UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

IN THE MATTER OF:	)	
	)	
SPACE EXPLORATION TECHNOLOGIES CORP., FLORIDA STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AND THE UNITED STATES DEPARTMENT OF THE AIR FORCE	)	ARB No. 14-001
	)	
With Respect To Applicability Of The Davis-Bacon Act To Construction At Space Launch Complex 40 At Cape Canaveral Air Force Station.	)	

AMICUS BRIEF IN SUPPORT OF PETITIONER JOINTLY SUBMITTED BY ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE FLORIDA CHAMBER OF COMMERCE, AND THE LOS ANGELES CHAMBER OF COMMERCE

Maurice Baskin, Esq.
Littler Mendelson, PC
1150 17th St., N.W.
Washington, D.C. 20036
Ph: 202-772-2526
Fax: 202-842-0011
mbaskin@littler.com

INTERESTS OF THE *AMICI*

This *amicus* brief is being jointly filed on behalf of the following organizations representing a broad cross-section of the private business community at both the national and local levels: Associated Builders and Contractors, Inc. (ABC), the National Association of Manufacturers (the NAM), the Chamber of Commerce of the United States (the US Chamber), the Florida Chamber of Commerce (the Florida Chamber), and the Los Angeles Chamber of Commerce (the LA Chamber).[1] All of these organizations, representing many thousands of private businesses, are deeply concerned that the decision of the Deputy Administrator at issue in this case threatens private investment in the economy, due to the decision's unwarranted expansion of the Davis-Bacon Act to the privately funded rocket launch construction project undertaken by Space Exploration Technologies for entirely commercial purposes.

ABC is a national construction industry trade association representing 22,000 chapter members. Founded on the merit shop philosophy, ABC's membership includes both union and non-union employers. Many of ABC's members perform government contracts covered by the Davis-Bacon Act, 40 U.S.C. § 3141 (hereafter "DBA" or "the Act"). Many of ABC's members also perform private construction work that is not funded by the government, and that until recently was widely understood not to be covered by the Act. Many of the construction contractors who have performed work on the project at issue in this case are ABC members. Absent ABC's participation they would not otherwise be represented in this important proceeding.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the

[1] ABC and the NAM were granted leave to file this Brief by the Board in response to their Petition filed on February 7, 2014. The US Chamber, the Florida Chamber and the LA Chamber hereby seek leave of the Board to join the same Brief as co-*Amici*. No party is prejudiced by such joinder.

voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and creates jobs across the United States.

The US Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the US Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Florida Chamber is the voice of business and the state's largest federation of employers, local chambers of commerce and partner associations, aggressively representing small and large businesses from every industry and every region. The Florida Chamber believes it is critical that Florida maintain its leadership role in space and that improper imposition of Davis-Bacon wages on private commercial investors will hinder that effort.

The LA Chamber works to create and sustain a favorable business environment in which all businesses can grow and prosper. The LA Chamber actively advocates on issues of importance to businesses including construction and technology.

Collectively, the *Amici* have filed many *amicus* briefs before this Board and in the courts that have assisted decision makers in properly interpreting federal labor law, including the DBA. As is further explained below, they are submitting this brief to highlight the adverse consequences of the Deputy Administrator's misapplication of this Board's decision in *CityCenterDC*, No. 11-074, 2013 WL 1874818 (ARB 2013), which is currently being challenged in *District of Columbia v. Department of Labor*, 13-cv-00730 (D.D.C.). The *Amici* contend that the Deputy Administrator's decision improperly expands the coverage of the DBA beyond the limited scope intended by Congress and calls into serious question the validity of the holding(s)

in *CityCenterDC* itself. This brief does not seek to repeat the Petitioner's arguments, which are incorporated by reference, but will focus on the need for reversal of the Deputy Administrator in order to prevent radical expansion of the DBA's coverage that will otherwise result in unwarranted interference with private sector investment in the construction economy.

ARGUMENT

I. APPLICATION OF THE BOARD'S *CITYCENTERDC* DECISION HERE THREATENS LIMITLESS EXPANSION OF THE DBA'S COVERAGE BEYOND THE INTENT OF CONGRESS.

The Deputy Administrator erred in applying this Board's *CityCenterDC* decision to the Petitioner's entirely private construction of launch facilities for a commercial space venture. The *Amici* believe that *CityCenterDC* was wrongly decided on its own facts. But application of the *CityCenterDC* holding to the present facts would confirm that there are no practical limits on that decision's expansion of the coverage of the DBA beyond the limited scope plainly intended by Congress. The *Amici* submit that such a result threatens private investment in the construction economy, with dangerous implications for the economy as a whole. Absent reversal of the Deputy Administrator's decision, private investors will be reluctant to participate in any project that could remotely be related to a public authority or public benefit, for fear of application of the DBA.

As argued in the Petition, the plain language of the Act shows that Congress intended the scope of the Act's coverage to be limited to publicly funded construction projects. Congress certainly never intended the Act to apply to privately funded, privately owned, and privately occupied construction projects, or else the statute would not have been limited by its terms to "public buildings and public works." Any doubts on this score should have been foreclosed by the Supreme Court's holding in *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981),

where the Court declared that the DBA is "a directive to federal agencies engaged in the disbursement of public funds." That holding is consistent with the legislative history of the Act, in which every single reference to the projects intended to be covered by the DBA referred to a publicly funded project.[2]

It is undisputed that the Act had never previously been applied to a privately funded, owned and occupied construction project in its entire 80-year history, until this Board's *CityCenterDC* decision. The Deputy Administrator's application of the *CityCenterDC* holding to the present facts less than a year after the Board's unprecedented ruling demonstrates the dangerously expansive nature of the Board's holding. Absent reversal, a broad spectrum of private construction projects will be threatened with coverage by the Act, and the Department will have dramatically exceeded its statutory authority far beyond the intent of Congress.

A. The Deputy Administrator's Ruling Improperly Expands *CityCenterDC*'s Definition Of "Contracts For Construction," Which Was Itself Overbroad.

In *CityCenterDC*, the Board held that the Act covered a privately funded project to build condominiums, apartments, retail space and office space on land that had been partially sold and partially leased by the District of Columbia to a group of private developers under a 99-year lease. The District provided no funding for the project, did not own any portion of the buildings being constructed and had no plans to occupy any portion of the project. Nevertheless, this Board held that the District was a party to a "contract for construction" of "public buildings or public works," by virtue of the long term lease and development agreements with the private developers.

---

[2] *See* Legislative History of the Davis-Bacon Act, Division of Wage Determinations, Office of the Solicitor, U.S. Dept. of Labor (1962). *See also Universities Research Ass'n v. Coutu*, 450 U.S. at 774, noting that the Congress that enacted the DBA spoke only of its impact on the nationwide federal building program, in which the federal government contracted for construction of public buildings such as courthouses, post offices, and government hospitals (*citing* 74 Cong. Rec. 6510-11 (1931)).

According to the Board's Decision, the lease contracts between the District and the Developers fell within the DBA's definition of a construction contract because those agreements "incorporated . . . a master plan agreed to by the District and the developers that provided detailed specifications and other requirements for the construction of the City Center project." *Id*., slip op. at 11. Further, the Board found that the District entered into the 99-year ground leases "for the purposes of developing the site in accordance [with the master plan]." *Id*. According to the Board, each of the three leases at issue in *CityCenterDC* "require[d]" substantial construction of improvements for office, residential, and retail use, including office buildings, condominiums, and retail stores as well as the infrastructure to support them, and it was this fact which supposedly brought the leases within the definition of "construction" contracts set out in 29 C.F.R. § 5.2(j). *Id*., citing the 1994 OLC Opinion authorizing treatment of long term lease agreements as covered by the Act under specified circumstances. That opinion, it should be noted, held that the regulatory definition of a contract for construction required "that one of the things *required* by that contract be construction of a public work." (emphasis added). *See also, In the Matter of Phoenix Field Office, Bureau of Land Mgmt.*, ARB No. 01-010, at 10-11 and other "leasing" cases cited therein. *CityCenterDC* Op. at 11.

None of the foregoing facts in *CityCenterDC* that this Board identified as significant in finding a "contract for construction" are present here. The alleged "contract" relied on by the Deputy Administrator in the present case is not a lease agreement at all, but is merely a "license" issued by the Air Force to the Petitioner. That license does not "require" the Petitioner to engage in construction and does not incorporate a "master plan" for such construction to be specified or approved by the government. For the Deputy Administrator to apply the *CityCenterDC* holding to the present facts distorts the statutory and regulatory meaning of "contract for construction" beyond all recognition. This is particularly so because the CityCenterDC holding itself

constituted an unwarranted expansion of the Act in its finding that a contract for construction existed in that case.[3]

B. The Deputy Administrator's Ruling Improperly Expands *CityCenterDC*'s Definition Of "Public Works," Which Was Already Overbroad.

The Deputy Administrator also misapplied the Board's holding in *CityCenterDC* that the construction project there was a "public work" because it was carried on directly by the authority of the District and served the interest of the public. *CityCenterDC* Op. at 12-13. As the Board held in *CityCenterDC*, both "prongs" of the newly applied definition have to be satisfied in order for DBA coverage to be found. The Deputy Administrator's Ruling misapplies both prongs of the *CityCenterDC* holding in the present case.

1. The Deputy Administrator Has Misapplied The (Overbroad) *CityCenterDC* "Authority" Prong .

With regard to the governmental "authority" criterion, the Board in *CityCenterDC* purported to find it significant that "the terms of the ground leases, the development agreements, and the Master Plan collectively provide the District with authority over what will be built and how it will be maintained during the lease terms." *Id*. The Board further highlighted the importance of the District's role in passing "enabling legislation authorizing redevelopment of the [CityCenterDC] site" in combination with the District's role as "signatory to the prime contracts (ERA and RDA) and the three lease agreements that embody the terms for construction and incorporate the project's master plan." *Id*. It was solely within this context that the Board concluded that "but for the District's agreement to lease the land upon which the CityCenterDC project is being built, the effort to transform this District real estate would not be taking place:"

---

[3] *See U.S. ex rel. Roc Carter Co., LLC v. Freedom Demolition, Inc*., 2009 WL 3418196 (M.D. Ga. Oct. 14, 2009) (holding that lease and development agreement did not constitute a "contract for construction" under the identical language of the Miller Act); *accord, Vealey v. Suffolk Constr. Co*., 1996 WL 391875, at *2-3 (S.D.N.Y. July 12, 1996).

> The District's Mayor conveyed this prime, downtown real estate for the purpose of redevelopment, and the D.C. City Council approved that redevelopment. The District's authority includes requiring that the Developers construct or cause construction of improvements that meet with the terms of the Master Plan as approved by the D.C. City Council. The District also has authority over design particulars, over the Developers' selection of general contractors, and over any changes to the Master Plan it negotiated. The District can terminate these leases in case of default, which includes any failure by the Developers to meet construction deadlines or to build a certain quantity of affordable housing units, or to abide by the terms negotiated by the District of Columbia exerting control over project design, construction, and maintenance.

CityCenterDC Op. at 12.

Again, none of the foregoing facts on which the Board premised its expansion of the Act's coverage in *CityCenterDC* exist in the present case. As noted above, there is no similar lease agreement by which the Air Force has exercised any authority over the construction at issue here. Moreover, unlike the District's alleged role in passing enabling legislation specific to the CityCenterDC site, according to the Board in that case, here the Air Force did not pass any enabling legislation at all. The legislation relied on by the Deputy Administrator, the Commercial Space Launch Act ("CSLA"), 51 U.S.C. § 50901-50119, was passed by Congress (not the Air Force) and is not specific to the Petitioner's construction project, unlike the enabling legislation in *CityCenterDC*. Finally, unlike the District's role as determined by the Board in *CityCenterDC*, the Air Force here has not "required" the Petitioner to construct any particular improvements, and the license at issue does not threaten Petitioners with termination for default if they fail to meet any specific timetables for such construction, as the Board purported to find significant in *CityCenterDC*.

Of particular concern to the *Amici* is the Deputy Administrator's reliance on *CityCenterDC* in asserting that "but for the government's decision to permit a private entity to arrange for construction on public land, the construction activities in question would not have been undertaken." Dep. Admin. Ruling at 6. First, as noted above, the Board's description of the type of activity by the District which was supposedly indispensable to the initiation of the construction project in *CityCenterDC* was different in scope and in kind from the actions of the Air Force in the present

case. But of equal significance, the Deputy Administrator's ruling demonstrates that the new *CityCenterDC* criterion is itself an open ended invitation to expand the DBA's coverage in ways never intended by Congress.

The *Amici* submit that government regulation of construction is so omnipresent that it can almost always be claimed that without some level of government involvement, little if any private construction can be built. Government approvals must be sought by private developers for even the most routine private projects, including zoning permits, building permits, environmental permits, transportation permits, contractor licensing requirements, and numerous similar approvals. Thus, on virtually any construction project, it can be said that "but for" some government action the project would not have been built. This cannot be a proper test for applying DBA coverage.

The Deputy Administrator's further claim that the construction in this case "would not have occurred without" the federal government's enactment of "enabling" legislation in the form of the CSLA, if affirmed, would also expose numerous other private construction projects to similar threats of DBA expansion due to their having been "encouraged, facilitated, or promoted" by other federal laws. *See* Schacht, *Competitive R&D: Federal Efforts To Promote Industrial Competitiveness* (CRS 2012) (discussing the myriad federal laws passed by Congress expressly to encourage and promote industry, few (if any) of which have invoked coverage under the DBA). As one of many examples, Section 706 of the 1996 Telecommunications Act directs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Under the Deputy Administrator's ruling, will private construction of telecommunications facilities be covered by the DBA?

Contrary to the logic of the Deputy Administrator's ruling, it could be said that "but for" the existence of federal laws generally, many private construction projects would not be built. That is no excuse for expanding the DBA's coverage beyond the stated intent of Congress. Indeed,

Congress has in the past determined that in order for Davis-Bacon requirements to apply to construction projects under federal laws intended to assist private construction, it is necessary to expressly include DBA requirements in the legislation. [4] There are approximately 60 such so-called "related acts" in which Congress has specifically incorporated the DBA by reference. [5]

Significantly, the CSLA does not incorporate the DBA by reference. Nowhere in the CSLA did Congress state or imply that the DBA should apply to construction undertaken by private entities in response to the CSLA's provisions. The Deputy Administrator's ruling fails to address the requirement of express incorporation of the DBA into the related acts, and the absence of such incorporation by the CSLA. For this reason as well the Department's ruling must be set aside.

2. The Deputy Administrator Has Also Misapplied The (Overbroad) *CityCenterDC* "Public Benefit" Prong .

In finding the present project to be a "public work" and applying the *CityCenterDC* holding, the Deputy Administrator was required to find that the Project "will serve the interest of the general public." *CityCenterDC* Op. at 11. Here too, the *CityCenterDC* opinion opened the door to uncontrolled expansion of the DBA's coverage by holding that the "public benefit" test

[4] As one of many examples, a series of federal laws over several decades expressly encouraged the construction of ethanol plants, without extending DBA coverage to private construction of such plants. *See* http://www.afdc.energy.gov/laws/key_legislation (providing chronology of key legislation beginning in 1970, without which most ethanol plants would never have been built). The DBA did not apply to ethanol plant construction, however, until Congress expressly incorporated the Act by reference, solely as to government-subsidized construction of such facilities, in Title IX of the Food, Conservation and Energy Act of 2008, P.L. 110-234.

[5] The Davis-Bacon Related Acts are described on the Department's own website as follows: "In addition to the Davis Bacon Act itself, Congress added Davis-Bacon prevailing wage provisions to approximately 60 laws—"related Acts"—under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance. (Examples of the related Acts are the Federal-Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act). Generally, the application of prevailing wage requirements to projects receiving federal assistance under any particular "related" Act depends on the provisions of that law." *See* www.dol.gov/compliance/laws/comp-dbra.htm.

did not require that the interest of the public be the "primary purpose" of the project. *Id*. This holding was itself contrary to decades of precedent and should be overruled or clarified in the present proceeding. However, the Deputy Administrator's misapplication of the Board's holding demonstrates how the overbroad nature of the *CityCenterDC* holding is likely to lead to further unwarranted expansion of the Act's coverage.

On this issue, the Board held as follows in *CityCenterDC*:

> The fact that the Developers are driven by private economic gains in this case does not undermine the fact that there are significant public benefits that inure to this commercial development project. The Administrator found, based on contractual and other documentary evidence in the record, that the CityCenterDC project includes construction of a park and central plaza for public use, the reintroduction of 10th and I streets, sidewalks, alleys, and walkways for pedestrians, a percentage of residences built for and designated as affordable housing, a percentage of new employment opportunities to be provided District residents, and substantial revenues to the District. The Administrator discussed these substantial and continuing economic gains to the District throughout the lease terms, during which terms the District maintains distinct authority over the course of the CityCenterDC project with its public benefits. Indeed, the CityCenterDC project was the result of the District's strategy to replace an out-dated and underused convention center with a thriving urban center that would be "the heart of an active, mixed-use development corridor."

CityCenterDC Op. at 12 (citations omitted).

The Deputy Administrator has identified no comparable public benefits resulting from the Petitioner's construction project. Therefore, the Deputy Administrator erred in extending the Board's *CityCenterDC* holding to the present facts. Conversely, affirmance of the Deputy Administrator's ruling would demonstrate that the *CityCenterDC* holding itself is not subject to any limiting principle with regard to the DBA's coverage of private projects. Such a result is prohibited by the Act's plain language and legislative intent and the Supreme Court's holdings limiting the DBA's coverage to public projects.

CONCLUSION

For the reasons set forth above and in the Petitioner's briefs, the *Amici* ask that the Deputy Administrator's ruling be reversed and set aside.

Maurice Baskin, Esq.
Littler Mendelson, PC
1150 17th St., N.W.
Washington, D.C. 20036
Ph: 202-772-2526
Fax: 202-842-0011
mbaskin@littler.com

Attorney for the *Amici*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Amicus* Brief have been served by first class mail, postage prepaid, this 18th day of February, 2014, on the following:

Jonathan Rees
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C.

Kevin J. McKeon, Esq.
Steven L. Lunsford, Esq.
Watt, Tieder, Hoffar & Fitzgerald, LLP
8405 Greensboro Drive, Suite 100
McLean, VA 22102

Thomas E. Weiers, Jr., Esq.
4848 Route 8, Suite 2
Pittsburgh, PA 15101

Richard G. Quinn
Contracting/Labor Relations Officer
National Aeronautics and Space Admin.
Mail Code OP-AM
Kennedy Space Center, FL 32899

Colonel Scott D. Peel
AFSPC/A3S
150 Vandenberg St., Suite 1105
Peterson AFB, CO 80914-4200

Terry R. Yellig
Sherman, Dunn, Cohen, Leifer & Yellig
900 Seventh St., N.W.
Washington, D.C. 20001

_____
Maurice Baskin