



DEC 15 2003

Mr. John P. Hoffa
General President
International Brotherhood of
Teamsters (Teamsters)
25 Louisiana Avenue, N.W.
Washington, D.C. 20001-2198

Mr. Frank Hanley
General President
International Union of Operating Engineers (IUOE)
1125 17th Street, N.W.
Washington, D.C. 20036

Mr. Boyd Young
International President
Paper, Allied-Industrial, Chemical and
Energy Workers International Union (PACE)
P.O. Box 1475
Nashville, Tennessee 37202

Dear Sirs:

Subject: Decision Number 03-005, rev. 1: Disposal Facility Modifications (Phase One)
Decision Number 03-008: Disposal Facility Materials Handling (Phase Two)

The Wage and Hour Division (WHD) of the Department of Labor (DOL) has been requested to rule on the applicability of the Davis-Bacon Act (DBA) and/or McNamara-O'Hara Service Contract Act (SCA) to the work associated with the above-referenced Department of Energy (DOE) Davis-Bacon committee decisions at the Idaho National Engineering and Environmental Laboratory (INEEL). INEEL is a government facility, located 32 miles west of Idaho Falls, Idaho. The site area is 890 square miles in size and is located at the northeastern portion of the Eastern Snake River Plain.

As we understand the facts in this case, work began in September on this two-phase Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) project. DOE Decision Number 03-005, rev. 1, Disposal Facility Modifications (Phase One) requires a contractor to provide all materials, labor, and equipment necessary to modify the disposal facility including the construction of a new disposal cell (number 2), and placement of an engineered environmental cover (CAP) over the disposal area. DOE Decision Number 03-008, Disposal Facility Soils Handling (Phase Two), requires a contractor to provide all materials, labor and equipment necessary to excavate

contaminated soils at the Waste Area Groups (WAGS) throughout the INEEL, transport soils to the existing disposal facility, place soils in the disposal area, obtain backfill materials from the borrow source, transport to contaminated soils excavation locations and backfill and compact to match existing terrain. These activities are expected to be performed over a 10-year period at an estimated cost of approximately \$32,000,000.

Specific duties to be performed during Phase Two, in accordance with the "Scope of Work for Environmental Restoration Contaminated Soils Remedial Action," (SOW-691) include:

- Excavating contaminated soil to a maximum of 10 feet or at the depth at which contaminant concentrations are below the final remediation goal (FRG), whichever is less for the various WAGS containing contaminated soils,
- Construction surveying and staking,
- Collect confirmation samples to verify that the remedial action meets the FRG,
- Grade all earth work involving excavation and backfill to encourage drainage away from the excavation,
- Employ dust control measures,
- In certain instances, remove contaminated soil using a high powered vacuum,
- Mowing existing vegetation,
- Excavate and dispose of all materials encountered,
- Perform compacting, backfilling, grading and leveling of all excavations,
- Revegetating,
- Removing inner and outer perimeter fences with the possibility of rebuilding

DOE essentially asserts that the majority of the work on the project is subject to the SCA because it believes that the excavating of contaminated soil and the refilling of the hole during Phase Two is analogous to demolition of a building with no follow-on construction which is SCA work. Demolition without follow-on construction of a "public building or public work" is not subject to the DBA, but has historically been treated by the Department as service work subject to the SCA labor standards provisions. See 29 C.F.R. 4.116(b). DOE also believes that the leveling and compacting of the soil and limited landscaping required in Phase Two is a trivial part of the contract and does not constitute "landscaping" as defined in the Department of Labor DBA regulations.

DOE has deemed Phase One of the project to be construction work that can be segregated and, accordingly, has identified those activities that involve the digging and preparation of the disposal cells, and placement of the CAP over the disposal area, as work subject to the provisions of the DBA. In addition, DOE has identified the spreading and compacting of the contaminated soils in the cells (Phase Two) as subject to the DBA. DOE believes that the filling of the cells is an integral and essential aspect to establishing and ensuring the overall structural integrity of the cells and is essential to the proper

placement of the CAP when the cell is filled, and thus is covered under the DBA. In sum, DOE believes that the principal purpose of the contract is to provide services based on its conclusion that the vast majority of the work performed in Phase Two is covered by the SCA, whereas all of the work in Phase One is substantial, segregable construction work subject to DBA. See generally 29 C.F.R. 4.116(c)(2).

It is our understanding that the INEEL clean-up activities during Phase Two will rarely involve the use of recycled soils and that the plan is to excavate and replace 430,000 cubic yards of soil by the year 2012. During excavation, testing and sampling will take place to ensure the appropriate level of excavation has been met in accordance with specified requirements. Classes employed on the project will include Industrial Hygienist, Soil Samplers, and Field Team Leaders. Additional classifications include Truck Drivers, Power Equipment Operators, and Laborers. After the contaminated soil has been excavated to the appropriate level, it will be transported to the disposal area for placement in the cells. Built to handle up to 510,000 cubic yards of contaminated soils, cell one and the newly constructed cell two are expected to receive up to 400,000 cubic yards of contaminated soils during the course of this 10-year remediation effort. Once these cells reach maximum capacity, and the necessary compaction requirements have been fulfilled, a cap will be constructed to permanently seal the cells.

The IUOE and the Teamsters have submitted letters arguing the reclamation work identified in Decision 03-008 (Phase Two) should be classified as Davis-Bacon. The two unions support DOE's determination regarding the DBA coverage determination in Decision Number 03-005, revision 1 (Phase One). PACE has submitted information in support of DOE's determination regarding the classification for work performed under Decision 03-008 (Phase Two), but has requested that the Department reverse DOE's decision regarding application of the DBA to certain activities involved in Decision 03-005, revision 1 (Phase One).

By its terms, the DBA applies to "every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or works." Section 5.2 (j) of Regulations, 29 CFR Part 5 defines the terms "construction, alteration and/or repair" to "mean all types of work done on a particular building or work at the site thereof...." Section 5.2 (i) of Regulations, Part 5, defines "building" and "work", in pertinent part, as follows:

The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types such as bridges, dams... drilling, blasting, excavating, clearing, and landscaping... (Emphasis added).

The Department's Bunker Hill opinion letter, issued on May 31, 1990 and later presented as All Agency Memorandum Number 155, describes the term "landscaping" as used in the DBA regulations as including not only such activities as planting trees, shrubs or

lawns when performed in conjunction with other construction work (e.g., the erection of a building or other structure), but also elaborate landscaping activities such as substantial earth moving and rearrangement or reclamation of the terrain that, *standing alone*, (emphasis added) are properly characterized as the construction, alteration or repair of a public work.

In the Bunker Hill opinion, the contractor was required to excavate and remove contaminated soils a maximum of 12 inches in depth over an area covering some 60 residences within the Bunker Hill site. These excavated soils were loaded into dump trucks and transported to a temporary storage area pending identification of a permanent disposal site. The contractor was required to replace the excavated soils with non-contaminated dirt, resod the area, and replace shrubbery. The contract was originally funded with \$2,000,000 from EPA's Superfund. The Department determined that substantial excavation of contaminated soils followed by restoration of the environment constitutes "construction of a public work" within the meaning of the DBA and the implementing Regulations, Part 5.

The INEEL disposal facility soil-handling project at issue involves a much larger area with more significant earth moving and reclamation than at the Bunker Hill site. At INEEL, the project calls for removing decontaminated soils from at least five WAGS, most of which are located a few miles from the disposal cells. However, a few WAGS are more than 20 miles from the disposal cells. Each WAG consists of a number of identified waste areas that require remediation. Some locations within a WAG may involve the removal of only a drum full of soil. Other locations are much more extensive in size and may require the removal and replacement of 40 to 50 thousand cubic yards of soil. Depending on the extent of the contamination, DOE estimates that excavations may be anywhere from 6 inches to 10 or more feet in depth.

DOE and PACE have argued that landscaping activities required under this contract are not as comprehensive as that contained in the relandscaping efforts surrounding the residences of Bunker Hill. DOE has provided pictures of INEEL that reveal a flat landscape, comprised mainly of field grasses and shrubs. Nevertheless, while the replanting efforts at INEEL may not be as extensive as those in Bunker Hill, the facts here show that the contract requires the contractor to regrade the affected surfaces to the existing terrain as well as relandscape in accordance with the natural vegetation contained at the site. We therefore believe that the guidance set forth in the Bunker Hill opinion applies to the work performed in Phase Two at INEEL.

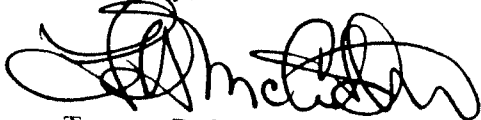
The WHD has consistently applied the DBA provisions to CERCLA-type projects where contractors have performed certain types of excavation work in which the remedial clean up calls for substantial earth moving and removal of soils followed by restoration of the landscape, even where such activities are performed without any other construction activities done on buildings or other structures at the cleanup site. As indicated by the regulatory definition noted above, "construction of a public work" within the meaning of the Davis-Bacon regulations at 29 CFR Part 5.2 (i), (j), and (k) (and Federal Acquisition Regulations at 48 CFR 22.401) may include "excavation, clearing, and landscaping."

without any requirement that it be related to other construction work. The term "landscaping", as clarified in the Bunker Hill opinion, includes not only such activities as planting trees, shrubs, and lawns when performed in conjunction with other construction work (e.g., the erection of a building or structure), but also elaborate landscaping activities such as substantial earth moving and/or rearrangement or reclamation of the terrain which, standing alone, would properly be characterized as construction of a public work. Accordingly, it is our determination that the excavation and restoration work required by DOE INEEL Decision Number 03-008 (Phase Two) constitutes construction work to which the DBA provisions and DBA wage determination are applicable.

With respect to the work performed in the compacting and filling of the Cell 2 Disposal Facility (Phase One), the Department agrees with DOE's judgment that such work is an integral and necessary component for assuring the structural integrity of the newly built cell. Accordingly, we will not take exception to the determination made by DOE in applying the DBA provisions to the construction, compacting, filling, and subsequent capping of the disposal cell.

This letter constitutes a final ruling. Pursuant to 29 C.F.R. 7.9, any interested party may file for review of this final determination with the Administrative Review Board. Any appeal should be addressed to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S4309, Washington, D.C. 20210.

Sincerely,

A handwritten signature in black ink, appearing to read "Tammy D. McCutchen", written in a cursive style.

Tammy D. McCutchen
Administrator

cc: Deborah Sullivan, DOE