

HB

331

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

March 11, 1983

Honorable Albert P. Adams
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Application of Little
Davis-Bacon Act
(AS 36.05) to designated
grants
Our file: 366-267-83

Dear Representative Adams:

You have requested our opinion whether construction contracts made by non-governmental entities which are financed by state-funded grants are subject to the provisions of the Little Davis-Bacon Act (AS 36.05) regarding payment of prevailing wages to employees working on public construction. You cite examples of grants made for a day care center, a "human services complex," and a public works facility. These grants were made by appropriations in which the grantees were specifically designated. In each case the grantee is a private non-profit corporation.

The grants to which you refer are commonly known as designated grants and are governed by the provisions of AS 37.05.316 (Grants to Named Recipients). Another category of designated grant which is used to construct capital improvements in unincorporated communities is an Unincorporated Community Grant under AS 37.05.317. Because an unincorporated community is not a legal entity and therefore lacks the capacity to receive and administer a grant of public funds, AS 37.05.317(2) authorizes the Department of Community and Regional Affairs to make the grant to a private non-profit corporation or federally recognized tribal council which is representative of the unincorporated community. We recently expressed our view that construction contracted out by such an organization for an unincorporated community with grant funds provided by the state under AS 37.05.317 is subject to the provisions of the Little Davis-Bacon Act. 1982 Inf. Op.

Att'y Gen. (October 5) 1/ A third category of grants, Grants to Municipalities under AS 37.05.315, provides state funds for a variety of local projects and activities directly to established political subdivisions of the state. The requirements of Little Davis-Bacon clearly apply to construction projects contracted out under those grants.

You now ask whether construction contracted out by non-governmental entities with grants made under AS 37.05.316 are also subject to that Act. We conclude that the answer to your question will depend upon the nature of the particular project being carried out by the grantee. If the project or improvement involves the undertaking or provision of traditional government facilities, services, or activities it is covered by the Act, despite the non-governmental status of the entity contracting out the work. However, if the work contracted out is not like that traditionally carried out or provided by government, it is not covered by Little Davis-Bacon. In order to define the line between those projects covered by the Act and those which are not, we recommend the adoption by the Department of Labor of regulations setting out the standards applicable to determining whether projects undertaken by affected grantees will be considered as covered or non-covered. By adopting regulations the department will put those entities on notice of their potential obligations under the Act and help assure uniform and consistent determinations of coverage or non-coverage. Our reasoning follows.

The fundamental requirement of the Little Davis-Bacon Act is set out in AS 36.05.010 which provides, in pertinent part, as follows:

Sec. 36.05.010. WAGE RATES ON PUBLIC CONSTRUCTION. A contractor or subcontractor who performs work on public construction in the state, as defined by AS 36.95.010(3), shall pay not less than the current prevailing wages for work of a similar nature in the region in which the work is done.

1/ We note that our October 5, 1982 opinion incorrectly referred to grants made under AS 37.05.315, which deals with grants to organized municipalities. This was obviously a typographical error as the problem which it addressed involved an Unincorporated Community Grant, which is covered by AS 37.05.317.

"Public construction" is defined in AS 36.95.010(3) as follows:

(3) "public construction" or "public works" means the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, highways or other improvements to real property under contract for the state, a political subdivision of the state, or a regional school board with respect to an educational facility under AS 14.08.161;

The answer to your question essentially revolves around whether work carried out with public funds by a designated grantee is "public construction" within the meaning and purpose of the Little Davis-Bacon Act. This is a question which has yet to be addressed by the Alaska courts and, while we believe the courts would follow the analysis which we apply here, we obviously cannot guarantee that our view will ultimately be adopted by them. 2/

In 1982, the Alaska Supreme Court adopted an expansive view of the concept of "public construction" under Little Davis-Bacon. City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (Alaska 1982). In the Sitka decision, the court expressly stated that "[t]he fundamental purpose of Little Davis-Bacon is to assure that employees engaged in public construction receive at least the prevailing wage." It went on to emphasize that "[t]he focus of the act, quite clearly, is to the benefit of the employees, not the contracting principals." Sitka, 644 P2d at 232.

2/ It is particularly important to keep in mind that our view may or may not be adopted by the courts where, as here, the statutes with which we deal create certain rights and obligations on non-governmental third parties (e.g., contractors and workers) which, unlike state agencies, are not bound to adhere to the advice of the Attorney General. That precise situation arose in City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (Alaska 1982) where the Alaska Supreme Court expressly rejected an earlier written determination by the Attorney General's Office that the Act did not apply to the facts of that case.

In deciding that the contract at issue in Sitka was subject to Little Davis-Bacon, the Supreme Court expressly rejected the argument that it was not covered because it was not in the form of a traditional construction contract. The City of Sitka had argued that the contract should be viewed in isolation as a timber sale contract, unconnected with the contract for the construction of a dam, even though the timber to be sold and cleared under that contract was to be removed in order to make the site suitable for construction of the dam. The court refused to follow Sitka's argument, however, saying that to do so "unduly exalts form over substance." Sitka, 644 P2d at 232.

Similarly, we believe that the court would reject the application of rigid tests which would only inquire whether a particular project was owned by a governmental entity or whether the project was being carried out under contract with a governmental entity. 3/ Certainly, in most situations it is to be anticipated that a "public work" will be owned by a governmental entity. However, nothing in Little Davis-Bacon expressly requires governmental ownership of the project. While ownership may often be indicative of the "public" nature of a particular project, we do not believe it is necessarily determinative. Similarly, the Act is not limited to projects under contract with the state or a political subdivision. In fact, the statute, at AS 36.95.010(3) expressly defines "public construction" as projects under contract for the state or a political subdivision, indicating that the legislature clearly had in mind application of a broader test for Little Davis-Bacon coverage than a simple mechanical inquiry into the status of the contracting entity.

3/ A rigid application of strict rules for determining whether a project is "public construction" could afford the opportunity to circumvent or evade Little Davis-Bacon simply by funding construction of projects such as roads, fire halls, police stations, or school buildings through designated grants. We do not believe our Supreme Court would permit such a result. "'While the ingenuity of man is apparently limitless, the court has held with unvarying regularity that one may not do by indirection what is forbidden directly.'" Sheldon Jackson College v. State, 599 P.2d 127, 132 (Alaska 1979), quoting Wolman v. Essex, 342 F.Supp. 399, 415 (S.O. Ohio 1972).

As in the Sitka case, the test to be applied in determining whether a particular project is "public construction" subject to the provisions of the Act is a functional one which inquires into the nature of the project under contract and its relationship to the purposes of Little Davis-Bacon. We believe that test is one which looks, among other things, to the nature of the project itself to determine whether it is the kind of project or activity which is traditionally undertaken by government. If it is, and if public monies are utilized, the Act applies, irrespective of questions of "ownership" and contractor status.

We arrive at our conclusion based both on our reading of the Sitka case and because of the similar approach taken by the U.S. Department of Labor in applying the federal Davis-Bacon Act (40 U.S.C. § 276a, et seq.). The definition of "public building" or "public work" for purposes of the federal Act is set out at 29 CFR § 5.2(h) and provides, in pertinent part, as follows:

(h) The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

The Alaska Supreme Court expressly stated in Sitka that, because Little Davis-Bacon is modeled after the federal Act and because the federal regulations implementing that Act were adopted before AS 36.95.010(3) defining "public construction" became law in 1972, it "will look to the federal regulations construing Davis-Bacon for assistance in interpreting Little Davis-Bacon." Sitka at 231, n.8.

The test which we have stated, while relatively simple to set out, may prove difficult to apply to some kinds of projects. Obviously, some projects such as roads, airports, sewers, municipal buildings and school buildings are traditionally governmental in nature. Others, such as construction of women's shelters, day care centers, and animal shelters, while serving a "public purpose", 4/ have probably not traditionally been con-

4/ Of course, any expenditure of state funds, whether through a governmental entity or a private organization must be made for a "public purpose." Article IX, sec. 6, Alaska Constitution.

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Representative
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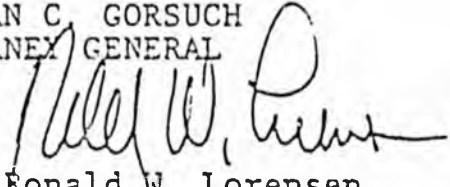
structed by government. However, there will undoubtedly remain a "gray area" of projects which cannot be readily characterized as either governmental or non-governmental like health care facilities and power generation and distribution facilities. These kinds of projects are sometimes provided by government, sometimes by private entities, and sometimes by both in the very same community. In order to clarify the gray area and provide a basis for entities who receive designated grants and who may therefore be subject to Little Davis-Bacon to determine whether their project is subject to the requirements of the Act, we recommend to the Department of Labor, by copy of this letter to Commissioner Robison, that it adopt regulations setting out the kinds of tests or factors which it will apply in enforcing the Act. ^{5/} By doing so, that department will assure that designated grantees have notice of their potential obligations under Little Davis-Bacon and that determinations made by it are uniformly and consistently applied.

If you have any further questions regarding the scope of Little Davis-Bacon, please let us know.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:


Ronald W. Lorensen
Deputy Attorney General

RWL:vrb

cc: Jim Robison
Commissioner
Department of Labor

^{5/} The Alaska Supreme Court expressly acknowledged Labor's authority, under AS 36.05.030, to determine whether a contract is subject to Little Davis-Bacon in Sitka at 229. The kinds of factors which might be applied could include, among others, ultimate ownership of the facility, who the intended operator and/or user will be, and who will bear the costs of operating and maintaining the facility.



THE ALASKA CHAPTER

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.



SKILL
RESPONSIBILITY
INTEGRITY

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RICHARD M. PITTENGER
MANAGER

April 22, 1983

The Honorable Walter R. Furnace
Chairman, House Labor and Commerce Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

RE: HB 331

Dear Representative Furnace:

The Alaska Chapter, Associated General Contractors of America, Inc., strongly supports the passage of HB 331. HB 331 clarifies existing law to assure that recipients of State public funds utilize procedures aimed at preserving the free enterprise system.

The proposed amendment to AS 37.05 is quite simple. Section (a) insures that recipients of public funds for the construction or repair of any public facility must advertise these projects and make an award to the lowest responsible bidder. Two unhealthy situations are avoided by utilizing competitive bids: (1) bias in the selection and award process and (2) force account work.

Bias or the appearance of bias in public contract awards should be avoided. The universally accepted method of assuring that no collusion exists between the contracting entity and the contractor is the competitive sealed bid process.

"Force Account" or "day labor" refers to public works construction done by a governmental body using public employees with equipment purchased or rented by that body, as opposed to a "hard dollar" contract.

Alaska Chapter, A.G.C., contends that the public interest is best served by the contract method of construction.

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Private industry is ready and willing to provide the public sector with the services it needs, and will do so at a competitive price. Taxpayers will benefit from this healthy competition because their main interest is to save tax dollars, and to get the maximum return for every tax dollar invested. When government decides to produce its own goods and services, it not only prevents the private sector from earning government dollars, but it also denies itself revenue from the taxes private enterprise must pay.

The contract method of construction has numerous advantages. It establishes definite costs before construction begins; it prescribes a date for completion of the work; it ensures quality workmanship and material; and it provides centralized responsibility for the work.

The quality of workmanship and materials is guaranteed by the contract system. The materials which go into the project are prescribed in detail in the specifications and are subject to the approval of the owner. If, in the owner's opinion, the workmanship or the materials are not as specified, the owner can reject the work and order it redone at the contractor's expense.

It is also a practice of many owners to require that the contractor maintain the project in good condition for a period of time after completion. It is, therefore, to the contractor's economic interest -- and to the maintenance of his reputation -- that the quality of his work measure up to the prescribed standards.

Not only does the public receive higher quality construction projects when they are contracted out, but the public also receives more for its money. Through long experience, contractors become specialists in one or more particular fields of construction. They know their sources of supply; they know the capacity of their machines and the capability of their personnel. When preparing a bid, a contractor's competitive incentive requires that he give considerable thought to the problem of devising the best and most economical manner of doing the work. His specialized knowledge and experience obtained in the marketplace have been sharpened and are instrumental in saving the taxpayer money on the project.

The contract provides that the project be completed on a prescribed date. The contractor cannot receive final payment or the release of money that is retained while the work is progressing until the job has been completed and accepted -- all to the satisfaction of the owner. This factor, plus his own economic need to finish and get on to the next project, gives assurance to the public that the job will be completed on time and within contract price. Many times the contract (bid) price is lower than what the government expects to pay.

In addition to providing the most efficient and economical means of producing public works construction, contracting out provides a variety of other benefits to the public in the form of risk shifting, which cannot be obtained under in-house performance. Some of these risks which are allocated when construction is done by contract are:

- The public only pays for what it receives; work actually performed is the basis of payment.
- The price is firm and guaranteed by the contract, and the public has no risk of cost increases. All of the variables of the market place, such as increases in material prices, wages and shortages are borne by the private contractor.
- Timely completion is assured by a liquidated damage provision.
- Faithful performance is backed by performance and payment bonds.
- Risk of damage during construction is borne by the contractor, not the public.
- The contractor must "defend and hold harmless" the public against claims and must provide the public with insurance coverage.
- Quality inspection is at "arm's length" by independent inspectors.
- The final work is warranted and defects must be corrected at no expense to the public.

To take the risks away from the taxpayers and put them on a private contractor who, through his payment and performance bond, guarantees the job will be finished according to the terms of the contract, is worth a great deal in dollars. None of this protection of the public's interest exists when work is performed by a public agency with public equipment and personnel -- all of the risks are on the taxpayer.

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Section (b) of HB 331 prohibits a recipient of State public funds from providing for preference to any local bidder unless that preference is established under AS 37.05.230(5). This provision eliminates local preference ordinances that provide preferences to contractors at the municipality, city or borough level; however, a preference can be given to "local bidders".

For the above mentioned reasons, we urge your support of this Bill.

Sincerely,

ALASKA CHAPTER
ASSOCIATED GENERAL CONTRACTORS



Richard M. Pittenger
Manager

/bj

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

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PHONE: (907) 264-2294

April 20, 1983

POSITION PAPER

RE: HB 331

SPONSOR: House Labor and Commerce Committee

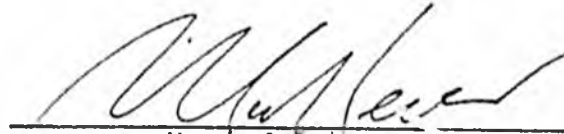
Program Effects of the Bill

This bill would make it mandatory that the recipients of all state grants for construction projects solicit bids for construction. It also allows those same recipients to give preference to in-state contractors.

Comments

The Department is concerned that this bill imposes a set of guidelines designed specifically for State Grants upon Municipal Government. In many cases these governments already have appropriate procedures in place.

Additionally, many municipalities currently use municipal employees on construction projects. This enables these municipalities to stretch State grant dollars. This bill would appear to prohibit that practice.



Mark Lewis, Commissioner

STATE OF ALASKA
FISCAL NOTE

Revision Date _____, 1983

REQUEST

Bill/Resolution No.: HB 331
 Title: State Grants...bidding rormnts
 Sponsor: HLC
 Requestor: HLC

II. FISCAL DETAIL

Agency Affected: DCRA
 Program Category Affected: Development
 BRU, Program of Subprogram(s) Affected: LGAD, DCP

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard Rainey Phone: 465-4793
 Division: Commissioner's Office Date: 4/21/83
 Approved by Commissioner: [Signature] Date: 4/24/83
 Department: DCRA

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