

S B

172

#1

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU, ALASKA 99801  
907-465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 3, 1983

SUBJECT: Amendments to the Little Davis-Bacon Act  
(AS 36.05) (Work Order No. 13-1354)

TO: Senator Richard I. Eliason

FROM: Thomas A. Sofo <sup>AS</sup>  
Legislative Counsel

You have asked this office to suggest and analyze methods of limiting the scope of Alaska's Little Davis-Bacon Act (AS 36.05.010 - 36.05.120) without going so far as repealing the act outright. That act was modelled on the federal Davis-Bacon Act (40 U.S.C. 276(a)) and has as its goal the protection of the local labor force from transient labor which is willing to work for less than the prevailing wage in that locality. The Alaska Supreme Court has recognized the genesis and fundamental purpose involved in the state act on more than one occasion. City of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (1982); and Fowler v. City of Anchorage, 583 P.2d 817 (1978).

As I understand it, arguments have surfaced which indicate that there is some dissatisfaction with the operation of the Little Davis-Bacon Act in Alaska. Rather than serving to protect the local labor force, in many instances the requirement that the prevailing wage be paid discourages the construction of certain public projects in smaller locales. Apparently the prevailing wage which the state Department of Labor uses is in excess of what the people would actually work for in some of our smaller villages. Thus, the application of the Little Davis-Bacon Act and its requirement that a higher prevailing wage be paid than actually would normally be available at a particular public construction site has served to undercut the local labor force by making that work competitive with and therefore more attractive to a more urbanized labor force which can be sent into the area to perform the local public construction. If the underlying facts exist to support this argument, there does not appear

to be any constitutional impediment from adding exemptions to the Little Davis-Bacon Act to reflect the economic reality of the situation.

As stated above, the Alaska Supreme Court has recognized as a legitimate goal the protection of the local labor force from itinerant labor. If the operation of the act is shown to have the opposite effect from what is intended in areas of particularly small populations which include many able workers who are willing to work for less than the higher official prevailing wage, there appears to be a rational relationship to a legitimate state purpose which is necessary to meet an argument concerning equal protection. The fact that a worker on a similar project in a larger, more urban area of the state might get paid more for doing the same work does not necessarily mean the exemption in the statute would fail. Since the history of the judicial decisions in this subject area has already clearly recognized the legitimate goal of government in enacting such legislation, exemptions to the statutory scheme which have the same goal would also apparently be valid.

The most direct approach of taking into account the inapplicability of the Davis-Bacon scheme to rural areas in Alaska is to provide an exemption from the provisions of the act for public construction projects in places which do not meet certain minimum population requirements. I believe that this is the tack taken by HB 304. Another way to remove the smaller rural area from the operation of the act would be to create an exemption for public construction below a certain dollar amount. This latter way is not as direct and may have some difficulty passing a constitutional challenge since it is not always clear that a lower cost is associated with our projects in the bush while there certainly may be lower cost projects built in urban areas. For that reason a minimum cost figure exemption would find it harder to meet the requirement of being rationally related to the permissible state goal of protecting the indigenous labor force in rural areas.

Another approach which has been mentioned is to tack on an exemption to the Davis-Bacon Act in specific appropriation bills as they arise. Although that particular approach may be viable in federal legislation, the Alaska Constitution contains several prohibitions which serve to make it of questionable value in this state. Article II, section 9 of the Alaska State Constitution provides that "bills for

Senator Richard I. Eliason  
Page 3  
May 3, 1983

appropriations shall be confined to appropriations". That restriction seems to eliminate the inclusion of an exemption from an area of substantive law in an appropriation bill. Additionally, Article II, section 19, contains a prohibition against local or special acts which such an exemption would also seem to violate.

Conceivably, many of the above problems may be avoided if the prevailing wage set by the Department of Labor was more narrowly focused to specific geographical areas so that it more accurately reflected the cost of labor in those areas. I imagine someone would have to discuss this at length with a representative of the Department of Labor in order to assess the feasibility of that approach.

Let me know if I can be of further assistance to you in this matter.

TAS:ljb  
17/019

Memos re:  
Davis - Bacon

# MEMORANDUM

State of Alaska

TO: Honorable Richard A. Nevé  
Commissioner  
Department of Environmental  
Conservation

DATE: May 9, 1983

FILE NO: 366-573-83

TELEPHONE NO: 465-3603

cc: Norman C. Gorsuch  
Attorney General

SUBJECT: Title 36

By: *Gary I. Amendola*  
Gary I. Amendola  
Assistant Attorney General  
Human Services-Juneau

IS & S  
JUNEAU MAY 19 1983

You have requested an opinion regarding the scope of Title 36 and its requirement that prevailing wages be paid on public works projects. Specifically you ask whether non-profit entities which receive grants under AS 37.05.316 or AS 37.05.317 can use "force account labor" to complete the public works project and thus avoid the payment of prevailing wages, as that term is used in AS 36.05.010 et seq.

On March 11, 1983, Deputy Attorney General Ron Lorensen issued an opinion regarding the application of the Little Davis-Bacon Act (AS 36.05) to designated grantees under AS 37.05.316 and 317. Under AS 37.05.317(2), nonprofit entities are permitted to receive and administer grants for public construction. This opinion addresses the related question which arose because of the issuance of that opinion.

A short answer to your question is yes.

The federal government has long recognized that where the government uses its own employees to perform public construction, the Davis-Bacon Act, upon which our "Little Davis Bacon Act" is modelled, does not require the payment of prevailing wages. See Veader v. Bay State Dredging and Contracting Company, 79 F. Supp. 837 (D.C. Mass. 1948); see also, Davis Bacon Act Field Operations Handbook, dated May 5, 1978 at page 15c14.

The 1978 informal Attorney General's opinion written by then Assistant Attorney General Ron Lorensen extended that rationale to municipal governments and by implication ratified that state governments could also use the "force account" system.

Without the existence of a contractual relationship between the non-profit entity and some third party doing the

C: Commissioner

Honorable Richard-A. Nevé  
Commissioner  
366-573-83

May 9, 1983  
Page 2

work, Title 36 simply does not apply. The legislation in Title 36 is written in terms of contractors, subcontractors, and contracts. AS 36.05.010 states in relevant part:

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 rate of wages for work of a similar nature in the region in which the work is done

...

Public construction, in turn, is defined at AS 36.95.-010(3) as "the onsite 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." (emphasis supplied).

We can perceive of no reason to distinguish between a nonprofit entity's use of "force account labor" and a state's or municipality's use of "force account labor" to complete similar construction projects.

GIA:bap

Comm.
Up. Com.
Sp. Asst.
Inf. Cf.
Adm. Cf.
cc <i>Amendola</i>
cc
cc

TO: Honorable Jim Robison  
 Commissioner  
 Department of Labor

DATE: May 23, 1983

FILE NO: 366-592-83

TELEPHONE NO: 465-3603

FROM: Norman C. Gorsuch  
 Attorney General

SUBJECT: Title 36 and the  
 Juneau ANB/Tlingit-  
 Haida building  
 project.

By: *Gary I. Amendola*  
 Gary I. Amendola  
 Assistant Attorney General  
 Human Services-Juneau

You have requested advice concerning the applicability of Title 36.05 (Little Davis-Bacon) to the above mentioned construction project. In order to decide on the applicability of Title 36.05 to this particular project, we have participated in discussions with representatives from your department and obtained a variety of materials and information regarding the project.

Our understanding of the facts is as follows:

In Chapter 82, SLA 1981, the legislature appropriated one million dollars for the Juneau Alaska Native Brotherhood by a grant identified as Juneau - Pilot Projects/Community Centers. The purpose of the appropriation was to provide funds to the Juneau ANB to replace its existing meeting hall, which had become quite old and inadequate, with a new one. The grant was authorized under AS 44.47.050(3), which permits the Department of Community and Regional Affairs to "conduct studies and carry out experimental and pilot projects for the purpose of developing solutions to community and regional problems". The Juneau ANB entered into an agreement with the Tlingit-Haida Central Council to jointly construct a building which will contain both the ANB tribal hall and offices for the Tlingit-Haida Central Council and its related organizations.

As we understand it, the Juneau ANB will own and utilize most of the first floor of the three-story building. Tlingit-Haida Central Council and its related organizations will own and utilize the remainder of the building.

The first floor utilized by Juneau ANB will be used mainly for Alaska Native Brotherhood community meetings and

Honorable Jim Robison  
Commissioner  
366-592-83

May 23, 1983  
Page 2

functions. Even though the tribal hall will be open to the general public, the focal point will be as a community center for Alaska Natives. Games, tribal dances and other cultural activities will take place in the hall. It is our understanding that the remainder of the building utilized by Tlingit-Haida Central Council will be used for office space, conference rooms and other business purposes directly related to the services offered by the Central Council.

Based on our understanding of the facts and a review of our March 11, 1983, opinion to Representative Al Adams regarding the application of Little Davis-Bacon to designated grants, \*/ it is our opinion that Little Davis-Bacon (AS 36.05) does not apply to the Juneau Alaska Native Brotherhood/Tlingit-Haida Central Council building project. The uses to which the building will be put are not the type which are traditionally provided by government. Further, the construction of the building, while serving a public purpose, is simply not the sort of project which is traditionally undertaken by government.

GIA:bap

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\*/ We are mindful that, as stated in footnote 3 of the March 11, 1983 Attorney General's opinion, a deliberate attempt to evade or circumvent the Little Davis Bacon Act would likely not survive judicial scrutiny. We find no indication of such intent in this particular project.

# STATE OF ALASKA

## DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

P. O. BOX 1149  
JUNEAU, ALASKA 99802  
(907)465-2700

May 6, 1983

The Honorable Richard Eliason  
Chairman, Senate Labor and Commerce Committee  
Pouch V  
Juneau, AK. 99811

Dear Senator Eliason:

Sheila Peterson requested that the Department provide you with some time-frames for promulgating regulations for application of AS 36.05 to designated grants as recommended in Ron Lorensen's Opinion of March 11, 1983.

The Department will be conducting a workshop for the Title 36 enforcement staff and our attorneys during the early part of May 1983. The purpose of this workshop is to acquaint the regional staff with the many problems that have recently come to light as the result of funding for public construction. The Department is currently in the process of contacting every other state that has a Little Davis-Bacon Act to determine which of those states are encountering the same problems as we are, and to find out what approach they are taking for resolution of those problems.

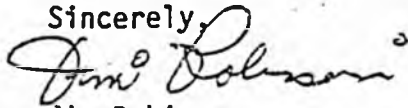
The Department is also surveying the U.S. Department of Labor to determine the federal approach for similar circumstances. While these surveys are being done by the Wage and Hour staff, we are also having our attorneys do independent research for any case law related to such funding problems. This information will then be used by the Department to bring to public hearings the proposed regulations that will, hopefully, clarify and give guidance to all parties when any public construction contract cannot be viewed in the traditional sense, whether the problems be related to funding or services to be provided.

Honorable Richard Eliason  
May 6, 1983  
Page Two

We are working toward holding public hearings in July and completing the regulations for submittal to the Attorney General in September 1983.

Thank you for your interest.

Sincerely,

A handwritten signature in cursive script that reads "Jim Robison". The signature is written in dark ink and is positioned above the printed name.

Jim Robison  
Commissioner

# STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF LABOR**  
WAGE & HOUR ADMINISTRATION  
LABOR STANDARDS & SAFETY DIVISION

3301 EAGLE STREET  
POUCH 7-021  
ANCHORAGE, ALASKA 99510  
PHONE: (907) 264-2435

March 7, 1983

PCOL #: 21

Honorable Richard I. Eliason  
Senator, State of Alaska  
Chairman, Committee on Labor  
and Commerce  
Pouch V  
Juneau, Alaska 99811

Re: Force Account Labor (AS 36.05.010)

Dear Senator Eliason:

Thank you for your letter of March 1, 1983 in which you asked our opinion as to whether or not "force account" labor by employees of political subdivisions on public construction projects would be exempt from the provisions of AS 36.05.010.

Your question was posed within the framework of a municipal government which was the recipient of state appropriations for small communities for the construction of public facilities. The example cited was the case in which the municipality used the appropriation to hire a construction manager to provide "hands in the pocket" management and supervision of the project. The actual work of the laborers, mechanics and field surveyors was performed by employees of the municipality; all wages and benefits were set by the municipality, all wages were paid by the municipality with municipal payroll checks; the municipality did all the hiring and firing; the management contractor could not intervene between the employees and the municipality; the management contractor's sole purpose was to be the construction manager, procure materials and supervise the design and engineering phases.

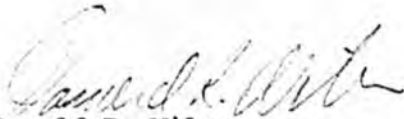
At a recent seminar in Anchorage relating to all aspects of AS 36, at which the Deputy Attorney General was in attendance, the subject of "force account" labor was very thoroughly discussed by our attorneys and the Wage and Hour staff. Your question as set forth in your letter, and as earlier relayed to us by one of your staff members, was especially considered. It was the consensus that the circumstances as you presented them were an accurate characterization of "force account" labor which is exempt from the provisions of AS 36.05.010.

We have enclosed a copy of an Attorney General Opinion dated October 10, 1978. We have also enclosed a copy of the section from the U.S. Department of Labor Compliance Officer's handbook dealing with "force account" situations. As you can see from a perusal of the text, the Attorney General Opinion is in accordance with the Federal Davis-Bacon Act. You may, however, wish to seek further clarification on the federal stance from the U.S. Department of Labor. We would suggest you contact Mr. Edward Woodruff, Wage and Hour Specialist, Region X, Federal Office Building, 909 First Avenue, Seattle, Washington, 98174, phone: 206-442-1914.

Senator Eliason  
March 7, 1983  
Page 2

If we can be of any other assistance in this matter, please do not hesitate to contact us.

Sincerely,



Donald R. Wilson  
Deputy Director  
Labor Standards & Safety Division

Enclosures

cc: Director  
PCOL File & Distribution



OFFICIAL BUSINESS

# ALASKA STATE LEGISLATURE - SENATE

## COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON  
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811  
(907) 465-3844

March 1, 1983

Donald R. Wilson, Supervisor  
Wage and Hour Administration  
Department of Labor  
3301 Eagle St.  
Pouch 7-021  
Anchorage, Alaska 99510

Dear Mr. Wilson:

Several communities in my district have developed a procedure for their municipal construction projects based on a sort of "force account" system. I fully support this approach to handling construction of projects funded through state appropriation in small communities. This approach offers many advantages, including much-needed local employment, close involvement of the municipal government in all phases of planning, development, and construction of projects, a sense of pride and involvement by citizens in projects and growth in their own community, and often more work can be completed within the budget than if projects went out to bid.

My concern is that there has been some discussion about the applicability of the Little Davis-Bacon Act to projects done in this way. What I would like to ask is that your office make a ruling on this matter after consulting with the Attorney General's office. I believe that it is important that we establish in writing that the way in which these communities are dealing with their construction projects is fine and they need not fear future legal questions about whether they should have been paying Davis-Bacon wages.

As I understand it, the procedure being used is as follows. The state appropriates money for a particular project to the city government in a direct grant. The city hires a construction manager (a person or firm to serve as a "hands-in-pocket" construction supervisor, and to handle engineering and design phases, ordering of materials, etc.). The city then hires laborers, usually local residents, unless some specialized skills are needed, to do the construction work. These laborers are non-union (or at least need no union affiliation to qualify), are hired and fired by the city, paid by city check, and are paid at whatever rate the city decides to pay as wages on the particular project.

Bill No. SB 172

Date May 6, 1983

Title "An Act relating to wage rates on public construction; and providing for an effective date"

Contact: Judy Knight

The Department of Labor and the Department of Community & Regional Affairs oppose passage of this legislation. While it is recognized that the legislation was introduced to attempt to address certain matters of public construction in rural and small communities in Alaska, we believe that the legislation effectively undermines a process of paying a prevailing and fair wage to persons employed in public construction activities.

The Departments recognize that there may be continuing problems with the payment of prevailing wage rates, resident (local) hire in remote locations, and possible difficulties in the annual calculation of prevailing wage rates.

Therefore, at the instructions of Governor Sheffield, we are forming a "mini-Cabinet" composed of the Departments of Labor, Community & Regional Affairs and Transportation and Public Facilities to evaluate in detail the issues that this legislation purports to address. Specific focus will be made on the issue of prevailing wage rates and their methods for calculation, potential recommendations for adjusting formulas for calculation of wage rates, the uniformity of local hire, and related issues.

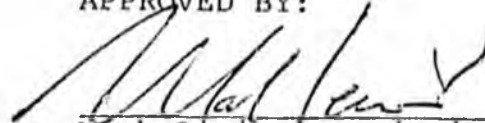
We believe that the formation of this mini-Cabinet and the issues that it will address will allow us to provide solutions to the problems that these two pieces of legislation are attempting to resolve.

APPROVED BY:



Jim Robinson, Commissioner  
Department of Labor

APPROVED BY:



Mark Lewis, Commissioner  
Department of Community &  
Regional Affairs

**POSITION PAPER/Department of Labor**

STATE OF ALASKA  
FISCAL NOTE

Revision Date April 25, 1983

I. REQUEST Sponsor Substitute II. FISCAL DETAIL  
 Bill/Resolution No.: for Senate Bill 172 Agency Affected: Labor  
 Title: "wage rates on public construction" Program Category Affected: Worker Protection  
 Sponsor: Senator Sackett BRU, Program of Subprogram(s) Affected:  
 Requestor: Senate Labor and Commerce Labor Standards and Safety, Wage & Hour

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
<b>OPERATING</b>						
100 PERSONAL SERVICES		(95.3)				
200 TRAVEL		0				
300 CONTRACTUAL		(73.9)				
400 COMMODITIES		(.9)				
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
<b>TOTAL OPERATING</b>		(170.1)	0	0	0	0
<b>CAPITAL</b>						
<b>REVENUE</b>						

FUNDING: (Thousands of Dollars)

GENERAL FUND		(170.1)	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		(3)	0	0	0	0
PART-TIME						
TEMPORARY						

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

Not Applicable

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: <sup>RS</sup> Robert J. Bacolas, Sr. *R. Bacolas* Phone: 465-4870  
 Division: Labor Standards and Safety Date: April 25, 1983  
 Approved by Commissioner: <sup>RS</sup> Jim Robison *Jim Robison* Date: April 25, 1983  
 Department: Labor  
 LEG:A:41

Distribution:

Original to Legislative Finance  
 Copy to Office of Management and Budget (for Legislature introduced bills)  
 Copy to Department (for Governor introduced bills)  
 Copy to Sponsor  
 Copy to Requestor (if different from Sponsor)

3/8/83

FISCAL NOTE

THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE

TITLE: "An Act relating to wage rates on public construction"

AGENCY AFFECTED: Department of Labor

Page 2

Detail Bill Analysis SSSB 172

The repeal of AS 36.05 will result in the discontinuation of enforcement activities by the Department of Labor with respect to contractor compliance with the payment of prevailing wages. This statute is modeled after the "Little Davis Bacon Act," which states that the payment of prevailing wages are required whenever public funds are appropriated for construction of projects for use by the public for traditional purposes.

Through the repeal of AS 36.05, the Department will not have any resources remaining to enforce AS 36.10, Employment Preference or Resident Hire.

Included in the fiscal note reduction is the current staff of three Wage and Hour technicians, associated non-personal services costs, and the deletion of funding for the annual prevailing wage study.

Assumptions:

Effective date July 1, 1983

1.	POSITION TITLE Wage and Hour Technician I				RANGE/STEP 12A	BARG. UNIT GGU	FORM 12 PAGE/LINE	COV.	APPRDV.	DISAPP.
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER SSSB 172	PCN NUMBER 074021	BRU PRIORITY	LOCATION Juneau	ELECTION DISTRICT	LEG.		

3.	CONTINUATION LEVEL	ADDITION			
4.	TYPE OF EXPENDITURE		AMOUNT		
	1	2	3		
	PERSONAL SERVICES				
5.	Salary	<23,676>			
6.	Benefits	<3,757>			
7.	Supplemental Benefits	<1,451>			
8.	Fixed Benefits	<2,880>			
9.	TOTAL PERSONAL SERVICES	01	<31,764>		
10.	Travel	02	-0-		
11.	Contractual	03	<63,900>		
12.	Commodities	04	<300>		
13.	Equipment	05			
14.	Other				
15.	TOTAL COST		<95,964>		

JUSTIFICATION

This position was required to audit certified payrolls to ascertain if contractors on public projects are employing local residents; if good faith efforts have been made to hire local residents; and further if labor from adjacent areas is being utilized when local skilled labor is not available.

Contractual service includes \$58,900 for the prevailing wage survey. All other costs are normal operating expenses.

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.	100	General Funds 1004	<95,964>
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR B&M USE ONLY  
4A KEY NUMBER \_\_\_\_\_

**13** REQUEST FOR  
NEW POSITION

AGENCY Labor

PROGRAM Worker Protection

BRU Labor Standards and Safety

COMPONENT Wage and Hour

Page 1 of 3

Revised Date \_\_\_\_\_

**FY 84**

1.	POSITION TITLE Wage and Hour Technician I				RANGE/STEP 12A	BARG. UNIT GGU	FORM 12 PAGE/LINE	GOV.	APPRDV.	DISAPP.
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER SSSB172	PCN NUMBER 074009	BRU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT	LEG.		

3.	CONTINUATION LEVEL	ADDITION	XX
4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	<23,676>	
6.	Benefits	<3,757>	
7.	Supplemental Benefits	<1,451>	
8.	Fixed Benefits	<2,880>	
9.	TOTAL PERSONAL SERVICES	01	<31,764>
10.	Travel	02	-0-
11.	Contractual	03	<5,000>
12.	Commodities	04	<300>
13.	Equipment	05	
14.	Other		
15.	TOTAL COST		<37,064>

JUSTIFICATION

This position was required to audit certified payrolls to ascertain if contractgors on public projects are employing local residents; if good faith efforts have been made to hire local residents; and further if labor from adjacent areas is being utilized when local skilled labor in not available.

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.	100	General Funds 1004	<37,064>
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR B&M USE ONLY  
4A KEY NUMBER \_\_\_\_\_

**13** REQUEST FOR  
NEW POSITION

AGENCY Labor

PROGRAM Worker Protection

BRU Labor Standards & Safety

COMPONENT Wage and Hour

**FY 84**

Page 2 of 3

Revised Date \_\_\_\_\_

1.	POSITION TITLE Wage and Hour Technician I				RANGE/STEP 12A	BARG. UNIT GGU	FORM 12 PAGE/LINE	GOV.	APPRDV.	DISAPP.
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER SSSR172	PCN NUMBER 074008	BRU PRIORITY	LOCATION Fairbanks	ELECTION DISTRICT	LEG.		
3.	CONTINUATION LEVEL	ADDITION	YX	JUSTIFICATION						
4.	TYPE OF EXPENDITURE			AMOUNT						
	1	2	3							
	PERSONAL SERVICES									
5.	Salary		<23,676>							
6.	Benefits		<3,757>							
7.	Supplemental Benefits		<1,451>							
8.	Fixed Benefits		<2,880>							
9.	TOTAL PERSONAL SERVICES	01	<31,764>							
10.	Travel	02	-0-							
11.	Contractual	03	<5,000>							
12.	Commodities	04	<300>							
13.	Equipment	05								
14.	Other									
15.	TOTAL COST		<37,064>							
	RECEIPT CODE	FUNDING SOURCE								
16.		Federal Receipts 1002								
17.		G.F. Match 1003								
18.	100	General Funds 1004		<37,064>						
19.		I-A Receipts 1005								
20.		Program Receipts 1028								
21.		Other								

This position was required to audit certified payrolls to ascertain if contractors on public projects are employing local residents; and further if labor from adjacent areas is being utilized when local skilled labor is not available.

FOR B&M USE ONLY  
4A KEY NUMBER \_\_\_\_\_

**13** REQUEST FOR NEW POSITION

AGENCY Labor  
PROGRAM Worker Protection  
BRU Labor Standards and Safety  
COMPONENT Wage and Hour

**FY 84**

Page 3 of 3  
Revised Date \_\_\_\_\_

PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.010.

CATCH LINE

WAGE RATES ON PUBLIC CONSTRUCTION.

TEXT

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 RATE OF WAGES FOR WORK OF A SIMILAR NATURE IN THE REGION IN WHICH THE WORK IS DONE. THE CURRENT PREVAILING RATE OF WAGES FOR EACH PAY PERIOD IS THAT CONTAINED IN THE LATEST DETERMINATION OF PREVAILING RATE OF WAGES ISSUED BY THE DEPARTMENT OF LABOR BEFORE THE END OF THE PAY PERIOD.

HISTORY (SEC. 14-2-1 ACLA 1949; AM SEC. 1 CH 142 SLA 1972; AM SEC. 1 CH 89 SLA 1976)

END OF DOCUMENT

AS36.05.020 DOCUMENT= 2 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.020  
TITLE = 36

HEADINGS

TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.020.

CATCH LINE

BASIS FOR DETERMINING WAGE.

TEXT

A SUBCONTRACT WHICH IS PERFORMED ON PUBLIC CONSTRUCTION MAY BE REDUCED TO A BASIS OF DAY LABOR FOR THE PURPOSE OF DETERMINING WHETHER OR NOT THE SUBCONTRACTOR OR CONTRACTORS HAVE PAID AT NOT LESS THAN THE PREVAILING SCALE OF WAGE.

HISTORY (SEC. 14-2-2 ACLA 1949)

END OF DOCUMENT

AS36.05.030 DOCUMENT= 3 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.030  
TITLE = 36

HEADINGS

TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.030.

CATCH LINE

AUTHORITY.

TEXT

(A) THE DEPARTMENT OF LABOR HAS THE AUTHORITY TO DETERMINE THE PREVAILING WAGE, AND WHETHER OR NOT THIS CHAPTER IS BEING VIOLATED. THE DEPARTMENT MAY WHEN NECESSARY FOR THE ENFORCEMENT OF THIS CHAPTER

(1) CONDUCT INVESTIGATIONS AND HOLD HEARINGS CONCERNING WAGES;

(2) COMPEL THE ATTENDANCE OF WITNESSES AND THE PRODUCTION OF BOOKS, PAPERS AND DOCUMENTS,

(3) PROMULGATE REGULATIONS.

(B) IF A PERSON VIOLATES THIS CHAPTER THE ATTORNEY GENERAL SHALL, WHEN REQUESTED BY THE DEPARTMENT OF LABOR, ENFORCE THESE PROVISIONS.

HISTORY (SEC. 14-2-3 ACLA 1949; AM SEC. 2 CH 142 SLA 1972)

END OF DOCUMENT

AS36.05.035 DOCUMENT= 4 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.035  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.035.

CATCH LINE

NOTIFICATION OF CONTRACT AWARDS.

TEXT UPON AWARDING A PUBLIC CONSTRUCTION CONTRACT, THE STATE OR A  
POLITICAL SUBDIVISION OF THE STATE SHALL

(1) IMMEDIATELY NOTIFY THE COMMISSIONER OF LABOR OF THE  
AMOUNT OF THE CONTRACT, THE EFFECTIVE DATE OF THE CONTRACT,  
THE IDENTITY OF THE CONTRACTOR AND ALL SUBCONTRACTORS, THE  
SITE OR SITES OF CONSTRUCTION AND PROVIDE A PROJECT  
DESCRIPTION; AND

(2) VERIFY THAT THE BONDING REQUIREMENTS OF AS 36.25  
HAVE BEEN MET AND THAT THE REQUIREMENTS OF AS 08.18 HAVE BEEN  
MET.

HISTORY (SEC. 3 CH 142 SLA 1972)

END OF DOCUMENT

AS36.05.040 DOCUMENT= 5 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.040  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.040.

CATCH LINE

FILING SCHEDULE OF EMPLOYEES, WAGES PAID AND OTHER INFORMATION.

TEXT ALL CONTRACTORS OR SUBCONTRACTORS WHO PERFORM WORK ON A PUBLIC  
CONSTRUCTION CONTRACT FOR THE STATE OR FOR A POLITICAL  
SUBDIVISION OF THE STATE SHALL, BEFORE THE FRIDAY OF EACH WEEK,  
FILE WITH THE DEPARTMENT OF LABOR A SWORN AFFIDAVIT FOR THE  
PREVIOUS WEEK, SETTING OUT IN DETAIL THE NUMBER OF MEN EMPLOYED,  
WAGES PAID, JOB CLASSIFICATION OF EACH EMPLOYEE, HOURS WORKED  
EACH DAY AND WEEK, AND OTHER INFORMATION WHICH THE DEPARTMENT OF  
LABOR REQUIRES.

HISTORY (SEC. 14-2-4 ACIA 1949; AM SEC. 4 CH 142 SLA 1972)

END OF DOCUMENT

AS36.05.050 DOCUMENT= 6 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.050  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.050.

CATCH LINE

HOURS TO CONSTITUTE DAY'S WORK.

TEXT REPEALED BY SEC. 1 CH 3 SLA 1973.

END OF DOCUMENT

AS36.05.060 DOCUMENT# 7 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.060  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.060.

CATCH LINE

PENALTY FOR VIOLATION OF THIS CHAPTER.

TEXT A CONTRACTOR WHO VIOLATES THIS CHAPTER, IS GUILTY OF A MISDEMEANOR, AND UPON CONVICTION IS PUNISHABLE BY A FINE OF NOT LESS THAN \$100 NOR MORE THAN \$1,000, OR BY IMPRISONMENT FOR NOT LESS THAN 10 DAYS NOR MORE THAN 90 DAYS, OR BY BOTH. EACH DAY A VIOLATION EXISTS CONSTITUTES A SEPARATE OFFENSE.

HISTORY (SEC. 14-2-6 ACLA 1949; AM SEC. 6 CH 142 SLA 1972)

END OF DOCUMENT

AS36.05.070 DOCUMENT# 8 OF 13 PAGE = 1 OF 2  
CHAPTER = 36.05  
SECTION = 36.05.070  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.070.

CATCH LINE

WAGE RATES FOR LABORERS AND MECHANICS ON PUBLIC CONTRACTS.

TEXT (A) THE ADVERTISED SPECIFICATIONS FOR A PUBLIC CONSTRUCTION CONTRACT EXCEEDING \$2,000 TO WHICH THE STATE OR A POLITICAL SUBDIVISION OF THE STATE IS A PARTY WHICH REQUIRES OR INVOLVES THE EMPLOYMENT OF MECHANICS, LABORERS, OR FIELD SURVEYORS SHALL CONTAIN A PROVISION STATING THE MINIMUM WAGES TO BE PAID VARIOUS CLASSES OF LABORERS, MECHANICS, OR FIELD SURVEYORS AND THAT THE RATE OF WAGES SHALL BE ADJUSTED TO THE WAGE RATE FOR EACH PAY PERIOD APPLICABLE UNDER AS 36.05.010.

(B) REPEALED BY SEC. 17 CH 142 SLA 1972.

(C) A CONTRACT FOR PUBLIC WORKS IN THE STATE OR A POLITICAL SUBDIVISION SHALL CONTAIN PROVISIONS THAT

(1) THE CONTRACTOR OR HIS SUBCONTRACTORS SHALL PAY ALL EMPLOYEES UNCONDITIONALLY AND NOT LESS THAN ONCE A WEEK;

(2) WAGES MAY NOT BE LESS THAN THOSE STATED IN THE ADVERTISED SPECIFICATIONS, REGARDLESS OF THE CONTRACTUAL RELATIONSHIP BETWEEN THE CONTRACTOR OR SUBCONTRACTORS AND LABORERS, MECHANICS, OR FIELD SURVEYORS;

(3) THE SCALE OF WAGES TO BE PAID SHALL BE POSTED BY

AS36.05.070 DOCUMENT# 8 OF 13 PAGE = 2 OF 2

THE CONTRACTOR IN A PROMINENT AND EASILY ACCESSIBLE PLACE AT THE SITE OF THE WORK,

(4) THE STATE OR A POLITICAL SUBDIVISION SHALL WITHHOLD SO MUCH OF THE ACCRUED PAYMENTS AS IS NECESSARY TO PAY TO LABORERS, MECHANICS, OR FIELD SURVEYORS EMPLOYED BY THE CONTRACTOR OR SUBCONTRACTORS THE DIFFERENCE BETWEEN

(A) THE RATES OF WAGES REQUIRED BY THE CONTRACT TO BE PAID LABORERS, MECHANICS, OR FIELD SURVEYORS ON THE WORK, AND

(B) THE RATES OF WAGES IN FACT RECEIVED BY LABORERS, MECHANICS OR FIELD SURVEYORS.

HISTORY (SEC. 4 CH 52 SLA 1959, AM SECS. 7, 8, 17 CH 142 SLA 1972, AM SEC. 2 CH 89 SLA 1974)

END OF DOCUMENT

AS36.05.080 DOCUMENT= 9 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.080  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.080.

CATCH LINE

FAILURE TO PAY AGREED WAGES.

TEXT

EVERY CONTRACT WITHIN THE SCOPE OF AS 36.05.070 SHALL CONTAIN A PROVISION THAT IF IT IS FOUND THAT A LABORER, MECHANIC, OR FIELD SURVEYOR EMPLOYED BY THE CONTRACTOR OR SUBCONTRACTOR HAS BEEN OR IS BEING PAID A RATE OF WAGES LESS THAN THE RATE OF WAGES REQUIRED BY THE CONTRACT TO BE PAID, THE STATE OR ITS POLITICAL SUBDIVISION MAY, BY WRITTEN NOTICE TO THE CONTRACTOR, TERMINATE THE CONTRACTOR'S RIGHT TO PROCEED WITH THE WORK OR THE PART OF THE WORK FOR WHICH THERE IS A FAILURE TO PAY THE REQUIRED WAGES AND TO PROSECUTE THE WORK TO COMPLETION BY CONTRACT OR OTHERWISE, AND THE CONTRACTOR AND HIS SURETIES ARE LIABLE TO THE STATE OR ITS POLITICAL SUBDIVISION FOR EXCESS COSTS FOR COMPLETING THE WORK.

HISTORY (SEC. 2 CH 52 SLA 1959)

END OF DOCUMENT

AS36.05.090 DOCUMENT= 10 OF 13 PAGE = 1 OF 2  
CHAPTER = 36.05  
SECTION = 36.05.090  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.090.

CATCH LINE

PAYMENT OF WAGES FROM WITHHELD PAYMENTS AND LISTING CONTRACTORS WHO VIOLATE CONTRACTS.

TEXT

(A) THE STATE DISBURSING OFFICER IN THE CASE OF A STATE CONTRACT AND THE LOCAL FISCAL OFFICER IN THE CASE OF A POLITICAL SUBDIVISION CONTRACT SHALL PAY DIRECTLY TO LABORERS, MECHANICS OR FIELD SURVEYORS FROM ACCRUED PAYMENTS WITHHELD UNDER THE TERMS OF THE CONTRACT THE WAGES DUE LABORERS, MECHANICS OR FIELD SURVEYORS UNDER AS 36.05.070.

(B) THE STATE DISBURSING OFFICER OR THE LOCAL FISCAL OFFICER SHALL DISTRIBUTE TO ALL DEPARTMENTS OF THE STATE GOVERNMENT AND TO ALL POLITICAL SUBDIVISIONS OF THE STATE A LIST GIVING THE NAMES OF PERSONS WHO HAVE DISREGARDED THEIR OBLIGATIONS TO EMPLOYEES. NO PERSON APPEARING ON THIS LIST AND NO FIRM, CORPORATION, PARTNERSHIP OR ASSOCIATION IN WHICH THE PERSON HAS AN INTEREST MAY WORK AS A CONTRACTOR OR SUBCONTRACTOR ON A PUBLIC CONSTRUCTION CONTRACT FOR THE STATE OR A POLITICAL SUBDIVISION OF THE STATE UNTIL THREE YEARS AFTER THE DATE OF PUBLICATION OF THE LIST. IF THE ACCRUED PAYMENTS WITHHELD UNDER THE CONTRACT ARE INSUFFICIENT TO REIMBURSE ALL THE LABORERS, MECHANICS, OR FIELD

AS36.05.090 DOCUMENT= 10 OF 13 PAGE = 2 OF 2

SURVEYORS WITH RESPECT TO WHOM THERE HAS BEEN A FAILURE TO PAY THE WAGES REQUIRED UNDER AS 36.05.070, THE LABORERS, MECHANICS OR FIELD SURVEYORS HAVE THE RIGHT OF ACTION OR INTERVENTION OR BOTH AGAINST THE CONTRACTOR AND HIS SURETIES CONFERRED BY LAW UPON PERSONS FURNISHING LABOR OR MATERIALS, AND IN THE PROCEEDINGS IT IS NOT A DEFENSE THAT THE LABORERS, MECHANICS OR FIELD SURVEYORS ACCEPTED OR AGREED TO ACCEPT LESS THAN THE REQUIRED RATE OF WAGES OR VOLUNTARILY MADE REFUSES.

HISTORY (SEC. 3 CH 52 SLA 1959, AM SEC. 9 CH 142 SLA 1972)

END OF DOCUMENT

AS36.05.100 DOCUMENT= 11 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.100  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.100.

CATCH LINE

EFFECT OF AS 36.05.070 - 36.05.110 ON OTHER LAWS.

TEXT AS 36.05.070 - 36.05.110 DO NOT SUPERSEDE OR IMPAIR AUTHORITY  
GRANTED BY STATE LAW TO PROVIDE FOR THE ESTABLISHMENT OF SPECIFIC  
WAGE RATES.

HISTORY (SEC. 4 CH 52 SLA 1959; AM SEC. 10 CH 142 SLA 1972)

END OF DOCUMENT

AS36.05.110 DOCUMENT= 12 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.110  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.110.

CATCH LINE

CONTRACTS ENTERED INTO WITHOUT ADVERTISING.

TEXT THE FACT THAT A PUBLIC CONTRACT AUTHORIZED BY LAW IS ENTERED INTO  
UPON A COST-PLUS-A-FIXED-FEE BASIS OR OTHERWISE, WITHOUT  
ADVERTISING FOR PROPOSALS, DOES NOT MAKE AS 36.05.070 - 36.05.110  
INAPPLICABLE IF THEY ARE OTHERWISE APPLICABLE TO THE CONTRACT.

HISTORY (SEC. 5 CH 52 SLA 1959)

END OF DOCUMENT

AS36.05.120 DOCUMENT= 13 OF 13 PAGE = 1 OF 1  
CHAPTER = 36.05  
SECTION = 36.05.120  
TITLE = 36

HEADINGS TITLE 36.  
PUBLIC CONTRACTS.  
CHAPTER 05.  
WAGES AND HOURS OF LABOR.

CITATION SEC. 36.05.120.

CATCH LINE

REGULATIONS GOVERNING CONTRACTORS.

TEXT REPEALED BY SEC. 17 CH 142 SLA 1972.

AS3601 \* END OF DOCUMENTS IN LIST - ENTER RETURN OR ANOTHER COMMAND.

Donald R. Wilson  
March 1, 1983  
Page two

Please investigate the applicability of the Davis-Bacon Act to projects handled as described above and let me know of your conclusions so that I may inform the municipalities in my district.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Dick Eliason". The signature is written in dark ink and is positioned above the typed name.

Sen. Dick Eliason

# STATE OF ALASKA

Bill Sheffield, Governor

APR 19 1983

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

April 19, 1983

Hon. John C. Sackett  
Senate  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Re: Applicability of AS 36.-  
05.010 -- 36.05.110 to  
forced-accounting  
Our file no.: 366-554-83

Dear Senator Sackett:

This letter responds to your inquiry regarding whether the prevailing wage stipulations required under the Little Davis-Bacon Act, AS 36.05.010 -- 36.05.110, apply where a municipality or a Rural Education Attendance Area (REAA) use their own employees to perform work on a public works project. It is our view that municipalities or REAAs which use their own employees on a public works project, a practice commonly referred to as "forced-accounting," are not required to pay prevailing wages. Where state funds are involved, however, other statutory provisions may limit the instances when forced-accounting is appropriate.

The prevailing wage requirement is set forth in AS 36.-05.010, which provides in pertinent part:

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 rate of wages for work of a similar nature in the region in which the work is done.

The statute plainly applies only to contractor or subcontractors under contract for public works. Where the state or a political subdivision uses its own employees to perform public construction, the Little Davis-Bacon Act does not apply. 1978 Inf. Op. Att'y Gen. (Oct. 11; J66-195-79). See Annot. 18 A.L.R.-3d 944 (1968).

We have not discovered any case authority which imposes any limit on the authority of a public employer to force-account. We note, however, that courts which address the distinction drawn in a prevailing wage provision between public employees and those of a contractor justify the distinction due to the perceived benefits of public employment. The presumption, here, is that public employment is more permanent and offers an employee other economic advantages such as fringe benefits. See City of Monmouth v. Lorenz, 195 N.E.2d 661 (Ill. 1963) (inclusion of public employees in prevailing wage provision violated constitutional guarantee to equal protection). If, when a municipality or an REAA employs persons on a sporadic, project-by-project basis, the public employees do not obtain the advantages typically available through public employment, a court may conclude that forced-accounting cannot serve to circumvent prevailing wage requirements. See 1983 Inf. Op. Att'y Gen. (Mar. 11; 366-267-83) (Little Davis-Bacon Act applicable to certain designated grants). See also City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (Alaska 1982).

While a municipality or an REAA may construct a project through forced accounting without being subject to prevailing wage requirements, the more difficult inquiry is when forced-accounting is an available option. Where state funds are used, the general preference for the award of contracts through public bid is set forth in AS 35.15.010(a):

Except as provided in AS 36.98 and AS 44.33.-300, it shall be the general policy of the department to require the construction of all public works under bid contract. However, when the estimated cost of a construction project is less than \$100,000, or when it appears to be in the best interests of the state, the department may perform the work, notwithstanding any other provisions of law. A complete record shall be kept by the commissioner or the commissioner's designee of all transactions entered into under this section including names of employees involved in the transactions.

(Emphasis added.)

A municipality may request the assumption of "all or part of the [Department of Transportation and Public Facilities'] responsibilities relating to the planning, design and

construction of a public works project of the state that is to be located within the boundaries of the municipality and that would otherwise be construction in the manner provided by AS 35.15.-010." AS 35.15.080. Arguably among the assumed responsibilities is the responsibility to determine under AS 35.15.010 whether "it appears to be in the best interests of the state" for the department to perform the work, notwithstanding that the public work costs in excess of \$100,000. 1/

An REAA, in turn, may assume "the responsibilities relating to the planning, design and construction of a school or an education-related facility, located within the boundaries or operating areas of the...[REAA]." AS 14.11.020. 2/ Title 14, however, does not define the Department of Education's "responsibilities" which may be assumed by an REAA. 3/ Were the Department of Education to retain responsibility for the construction of a school project, the public bid requirements set forth in AS 35.15 would be applicable. Consequently, an REAA which assumes responsibility for a school project is subject to the preference for public bidding under AS 35.15.010.

---

1/ A countervailing argument is that only a state agency has the requisite breadth of perspective to make a determination of what is in the best interest of the state. For purposes of this opinion, we assume that the best interest determination is delegable. Moreover, it is a separate inquiry whether DOT/PF may by regulation limit the authority to force-account. See AS 35.15.080(f).

2/ Indeed, prior the adoption of ch. 92, SLA 1982, AS 35.15.080 also provided for the assumption of responsibility in a local public works project by both a municipality and an REAA. We note that other provisions in AS 35.15 which relate to an assumption by an REAA were not amended. In particular, we do not interpret AS 35.05.080(f) to impose an independent obligation for an REAA to pay prevailing wages to its own employees engaged in work on a public project.

3/ Presumably, an REAA also assumes the concomitant responsibility to determine whether forced-accounting would be in the public interest. See supra, note 2. We are advised that, as required by AS 14.11.020(d), the Department of Education is presently drafting regulations which relate to the assumption of departmental responsibilities.

We finally offer an observation regarding the flexibility of a municipality or an REAA to use its own employees on a public works project which costs in excess of \$100,000.

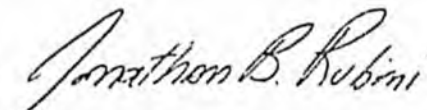
While a degree of deference would be due an administrative determination of when it is in the "public interest" to force-account rather than contract for services, we caution that an anticipated reduction in project costs may not, by itself, be a sufficient basis for that determination. The Alaska Supreme Court addressed an analogous claim in City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (Alaska 1982). Sitka had attempted to execute a timber sale contract separate from a dam construction contract subject to the Little Davis-Bacon wage stipulations. The separate timber sale contract allowed Sitka to maximize the value of the merchantable timber on the dam site. The court, however, rejected Sitka's attempt to enhance economic returns through the avoidance of contractual prevailing wage stipulations.

Sitka's position, in essence, invites the government to sever from a public construction bid offering any aspect of the endeavor which may have an unrelated profit incentive, such as the removal of a natural resource. Such a rule impermissibly enables a public agency to profit at the expense of workers engaged in activities instrumental to a public construction project.

644 P.2d at 233. The Sitka analysis suggests that a municipality or an REAA must articulate other considerations in support of a finding that force-accounting a particular project is in the best interests of the public.

We hope this responds to your concerns. Please feel free to contact us if you have any further questions on this matter.

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:   
Jonathan B. Rubini  
Assistant Attorney General

JBR:jb

# MEMORANDUM

# State of Alaska

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

DATE: May 24, 1982

FILE NO: A66-453-82

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....

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

-6-

May 24, 1982

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

# MEMORANDUM

TO: Dale Cheek, Director  
Wage & Hour Division  
Department of Labor

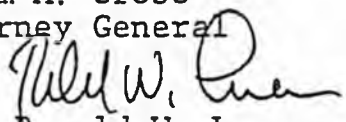
DATE: October 11, 1978

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross  
Attorney General

SUBJECT: Performance of Public  
Construction Projects by  
Municipalities; A.G. File  
No. J-66-195-79

By:   
Ronald W. Lorensen  
Assistant Attorney General

This is in response to your recent request for our advice as to whether municipal governments may properly carry out their public construction projects by using their own employees under a "force-account" system which utilizes private contractors, if at all, solely to provide overall "hands-in-pocket" management and supervision of the project. Also, if municipalities may perform their own public construction in this manner, you wonder whether they are subject to the provisions of AS 36.05, relating to the payment of prevailing wages on public construction contracts.

As we understand the situation about which you are inquiring, at least one organized borough in the state does not carry out its public construction projects by hiring private construction contractors to perform all phases of the work and complete the project. Instead, it hires private contractors to perform only the management and supervisory functions necessary to accomplish the project for the borough, but requires that the contractor utilize borough employees to actually do the construction work. We see no legal impediment to a borough doing all or any portion of its public construction projects on its own in this manner.

As to whether AS 36.05 applies to a borough which accomplishes its public construction projects by use of its own employees under a "force account" system, we think the answer is clearly that it does not. AS 36.05.010, which establishes the scope of the requirement of payment of prevailing wages under AS 36.05, speaks only in terms of the duty of "contractors" and "sub-contractors" who perform work on public construction in the state. It does not state that political subdivisions performing such work must pay prevailing wages. Nor does it state that all employees working on public construction projects are entitled to be paid in accordance with prevailing wages. Thus, while it appears that AS 36.05 would apply to a municipality's contractor for management services on a public construction project, it does not apply to the municipality in carrying out such projects with its own employees.

RWL:lw

Bill Sheffield, Governor

**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.

Honorable Albert P. Adams  
Representative  
366-267-83

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Page 2

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.

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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.

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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. <sup>3/</sup> 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.

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<sup>3/</sup> 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-

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Honorable Albert P. Adams  
Representative  
366-267-83

March 11, 1983  
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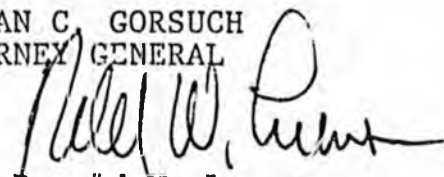
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If you have any further questions regarding the scope of Little Davis-Bacon, please let us know.

Sincerely,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:

  
Ronald W. Lorensen  
Deputy Attorney General

RWL:vrh

cc: Jim Robison  
Commissioner  
Department of Labor

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STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

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Representative  
Alaska State Legislature  
Pouch V  
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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-

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Honorable Albert P. Adams  
Representative  
366-267-83

March 11, 1983  
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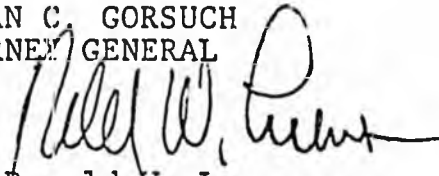
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If you have any further questions regarding the scope of Little Davis-Bacon, please let us know.

Sincerely,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:

  
Ronald W. Lorensen  
Deputy Attorney General

RWL:vrp

cc: Jim Robison  
Commissioner  
Department of Labor

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## MEMORANDUM

State of Alaska

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

DATE: May 24, 1982  
FILE NO: A66-453-82  
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....

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

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. Lorenson, 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

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

-6-

May 24, 1982

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

# MEMORANDUM

TO: Dale Cheek, Director  
Wage & Hour Division  
Department of Labor

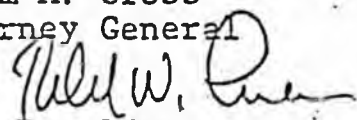
DATE: October 11, 1978

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross  
Attorney General

SUBJECT: Performance of Public  
Construction Projects by  
Municipalities; A.G. File  
No. J-66-195-79

By:   
Ronald W. Lorensen  
Assistant Attorney General

This is in response to your recent request for our advice as to whether municipal governments may properly carry out their public construction projects by using their own employees under a "force-account" system which utilizes private contractors, if at all, solely to provide overall "hands-in-pocket" management and supervision of the project. Also, if municipalities may perform their own public construction in this manner, you wonder whether they are subject to the provisions of AS 36.05, relating to the payment of prevailing wages on public construction contracts.

As we understand the situation about which you are inquiring, at least one organized borough in the state does not carry out its public construction projects by hiring private construction contractors to perform all phases of the work and complete the project. Instead, it hires private contractors to perform only the management and supervisory functions necessary to accomplish the project for the borough, but requires that the contractor utilize borough employees to actually do the construction work. We see no legal impediment to a borough doing all or any portion of its public construction projects on its own in this manner.

As to whether AS 36.05 applies to a borough which accomplishes its public construction projects by use of its own employees under a "force account" system, we think the answer is clearly that it does not. AS 36.05.010, which establishes the scope of the requirement of payment of prevailing wages under AS 36.05, speaks only in terms of the duty of "contractors" and "sub-contractors" who perform work on public construction in the state. It does not state that political subdivisions performing such work must pay prevailing wages. Nor does it state that all employees working on public construction projects are entitled to be paid in accordance with prevailing wages. Thus, while it appears that AS 36.05 would apply to a municipality's contractor for management services on a public construction project, it does not apply to the municipality in carrying out such projects with its own employees.

15c14 "Force account" construction work. In some instances a Government agency (or a State or political subdivision thereof or a private firm or individual using Federal money) may perform construction work under what is generally known as "force account". In essence, this is a "do-it-yourself" type of construction - the agency or grant recipient decides not to contract out the work but actually performs it "in-house" with its own employees. Such work is not subject to DBRA/CWHSSA, except under the Public Works Employment Act of 1977 and the U.S. Housing Act of 1937 and the Housing Act of 1949. (See FOH 15e23.) This is true even though - in the case of loans or grants - the lender or grantor may provide as a condition that the construction be performed in accord with DBRA/CWHSSA stipulations and pay requirements. However, that part of the work not done under "force account" but contracted out is subject to DBRA/CWHSSA in the usual manner. (See FOH 15c19.)

15c15 Owner-operators of trucks and other hauling equipment.

(a) As a matter of administrative policy, the provisions of DBRA/CWHSSA have not been applied to bona fide owner-operators of trucks and other hauling equipment on construction projects. For purposes of these Acts, the certified payrolls including the names of such owner-operators need not show hours worked nor rates allegedly paid, but only the notation "Owner-operator". This position does not pertain to owner-operators of other equipment such as bulldozers, scrapers, backhoes, cranes, drilling rigs, welding machines, and the like.

15c16 Supply and installation contracts. Installation work is covered by the DB Act where it involves more than an incidental amount of construction activity. For example, DB coverage has been extended to installing a security system or an intrusion detection system, installing permanent shelving which is attached to the structure, installing air-conditioning ducts, excavating outside cable trenches and laying cable, installing heavy generators, mounting radar antenna, and installing instrumentation grounding systems. However, where mixed or combination supply and installation contracts are involved, the DB Act may apply to a portion of the contract, depending upon whether more than an incidental amount of construction work is involved.

# MEMORANDUM

TO: Dale Cheek, Director  
Wage & Hour Division  
Department of Labor

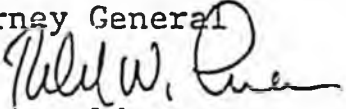
DATE: October 11, 1978

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross  
Attorney General

SUBJECT: Performance of Public  
Construction Projects by  
Municipalities; A.G. File  
No. J-66-195-79

By:   
Ronald W. Lorensen  
Assistant Attorney General

This is in response to your recent request for our advice as to whether municipal governments may properly carry out their public construction projects by using their own employees under a "force-account" system which utilizes private contractors, if at all, solely to provide overall "hands-in-pocket" management and supervision of the project. Also, if municipalities may perform their own public construction in this manner, you wonder whether they are subject to the provisions of AS 36.05, relating to the payment of prevailing wages on public construction contracts.

As we understand the situation about which you are inquiring, at least one organized borough in the state does not carry out its public construction projects by hiring private construction contractors to perform all phases of the work and complete the project. Instead, it hires private contractors to perform only the management and supervisory functions necessary to accomplish the project for the borough, but requires that the contractor utilize borough employees to actually do the construction work. We see no legal impediment to a borough doing all or any portion of its public construction projects on its own in this manner.

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SB 172 TITLE & SPONSOR SUMMARY

14:15 5/22/84 PAGE 1 OF 2

AMENDED TITLE: SSSB 172

AN ACT RELATING TO WAGE RATES ON PUBLIC CONSTRUCTION

PRIME SPONSOR: SACKETT.

CO-SPONSORS:

CURRENT STATUS: 4/22/83 IN (S) LABOR & COM REFERRAL: FINANCE

SB 172 SENATE ACTION 14:15 5/22/84 PAGE 2 OF 2

DATE	SEQ	PAGE	LEGISLATIVE ACTION
04/22/83	01	0784	FIRST READING -- COMMITTEE REPORTS LABOR & COMMERCE FINANCE RULES
***	**	**	*** ** *

# STATE OF ALASKA

Bill Sheffield, Governor

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

APR 19 1983

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

April 19, 1983

Hon. John C. Sackett  
Senate  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Re: Applicability of AS 36.-  
05.010 -- 36.05.110 to  
forced-accounting  
Our file no.: 366-554-83

Dear Senator Sackett:

This letter responds to your inquiry regarding whether the prevailing wage stipulations required under the Little Davis-Bacon Act, AS 36.05.010 -- 36.05.110, apply where a municipality or a Rural Education Attendance Area (REAA) use their own employees to perform work on a public works project. It is our view that municipalities or REAAs which use their own employees on a public works project, a practice commonly referred to as "forced-accounting," are not required to pay prevailing wages. Where state funds are involved, however, other statutory provisions may limit the instances when forced-accounting is appropriate.

The prevailing wage requirement is set forth in AS 36.-05.010, which provides in pertinent part:

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 rate of wages for work of a similar nature in the region in which the work is done.

The statute plainly applies only to contractor or subcontractors under contract for public works. Where the state or a political subdivision uses its own employees to perform public construction, the Little Davis-Bacon Act does not apply. 1978 Inf. Op. Atty Gen. (Oct. 11; J66-195-79). See Annot. 18 A.L.R. 3d 944 (1968).

We have not discovered any case authority which imposes any limit on the authority of a public employer to force-account. We note, however, that courts which address the distinction drawn in a prevailing wage provision between public employees and those of a contractor justify the distinction due to the perceived benefits of public employment. The presumption, here, is that public employment is more permanent and offers an employee other economic advantages such as fringe benefits. See City of Monmouth v. Lorenz, 195 N.E.2d 661 (Ill. 1963) (inclusion of public employees in prevailing wage provision violated constitutional guarantee to equal protection). If, when a municipality or an REAA employs persons on a sporadic, project-by-project basis, the public employees do not obtain the advantages typically available through public employment, a court may conclude that forced-accounting cannot serve to circumvent prevailing wage requirements. See 1983 Inf. Op. Att'y Gen. (Mar. 11; 366-267-83) (Little Davis-Bacon Act applicable to certain designated grants). See also City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (Alaska 1982).

While a municipality or an REAA may construct a project through forced accounting without being subject to prevailing wage requirements, the more difficult inquiry is when forced-accounting is an available option. Where state funds are used, the general preference for the award of contracts through public bid is set forth in AS 35.15.010(a):

Except as provided in AS 36.98 and AS 44.33.-300, it shall be the general policy of the department to require the construction of all public works under bid contract. However, when the estimated cost of a construction project is less than \$100,000, or when it appears to be in the best interests of the state, the department may perform the work, notwithstanding any other provisions of law. A complete record shall be kept by the commissioner or the commissioner's designee of all transactions entered into under this section including names of employees involved in the transactions.

(Emphasis added.)

A municipality may request the assumption of "all or part of the [Department of Transportation and Public Facilities'] responsibilities relating to the planning, design and

construction of a public works project of the state that is to be located within the boundaries of the municipality and that would otherwise be construction in the manner provided by AS 35.15.-010." AS 35.15.080. Arguably among the assumed responsibilities is the responsibility to determine under AS 35.15.010 whether "it appears to be in the best interests of the state" for the department to perform the work, notwithstanding that the public work costs in excess of \$100,000. 1/

An REAA, in turn, may assume "the responsibilities relating to the planning, design and construction of a school or an education-related facility, located within the boundaries or operating areas of the...[REAA]." AS 14.11.020. 2/ Title 14, however, does not define the Department of Education's "responsibilities" which may be assumed by an REAA. 3/ Were the Department of Education to retain responsibility for the construction of a school project, the public bid requirements set forth in AS 35.15 would be applicable. Consequently, an REAA which assumes responsibility for a school project is subject to the preference for public bidding under AS 35.15.010.

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1/ A countervailing argument is that only a state agency has the requisite breadth of perspective to make a determination of what is in the best interest of the state. For purposes of this opinion, we assume that the best interest determination is delegable. Moreover, it is a separate inquiry whether DOT/PF may by regulation limit the authority to force-account. See AS 35.15.080(f).

2/ Indeed, prior the adoption of ch. 92, SLA 1982, AS 35.15.080 also provided for the assumption of responsibility in a local public works project by both a municipality and an REAA. We note that other provisions in AS 35.15 which relate to an assumption by an REAA were not amended. In particular, we do not interpret AS 35.05.080(f) to impose an independent obligation for an REAA to pay prevailing wages to its own employees engaged in work on a public project.

3/ Presumably, an REAA also assumes the concomitant responsibility to determine whether forced-accounting would be in the public interest. See supra, note 2. We are advised that, as required by AS 14.11.020(d), the Department of Education is presently drafting regulations which relate to the assumption of departmental responsibilities.

We finally offer an observation regarding the flexibility of a municipality or an REAA to use its own employees on a public works project which costs in excess of \$100,000.

While a degree of deference would be due an administrative determination of when it is in the "public interest" to force-account rather than contract for services, we caution that an anticipated reduction in project costs may not, by itself, be a sufficient basis for that determination. The Alaska Supreme Court addressed an analogous claim in City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (Alaska 1982). Sitka had attempted to execute a timber sale contract separate from a dam construction contract subject to the Little Davis-Bacon wage stipulations. The separate timber sale contract allowed Sitka to maximize the value of the merchantable timber on the dam site. The court, however, rejected Sitka's attempt to enhance economic returns through the avoidance of contractual prevailing wage stipulations.

Sitka's position, in essence, invites the government to sever from a public construction bid offering any aspect of the endeavor which may have an unrelated profit incentive, such as the removal of a natural resource. Such a rule impermissibly enables a public agency to profit at the expense of workers engaged in activities instrumental to a public construction project.

644 P.2d at 233. The Sitka analysis suggests that a municipality or an REAA must articulate other considerations in support of a finding that force-accounting a particular project is in the best interests of the public.

We hope this responds to your concerns. Please feel free to contact us if you have any further questions on this matter.

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:

*Jonathan B. Rubini*  
Jonathan B. Rubini  
Assistant Attorney General

JBR:jb

STATE OF ALASKA

Bill Sheffield, Governor

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.

Honorable Albert P. Adams  
Representative  
366-267-83

March 11, 1983  
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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.

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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.

Honorable Albert P. Adams  
Representative  
366-267-83

March 11, 1983  
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"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.

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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.

Honorable Albert P. Adams  
Representative  
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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. <sup>3/</sup> 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.

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<sup>3/</sup> 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 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-

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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.

Honorable Albert P. Adams  
Representative  
366-267-83

March 11, 1983  
Page 6

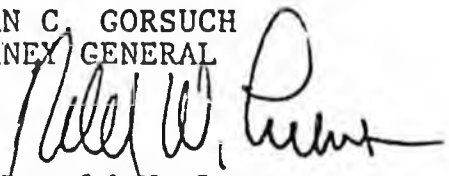
structed by government. However, there will undoubtedly remain a "gray area" of projects which cannot be readily characterized as either governmental or non-governmental like health care facilities and power generation and distribution facilities. These kinds of projects are sometimes provided by government, 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. <sup>5/</sup> 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:vrh

cc: Jim Robison  
Commissioner  
Department of Labor

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<sup>5/</sup> 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.

# Officials: Repeal may cut costs, but threatens jobs

By DEBBIE REINWAND ROSE  
Empire Staff Reporter

Getting more buildings for the buck is the aim of a bill introduced by Sen. John Sackett, R-Ruby, but that bill could end up taking jobs away from Alaska workers, union officials claim.

The bill would repeal the Davis-Bacon Act in Alaska, a 1931 federal act which states may or may not enact. The goal of the act, which was passed during the Depression, was to protect local laborers from contractors who were able to submit low bids by using transient, low-paid workers.

The act now "seems to inflate capital construction costs," Sackett said.

One provision of the bill which Sackett takes issue with is the 30-percent rule, which provides that workers in a given job classification receive the same wage and benefits.

Under the 30-percent rule, the prevailing wage is based on the average salary of 30 percent of the workers. For example, if one painter made \$8.74 per hour, two more made \$6.25, another made \$9, and three more received \$12.40 an hour, the three highest-paid painters "made up more than 30 percent of the total, so \$12.40

became the prevailing wage," Sackett's statement said.

In a prepared release, Sackett said the rule "actually increases construction costs."

Alaska has never used the 30-percent rule, but a "standard average," said Labor Standards Deputy Director Don Wilson.

Since last year, the prevailing construction wage has been based on a 51-percent rule, which is based on the average salaries of a majority of the workers, Wilson said.

"If we are not able to find 51 percent of the workers at a given rate, then we use an

arithmetic mean, by taking all the wages, throwing out the top five percent and the low five percent, adding up the remainder and dividing it to come up with the prevailing wage," he said.

This is a routine procedure, and has been adopted by the federal government, said Wilson.

Sackett, co-chairman of the Senate finance panel, claims the Davis-Bacon Act increases wages on construction projects, particularly in areas which do not use much union labor.

"Paying realistic local wages would not only reduce the costs of a project, but

would increase the amount of funds available for other necessary capital projects," he said.

However, Jim Wakefield, assistant business manager of Laborers Local 942, said repeal would take jobs away from Alaska contractors, and has proven not to reduce costs significantly.

"This would be a terrible travesty to the working man in the state. With the repeal of Davis-Bacon, you'll have contractors from down south bidding low on jobs in Alaska, and bringing their whole crew up here at \$4 and \$5 an hour each," he said.

"While the state may be able to get

cheaper labor, the quality of the buildings won't be the same at that rate. There won't be any requirement to pay the workers anything other than minimum wage," Wakefield said.

In most areas of Alaska, the prevailing wage is the same as union scale, which is agreed to by the Associated General Contractors. "This is something that is worked out between management and the union. Management has to make money, too, so you won't see them cheating themselves," he said.

Wakefield refutes any claims that construction workers are overpaid.

It has been proven that repeal of the Davis-Bacon Act does not produce lower costs, Wakefield said. In 1971, then-President Richard Nixon suspended the act. He hopes it would cause a major construction price reduction.

"In reality, there was no such reduction. The overall decrease was .6 of 1 percent."

*So. Eliason*

"HISTORICAL OVERVIEW OF THE DAVIS-BACON AND RELATED ACTS"

The Davis-Bacon Act is one of the oldest American labor laws and was the first federal law enacted to regulate the wages of non-government workers. Like most early federal labor laws, the Act was preceded by various state statutes. Kansas, for example, had enacted the first prevailing wage law for state construction projects in 1898. Federal congressional hearings were held as early as 1898 although legislation did not result until 1931. Today, all but 10 states have enacted prevailing wage laws governing state construction projects.

The principal impetus for government regulation of wages for workers employed on public construction projects was the economic and social conditions of the 1930's. During the Depression, the national conscience was aroused by the effect of widespread unemployment on the wages of workers. While the competition for limited markets forced employers to cut labor costs, the scarcity of work created an oversupply of labor that resulted in low wage rates. The absence of job opportunities further increased public reliance upon federal construction as a source of employment at a time when the federal government was required to award its contracts to the lowest bidder. This requirement prevented federal contracting agencies from dictating that successful bidders pay their employees wages comparable to those paid for similar labor in private industry in the same area as the government projects under construction. Some successful bidders took advantage of this situation by "selfishly import[ing] labor from distant localities and...exploit[ing] this labor at wages far below local wage rates." Local workmen were unable to compete with migratory laborers, and qualified local contractors found it impossible to compete with outside contractors who based their estimates for labor costs upon the low wages paid to imported laborers.

The Davis-Bacon Act, enacted on March 3, 1931, was designed to curtail such unscrupulous practices among government contractors during a decade in which public works were on an upswing and economists and politicians were particularly wary of depressed labor markets. The Act was also designed to prohibit wage differentials from becoming a major competitive advantage in bidding on government construction contracts, thereby insuring that the economic power of government as an employer would not contribute to a further depression of local markets. To accomplish these goals, the federal Act required government contractors to pay their "laborers and mechanics" the prevailing private industry wage rates.

The compulsory nature of the Act's prevailing wage rate provision was emphasized throughout the 1931 congressional debates in Davis-Bacon Legislation. Because the Act mandated that under all covered contracts the contractor pay the prevailing wage rate, the only variable was the exact rate to be paid. In the event of a dispute concerning the applicable wage rate, the government contracting officer was to attempt to adjust the rate in accordance with the character of the work performed and the locality in which it was performed. If the contracting officer could not resolve the dispute, the matter was then to be referred to the Secretary of Labor for a conclusive determination.

In the 50 years since the enactment of the federal Davis-Bacon Act, a series of executive orders and congressional amendments have generally broadened its scope and strengthened its impact. Additionally, more than 80 other federal laws relating to prevailing wages have been passed during this period, covering a wide range of federal projects and activities. The amendments to the Davis-Bacon Act as well as the variety of federal legislation requiring prevailing wages to be paid serve to indicate the continuing concern of Congress to preserve prevailing wage standards for government contract work.

In Alaska, legislation requiring the payment of prevailing wages on public construction work has also been in effect since 1931. The original Alaska prevailing wage laws were passed by the territorial legislature on an emergency basis, presumably in direct response to the passage of the federal Davis-Bacon Act by the U.S. Congress two months earlier. The Alaska version was introduced as Senate Bill 69 by Senator Lomen of Nome and was swiftly enacted into law effective April 29, 1931 (SLA 1931, ch. 69). Unfortunately there appears to be no written record on any legislative debate or committee hearings on the proposed Alaska legislation. The prevailing wage provisions were later included in the 1933 and 1949 compilations of Alaska law and, upon statehood, were carried over into state law and are now codified at AS 36.05.010-.110. In the years since the enactment of the original prevailing wage laws in Alaska there have been periodic amendments which further define the scope of the Little Davis-Bacon Act and establish enforcement procedures, largely in response to similar changes in federal law.

In addition to the legislative history, both federal and Alaska courts have had occasion to interpret the basic purposes and policies underlying prevailing wage legislation. In a leading federal case, the U.S. Supreme Court recognized the important wage protection purpose of the Davis-Bacon Act: "The language of the 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." U.S. v. Binghamton Construction Co., 347 U.S. 171, 177 (1953). The Alaska Supreme Court has quoted this language in at least two separate cases involving Alaska's Little Davis-Bacon Act, noting that the Alaska statutory scheme is closely patterned after the federal Act. City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227, 231-33 (Alaska 1982); Fowler v. City of Anchorage, 583 P.2d 817, 821-22 (Alaska 1978). In reviewing the policies underlying the Little Davis-Bacon Act, the Alaska Supreme Court has further stated: "The fundamental purpose of Little Davis-Bacon is to assure that employees engaged in public construction receive at least the prevailing wage. The focus of the Act, quite clearly, is to the benefit of the employees, not the contracting principals." City and Borough of Sitka, supra, at 232. From these judicial statements, it is apparent that both the federal and state prevailing wage laws have as their primary objective the protection of local workers on government projects by establishing a required minimum wage in accordance with that prevailing in the area where the work is done. Both the legislative history and judicial interpretation of prevailing wage legislation strongly suggest that this primary objective is as fundamental and vital today as it was in 1931 when the legislation was first enacted.

MEMORANDUM

April 6, 1983

SUBJECT: Little Davis-Bacon Act  
(Work Order No. 13-1187)

TO: Senator John C. Sackett

FROM: Thomas A. Sofo *TAS*  
Legislative Counsel

I just received a response from Bill Walker of the National Council of State Legislatures. There are 37 states have a version of the Little Davis-Bacon Act presently on their books. The 13 states which do not have a Little Davis-Bacon Act are Alabama, Arizona, Florida, Georgia, Iowa, Mississippi, North Carolina, North Dakota, South Carolina, South Dakota, Utah, Vermont, and Virginia. Of those 13 states Arizona and Florida repealed their statutes in 1980 and 1979 respectively, while Utah repealed their Little Davis-Bacon Act in 1981. Of potential interest to you is the fact that the legislature's of both Colorado and Idaho repealed their respective Little Davis-Bacon Acts in 1981 but in both instances the repeal was vetoed by the governor and the legislature in each instance was unable to override the governor's veto.

Let me know if I can be of any further assistance to you on this project.

TAS:ljb



ALASKA

# NUSHAGAK ELECTRIC CO-OPERATIVE, INC.

P. O. BOX 197 . DILLINGHAM, ALASKA 99576 . AREA CODE (907) 842-5251

March 24, 1983

Senator Bob Mulcahy  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Re: SB 172 by Sackett

Dear Senator Mulcahy:

We urgently recommend this bill to your favorable attention because it is a vehicle for correcting deficiencies in AS 36.05.

As this statute presently exists, all wage rates on public construction projects funded by grants administered by Community and Regional Affairs (and possibly other state agencies) to municipalities, public non-profit corporations and other community interest groups are mandated by a Department of Labor scale titled "Laborers & Mechanics Minimum Rates of Pay" dated 10/15/82. Not all communities are geared up to or financed well enough to pay these wages and they seriously distort other wage and salary plans existing in the different areas including the fueling of unnecessary inflation.

For example, a lineman in Dillingham would have to be paid a basic hourly rate of \$25.15 per hour and a cable splicer rate would be \$26.90 per hour. These rates represent an approximate 25% increase over Nushagak Electric's prevailing wage rates which are among the highest in Dillingham. Our perception of existing AS 36.05 is that these rates are probably geared to large contractors' benefit and promoted by the unions in the rail belt who are eager to see their constituents get the construction jobs in the rural as well as the urban centers of the state.

As you are no doubt well aware, the rural economy does not enjoy the stability that is generally prevalent in the railbelt or South eastern areas of the state and we must compensate for this fact of life by doing things ourselves to realize efficiencies not always found elsewhere.

In 1982, the legislature approved a grant of \$539,000 to Nushagak Electric which was to be administered by Community and Regional Affairs to extend a waste heat supply system to the high school, court house, Southwest Regional School District and to State Shop facilities. The mandated wage rates make it very difficult to perform the project in an efficient manner because these rates are significantly higher than local rates and the project cost was based on local wage rate levels. Therefore, the

scope of the project will have to be reduced if NEC is forced to adopt wage rates mandated by the Department of Labor. This concept appears to be a very poor allocation of resources.

We would recommend that SB 172 as written be slightly amended to read as follows:

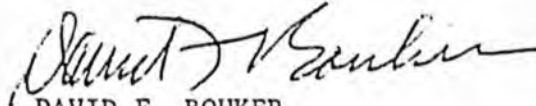
SEC. 36.05.130 APPLICABILITY OF CHAPTER  
This chapter does not apply to public construction under contract to a municipality having a population of 5,000 or less or to a public non-profit corporation or to a public utility as defined in AS 42.05 operating in a community of 5,000 or less and this section is to be effective for all contracts executed after 1/1/83.

Since Nushagak Electric Co-operative, Inc. has not signed the contract with Community and Regional Affairs as of this writing, I included the effective date of 1/1/83 in my suggested change of SEC. 36.05.130 above in order to be covered under any possible change in this law.

We would appreciate your attention to this matter because we feel that the concept of a high standardized state wage rate mandated by law is not in the best interest of especially the rural communities that have generally made a practice of maximizing their resources in the most efficient manner possible.

Thank you.

Yours very truly,

  
DAVID F. BOUKER  
Manager

DFB:ka

AMENDMENTS TO "LITTLE BACON-DAVIS ACT"

WHEREAS Title 36 of the Alaska Statutes known as the "Little Davis-Bacon Act" is intended to assure that workers receive fair compensation on construction projects by state and local governments and to avoid undercutting of local wages by importing outside workers; and

WHEREAS the prevailing wage for local workers varies substantially throughout the state; and

WHEREAS the present laws actually encourage importing construction firms and labor from the large populations centers of the state and may artificially inflate the costs of construction for local governments beyond actual prevailing costs, which exacerbates local unemployment problems; and

WHEREAS local public construction is primarily a function of local government and administration and policy should be established at a local level to the greatest extent possible;

NOW THEREFORE BE IT RESOLVED that the Alaska Municipal League urges amendments to Title 36 consistent with the premises stated above as follows:

1. To provide for local government control in establishing prevailing wages, based on local needs and conditions.
2. To clarify the definition of public construction and, in particular, that public construction does not include projects of non-profit corporations funded by pass-through grants or projects for maintenance, repair, or minor construction.

Adopted at the 32nd Annual Local Government Conference of the Alaska Municipal League on November 13, 1982.

# Nulato City Council

Nulato, Alaska 99765  
Phone: (907) 898-8001

April 26, 1983

Senator John Sackett  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

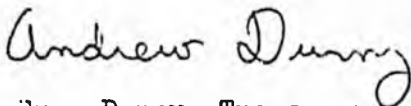
Dear Senator:

This is to let you know that we support Legislation (SSSB 172), to repeal the Little Davis-Bacon Act in Alaska (SSSB 172).

Almost all capitol projects of the City of Nulato are funded directly or indirectly by the State. Declining state revenue and increasing difficulty of acquiring state funding make it more important to stretch each available dollar as far as it will go. In attempting to achieve this goal of effective and efficient use of state funding, the City of Nulato finds the Little Davis-Bacon Act not only counter-productive but harmful as well, since it would reduce cost-efficiency on capitol projects and create an inflated wage scale on other programs as well. The City of Nulato feels that it would be almost impossible to provide capitol improvements as well as other municipal programs if union-level wages are mandatory. Projects such as water and sewer system, road improvements and public facilities could be threatened. In effect, necessary projects and programs that would benefit all citizens of Nulato could be threatened by an attempt to benefit a limited number of employees.

We feel that the Little Davis-Bacon Act does not allow for efficient use of available funds (not just for the City of Nulato but for all recipients of State funds). We feel that if the Little Davis-Bacon Act is repealed, we could provide a much more efficient use of available State funds, while still paying a fair wage to employees. The more efficiently and effectively we can spend available State funds, the more will be left available for future spending; at the same time, if funds can be effectively spent, the need for additional funds may actually decline. For these reasons, we ask for your support in repealing the Little Davis-Bacon Act in Alaska.

Thank you,



Andrew Durny, Treasurer  
City of Nulato

STATEMENT OF ALASKA NATIVE BROTHERHOOD, ROBERT WILLARD, EXECUTIVE VICE PRESIDENT, RE: TITLE 36 - ALASKA STATUTES.

The Alaska Legislature has before it Senate Bill No. 172 and House Bill No. 378, "An Act relating to wage rates on public construction," or the so-called "Little Davis-Bacon Act."

The Alaska Native Brotherhood is the recipient of a State appropriation in the amount of one million dollars (\$1 Million) to construct a Juneau Pilot Project - Community Building. Upon notification that the Governor would sign the appropriation measure into law, the ANB immediately proceeded with development planning. In this process encounter came to Title 36 of the Alaska Statutes namely the Little Davis-Bacon Act. (hereinafter Davis-Bacon).

If the ANB Project were to fall under the interpolation and application of Davis-Bacon, it goes without question that the costs would increase by 25 - 30%. A value engineering report by qualified consultants have confirmed this reality.

In our opinion, and that of our consultants, if strict application of Davis-Bacon had been applied, this project would not have been feasible, because of the escalated costs.

It should be made clear that the Alaska Native Brotherhood, or its affiliates, is not opposed to unions -- or organized labor. There are some union or contractor practices which we are not in total agreement, but in the overall sense, the ANB is not necessarily averse to unions.

Upon reflection of the ANB project, and that of some projects which have been administered by the Tlingit and Haida Regional Housing Authority over the past ten years, it can be shown that full application of the Little Davis-Bacon Act resulted in increased construction costs

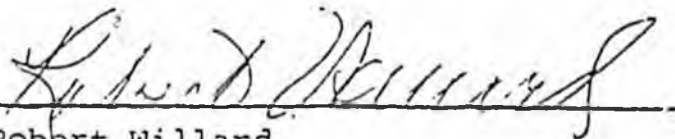
and created artificial costs of labor, thus decreasing the number of housing units that could have been built. Tlingit and Haida administrators estimate that by virtue of full application of the Davis-Bacon Act 23 - 27% more housing units could have been built. That equivalates to approximately one hundred and fifty (150) more families that could have had homes. The imposition of Davis-Bacon interpolated and applied to the rural areas have resulted in the creation of artificial costs of labor.

It is not the intent of the ANB to move towards the minimum wage. It is our concern that the "prevailing wage" as set by the Department of Labor in the populated areas and, as applied to the adjacent rural proximity of that urban center may not be reflective of the fair market value of labor and skilled services in the broad spectrum of enterprise in Alaska.

Moreover, this reality may be influenced by special interest groups such as unions and/or organized general contractors, and artificial influences such as labor-related requirements imposed by this legislation.

The Alaska Native Brotherhood, and its affiliates, urge passage of Senate Bill 172 and House Bill 378 thereby repealing Alaska Statutes 36.05.

Signed:



Robert Willard  
Executive Vice President  
Alaska Native Brotherhood  
318 W. Willoughby Avenue  
Juneau, Alaska 99801

BUS: (907) 586-2049  
586-3301

# TELEGRAM

PHONE: 855-112  
#TUNRAC. 117 098175

1983 APR 28 PM 12 50

82329 IDA MOUNTAIN VILLAGE ALASKA 76 04-28 101WA ADT

PMS SEN JOHN SACKETT

POUCH V

**2044**

APR 29 1983

JUNEAU AK 99811

DEAR SENATOR SACKETT,

I STRONGLY SUPPORT YOUR SPONSORSHIP OF SBITO, WHICH WOULD, IF SUCCESSFUL, REPEAL THE "LITTLE DAVIS/DACON" ACT IN ALASKA. AS A NEED FOR STATE OF ALASKA FUNDING FOR THE CITY OF MOUNTAIN VILLAGE CAPITOL PROJECTS CONTINUE TO INCREASE FROM YEAR TO YEAR, I SEE CLEARLY THE NEED TO REDUCE LABOR COSTS. AS LABOR COSTS ARE CUT I FORESEE THE INCREASE IN THE FUNDING OF OTHER PROJECTS. SINCERELY,

ED BEANS COUNCIL MEMBER

CITY COUNCIL OF MOUNTAIN VILLAGE



APR 28 1983

THE CITY OF HAINES, ALASKA  
P.O. BOX 576  
HAINES, ALASKA 99827  
(907) 766-2231

In Reply  
Refer To: April 26, 1983

Senator John C. Sackett  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: SSSB 172

Dear Senator Sackett:

On behalf of the City of Haines, I would like to offer our support of your sponsored bill repealing the little Davis-Bacon Act in Alaska. In concurrence with your views we feel this Act has resulted in inflated construction costs at far greater consequences to smaller, rural cities than to the large metropolitan areas.

Sincerely,

A handwritten signature in cursive script that reads "Darrell Maple".

Darrell Maple  
City Administrator  
CITY OF HAINES

DM/ktg  
cc: Governor Sheffield  
Senator Eliason  
Representative Goll

APR 27 1983

MANLEY HOT SPRINGS COMMUNITY ASSOCIATION

MANLEY HOT SPRINGS, ALASKA 99756

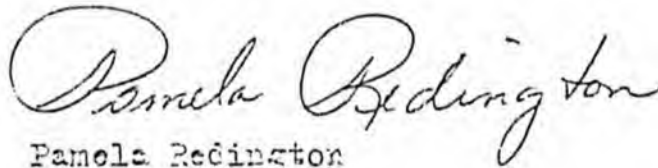
April 24, 1983

Hon. John Sackett  
Pouch V  
Jenaru, Alaska 99811

Dear Sen. Sackett

The Manley Hot Springs Community Association Board voted to write you in regard to Title 36, Davis-Bacon wage requirements which creates a hardship for our state funded community projects. Not only does this regulation upset our local economy, it also makes it difficult to complete local projects within budgetary limitations. We recently became aware of requirements when signing our SB 168# contracts. There was no knowledge of the Title 36 requirements when we first wrote our project proposals and budgets. Your consideration and assistance in this matter this session will be greatly appreciated.

Respectly



Pamela Redington  
Secretary

# The Outdated Law That's Costing Taxpayers Billions

Most people have never heard of it, but it is one of the most insidious sources of inflation in America

By IRWIN ROSS

INITIALLY, the contractor had figured the cost of a residential high-rise in Gaithersburg, Md., to be \$4,694,452. But then the developer asked the Department of Housing and Urban Development to subsidize the project. Result: an extraordinary escalation of labor costs.

With federal money involved, the contractor was required, under provisions of the Davis-Bacon Act—a law passed in 1931—to pay his work force the prevailing wages in the community, *as determined by the Department of Labor.*

Common laborers at Gaithersburg now had to be paid \$10.95 an hour, rather than the \$4.50 to \$6 at which they could have been hired. Excavation-equipment operators

were entitled to \$14.40 an hour rather than \$9, carpenters to \$13.61 rather than \$8.60. Overall, the project's cost jumped to \$5,142,260—an increase of nearly ten percent.

Most people have never heard of the Davis-Bacon Act, but it is a major cause of our skyrocketing construction costs. In 1979 the General Accounting Office surveyed 30 federal construction projects. In 12 instances, they found that rates established by the Department of Labor were unrealistically high—raising wage costs 36.8-percent higher than they should have been. The GAO also concluded that Davis-Bacon had saddled the government with excess costs of perhaps \$700 million a year.

Two years ago, an inter-agency

Senator John C. Sackett  
Pouch V  
Juneau, AK 99811

### THE OUTDATED LAW

task force of the Carter Administration came to similar conclusions. It calculated that if the inflated wage rates of Davis-Bacon were eliminated, federal-construction-payroll costs would be reduced by ten percent—a saving of a billion dollars a year on a federal-construction budget of \$40 billion.

The Davis-Bacon Act served a purpose during the Depression. It protected local workers from contractors who might bid low on a government project and then import itinerant workers who found substandard wages preferable to starvation. Initially, the act applied only to construction projects directly undertaken by the federal government, but gradually it was extended to include just about every construction program with a federal subsidy or loan guarantee.

The basic problem with the act involves the bewildering rules the Department of Labor uses in determining what wage "prevails." Under department regulations, the prevailing rate is the one received by a majority of workers in a specific craft. The majority rule seems fair enough, and in highly unionized areas there is generally no argument about the prevailing wage.

The rub comes, however, when 50 percent or more of the workers do not receive the same wage—a characteristic of open-shop, or lightly unionized areas. Then the Department of Labor invokes the "30-percent rule." If 30 percent of

### Why you should consult your doctor to determine if this vaccine is right for you

The vaccine helps protect against 14 of the most common types of pneumococcal pneumonia. While there are over 80 different types of pneumococci, the vaccine affords protection against the most prevalent types in the U.S., causing approximately 60 percent of all pneumococcal pneumonia. The vaccine will not afford protection against any type of pneumococcus not included in the vaccine. Also, the vaccine is not 100 percent effective for the 14 types included. It is intended for certain people, 2 years of age or older, whose physical condition indicates an increased risk of serious, or possibly fatal, illness should they develop pneumococcal pneumonia. Included in these "higher risk" groups are: (1) persons who have chronic ailments, such as chronic heart disease, chronic disease of the lungs or air passages, chronic kidney problems, diabetes, or other chronic disorders involving metabolism; (2) persons in chronic care facilities; (3) persons convalescing from severe disease; (4) persons 50 years of age or older, especially those over 65. Only your doctor can determine if the vaccine is appropriate for you.

#### Special Considerations

AS WITH MOST VACCINATIONS, certain adverse reactions may occur. A common reaction is redness and soreness at the point of injection. Usually this will last less than 48 hours. In some cases, a hard, lump-like spot may appear in the area, but this happens less frequently. Occasionally, low-grade fever (less than 100.9°F) occurs. When it does, it usually lasts no more than 24 hours following the vaccination. In rare cases, there have been reports of fever over 102°F. More serious long-lasting reactions and serious allergic reactions are unusual, but may occur.

Your doctor knows that special care must be taken when administering the vaccine and in selecting patients who should receive the vaccine. For example, women who are pregnant should not be vaccinated, because the possible effects of the vaccine on the development of the infant are not known. The vaccine is also not intended for persons who are allergic to any of its components, for children less than 2 years of age, or for persons with Hodgkin's disease who have received extensive chemotherapy and/or nodal irradiation. Other factors which may preclude vaccination are:

- medication affecting the body's immune response;
- respiratory illness with fever or other active infection;
- severe heart or lung disease.

Available information indicates that revaccination before five years is unnecessary and may, in fact, cause more frequent and severe local reactions at the site of injection. Thus, it is important that people not be revaccinated within five years.

This message does not include complete information regarding pneumococcal pneumonia or the vaccine. Therefore, you should consult your doctor for further details.

## THE OUTDATED LAW THAT'S COSTING TAXPAYERS BILLIONS

the workers in a classification receive the same wages and fringe benefits—so the penny—then that rate becomes the prevailing one. The likeliest circumstance in which that can occur is when 30 percent of the workers in a particular craft are unionized. Thus, the minority-union rate becomes the prevailing rate, even though 70 percent of the craftsmen are paid less. Only when the 30-percent rule cannot be applied does Labor average all the local wages.

In its 1979 study, the GAO chronicled a typically absurd example of the 30-percent rule that turned up in Carson City, Nev. To determine the prevailing wage for painters, the Department of Labor surveyed 11 projects, finding eight painters at work. Two were paid \$6.25 an hour, two were paid \$8.74 and one \$9. But three painters were getting \$12.40 an hour. Three out of eight comes to 37.5 percent—so \$12.40 became the prevailing wage.

Sometimes Labor does not even bother to take a wage survey. When the GAO was conducting its study, it asked the department for the basis for the 530 area-wage determinations that were in effect in October 1976. But no surveys had been conducted for 57 percent of them. The Labor Department simply adopted the union rates of each locality.

The "importing" of union rates from big cities into smaller communities also prompts a persistent

criticism of Davis-Bacon. Michael Callas, a general contractor in Hagerstown, Md., told a Senate committee that he had been interested in bidding on a government project in Adams County, Pa. He was already working on a similar project four miles away, at Fort Ritchie, Md. Callas was amazed to learn that Labor Department wage rates were more than double the Davis-Bacon rates he was paying at Fort Ritchie. The reason: the department had gone to Harrisburg, Pa.—75 miles away—to find the prevailing wage rates.

Callas refused to bid on the project because of the inevitable friction that would have resulted within his work force over widely varying rates for identical work. For the same reason, many non-union contractors refuse to bid on federal construction. Where this occurs, there is less competition for government work—a phenomenon that hardly keeps prices down.

Davis-Bacon inflates costs in another way as well. Non-union contractors often employ "helpers and learners" at considerably lower rates to assist qualified craftsmen. But the Labor Department generally requires all workers on a federally subsidized construction project to be paid journeymen's wages.

The absurdities of Davis-Bacon have led to widespread demands for its demise. The GAO argues that, besides being inflationary, "other wage legislation and changes in economic conditions

THE OUTDATED LAW THAT'S COSTING TAXPAYERS 100 BILLS

make the law obsolete. GAO believes it should be repealed." Support for repeal also comes from newspapers with such diverse editorial views as the *New York Times* and *The Wall Street Journal*. The liberal organization Common Cause as well as many building-contractor groups point to flaws in Davis-Bacon.

Several bills are currently being considered in Congress to rescind the act completely. A piecemeal approach is also being tried—tacking on a Davis-Bacon exemption to expenditure bills as they come up. Such an exemption was part of the military-construction bill that recently emerged from Senate committee.

The staunch defenders of Davis-Bacon are the construction unions of the AFL-CIO. They maintain that if the act were discarded, workers would be subject to the potential abuses that were feared in 1931. Union spokesmen also minimize any deficiencies in the Labor Department's application of the law. But organized labor has a clear economic stake, for whenever it maintains high union rates, unionized contractors can compete effectively and thus obtain more jobs for union members.

The Department of Labor and the Reagan Administration favor reform rather than repeal of the Davis-Bacon Act. Proposed reforms,

announced in April would substitute a 50-percent rule for the present 30-percent rule to prohibit the importing of urban workers into rural areas, and allow a helper for every five journeymen.

But the case for repeal is more compelling. A 50-percent rule would still be inequitable, if, for example, other wage rates in an area were lower; the Labor Department would be establishing a minimum-wage rate rather than a true prevailing one. Besides such details, the problem with changing the regulations is that the reforms of one Administration can be undone by the next. Moreover, whatever the changes, the Davis-Bacon Act by its very nature imposes an impossible burden on bureaucrats by obliging them, if need be, to issue wage determinations for more than 3100 counties and at least 19 crafts.

As Sen. Donald Nickles (R., Okla.), author of one of the repeal bills, says, "I find it ludicrous that the Department of Labor—in Washington, D.C.—is in the business of setting local wage rates for projects all across the United States."

Indeed, the country is too large and diverse, local economic conditions are too varied, for centralized bureaucratic wage determination. Beyond that, the Davis-Bacon Act is expensive, inequitable and unnecessary. We would be well off without it.

A MIDWESTERNA living in California: "How do I stand the smog? Well, I haven't had to shovel it yet."

—Contributed by William Rousler