building permit, completed construction documents, completion of principal categories of work, phase completion, and final construction completion, and construction progress reports; and that the developer permit construction inspections. *Crown Point*, WAB No. 86-33 at 4-5.¹³

Later cases likewise have turned on the specific provisions of the contract at issue. In *Purchase of a Building in Farmer’s Branch, Texas*, WAB No. 90-19 (May 17, 1991), the WAB found that a contract for purchase of a building that contained “express provisions calling for specific construction work in the amount of \$2.3 million” (for alteration of the building in preparation for government occupancy) involved an amount of construction work which “was not incidental but manifestly substantial.” *Id.* at 2. More recently, the ARB determined that a Bureau of Land Management (BLM) lease of a privately owned building and storage facility came within coverage of the Act, where the contract required the lessor to build a new facility for BLM’s use, included “extensive materials that are best described as construction specifications for the project,” and reserved to the BLM the right to make construction inspections. Moreover, the ARB found that the stream of lease payments in that case would substantially pay for the cost of construction. *In the Matter of Phoenix Field Office, Bureau of Land Management*, ARB No. 01-010, slip op. at 10-11 (June 29, 2001).

The Administrator and Intervenors have not pointed to any provisions within this agreement

¹³ The U. S. Department of Justice, Office of Legal Counsel (OLC) issued a legal opinion in June 1988 to the VA concerning the project in *Crown Point*. The OLC concluded that the WAB decision was erroneous and that there was “nothing in the language of the statute to suggest that it was meant to extend beyond construction contracts to leases.” *Applicability of the Davis-Bacon Act to the Veterans Administration’s Lease of Medical Facilities*, 12 U.S. Op. Off. Legal Counsel 89, 94 (June 6, 1988) (1988 OLC Opinion). The 1988 OLC opinion was superseded upon reconsideration by that office in 1994. OLC then concluded that “the determination whether a particular lease-construction contract is a ‘contract . . . for construction of a public building or public work’ within the meaning of the Davis-Bacon Act will depend upon the details of the particular agreement.” *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, 124 (May 23, 1994) (1994 OLC Opinion).

which call for construction activity comparable to that in the cited cases. Nor do we find any such provisions on reviewing the agreement.

Finally, we address the specific arguments raised by the Petitioner, the Administrator and Intervenors, not previously addressed *supra*. The Administrator contends that the contract is a contract for construction because its purpose is to enable construction of the medical facility. In making this argument, the Administrator ignores the particular requirements of the contract, seeking instead to look to the project being undertaken by the Association. However, it is the contract, not the project, which is at issue. As noted above, the requirements of the contract do not (with the exception of the limited amount for installation of equipment), call for construction activities. They call for funding the purchase of equipment. As a consequence, the purpose of the contract is to enable equipping of the facility (in return for discounted services and available space), not construction.

Similarly, the Administrator's argument that the agreement in essence calls for \$7,000,000 to help build and equip the new hospital because services could not be provided until the facility was constructed and equipped, and that therefore the \$7,000,000 is being used for construction, also fails because it does not consider the actual contract and its requirements. Aside from the limited funds for installation, the \$7,000,000 may only be used for equipment. Funding for construction is coming exclusively from other sources, and the contract does not contain construction requirements. Thus, this contract is not a contract for construction any more than one where a pre-existing building is leased for use by the Federal government (with no construction alterations) and equipment (with no installation construction) is required for the government's use during the tenancy.

The Intervenors suggest that in actuality more than \$2,000 of federal funds will be spent for construction, because far less than \$7,000,000 is required to equip the Medical Center facility. Intervenors' Statement at 22. We reject Intervenors' suggestion because we must rule on the case before us, and not hypotheticals and speculations. Intervenors also argue that Congress intended that the \$7,000,000 be spent for construction. We note that it is not Congressional intent, but the contract, that must be evaluated. Therefore, we reject that argument as well. We do not address Petitioner's contention that the Act applies only to "advertised specifications" because we conclude on other grounds that the DBA does not apply to the agreement under consideration here.

Although we have determined in this decision that the Medical Center construction project was not subject to DBA wage payment requirements, our conclusion is limited to the particular facts of this matter. Our decision is not a retreat from the body of decisional law involving the Administrator's application of the Act to novel forms of "contracts for construction," such as those which were presented by the leased housing in *Fort Drum*, the leased hospital in *Crown Point*, and the leased building and storage facility in *Phoenix Field Office*.

CONCLUSION

For the foregoing reasons, we hold that construction of the Gerald Champion Memorial Hospital is not subject to the prevailing wage labor standards provisions of the Davis-Bacon Act, given our conclusion that the agreement between the United States Air Force and Petitioner is not

a contract for construction of a public building or public work. Accordingly, the Petition for review is **GRANTED** and the Administrator's December 29, 1998 final determination is **REVERSED**.

SO ORDERED.

JUDITH S. BOGGS

Administrative Appeals Judge

WAYNE C. BEYER

Administrative Appeals Judge

OLIVER M. TRANSUE

Administrative Appeals Judge