

MEMORANDUM

State of Alaska

TO: Dale Cheek, Director
Labor Standards & Safety Division
Department of Labor
Juneau

ALASKA DEPT. OF LABOR
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TELEPHONE NO: 276-3550

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Applicability of Little
Davis-Bacon Act
(AS 36.05.010-.110)
to Road Maintenance and
Repair Projects

By: *Robert W. Landau*
Robert W. Landau
Assistant Attorney General

You have requested our assistance in resolving an apparent dispute between the Department of Labor and the Matanuska-Susitna Borough concerning the applicability of the prevailing wage requirements contained in Alaska's "Little Davis-Bacon Act" (AS 36.05.010-.110) to road and highway maintenance and repair projects. As part of our inquiry, we have also reviewed the correspondence between the Department and the Borough on this subject.

AS 36.05.010 requires contractors and subcontractors performing work on "public construction" in the state to pay "not less than the prevailing rate of wages for work of a similar nature in the region in which the work is done." AS 36.05.030 authorizes the Alaska Department of Labor to determine prevailing wage rates, and whether or not a given project is subject to the Little Davis-Bacon Act.

AS 36.95.010(3) defines "public construction" as follows, in pertinent part:

"Public construction" or "public works" means the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, of highways or other improvements to real property under contract for the state, [or] a political subdivision of the state....

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The central question in this inquiry is: how broad is the definition of "repair" under AS 36.95.010(3), and does it extend to cover routine "maintenance" work on public streets, roads or highways?

The applicability of the Little Davis-Bacon Act to particular public projects in Alaska has been addressed in at least three prior opinions from this office. An August 1977 memorandum concluded that a contract for window washing services between the state and a private contractor was not subject to the provisions of AS 36 (Ronald W. Lorensen, August 5, 1977). A March 1981 memorandum found that contracts for snow removal from state airports and roads were not contracts for "public construction" subject to the requirements of AS 36 (John B. Gaguine, March 10, 1981). A third opinion in August 1979 concluded that contracts for highway maintenance on the North Slope Haul Road were subject to the prevailing wage and bonding requirements of AS 36 (Larry Wood, August 14, 1979). It was noted in this latter opinion that most courts have found the concepts of "maintenance" and "repair" - as they relate to streets, roads and highways - to be synonymous for all practical purposes.

In a decision just released, the Alaska Supreme Court for the first time reviewed the applicability of the Little Davis-Bacon Act to a specific public project. City and Borough of Sitka v. Construction and General Laborers Local 942, Opinion No. 2495 (Alaska Supreme Court, May 7, 1982). The principal issue in the case was whether a contract for the sale of timber between the City and Borough of Sitka and a private logging company preparatory to a dam construction project was "public construction" subject to the wage protections afforded by Little Davis-Bacon. The court held that even though a timber sale contract standing alone might normally be outside the scope of Little Davis-Bacon, it nonetheless was subject to the Act because the subject matter of the contract was "substantially related" to "public construction". In making its decision, the court relied heavily on federal

regulations under the Davis-Bacon Act, which indicated that clearing done at a dam site in preparation for the dam's construction was "construction" within the purview of the Davis-Bacon Act. Accordingly, the court found that the clearing of timber and its subsequent sale was such an integral part of the entire dam construction project that it constituted "public construction". It rejected Sitka's contention that because the timber sale contract had been severed from the dam construction contract it was outside the scope of Little Davis-Bacon coverage.

Moreover, the court reaffirmed that the fundamental purpose of the Little Davis-Bacon Act is "to assure that employees engaged in public construction receive at least the prevailing wage" and that "the focus of the Act, quite clearly, is to the benefit of the employees, not the contracting principals". Slip opinion at 15. The court also cited a leading federal case holding that the language of the Davis-Bacon Act and its legislative history "plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects." City and Borough of Sitka, supra, slip op. at 15 n.11, quoting U.S. v. Binghamton Construction Co., 347 U.S. 171, 177 (1953).

The federal Davis-Bacon regulations relied upon by the Alaska Supreme Court in City and Borough of Sitka define the terms "construction", "prosecution", "completion" or "repair" to mean "all types of work done on a particular building or work at the site thereof... including without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work..." 29 C.F.R. § 5.2(g) (1981) (emphasis added). On the other hand, the same regulations define the terms "building" or "work" to generally include "construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work". 29 C.F.R. § 5.2(f) (1981) (emphasis added). Unfortunately, the federal regulations do not elaborate

on the apparent distinction between "repair" and "servicing or maintenance" work.

The few authorities which discuss the concepts of "repair" and "maintenance" as they relate to streets, roads and highways generally indicate that the terms are essentially synonymous. Black's Law Dictionary (Rev. 4th ed. 1968) defines "repairs" as "restoration to soundness; reparation; work done to property to keep it in good order." The same authority defines "maintenance" as "acts of repair and other acts to prevent a decline, lapse or cessation from existing state or condition". "Maintain" as used in a state statute referring to maintenance of roads includes the word "repair". Weiher v. Phillips, 133 N.E. 67, 68 (Ohio 1921). The words "maintain" and "repair", when applied to a street, practically mean one and the same thing. Barber Asphalt Paving Co. v. Hezel, 56 S.W. 449, 451 (Mo. 1900); Verdin v. City of St. Louis, 33 S.W. 480, 494 (Mo. 1895);. To "maintain" means to preserve or keep in an existing state or condition and embraces acts of repair and other acts to prevent a decline, lapse or cessation from that state or condition, and includes the idea of keeping in repair but has much broader meaning involving the concept of supporting, sustaining, carrying on and continuing. State Farm Mutual Automobile Insurance Co. v. Pan American Insurance Co., 437 S.W. 2d 542, 545 (Tex. 1969), quoting Morris v. American Liability & Surety Co., 185 A. 201, 202 (Pa. 1936).

From the above authorities it appears to us that the concepts of "repair" and "maintenance" are closely related and in most cases mean the same thing. All repairs by definition are a form of maintenance. However, not all acts of maintenance constitute repairs. For example, we do not believe that street sweeping, window washing, snow removal, or the cleaning of public buildings are in and of themselves acts of repair. With respect to work on public roads and highways, we believe that the concept of "repair" under the Little Davis-Bacon Act requires that the term be defined in its broadest sense, consistent with the broad statutory

purpose recognized by the Alaska Supreme Court in its recent City and Borough of Sitka opinion. As a general guideline, therefore, we believe "repair" includes the excavation of mudholes and potholes, the hauling and placing of any additional material or fill on the roadway, the grading or reshaping of newly added materials, and the correction or replacement of damaged culverts, fences or guardrails. On the other hand, we believe that the grading or smoothing of an existing roadway surface, the straightening or reshaping of shoulders, slopes and ditches, and the unplugging or cleaning of culverts are merely "maintenance" activities and would not independently be subject to the Little Davis-Bacon Act unless otherwise "substantially related" to ongoing construction or repair.

We recognize that the distinction between "repair" and "maintenance" is often a difficult one to define in practical terms, and that it is not possible to set out an exhaustive list of illustrative examples. We would note, however, that frequently the "principal purpose" of the overall project will aid in the determination of whether a contract calls for construction or repair on the one hand, or maintenance or servicing on the other. See, e.g., 29 C.F.R. §§ 4.115-4.132 (1981) (McNamara-O'Hara Service Contract Act regulations). As the Alaska Supreme Court noted in City and Borough of Sitka, it is the nature of the specific work as well as the relationship of that work to the overall project which are the salient considerations. Slip opinion at 15.

Finally, it should be emphasized that the Department of Labor is the state agency authorized under AS 36.05.030 to make final determinations of statutory coverage under the Little Davis-Bacon Act. City and Borough of Sitka, supra, Slip Op. at 5. See also 29 C.F.R. § 5.12 (1981). Other state agencies or political subdivisions awarding contracts for publicly financed work should be advised to refer any questions or uncertainties regarding Little Davis-Bacon coverage

Dale Cheek

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to the Department's Wage and Hour Administration for resolution prior to the commencement of the project.

cc: Donald R. Wilson, Wage and Hour Administration
Ronald W. Lorensen, Deputy Attorney General