

Does pounding a hub on a construction site make you a “laborer or mechanic” in the eyes of the Department of Labor?

By Glen Thurow

The answer to the above question is “we’re still not sure”. For those *Benchmarks* readers who have not been following this developing story, in March of 2013 the Department of Labor issued an All Agency Memorandum (AAM212) classifying certain activities performed by survey crew members on federal constructions projects as falling under the provisions of the Davis-Bacon Act (DBA). Essentially, when a crew member performs certain activities they are to be considered “laborers or mechanics” as defined by DBA labor standards. The memorandum was issued in consultation with the International Union of Operating Engineers. No other stakeholders such as the National Society of Professional Surveyors (NSPS) were consulted and no legislative or legal mandate cited as the reason for reversing a long-standing DoL policy.*

Since the issuance of the March memorandum NSPS and others have been trying to establish the reasoning and motivation behind the policy change. This attempt has included NSPS letters to DoL, meetings with the DoL last summer and a Freedom of Information Act (FOIA) request for documents relating to the policy revision. As of this writing the DoL has not responded to the FOIA request. However, it did finally respond in December, 2013 with a letter to Curt Sumner, NSPS Executive Director, attempting to clarify the DoL position.

Rather than clarifying the issue, the December DoL letter has introduced inconsistencies with the March letter to the Operating Engineers and AAM212. Executive Director Sumner has outlined the current NSPS line of reasoning as follows:

NSPS is working to compile a document to "map" the inconsistencies between the (1) March 2013 letter to the Operating Engineers, (2) the AAM 212, and (3) the December letter to NSPS. We will schedule a meeting to ask that they repeal the AAM 212, or revise it to clearly and consistently state what is and is not subject to Davis Bacon.

Although it appears the letter implies that DoL seems to be retreating, the letter and the AAM are inconsistent. Some of the inconsistencies include:

1) how to define “employed by the contractor or subcontractor”; our perspective on this is that survey crews employed by companies owned by professional surveyors (or even engineers) that are hired to provide a service to a contractor or subcontractor are not to be “covered” by Davis-Bacon. Although AAM 212 does not specifically state this, the December letter states, “Survey crew members not employed by a construction contractor or subcontractor are not subject to DBA requirements”. Still, such the companies employing such not covered survey crew members are being forced to comply with AAM 212.

2) The December letter states that DoL Wage and Hour Division (WHD) will “review contracting agency requests” related to inclusion of survey crew classifications to be covered, implying that the issue will be considered on a case-by-case basis. Yet, AAM

212 is being used “universally”, and the letter says DoL does not “intend to stay implementation of the AAM”.

At this point, I don't think we can interpret the letter as saying surveying crews (even those employed by professionals) on a construction site do not fall under DBA requirements because this is being enforced now. However, we do believe we have a strong case to make that, at the very least survey crews working for licensed professionals should not be covered. Whether that can extend to employees of construction companies or subcontractors is uncertain. In any case, we feel that the definition of activities to be covered as defined in AAM 212 should be changed.

Part of the problem in applying AAM212 to surveying crews is the mixed nature of the survey work performed on a construction site. For instance, if I'm the head chainman and we are setting out points for building control, or I'm using GPS to set control points, does precise and accurate line and grade constitute a professional activity while pounding the hub for the point suddenly convert me to a laborer and mechanic? How do I track the time? Will I now have to keep track of who's doing what and for how long?

Hopefully, this issue will be resolved in the near future. The problems AAM212 introduce are unnecessary and to date, the reasoning behind changing long established policy DoL inexplicable.

*Note: Documents relating to this issue can be found on a special NSPS webpage: Go to www.nsps.us.com and click on Advocacy / Government Affairs from the site menu.