

U.S. Department of Labor

Office of Administrative Law Judges  
1111 20th Street, N.W.  
Washington, D.C. 20036



JAN 13 1986

Case No. 83-DBA-22

.....  
In the Matter of

Disputes concerning the payment of  
prevailing wage rates by:

GENERAL FEDERAL CONSTRUCTION, INC.  
Prime Contractor

ATCHISON & KELLER, INC.  
Subcontractor

PRINCE GEORGE'S COUNTY, MARYLAND  
Grantee

With respect to laborers and mechanics  
employed by the subcontractor under Prince  
George's County Contract No. 76-00250-H,  
Upper Marlboro, Maryland and Howard University  
Contract No.  
SA3-h2135, Washington, DC  
.....

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On behalf of General Federal  
Construction, Inc.,

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On behalf of the Atchison and Keller,  
Incorporated.,

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On behalf of the Government

BEFORE: SAMUEL B. GRONER  
Administrative Law Judge

DECISION AND ORDER

I. THE CASE AND THE ISSUES

A. The Case

This case, an action brought by the United States Department of Labor\* under the Davis-Bacon Act, 40 U.S.C. 276a, was heard August 29, 1984 in Washington, D.C. Named as respondents by the Department are General Federal Construction, Inc.,\* prime contractor under two certain construction contracts made respectively with Prince George's County, Maryland and Howard University in the District of Columbia, and Atchison & Keller, Inc.,\* a subcontractor on those construction projects. All these parties, except Howard University, appeared at the hearing and filed briefs thereafter.

The Department contends that violations of the Act occurred on the two sites involved with respect to certain employees of A&K, in an amount specified respectively for each one, and that as a result of those violations GFC and A&K are liable in a total amount exceeding \$61,000.

General takes the position that it paid what it was billed by Atchison, that if any violation of the Act occurred it was by Atchison, and that accordingly no liability on that account should accrue against General. Atchison, on the other hand, contends that its only contract on these jobs was with General, that that contract did not subject Atchison to the Davis-Bacon Act, and that Atchison was therefore not

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\* These parties may be respectively referred to herein as "DOL" or "the Department", "GFC" or "General", and "A&K" or "Atchison".

subject to the Act on those jobs. In any event, Atchison contends, its payments were such as would satisfy the statutory requirements.

Prince George's County was made a party to the case at its request (and the caption of the case was changed accordingly). It points out that the Department's enforcement action comes late in the game, that having been given no intimation of any Davis-Bacon problem the County disbursed all its funds attributed to the project, and that if the Department withholds reimbursement now Prince George's is left with no holdback of funds from which it could make itself whole. It pleads to be accorded some relief on that account.

B. The Issues

On these facts, the following issues present themselves for our decision:

1. Were the workmen in question covered by the Davis-Bacon Act?
2. If they were, did a violation of the Act occur?
3. If it did, what amount is owing as a result of that violation?
4. And, further, who is liable for that amount? Specifically:
  - a) Is subcontractor Atchison liable?
  - b) Is prime contractor General liable?
  - c) Is any relief available to Prince George's County?

II. WERE THE WORKMEN COVERED BY THE ACT?

The Davis-Bacon Act, 40 U.S.C. 276a-276a-5, applies to "every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction. . . of public buildings or public works. . . ." It requires that every contract for such work "shall contain a stipulation that the contractor or his subcontractor shall

pay all mechanics and laborers employed directly upon the site of the work . . . wage rates not less than those determined by the Secretary of Labor to be prevailing in the locality." This obligation shall exist "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics . . . ." 40 U.S.C. 276a(a); 29 CFR 5.2(i), 5.5(a). The term "wages" for purposes of the Act is defined to include not only "the basic hourly rate of pay," but also the amount contributed by the employer to defray the cost of certain approved types of fringe benefits. 40 U.S.C. 276a(b).

The purpose of the Act is to protect employees working on Government projects from receiving substandard wages. It is a remedial statute, designed to benefit construction workers, and should therefore be liberally construed to effectuate its beneficent purpose. Drivers, Salesmen, Warehousemen, etc. v. National Labor Relations Board, 361 F.2d 547, 553 note 23 (D.C. Cir. 1966).

In general, all laborers and mechanics employed by a contractor or its subcontractor on the site of the work are entitled to the protection of the Act, and must be paid at least the applicable rate set by the Secretary of Labor. Ibid. Moreover, the Act was enacted for the benefit of workers, specifically those working at the site of the project, and not for the benefit of contractors or subcontractors. United States v. Binghamton Construction Company, Inc., 347 U.S. 171 (1954); In the Matter of Griffith Company, Wage Appeals Board (WAB) Case No. 64-3 (July 2, 1965), slip op. at p. 7. Atchison argues that the Government has failed to carry its burden of proof to show that any of the parties were bound by the Act, or that the Act applied to the projects at all. A&K, Bf., p. 1. But this is disingenuous. Certainly they are not bound by the stipulation between the prime contractor and the Department, that both projects were Davis-Bacon Act projects and that the minimum wages had to be paid. Tr. 276-7. But Atchison knew at all times relevant here that the project was covered by the Act; its president himself testified in open court that he was aware of that fact from the very beginning, and the Department's representative confirmed that the president had acknowledged the obligation in conversation with him. Tr. 264, 164.

Moreover, A&K's course of conduct during its performance leaves no doubt but that it understood and was purporting to comply with the Davis-Bacon requirements. In the first place, it had notice of the coverage in advance. General Federal's letter of March 12, 1979, sent shortly before the subcontractor began work on the Howard University project, plainly directed Atchison to "bill us weekly for your labor at the Davis/Bacon wage scale plus 29% for Workman's Compensation, F.I.C.A., etc., plus 10% overhead and 10% profit". Exh. RG-1. During the course of its performance on the contract, A&K gave every indication of its awareness of the Act's application. It filed the weekly compliance statements and certified payroll sheets required by the Act. Tr. 73-75; Exh. G-6. It made no protest and asked no questions when Mr. Glyder, the Government's investigator, communicated with A&K's office manager regarding the alleged violations; on the contrary, the latter acknowledged to Glyder that "it was a Davis-Bacon project." Tr. 58. Although A&K denies that this office manager had authority to contract on behalf of the company, the president of Atchison confirmed the manager's authority to sign and file the certified payrolls that Atchison submitted weekly throughout the job. Tr. 251. The A&K president's denial of any Davis-Bacon obligations (Tr. 206) and his assertion that the [A&K] contract "doesn't say it's a Davis-Bacon job" (Tr. 263) are unconvincing in the face of his admissions that "I was aware that there was a wage scale on the job and there were fringe benefits that were required on the project" (Tr. 205) and that the parties' agreement "says that we will bill them at the Davis-Bacon rate," in addition to his explicit admission that his awareness of the Davis-Bacon Act applied to his subcontract (Tr. 264). The facts show convincingly that A&K knew of the Act's requirements, intended to comply with them, and in its contractual performance here purported to do so.

Atchison's reliance on Universities Research Association, Inc. v. Coutu, 450 U.S. 754 (1981), is misplaced. In that case, the parties had entered into their contract in the contemplation that the subcontractor would perform no Davis-Bacon Act work. It later appeared that the subcontractor nevertheless had done so, and one of the employees affected brought suit in the fashion of a "private attorney general" to enforce the Act. In Coutu v. Universities Research Association, Inc., 595 F.2d 396 (7th Cir. 1979), it was held

that the suit could lie because the Act did apply under those circumstances. The Supreme Court reversed, in the case cited by Atchison, but only on the ground that there is no private remedy under the Davis-Bacon Act. Obviously, the question addressed by the Court is not involved here.

Nor is A&K released, from the obligation of compliance that it clearly undertook, by the fact that its own contract with GFC did not explicitly mention the Act or the applicability of its requirements. It is well settled that applicable statutory requirements will be read into Government contracts and made part of them by operation of law.

Agreement to the conditions is unnecessary; where regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties.

United States v. New Orleans Public Service, Inc., 553 F.2d 459, 469 (5th Cir. 1977), cert. den., 454 U.S. 892 (1981); G.L. Christian and Associates v. United States, 320 F.2d 345, 350-1 (Ct. Cl. 1963); City of Tullahoma, Tennessee v. Coffee County, Tennessee, 204 F. Supp. 794, 800 (E.D. Tenn. 1962).

The statute directs that contracts meeting its requirements "shall" contain the Act's provisions. 40 U.S.C. 276a. Atchison argues that the "Secretary of Labor in promulgating rules under the Act, has created in the plaintiff's and other similarly situated contractors and trade organizations, a reasonable and protectable expectation that the rules and procedures presented by the regulations will be scrupulously and conscientiously followed. Associated Builders and Contractors of Texas Gulf Coast, Inc., v. U.S. Department of Energy, 451 F. Supp. 281 (D.C. S.D. Tex. 1978)." A&K, Bf., p8. Certainly the Government is required "to adhere to its own rules." U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 286 (1954). (1954). Atchison contends that the Government has failed to do so here in that it failed to show the source of funds for the projects or the existence of any Federal fund, grant, or assistance that was promised or given to the agencies. The

regulations specifically require this in order for the Act to apply. A&K, Bf., p. 8. This is an argument addressed not to regularity of agency procedure but to a failure to carry judicial burden of proof, and we have already held that this burden has been amply discharged here. Similarly, while it is surely true that a party may bind itself enforceably by contract to pay Davis-Bacon wages even in a situation where the Act would not be applicable merely by the force of its own provisions, a proposition for which Atchison correctly cites Woodside Village v. U.S. Department of Labor, 611 F.2d 312 (9th Cir. 1980), that freedom of contract would not exempt a party from complying with the requirements of the Act in a situation where the provisions of Davis-Bacon do make it applicable.

It is not disputed, and was implicitly recognized throughout by all the parties, that the workmen in question were "mechanics and/or laborers" within the meaning of the Act, and that they were employed by A&K on the sites of the Howard and Prince George's projects. We hold that the sweep of the Davis-Bacon Act did extend to Atchison & Keller as subcontractor to General Federal, and that the workers involved here were entitled to be paid wages at or above the levels mandated by the Act.

### III. DID A VIOLATION OF THE ACT OCCUR?

Section 1(b) of the Davis-Bacon Act, 40 U.S.C. 276a(b), provides in pertinent part as follows:

(b) As used in [this Act] the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include --

- (1) the basic hourly rate of pay; and
- (2) the amount of--

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor [under this Act] . . . may be discharged under . . . paragraph (2) (A) or . . . paragraph (2) (B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

\* \* \*

The Department contends that, under the standards of the Act, A&K underpaid the 58 employees here in question individually in the amounts shown in Exhibit G-8, to a total sum of \$61,617.67. Atchison & Keller contends that payments by them if properly computed were sufficient in amount to comply with the requirements of the Act, so that in any event there occurred no violation of those requirements; alternatively, if violation nevertheless be found, they argue that it cannot consist of more for each individual than the respective amounts shown in Exhibit RA-4, nor more in total than the \$25,494.99 that is the sum of those amounts. General Federal Construction takes the position that all facts bearing on the question of violation were and are in Atchison's possession, so that General has no independent knowledge as to whether or not any violation occurred or about the amount involved if it did occur.

Four of the five ingredients involved in the determination about violations are not in dispute. Atchison and the Department inevitably concur -- because the Department used Atchison's own figures (Tr. 102, 106, 110; Exh. G-8) -- with respect to each workman's hours worked, his wage rate per hour, and his total pay, and also with reference to Atchison's respective payment for two other purposes, specifically, the amount of its total expenditures for workers' health or hospital insurance and its total administrative costs incurred in connection with its overall program for training apprentices. The issue between them relates to the proper characterization of those two sets of payments in terms of Davis-Bacon criteria, i.e., whether or not they are cognizable under the provisions of paragraph (2) of the Act's subsection 1(b), 40 U.S.C. 276a(b)(2).

A. The Health Benefits Costs

With respect to the dispute over the computation of health benefits, the information and records furnished by Atchison showed that it contributed \$46.44 a month per employee to a company-wide health benefit plan that covered every employee uniformly for all hours worked, regardless of the number of such hours that were subject to Davis-Bacon requirements. Tr. 61-65, 99-100, 120-121; Exh. G-4. The president of the company testified to the same effect. Tr. 248.

The basic dispute concerns the proper method for calculating the credit for this hospitalization plan. It appears in fact that the major portion of the disparity between the computation by Atchison and the amount claimed by the Department arises from differences in the method of calculation of this item. The Department's position is that the correct Davis-Bacon hourly credit is to be determined from total costs incurred for the plan, divided by total hours worked by all A&K employees, on the basis that the plan was company-wide for all hours worked by all its labor force rather than only for Davis-Bacon project hours worked. Atchison contends that the proper divisor, into the dividend of total health plan costs, is only the sum of the Davis-Bacon project hours worked. But this is illogical, for in effect it would subsidize A&K's company-wide benefit plan by inflating the health plan benefit rate for work on Davis-Bacon projects over the rate for the same benefit on the company's other work. Such a computation would contravene the purposes of the Act, for it appears to have precisely the negative impact on labor standards, as set forth in the wage determinations, that the Davis-Bacon Act was designed to prevent. We therefore find the Department's theory of computation respecting distribution of Atchison's health benefits costs to be reasonable, and we accept it.

#### B. The Apprentice Training Costs

The Department and Atchison likewise disagree on the proper distribution of the company's expenditures for the training of apprentices. On this subject the parties disagree in two respects. One is similar in nature to their disagreement on health benefits: whether in computing the hourly value of this benefit for Davis-Bacon purposes one should divide the total cost of the program for all Atchison's labor force by only the Davis-Bacon hours worked, as Atchison contends, or by the larger amount consisting of all hours worked, which is the Department's position. The considerations applying here seem to us to be the same as those that applied to the dispute over the computation of the hourly value of health benefits, and our conclusion is therefore the same, that the Department's method should be accepted.

The parties differ also in regard to A&K's contention that the total cost credited to it for the apprentice training program should consist of its entire general administrative costs in that regard, such as membership in the trade association that oversees the apprenticeship programs conducted in this area, while the Department contends that only direct costs

chargeable to the individual apprentices involved in Davis-Bacon work may be recognized. On this subject the Department's Wage Appeals Board, in its decision of April 20, 1977 In the Matter of Collinson Construction Company, etc., WAB Case No. 76-9, had this to say:

"The Board does not however believe that the contractor's own administrative expenses in providing bona fide fringe benefits are creditable toward discharging the obligation to pay prevailing wages under the Davis-Bacon Act. It views these costs as a part of the general overhead expenses of doing business and should not serve to decrease the direct benefit going to the employee. The contractor has chosen to self-administer the program [or, as in the present case, to administer it through an association] presumably for its own reasons and, whatever those business reasons, they should not serve to take benefits away from the employees. It is evident from the clear language of the statute and from its legislative history that the term 'costs' refers to the costs of benefits under an unfunded plan, not costs of administration under a funded plan, such as was involved in the instant case." (underscoring in original)

Id., slip op., p. 4.

The reasoning of the Wage Appeals Board seems correct to us, and accordingly we hold that in this respect also the Department's position must be accepted.

C. Did a Violation of the Act Occur?

It necessarily follows, from the theories of computation that we have found should be accepted, that Atchison's employees covered by the Act did receive wages less than that required by the Act, so that a violation of the Act did occur.

IV. WHAT AMOUNT IS OWING AS A RESULT OF THAT VIOLATION?

Even though the Government's theory of computation in this case be accepted, the question remains whether the specific amounts alleged have been adequately proved up.

We think they have. The basic data used, as we have said before, came from the books and records of A&K. In the relatively few instances where either the Department used estimates or it found the record incomplete, it established

the existence of a uniform pattern of employment practice on which it may properly rely. Brennan v. General Motors Acceptance Corporation, 482 F.2d 825 (5th Cir. 1973). Moreover, the amounts claimed having been established within the bounds of permissible inference, and no countervailing evidence appearing in the record, those amounts may be accepted as proved. Anderson v. Mt. Clemens Pottery Company, 328 U.S. 680 (1946).

We find, accordingly, that the amounts of money by which the statute was violated was that shown for each individual workman as follows, in a total amount of \$61,617.67.

W. Alexander	\$1,525.37
James W. Atchison	935.68
Roger Atchison	413.60
William Beffit	3,004.83
Nathaniel Bolling	33.84
Edward C. Bowen	228.80
Philip N. Buttgen	26.32
Joseph W. Canter, Sr.	1,399.75
Michael Canter	3,487.63
Monroe Cooper, Jr.	888.16
Galen Crawford	344.25
David Crayle	521.89
Donald Demeza	300.38
John B. Demeza, Jr.	106.40
James Dennis	107.60

Claude Fortson	97.47
Roger L. Garland	2,322.28
William Garland	1,654.11
James Gibson, Jr.	865.65
Arthur H. Gillian	119.08
William Grimes	37.68
Jackie W. Harick, Jr.	31.36
Donnie R. Harrell	944.51
Nelson Hensley	1,641.44
Gregg P. Henson	1,186.10
Eric Hiller	760.06
Richard A. Ivery	444.04
Lavern Jacobs	195.16
Donald Jett	84.56
William Jones	155.10
Ray Joyner	909.48
Dale Long	92.40
Russell Long	1,750.50
Reynold Magloire	976.06
Casper McIlwee	2,901.79
Charles E. McIntire	776.91
Cornelius Montague	48.88
William O. Moore	3,008.68

James Murphy	1,167.40
Edgar M. Nutt	1,740.32
Avon V. Perry	2,010.14
Winston Plummer	31.00
Patrick Ponton	1,164.77
Otis Prichard	3,669.55
Robert D. Ramey	44.80
Elmer T. Rankin	1,572.40
James R. Rankin	1,334.66
Roger S. Reinburg	191.53
Robert A. Sadtler	3,077.56
Stephen Sadtler	3,386.28
Robert B. Schoff	736.44
James Schweitzer	555.12
Richard L. Scribner	18.90
Wesley D. Stange	181.86
Greg Sullivan	88.00
Clyde T. Thee	245.76
Thomas J. Thornhill	272.17
James A. Turner	204.35
Stephen F. Turner	1,549.04
Gregory Van Alton	106.76
Morris F. Varnell	2,594.98

Joseph Watt	63.51
James Webb	267.97
Joseph M. Weiland	10.00
James C. Williams	38.67
Theodore Williams	290.28
John Williamson	405.87
Carolyn P. Woodson	268.80

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TOTAL	\$61,617.67
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V. LIABILITY

The question of liability need detain us only briefly, for it is clearly addressed in the Davis-Bacon Act and the regulations issued under it:

". . . the contractor [GFC here] or his subcontractor [A&K here] shall pay all mechanics and laborers employed directly upon the site of the work [the required wage rates] . . . regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and . . . there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work [the amount necessary to make up the difference between the rates required and those actually paid] . . . "

40 U.S.C. 276a; 29 CFR 5.5(a).

Under these unambiguous provisions, prime contractor General and subcontractor Atchison are clearly, as far as this proceeding is concerned, jointly and severally answerable to the Government for the violations found in this proceeding. We state expressly, however, that we neither make nor imply any holding with respect to what obligations may exist as between them on this account; our holding goes no further than to find that the Government may make the violations good from the assets of either or both of these firms, and it does not reach or affect the question whether or not one of them may hold the other liable for the costs involved.

We are unable, also to afford any relief to Prince George's County; it is clear that the money may be withheld by the Department to the end of making good the workmen's losses. But in this respect, also, we explicitly neither make nor imply any suggestion with respect to any rights over that the County may assert against either or both of the other parties to this cause.

It is obvious that the workmen involved have suffered substantial delay in the recovery of the wages to which they were and are entitled. If the monies withheld have accumulated interest during the period of delay, equity clearly requires that the benefits of that accumulation go to each workman as his interest in the total may appear.

ORDER

For the reasons stated above, it is hereby ORDERED, That:

1. The Secretary shall, from the amounts withheld for that purpose under Contracts Nos. 76-00250-H and SA3h-2135, pay to each workman whose name is listed in Section IV of this Decision and Order the amount there set forth beside that worker's name, together with any interest earned on that amount during the period of withholding.

2. The Secretary shall disburse any balance that, after such payment, may remain under those contracts in accordance with the applicable provisions of the respective contracts.

  
Samuel B. Groner  
Administrative Law Judge

SERVICE SHEET

Case Name: General Fededal Construction Inc. Prime Contractor  
Atchison & Keller, Inc. Subcontractor, Prince George's County,  
Maryland Grantee

Case No.: 83-DBA-22

Title of Document: Decision and Order

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