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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-195283 DATE: September 21, 1979

MATTER OF: Irby Construction Company DLG02830
[Request For Review of Department of Labor Decision]

DIGEST:

Where Department of Labor, pursuant to "Disputes Concerning Labor Standards" clause, held that contractor had to pay workers who assembled steel towers "groundmen" wage rate rather than "laborers" wage rate since this was prevailing practice, GAO will not review decision in light of holdings in S&E Contractors, Inc. v. United States, 406 U.S. 1, and Nello L. Teer Company v. United States, 348 F. 2d 533.

By letter dated June 22, 1979, counsel for Irby Construction Company (Irby) requested that our Office review the March 16, 1979, decision of the Wage Appeals Board, United States Department of Labor (WAB DLG02831 DLG02832 Case No. 78-9). The Board's decision affirmed a ruling by the Assistant Administrator, Wage and Hour Division, which held that workers, employed by Irby on a Bureau of Reclamation project, who assembled steel structures used to carry electrical transmission lines had to be paid the appropriate groundman rate from the "line construction" classification rather than the laborer's rate as contended by Irby.

The workers in dispute were employed under a contract between Irby and the Bureau of Reclamation, 4GC00076 United States Department of the Interior, for the construction of a 68-mile-long 230-KV transmission line running from the Davis Dam switchyard in Arizona to Parker Dam switchyard in California. This contract was subject to the Davis-Bacon Act, 40 U.S.C. § 276a

(Wage Rates)

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(1976), and contained an appropriate wage determination (Wage Decision No. AZ 75-5087) as required by the act. The wage determination, issued by the Department of Labor, listed the prevailing wage rates for and classifications of workers to be used on the above-mentioned project.

Irby classified and paid as "laborers, group 4" certain of its employees who assembled, on the ground, steel structures used for the carrying of transmission lines. The Bureau of Reclamation advised Irby that the prevailing practice for the area in question required that these employees be paid in accordance with "line construction" classifications. By letter of November 10, 1976, Irby requested, pursuant to 29 C.F.R. § 5.12, a ruling from the Department of Labor concerning the classification of these employees. On March 6, 1978, the Assistant Administrator, Wage and Hour Division, issued the ruling referred to in the opening paragraph, which held that assembly and erection of transmission line steel towers are performed by groundmen under the "line construction" classifications and not by laborers. The ruling explained that the prevailing practice for the area in question was to pay these workers as groundmen rather than laborers. We note that at no time during these proceedings did Irby dispute the fact, as indicated by the record, that the prevailing practice was to pay these workers as groundmen rather than laborers.

Clause 9 of the contract's Labor Standards Provisions entitled "Disputes Concerning Labor Standards" provides as follows:

> "Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decision of the Secretary of Labor or the applicability of the labor provisions of this contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor."

Also, clause 1(d) of the contract's Labor Standards Provisions provides, in pertinent part, as follows:

> " * * * If the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers or mechanics to be used, the contracting officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.* * *"

We have held that where, as in the instant case, a contractor agrees to a contractual provision which provides for referral of disputes to the Secretary of Labor for final determination, the contractor, under 41 U.S.C. § 321 (1976), is bound by the decision rendered by the Secretary or his representative unless the decision was arbitrary, capricious, or unsupported by substantial evidence. See 51 Comp. Gen. 42 (1971) and 50 id. 103 (1970). Also, see 45 Comp. Gen. 318 (1965) and a companion case, B-154253, December 13, 1965, both of which involved the same type of dispute as is involved in the present case, the latter decision involving the same contractor, Irby Construction Company. Subsequent to the above decisions, the Supreme Court held in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), that absent bad faith or fraud, a final agency settlement or decision, rendered under the Disputes clause, is not subject to further administrative review. The ruling in S&E Contractors is applicable to a final agency decision against a contractor. 52 Comp. Gen. 196 (1972). See also Nello L. Teer v. United States, 348 F.2d 533 (Ct. Cl. 1965), holding that a decision of the Secretary of Labor resulting from a question considered under the contract Disputes clause reserving the matter for the Secretary of Labor is final and not subject to review.

In any event, whether the Wage Appeals Board's decision is final or may be appealed in accordance with Wunderlich standards, it is clear that our Office may not review that determination as requested by Irby.

Therefore, our Office will take no action on the request.

R. F. Keller

Deputy Comptroller General
of the United States