

The Honorable C.W. Mahlen
Commissioner
Department of Labor

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Application of AS 36.05
to hotel constructed by
partnership in which the
Alaska Railroad
Corporation
holds an interest

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Deputy Commissioner Abshire requested our assistance in determining whether AS 36.05, the Little Davis-Bacon Act (the Act), applies to a hotel being constructed by "Inn-Vestments Associates of Alaska," a partnership in which the Alaska Railroad Corporation (the railroad) holds a 40 percent interest. For the reasons discussed below, we conclude that the work is covered by the Act.

Factual Background

As we understand the facts, in August of 1991, the railroad entered into a partnership with three husband-wife couples to build a hotel on railroad property located in the Ship Creek area of Anchorage. The partnership is known as Inn-Vestments Associates of Alaska (IAA).

According to the partnership agreement, the railroad has a 40 percent interest in the partnership. The railroad purchased its 40 percent interest in IAA in exchange for the railroad's contribution of a long-term ground lease to IAA for the property upon which the hotel is being constructed. The lease is for an initial term of 35 years with the partnership retaining an option to renew for an additional 35 years. Upon expiration or early termination of the lease, the railroad, at its option, may allow IAA to leave some or all of the improvements on the property. If the railroad so elects, these improvements then become the property of the railroad.

Documents provided by the railroad indicate that the hotel is being constructed pursuant to a construction contract between IAA and A&A Construction and Development, Inc. (A&A). A&A is owned by William Lawson and his wife Carol, who are both partners in IAA. The total cost to construct, equip, and furnish the hotel is estimated by the railroad to be \$5,124,950. The partnership is attempting to secure a \$3.9 million construction loan to finance the project. Furniture, fixtures, and equipment, which are estimated to cost \$350,000, will be acquired under a lease/purchase agreement from a hotel fixture finance company.

Costs that are not financed through partnership loans will be borne by the partners based on their respective partnership interests.

Once constructed, it is anticipated that the hotel will be operated as a "Comfort Inn" pursuant to a franchise agreement between IAA and Choice Hotels International, Inc. The hotel will be operated, managed, and controlled by Hospitality Associates, Inc., pursuant to a management agreement with IAA. Under the terms of the lease agreement, the railroad will receive one dollar (\$1.00) in annual rent from IAA as long as it remains an investor in the hotel project. As a partner it will share in the profits and losses of the partnership based on its 40 percent interest.

Legal Analysis

Alaska's Little Davis-Bacon Act, which is codified at AS 36.05, requires that certain "public construction" contracts contain a stipulation that laborers and mechanics will be paid "not less than the prevailing wages."¹ The term "public construction" is defined at AS 36.95.010(3) as

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[.]

(Emphasis added.)²

¹ AS 36.05.010 provides:

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, 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.

² The phrase "state or a political subdivision of the state" is defined at AS 36.95.010 as "any state department, state agency, state university, borough, city, village, school district, or

The question presented is whether the work performed incident to the hotel construction contract between IAA and A&A constitutes "public construction" within the meaning of the Act. For the reasons discussed below, we conclude that the work is "public construction" and, thus, covered by the Act.³

a. The ANB case

According to the definition of "public construction," to fall within the scope of the Act, the work in question must be performed "under contract for the state." According to the Alaska Supreme Court in Alaska State Federation of Labor v. State, 713 P.2d 1208 (Alaska 1986) (the ANB case), this requires "significant state involvement." The court's analysis follows.

In the ANB case, the Department of Community and Regional Affairs (C&RA) awarded the Alaska Native Brotherhood (ANB) a one-million-dollar grant for the construction of a community hall. The ANB subsequently entered into an agreement with the Central Council of Tlingit and Haida Indian Tribes of

other state subdivision."

³ Initially we note that the Alaska Railroad Corporation is a "state agency" and subject to the provisions of Title 36 even though it has special status as a "public corporation." AS 42.40.101. The factors on which we rely were outlined by the Alaska Supreme Court in Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast, 715 P.2d 707 (Alaska 1986), and previously applied by this office in concluding that the railroad is a state agency for purposes of applying the Equal Employment Opportunity Act. See 1986 Inf. Op. Att'y Gen. (Nov. 6; 663-86-0291). First, legislation creating the railroad locates it within the Department of Commerce and Economic Development. AS 42.40.010. See CFAB, 715 P.2d at 710. Second, the commerce commissioner is a railroad director, as is the commissioner of the Department of Transportation and Public Facilities, and the remaining railroad directors serve at the pleasure of the governor. Id. See AS 42.40.020 -- 42.40.030. Third, the railroad must submit annual reports to the legislature and the governor. AS 42.40.260; CFAB, 715 P.2d at 710. Fourth, nothing in the railroad's statutes or Title 36 excludes the railroad from the Act's provisions. See also Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alaska 1972) (although a public corporation, ASHA is an organizational unit of the executive branch). Based on these factors, we find that the railroad is a state agency within the meaning of the Act and, therefore, is subject to the Act.

Alaska (THCC) to add an additional three million dollars of privately financed funds to build an even larger hall. While the terms of the grant required ANB to guarantee that the monies would be used solely for the building project, the actual construction contract was between ANB and the contractor, Mountain Pacific. The contract did not require payment of Little Davis-Bacon wages.

The Alaska State Federation of Labor (the Federation) filed an action seeking a declaration that the Act applied. The court found that it did not. Specifically, it found that the project was not "under contract for the state" and, therefore, was not "public construction" within the meaning of the Act. In analyzing this issue, the court examined the contract itself and it considered the level of "state involvement" in the project.

First, the court found that the state was not a party to a "construction contract." It rejected the argument that a "grant contract," the sole purpose of which is to disburse grant monies, is a "construction contract" as that term is used in the Act. As the court stated, "The Act clearly envisions contracts between the state or a political subdivision, and a contractor for the construction of a specified public project." Alaska State Federation of Labor v. State, 713 P.2d at 1210.

Next, the court found that the state lacked significant involvement in the construction project. It noted that there was no evidence that the building was being constructed for the state or that the state would have control over the construction of the building or that it would retain control over the building upon its completion. It also observed that the state only contributed 25 percent of the funding for the project. Finally, in concluding that the project was not covered, the court considered the fact that the project was intended primarily for private purposes and benefit and that any public use would be limited.

Considering these same factors as well as the "paternalistic design" of the Act, we reach the opposite conclusion here.⁴ We believe the construction work necessary to

⁴ In City and Borough of Sitka v. Constr. and General Laborers Local 942, 644 P.2d 227, 232 (Alaska 1982), the court stated, "The fundamental purpose of Little Davis-Bacon is to assure that employees engaged in public construction receive at least the prevailing wage." Noting the "paternalistic design" of the Act, the court went on to emphasize that "[t]he focus of the Act, quite clearly, is to the benefit of the employees, not the contracting principals." Id. at 232.

build the hotel is being performed "under contract for the state" and that the state's involvement in the project is significant.

b. The work is being performed pursuant to a construction contract for the state.

First, unlike the "grant contract" in the ANB case, the contract at issue here is actually a "construction contract." It is a contract for the construction or "erection" of a hotel. Thus, the nature of the work to be performed under the contract plainly falls within the type of work covered by the Act.

Second, although the contract is nominally between IAA and A&A, we still conclude that work is being performed "under contract for the state." To find otherwise would, we believe, "unduly exalt form over substance." In reaching this conclusion, we rely on the reasoning of the Alaska Supreme Court in City and Borough of Sitka v. Constr. and General Laborers Local 942, 644 P.2d 227 (Alaska 1982).

In Sitka, the court considered whether a contract to clear timber on a site that was to be later used for the construction of a dam was covered by the Act. The City of Sitka had argued that the contract should be viewed in isolation as a timber sale contract, unconnected with 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 the City's argument, saying that to do so "unduly exalts form over substance." Id. at 232. Given the court's willingness to look behind the contract in Sitka, we believe it would look behind the contract here in determining that the state is one of the principals to the contract.

Although the construction contract is in the partnership name, like all partnerships, Inn-Vestments Associates of Alaska is nothing more than an association of persons joined together to carry on a business for profit.⁵ The business purpose of this particular partnership is the financing, construction, operation, and maintenance of the hotel.⁶ To achieve its purpose,

⁵ Alaska Statute 32.05.101(a) defines the term "partnership" as "an association of two or more persons to carry on as co-owners a business for profit."

⁶ The purpose of the partnership is described in the partnership agreement as follows:

The Partners are desirous of contributing cash and

the partnership has entered into a contract for the construction of the hotel. Under the terms of the partnership agreement as well as by statute, each partner, including the railroad, is jointly liable for the debts and contractual obligations arising from this contract.⁷ Under these circumstances, we believe that the work is being performed "under contract for the state." The fact that the railroad is not the sole obligor under the contract is simply one of the factors to be considered in analyzing the level of state involvement in the contract.

c. There is "significant state involvement" in the contract.

In analyzing the state's level of involvement in the contract, we have considered the railroad's financial contribution and interest in the project, the ownership and control of the hotel, and the public benefit to be derived from the hotel. On balance, we find that these factors weigh in favor of a finding that the project constitutes "public construction."

At this juncture, it is unclear exactly what total capital contribution the railroad will make to the project given the uncertainty of the actual cost of construction. Pursuant to the partnership agreement, each partner is "personally responsible for his pro rata share of additional capital which may become necessary" in order to construct and operate the hotel. Since the \$3.9 million loan that the partnership is presently seeking is less than the projected cost of constructing and equipping the hotel, it appears clear that the railroad will be required to make an additional capital contribution to the project based on its partnership interest. Thus, while the dollar amount of the railroad's contribution may be unclear, it is certain that it will comprise 40 percent of the additional capital required. Relative to the other partners' contributions, we believe that this percentage constitutes a significant contribution signalling "significant state involvement."

property, for the purpose of forming a Partnership to finance, construct, operate and maintain, for investment purposes, a hotel complex on premises located on Warehouse Avenue near the Ship Creek Pedestrian Bridge in Anchorage, Alaska.

⁷ Generally speaking, execution of any instrument in the partnership name binds the partnership of which the partner is a member. AS 32.05.040(a). All partners are jointly and severally liable for all debts and obligations of the partnership. AS 32.05.100.

Coupled with its cash contribution is the railroad's contribution of the land upon which the hotel is being built. This contribution, as set forth in the ground lease, gives the partnership the right to build the hotel and use the land for a period of 35 years with an option to renew the lease for an additional 35 years. Although we have not been provided with a fair market rental value for the land, it appears clear that it has a substantial value over and above the rental payments set forth in the lease. The land, which consists of a 1.6 acre tract, has an appraisal value of \$845,000. Yet, it is being leased to the partnership for a token rent of one dollar per year. Over the 35-year life of the lease (or 70 years if the option to renew is exercised), it is evident that this constitutes a significant contribution.

We have also examined the railroad's control over the project during the construction phase as well upon the hotel's completion. Under the partnership agreement, the railroad has important voting rights with respect to partnership decisions. Decisions concerning matters such as the sale of partnership property; the mortgage, financing or refinancing of partnership property, or the construction of and additions to or other development with respect to the hotel are all subject to a 61 percent vote of the partners. Thus, with its 40 percent interest, the railroad has a controlling minority interest on major partnership decisions concerning the hotel construction project.

Even after the construction is completed, the railroad's voting rights remain the same and, thus, its ability to control the partnership's major decision-making processes will continue. The fact that the completed hotel will be managed on a day-to-day basis by Hospitality Associates, Inc. does not diminish the importance of the railroad's ability to control and influence the operation of the hotel on these major matters. For these reasons, we believe the railroad's control over the project is substantial.

We have also considered the fact that the railroad owns the land upon which the hotel is being built. Upon expiration or early termination of the lease, the remaining partners as well as the partnership itself have no right to continued use of the hotel. Indeed, if the railroad exercises its option to allow the partnership to leave the building on the premises,⁸ it will

⁸ Under the terms of the lease agreement, the partnership may be required to leave the premises in "broom-clean condition" i.e., with all improvements to property removed.

physically own and control the hotel itself. Thus, unlike the situation in the ANB case where the state had no control whatsoever over the project being constructed or the underlying land, the railroad here has retained control of the land. It also has the potential for physical possession and control of the hotel itself at the end of the lease. We believe that all of these "control" factors evidence "significant state involvement" by the railroad in the hotel construction project and weigh in favor of coverage of the Act.

The last factor analyzed by the court in the ANB case is the public benefit to be derived from construction of the project. In this case, we find that this factor weighs in favor of Little Davis-Bacon coverage. According to information released by the railroad, it is participating as a partner in the construction of this hotel to: "augment passenger business, create a source of real estate income and support our redevelopment of the Ship Creek Area." Apparently, the railroad operates several other hotels for the benefit and support of its passenger business as well. Since the railroad is, in essence, expecting to generate revenue through this enterprise, whether through increased passenger business or profits from the operation of the hotel itself, we believe that there is a public benefit to be derived.⁹

The final point we have considered in concluding that the Act applies is the fact that a substantial portion of the monies being used to finance the construction project are to be secured through a loan which obligates the railroad. The Alaska Supreme Court has not specifically addressed the import of the state's role in securing financing.¹⁰ In the absence of any state case law or regulations on point, we have considered the regulations adopted by the U.S. Department of Labor in applying the federal Davis-Bacon Act, 40 U.S.C. § 276(a) et seq. (1991)¹¹

⁹ Although revenues from the railroad are not deposited in the general fund, they are retained and managed by the railroad, which is a "public corporation." See AS 42.40.530.

¹⁰ In the ANB case, the ANB and THCC obtained private financing of approximately three million dollars to combine with the one-million-dollar grant from C&RA. Here, by way of contrast, pursuant to the partnership agreement, the railroad will be an obligor on any note or loan entered into by the partnership.

¹¹ In Sitka, the Alaska Supreme Court concluded that because the Little Davis-Bacon Act is modeled after the federal Act "the federal regulations set forth an appropriate test to establish the parameters of Little Davis-Bacon." Sitka at 232.

Specifically, we have considered the definitions of the terms "public building" or "public work" and the term "Federal agency" as set forth in the federal regulations.¹²

The definition of "public building" or "public work" for purposes of the federal Act is set out at 29 C.F.R. § 5.2(k) (1991). It provides, in pertinent part:

(k) 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 interests of the general public regardless of whether title thereof is in a federal agency.

The term "federal agency" is defined at 29 C.F.R. § 5.2(c) (1991) as follows:

(c) The term "Federal agency" means the agency or instrumentality of the United States which enters into the contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to the project subject to the statute listed in § 5.1.

Under both of these definitions, it is clear that the Act is not triggered solely by the expenditure of public monies. Rather, it is sufficient that the work be carried on by the "authority" of the contracting agency or that the contracting agency "guarantee the loan." This approach is consistent with AS 36.95.010(3), which 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 source of the funding. Cf. Drake v. Molvik and Olsen Electric 726 P.2d 1238 (Or. 1986) (the source of funding does not determine the applicability of the prevailing wage statute).

Since the railroad, as a controlling minority interest holder in the partnership, must approve any loan assumed by the

¹² 29 C.F.R. § 5.2(k), which defines the term "public building" or "public work," was in effect at the time AS 36.95.010(3), defining "public construction," became law in 1972. 29 C.F.R. § 5.2(c), which defines the term "Federal agency," was amended in 1983 to its present form.

partnership and since it is liable under the partnership agreement for such obligations of the partnership, we conclude that the work is being carried on under the authority of the railroad and that the railroad has provided a "loan guarantee" within the meaning of 29 C.F.R. § 5.2(c). Therefore, we conclude that the work is being carried on "for" the railroad.

Conclusion

For all of the above reasons, we believe the construction work necessary to build the hotel is being performed "under contract for the state" and that the state's involvement in the project is significant. We therefore conclude that the project is subject to the provisions of AS 36.05. Please let us know if you have any further questions.

LMF: jk