(ORAL ARGUMENT NOT YET SCHEDULED)

Nos. 14-5132 and 14-5133 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA and CCDC OFFICE LLC,

Plaintiffs-Appellees,

v.

DEPARTMENT OF LABOR, *et al.*,

Defendants-Appellants

ON APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLEE CCDC OFFICE, LLC, AND IN SUPPORT OF AFFIRMANCE

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CIRCUIT RULE 28 CERTIFICATE
AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici: Except for the National Association of Manufacturers, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Certificate of Defendants-Appellants, the Department of Labor, *et al*.

B. Rulings Under Review: The rulings under review are the district court's Order and Memorandum Opinion dated March 31, 2014.

C. Related Cases: This case has not previously been before this Court or any other court and, as far as counsel is aware, this case is not related to any pending cases in this Court or any other court. As described in greater detail herein, there is a similar matter pending before the Administrative Review Board of the Department of Labor in the matter of Space Exploration Technologies Corp., at ARB No. 14-001.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Pursuant to FRAP 26.1 and Circuit Rule 26.1, Associated Builders and Contractors, Inc. ("ABC") states that it is a not-for-profit corporation. No publicly-traded entity owns or controls more than 10% of the shares of ABC.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF NATIONAL ASSOCIATION OF MANUFACTURERS

Pursuant to FRAP 26.1 and Circuit Rule 26.1, the National Association of Manufacturers ("NAM") is a not-for-profit corporation. No publicly-traded entity owns or controls more than 10% of the shares of NAM.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Other Authorities

GLOSSARY

ABC: Associated Builders and Contractors, Inc.

ARB: Administrative Review Board

DOL: Department of Labor

WAB: Wage Appeals Board

I. FED. R. APP. P. 29(c)(4) STATEMENT

A. *Identity of the Amici Curiae*: ABC is an association of more than 22,000 members from more than 19,000 construction contractors and related firms. Founded on merit shop philosophy, ABC's membership represents all specialties within the construction industry. ABC's membership includes both union and non-union members, many of whom perform work pursuant to public works construction contracts with the United States government. A majority of the construction contractors who worked on the construction project in question (CityCenterDC, referred to hereafter as the "Project"), including the general contractor, are members of ABC. The ABC members working on the Project are not presently represented by any of the parties to this litigation.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.1 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to economic growth. NAM is the 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. NAM's membership includes both union and non-union members, many of whom supply materials pursuant to public works construction contracts with the United States government. NAM members are not presently represented by any of the parties to this litigation.

B. *Interest in the Case*: ABC and NAM are interested in this case due to the impact that the Department of Labor's ("DOL") overly broad application of the Davis-Bacon Act ("Act") would have on their members in the construction and manufacturing industries. More specifically, ABC and NAM are concerned about DOL's attempt to enforce and apply the Act in a manner that is not only inconsistent with the plain language of the Act, but also inconsistent with Congressional intent.

More specifically, these *amici curiae* view the DOL's attempt to apply the Act to the Project as an unprecedented effort to impose the requirements of the Act far beyond the public works, government construction contracts that it was meant to regulate, and into the context of private construction projects that are *not* funded by the government, *not* constructed by or for the government, *not* owned by the government, *nor* occupied in any respect by the government.

C. *Source of Authority to File*: The *amici curiae* previously filed a Motion for Leave to File on February 24, 2015, and no party has filed any opposition.

II. FED. R. APP. P. 29(c)(5) STATEMENT

This brief has been authored in whole by counsel for ABC and NAM, and funding to support the preparation of this brief is being provided only by ABC.

III. ARGUMENT

A. The Department of Labor's attempt to apply the Davis Bacon Act to a private construction project is fundamentally flawed and contrary to the plain language and intent of the Act.

If Congress desired to apply the Act on construction projects like the CityCenterDC project, it would *not* have limited its application to "*public* buildings and *public* works *of the Government or the District of Columbia*." 40 U.S.C. § 3142(a)(emphasis added). Given the undisputed facts regarding the nature of this Project, it cannot be considered a "public" building or work "of…the District of Columbia," absent tortured logic and an unfounded expansion of the otherwise universal concept of "public work" that is "of" the Government or the District. As such, the DOL's attempt to apply the Act to the Project is unsupported *even by the DOL's own precedent*, as admitted by the DOL itself: "Though Phoenix, Crown Point, and Ft. Drum are *not* on all fours with the instant case, the ARB found the overall import equally applicable." (DOL Br. 52 (emphasis

added), citing three administrative opinions applying the Act to projects that were: (a) directly funded by the government (In re Crown Point, Ind. Outpatient Clinic, WAB No. 86-33, 1987 WL 247049 (Dept. of Labor June 26, 1987), aff'd sub nom. Building & Const. Trades Council, AFL-CIO v. Turnage, 705 F. Supp. 5 (D.D.C. 1988); In re Military Hous., Ft. Drum, N.Y., WAB No. 95-16, 1985 WL 167239 (Dept. of Labor Aug. 23, 1985)), or (b) leased, used and occupied by the government (In re Phoenix Field Office, Bureau of Land Mgmt., ARB No. 01-010, 2001 WL 767573 (Dept. of Labor June 29, 2001))).

Instead, the DOL's argument to apply the Act to the Project is founded on an administrative regulation that does not even apply to the District. See 29 C.F.R. § 5.2(k) (defining "public work" as "work, the construction…of which…is carried on directly by the authority of or with funds of a Federal agency."); see also 29 C.F.R. § 5.2(c) (defining "Federal agency" without reference to the District of Columbia); 29 Fed. Reg. 95, 100 (1964) (including the District in the definition of "Federal agency") and 29 C.F.R. § 5.2(c), 48 Fed. Reg. 19,450 (1983) (omitting the District from the definition of "Federal agency"). It is undisputed that the Project was *not* carried on "with funds of a Federal agency," so the DOL can only found its argument on the notion that the Project was "carried on directly by the authority of" the District of Columbia. The lack of any logical bridge between Section 5.2 and the District is, however, a fatal and fundamental omission in the

DOL's position. Indeed, when this matter was first reviewed by DOL, the Chief of the Branch of Government ruled that the Act did not apply.

In sum, the DOL cannot rationally purport to apply a statute applicable to government construction projects ("*public* buildings and *public* works *of the Government or the District of Columbia*") to a private construction project, such that decision of the district court must be affirmed.

B. If unchecked, the Department of Labor is poised to continue its unprecedented attempt to expand the scope of the Davis Bacon Act into the private construction industry.

While the DOL's attempt to apply the Act to the CityCenterDC project is unsupported by precedent and contradicts the plain language of the Act, the DOL has already used the decision of the ARB in this matter as justification in an attempt to expand the scope of the Act even further. In Space Exploration Technologies Corp., ARB No. 14-001, the final ruling of the DOL finding that the Act was applicable to the project at issue in that matter was in large part justified by citing to the ARB's underlying decision in this matter. See Final Ruling of the DOL's Principal Deputy Administrator dated Sept. 10, 2013 (referred to herein as the "SpaceX F.R.," attached hereto as an appendix).[1]

[1] The Petition for Review filed on behalf of Space Exploration Technologies Corp. on October 9, 2013, and challenging the Final Ruling, remains pending before the ARB at Case No. 14-001.

In the case involving Space Exploration Technologies Corp. ("SpaceX"), a private company that launches its own space vehicle to support commercial and possibly Government space launches, the United States Air Force ("Air Force") entered into a license by which SpaceX was to pay the Air Force for the right to construct and use a private launch facility at Cape Canaveral. (SpaceX F.R. 1). Like the CityCenterDC project, the SpaceX launch facility was constructed with private funds, and was not leased, used, or occupied by the Government. Unlike the CityCenterDC project, the SpaceX launch facility did not involve a lease, but only a license, which did not require SpaceX to engage in construction, nor did it incorporate the kind of "master plan" for construction to be specified or approved by the District in this matter. Nevertheless, the DOL's Principal Deputy Administrator found that the Act was applicable to the launch facility, relying not only on the three distinguishable administrative opinions (Crown Point and Ft. Drum, involving projects that were directly funded by the Government, and Phoenix, involving a project that was leased, used and occupied by the Government), but repeatedly citing to the ARB's underlying decision that is presently before this Court. (See, e.g., SpaceX F.R. 8 ("Indeed, the ARB considered and rejected a similar argument in CityCenterDC finding that the construction at issue constituted a 'public work' even though the District of

Columbia Council had found that the site was 'no longer required for public purposes.'")).

While the district court's decision in the matter pending before this Court correctly halts the expansion of the Act into the realm of private construction contracts, the ARB appears to be waiting for this Court's decision before ruling in the matter involving SpaceX. The district court's decision was brought to the ARB's attention in correspondence from the under-signed to the ARB dated May 14, 2014, but the ARB is yet to issue its findings in the SpaceX matter. As such, the *amici* believe it is important for this Court to affirm the ruling of the district court to avoid the slippery slope created by the ARB's underlying decision in this matter.

C. If unchecked, the Department of Labor's attempt to apply the Davis Bacon Act to the private construction industry would have a significant and potentially negative impact on private industry, the government and the economy.

The potential impact of the ARB's decision in this matter should not be underestimated. The cost impact to the CityCenterDC project alone would be an increase of $20 million. (JA 138-39). The DOL Administrator indicated that the District would somehow be responsible for paying for this unanticipated cost increase – without offering any suggestion as to how the District could possibly appropriate $20 million for a project that it did not fund, construct, or occupy. (JA 135). The ARB inexplicably found that the District's objection to paying the

increase was "not ripe" (JA 1502), but fortunately, the district court's decision rendered the issue moot.

Nevertheless, if this Court were to somehow find that the Act is applicable to the Project, the question of who would have to pay the increase, and how such payments would be funded, would seemingly have to be addressed, with significant negative consequences to future construction projects in the District. More broadly, one should also consider whether a Project like the CityCenterDC would ever have been constructed in the first place, if such an incredible additional cost had been anticipated. While the DOL argues in support of the ARB's finding that there are "significant public benefits" to the Project, including "new public space, affordable housing, employment opportunities for District residents, substantial revenue to the District, and revitalization of a large downtown area," none of those benefits would have occurred if the anticipated cost of the Project had been deemed too high for private investment.

This negative economic impact must be considered if the Court concurs with the DOL's argument that the Act applies to what the DOL now characterizes as a "public-private partnership." (DOL Br. 2). For practical purposes, almost any private construction project takes place only "by the authority of" the government, between the application of zoning and construction regulations, permits, inspections and certificates of occupancy. If the DOL's interpretation of the Act

continues to inflate, so too will the cost of what has previously been considered private construction, to a degree that may be prohibitive and discourage private construction spending.

For example, although the Federal Government invests significantly in the public construction arena to which the Act applies, that investment is dwarfed by the amount of spending in private construction. According to the United States Census Bureau, construction spending by the Federal Government for 2008 through 2014 averaged slightly less than $27 billion annually, while private construction spending for the same time period averaged more than $609 billion annually. See www.census.gov/construction/c30/historical_data.html (compare figures for annual spending for 2008 – 2014 for "Federal" vs. "Private"). The impact of allowing the DOL to apply the Act and its regulations to the private construction industry is simply impracticable – and again, was obviously never intended by Congress given the plain, common sense limitation of the Act to "*public* buildings and *public* works *of the Government or the District of Columbia*." 40 U.S.C. § 3142(a) (emphasis added).

D. The Department of Labor's methods for calculating the prevailing wage are unreliable and should not be applied to the private construction market.

As reflected in application to the CityCenterDC project, the DOL's wage determinations are substantially higher than market rates for private sector

construction companies. But regardless of the measure of the cost increase to any particular project, the system for and unreliability inherent in determining the "prevailing wage" illustrates why the Act should never be, and was never intended to be applied to the broader private construction market.

For instance, the Federal Government Accountability Office ("GAO") has reported that there are widespread accuracy, quality, bias, and timeliness problems with the DOL surveys used to establish the pre-determined prevailing wage rates . See GAO Report No. 11-152, "Davis Bacon Act: Methodological Changes Needed to Improve Wage Survey," March 2011 at http:/www.gao.gov.news.items/d11152.pdf. Even the DOL's own Office of Inspector General has recognized that the integrity of rates established as "prevailing" are suspect. See U.S. Department of Labor, Office of Inspector General, "Concerns Persist with the Integrity of Davis –Bacon Prevailing Wage Determinations," Audit Report No. 04-04-0003-04-420, at www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf.

By way of background, the DOL uses a survey process to "determine" the "prevailing wage" for each county in the United States and for each classification of construction worker. The prevailing wage is the rate paid to a majority (more than 50%) of workers in a similar classification during a period in question. This majority rate then becomes the prevailing wage rate issued and incorporated into

the procurement documents for Federal Government projects. 5 C.F.R. §1.2(a). In effect, the DOL uses an unscientific, self-selected sample that results in high error rates, and takes years to process and to publish the results.

In that regard, the 2011 GAO report concluded that efforts to improve the survey process - both with respect to data collection and internal processing - have not addressed key issues relating to wage rate accuracy, timeliness and overall quality. See GAO Report No. 11-152, "Davis Bacon Act: Methodological Changes Needed to Improve Wage Survey," March 2011 at http:/www.gao.gov.news.items/d11152.pdf. Importantly, the GAO found that the DOL "cannot determine whether its wage determinations accurately reflect prevailing wages," and "does not currently have a program to systematically follow up with or analyze all non-respondents." Id.

The inaccuracy in the DOL's survey method can be illustrated by comparing two key statistics. According to the Bureau of Labor Statistics, in 2010, approximately 14 percent of construction workers in the United States were covered by a collective bargaining agreement; yet, according to the GAO, 63 percent of all DOL wage determinations established that such collectively bargained rates were "prevailing." Id. at 20. Such a result is statistically impossible for DOL to have achieved by any fair survey method. This results in pre-determined wages from the DOL that are significantly exaggerated, causing the

federal government to pay significantly more to complete a construction project than what it would cost for a similar private project using actual local prevailing wages.

V. CONCLUSION

For all the foregoing reasons, as well as those set forth in the District's and the CCDC Office LLC's briefs, the Associated Builders and Contractors, Inc. and the National Association of Manufacturers respectfully request that the order and judgment of the United States District Court for the District of Columbia in this matter be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Circuit Rule 32(a)(3) because it contains 2654 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

The undersigned counsel for Associated Builders and Contractors, Inc. and National Association of Manufacturers, hereby certifies that on March 11, 2015 that a true and correct copy of the preceding Brief was served via email / the Court's ECF system on the following persons:

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APPENDIX

DETERMINATION OF PRINCIPAL DEPUTY ADMINISTRATOR

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Dear Messrs. Yellig, Harris and McKeon:

This is in response to the request of the Florida State Building and Construction Trades Council ("FSBCTC") for a ruling on the applicability of the Davis-Bacon Act ("DBA"), 40 U.S.C. § 3141, *et seq*., to construction performed by Space Exploration Technologies Corp. ("SpaceX") at Cape Canaveral Air Force Station Space Launch Complex 40 ("SLC-40"). As explained below, we conclude that the May 2008 License Agreement ("License") between the United States Air Force ("Air Force") and SpaceX constituted a contract for construction of a public work within the meaning of the DBA and its implementing regulations.

SpaceX is a private company that provides launch services to commercial entities and government agencies. SLC-40 is a launch pad facility located at the north end of Cape Canaveral, Florida that was made available to SpaceX in accordance with the Commercial Space Launch Act ("CSLA"), 51 U.S.C. §§ 50901-50119. In furtherance of the CSLA's policy to facilitate and encourage commercial space launches, in November 2007 SpaceX and the Air Force entered into a Commercial Space Operations Support Agreement ("CSOSA") that set forth the terms and conditions under which the Air Force would furnish "government facilities, launch property and/or launch services" to SpaceX in support of its commercial space activities. Subsequently, in May 2008, the Air Force and SpaceX entered into the License, under which the Air Force granted SpaceX use of SLC-40 for a period of five years, commencing on June 1, 2008 and ending on May 31, 2013.

The express purpose of the License is for "construction, establishment and maintenance of a space launch complex for the Falcon 9 launch vehicle to support commercial and possibly Government space launches." *See* License preamble. SpaceX's construction and other activities under the License are subject to a number of conditions, including that SpaceX pay all direct costs associated with its use of the facilities on the licensed premises and that the Air Force reserves the right to use or share the facilities as necessary to support its own programs. *Id.* arts. 1, 3.

The License also contains a condition that specifically addresses construction and alterations at SLC-40. The condition provides that "[a]ll plans for construction, repair, modifications, demolition, or additions ('Alterations Plans') by the Licensee must be consistent with the Air Force Space Command and local Facilities Excellence Guides, and be approved by the Government before the commencement of any construction project." License art. 13a. Subparts to this condition expressly provide that: (1) Alterations Plans "must include a time schedule for completion of the Alterations"; (2) SpaceX "shall inform the Base Civil Engineer of any planned Alterations Plans or Utility Designs [i.e., designs for SpaceX connections to Cape Canaveral Air Force Station utilities and infrastructure] prior to commencing designs, and then submit the Alterations Plans and Utility Designs to the Commander for approval," which will not be unreasonably withheld; (3) "[t]he Government shall have the right to approve or reject any or all Alterations Plans and Utility Designs"; and (4) "all construction shall be in accordance with the approved permits, designs, and plans." *Id.* art. 13(a)-(c).

The License also provides a general right to access and inspection, authorizing "[a]ny agency of the United States" to enter the Licensed premises "at all times" for the purpose of inspection and for any other purpose "not inconsistent with Licensee's quiet use and enjoyment of the Premises." *Id.* art. 14. Similarly, in light of Cape Canaveral Air Force Station's status as an operating military installation, the License provides that the Government's military mission has priority over all other operations on Cape Canaveral Air Force Station. The License therefore expressly provides that "[t]he Licensee understands and accepts that the priority of conducting Government operations at Cape Canaveral Air Force Station, including but not limited to normal base-related operations, Government and commercial launches, overflight, surges, exercises, contingencies, inspections, and other Air Force operations . . . may at times require delay in, modification or other interruption of the Licensee's operations, including its construction activities." *Id.* art. 17.

Finally, the License provides that it is revocable at the will of the Secretary of the Air Force and may be terminated by SpaceX at any time by giving at least 60 calendar days' notice. *Id.* art. 11 & preamble. On or before the date of expiration of the License or its relinquishment by SpaceX, SpaceX must vacate the premises, remove its property (including improvements and personal property), and repair and restore the premises to the condition that existed at the beginning of the License term. The License also provides, however, that the Government could, at its option and subject to any required Congressional authorization, accept SpaceX's property in lieu of such restoration. *Id.* art. 9. Furthermore, the License provides that, except as otherwise provided by the Federal Government's written consent, "all approved alterations to the Licensed Premises shall become Government property at the termination of [the] License, and shall not be removed [by SpaceX] at any time without the prior written approval of the Government." *Id.* art. 13h.

When the License was executed, the parties apparently anticipated that the License would be extended for as long as SpaceX is engaged in the business of providing launch services. SpaceX and the Air Force recently (in March 2013) executed a new five-year License for SpaceX's use of SLC-40. The terms and conditions of the new License, which expires in March 2018, are largely the same as those reflected in the original License. In addition, as of August 2011 – and perhaps continuing to the present – the parties have been in discussions regarding a long-term extension of the License, or conversion of the License to a lease, that would provide SpaceX

with long-term rights to SLC-40, perhaps through May 31, 2033 or beyond. *See* Letter from David C. Harris, Senior Counsel, SpaceX, to Timothy J. Helm (August 17, 2011), at 2.

Pursuant to the License, and in order to make SLC-40 suitable for supporting future launches of SpaceX's launch vehicles, SpaceX demolished certain existing facilities on SLC-40 and constructed new facilities specifically designed to support its launch operations. In particular, SpaceX constructed a horizontal integration hangar and built new liquid oxygen ground handling and storage systems and numerous other systems, including supports for the storage and handling of RP-1 fuel, as well as nitrogen and helium, water deluge systems, and auxiliary systems such as TEA-TEB handling, and spin-start support systems. *Id.* Construction of the new launch facilities was completed in 2009, and SpaceX's first launch from SLC-40 occurred on June 4, 2010. The SpaceX launch manifest on its web site lists 32 launches at SLC-40 between 2010 and 2016. Seventeen of these are for the Federal Government (particularly NASA), and 15 are for private entities or foreign governments. *See* SpaceX launch manifest, available at http://www.spacex.com/launch_manifest.php.

In seeking a ruling that the DBA applies to SpaceX's construction activities at SLC-40 pursuant to the License, the FSBCTC contends that the License constitutes a "contract for construction" under the DBA because the provisions of the License demonstrate not only that the Air Force contemplated construction by SpaceX at SLC-40, but also that the Government is "deeply involved" in the planning, execution, and oversight of all construction activity initiated on the site. The FSBCTC also contends that the SLC-40 launch facilities constructed by SpaceX are "public works of the Government" within the meaning of the DBA's implementing regulations because the construction at issue "is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public." 29 C.F.R. § 5.2(k). In support of this conclusion, the FSBCTC contends, among other things, that SLC-40 is Federal property; that under the License all approved alterations to the Licensed premises shall become Government property at the termination of the License; and that SpaceX's activity at SLC-40 best serves the interest of the general public given the Federal Government's reliance on private launches to achieve governmental objectives.

In its responsive submissions, SpaceX has contended that the DBA clearly does not apply to its construction at SLC-40. In particular, SpaceX contends that the License cannot be viewed as a contract for construction because, *inter alia*, it did not require SpaceX to perform any construction work, and because the License contemplates that SpaceX will independently, with separate third-party agreements to which the Air Force is not a party, construct and alter SLC-40. SpaceX has similarly contended that its construction does not qualify as a public work, and has invoked in particular both the purpose of the CSLA – to promote commercial space launches and reentry by the private sector – and the fact that the Federal Government has not funded SpaceX's construction activities at SLC-40 and has expressly deemed the SLC-40 site as excess property "not needed for public use." SpaceX also emphasized that, as reflected in a July 1, 2008 letter to Senator Ben Nelson, the Air Force concluded that the DBA did not apply to SpaceX's construction at SLC-40. The Air Force likewise has advised the Wage and Hour Division ("WHD") of its view that the DBA does not apply, and has emphasized, consistent with SpaceX's position, that SpaceX's construction activities were conducted independently and without Federal funding.

SpaceX also urged the WHD to postpone any ruling on the coverage question in this case until after the Department's Administrative Review Board ("ARB") issued a Final Decision and Order of the Department in another Davis-Bacon coverage matter involving privately financed construction on government-owned land, *Application of the Davis-Bacon Act to Construction of the CityCenterDC Project in the District of Columbia*, Nos. 11-074, 11-078, & 11-082, 2013 WL 1874818 (ARB April 30, 2013). *See* SpaceX's November 18, 2011 Submission, at 2. The ARB issued its decision in *City Center* on April 30, 2013. Moreover, after making multiple requests to the Air Force, NASA, and SpaceX for documents pertinent to the coverage issue in this case – including, most recently, requests dated March 4, 2013 that resulted in the production of a significant amount of supplemental documentation – the WHD believes that the coverage issue raised by the FSBCTC is now ripe for consideration.

Analysis

The Davis-Bacon Act applies to "every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers . . . ." 40 U.S.C. § 3142(a). A contract is "for construction" if "more than an incidental amount of construction-type activity is involved in its performance." *See*, *e.g.*, *In re: Military Housing, Fort Drum, New York*, WAB Case No. 85-16, 1985 WL 167239 (Aug. 23, 1985); *see also* 18 U.S.C. Op. Off. Legal Counsel ("1994 OLC Op."), 1994 WL 810699 (May 23, 1994), at *5. The term "contract for construction" is not limited to contracts entered into with a construction contractor; rather, a "contract for construction" must simply "call[] for the construction of a public work." *See*, *e.g.*, 1994 OLC Op., 1994 WL 810699, at *4. A lease agreement or other contract with the Federal Government that calls for such construction therefore will qualify as a contract for construction under the DBA. *Id.*; *see also*, *e.g.*, *Phoenix Field Office,* ARB Case No. 01-010, 2001 WL 767573, at *8-9 (a contract for the lease of a Bureau of Land Management ("BLM") field office was "for construction" where it provided that the office be constructed in compliance with BLM's construction specifications and that BLM had the right to make construction inspections); *Fort Drum*, 1985 WL 167239, at *4-5 (contracts for the lease of military housing were "for construction" where the request for proposals required that the housing be built to Army specifications, and where government representatives had the right of entry for monitoring purposes throughout the construction period).

The License constitutes a contract for construction under this authority. Not only does a license give rise to enforceable contractual rights, but also the express purpose of the License at issue in this case is for "construction, establishment and maintenance of a space launch complex for the Falcon 9 launch vehicle to support commercial and possibly Government space launches." The License also provides, among other construction-related provisions, that "[a]ll plans for construction, repair, modifications, demolition, or additions ('Alterations Plans') by the Licensee must be consistent with the Air Force Space Command and local Facilities Excellence Guides, and be approved by the Government before the commencement of any construction project." Given the terms of the License granting SpaceX a right of access to construct launch facilities at SLC-40, and given the License's numerous construction-related conditions on that right, the

License plainly "calls for construction" and involves "more than an incidental amount of construction-type activity." *E.g.*, *Fort Drum,* 1985 WL 167239. Moreover, the fact that the Air Force itself is not a party to a contract with a construction contractor does not negate the existence of a contract for construction, as the ARB has repeatedly held (in decisions such as *CityCenterDC, Phoenix Field Office,* and *Fort Drum*) that a government lease agreement that "'contemplates construction activity'" qualifies as a contract for construction under the DBA even when a government agency is not a party to the contract with the construction contractor. *See Phoenix*, 2001 WL 767573, at *4 (quoting *Ft. Drum*, 1985 WL 167239, at *5). The License in this case thus clearly qualifies as a contract for construction under this authority.

The sole remaining issue is whether SpaceX's construction performed under the License at SLC-40 is of a "public work" within the meaning of the DBA and its implementing regulations. The term "public building or public work" includes "building or work, the construction, prosecution, completion or repair of which . . . 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." 29 C.F.R. § 5.2(k). In addressing what qualifies as a public building or a public work under the DBA, the Department of Labor's Administrative Review Board has noted that this regulatory definition, which the Department promulgated in 1947, appears to paraphrase language in the oft-cited case *Peterson v. U.S.*, 119 F.2d 145 (6th Cir. 1941). *See Phoenix Field Office*, 2001 WL 767573, at *4-5. In *Peterson*, the Sixth Circuit held that relocation of privately-owned railroad trackage as part of a flood control project was a "public work" within the meaning of the Heard Act despite the project's benefits to private enterprise. The *Peterson* court added that:

> The term 'public work' as used in the act is without technical meaning and is to be understood in its plain, obvious and rational sense. The Congress was not dealing with mere technicalities in the passage of the Act in question. 'Public Work' as used in the act includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds.

Peterson, 119 F.2d 145, 147, *cited in Phoenix Field Office*, 2001 WL 767573, at *4-5. *See also United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23, 24 (1942) (broadly defining the term "public work" under the Miller Act "to include any project . . . constructed or carried on either directly by the public authority or with public aid, to serve the public interest," and holding that a library built with Federal funds for a private college, Howard University, was a public work), *cited in Phoenix Field Office*, 2001 WL 767573, at *5.

In evaluating whether SpaceX's construction at SLC-40 qualifies as a public work, we first consider whether the project was carried on directly by authority of, or with funds of, the Federal Government. SpaceX contends, and the FSBCTC does not dispute, that SpaceX's construction at SLC-40 was paid for by SpaceX, not with funds of the Federal Government. Even in the absence of Federal funding, however, the construction at issue occurred on a Federal enclave pursuant to a License that gave the Air Force extensive authority over the construction at issue. As explained below, we therefore conclude that the construction was carried on directly by authority of the Federal Government.

While the term *directly* is not defined in the applicable regulations, the ARB has repeatedly determined that such authority exists under circumstances where the Federal agency establishes its authority by lease or other development agreements. *See generally, Phoenix Field Office*, 2001 WL 767573; *Crown Point, Indiana Outpatient Clinic*, 1987 WL 247049; *Ft. Drum*, 1985 WL 167239. In its decision in *CityCenterDC*, for example, the ARB concluded that a private developer's construction of hotel, retail and other commercial facilities on District of Columbia land was conducted directly by authority of the District of Columbia because the District leased the land to the developer in order to construct improvements that would achieve specific public objectives. As the Board explained:

> The project's construction "is carried on directly by authority of" the District given that it passed enabling legislation authorizing redevelopment of the site and is a signatory to [leases and related agreements] that embody the terms for construction and incorporate the project's master plan. Moreover, 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.

CityCenterDC, 2013 WL 1874818, at *10. *See also Crown Point*, 1987 WL 247049, at *4 (construction of a Veterans Administration ("VA") outpatient clinic on private land by a private developer was "carried on directly by authority of" the VA where "[t]here is no evidence of record that a private developer would undertake the project without the assurances of the Federal agency" and "no such project was contemplated but for" the VA's solicitation "and the guarantee of a long rental period.").

Similarly, the construction at issue in this case directly results from, and would not have occurred without, the Federal Government's exercise of legislative and contractual authority. The Commercial Space Launch Act directs the Secretary of Transportation ("Secretary") to encourage, facilitate and promote commercial space launches and reentries by the private sector. *See* 51 U.S.C. § 50913(b)(1). To that end, the CSLA authorizes the Secretary to oversee and coordinate the conduct of commercial launch and reentry operations, and to facilitate and encourage the acquisition by the private sector and state governments of launch or reentry property of the U.S. Government that is excess or otherwise not needed for public use. *Id.*§ 50913(a). Pursuant to this statutory authority, the Federal Government entered into both a Commercial Space Operations Support Agreement and the License with SpaceX "for the purpose of construction, establishment and maintenance of a space launch complex for the Falcon 9 launch vehicle." Given this statutory backdrop and express contractual authorization for construction – and given that SLC-40 is located within the Federal enclave at Cape Canaveral – it is reasonable to conclude that the project would not have been constructed without the exercise of direct Government authority. Indeed, as in *CityCenterDC,* 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.

Likewise, as in *Crown Point*, there is no evidence that SpaceX would have undertaken the reconstruction of the launch complex without the definite expectation of governmental launches paid for by NASA. Indeed, through the Commercial Orbital Transportation Services ("COTS")

program and the Commercial Resupply Services program, NASA has supported SpaceX's Falcon 9 rocket's development, largely for service of the International Space Station, and has scheduled more than half of the launches from SLC-40 through 2016 - the majority of which will be missions to the International Space Station. *See* SpaceX launch manifest, available at http://www.spacex.com/launch_manifest.php. Although the Federal Government did not directly fund SpaceX's construction at SLC-40, we note that the National Aeronautics and Space Administration ("NASA") authorized approximately $500 million through 2012 – including substantial milestone payments to SpaceX – under the COTS program for the demonstration of commercial orbital transportation services in lieu of flying payloads to the International Space Station on government-operated vehicles, and that NASA and SpaceX subsequently entered into an International Space Station Cargo Resupply Services contract valued at approximately $1.6 billion. Such Federal payments to SpaceX illustrate the importance to the Federal Government of the launch activities for which SpaceX engaged in construction activity at SLC-40.

The Government's control over SpaceX's construction and other activities at the launch complex further reflects the extent to which SpaceX's construction has been conducted directly by authority of the Government. As noted, the License provides for the Air Force's review and approval of all of SpaceX's construction plans. *See* License art. 13(a). The License further provides that SpaceX must inform the Air Force of any planned Alterations Plans or Utility Designs [i.e., designs for SpaceX connections to Cape Canaveral Air Force Station utilities and infrastructure] prior to commencing designs, and then submit the Alterations Plans and Utility Designs for Air Force approval. Furthermore, SpaceX's "Alterations Plans" must include a time schedule for their completion, and "all construction shall be in accordance with the approved permits, designs, and plans." License art. 13(a)(1-2), 13(c). Authority to grant approvals, consents and waivers under the Construction and Alterations provisions of the License Agreement is vested in the Commander of the Air Force's 45th Space Wing. Although the AFSPC Civil Engineer may review any construction-related disapproval at the written request of SpaceX, such review is discretionary and the Civil Engineer's decision "is final and not subject to further appeal." License art. 13e.

Additionally, the License provides a general right to access and inspection, authorizing "[a]ny agency of the United States" to enter the Licensed Premises "without escort, at all times" for the purpose of inspection and for any other purpose "not inconsistent with Licensee's quiet use and enjoyment of the Premises." License art. 14. The License also provides that the "Air Force shall have the ability to direct the Licensee to cease all activities under this License that are reasonably believed to be incompatible with safety, security, environmental protection, resource protection, or other Government interests." *Id.* art. 17(g). Thus, if an inspection reveals the presence of construction or other activities throughout the term of the License that are "reasonably believed to be incompatible" with Government interests, the Air Force has the full authority to order SpaceX to cease such activities.

In short, although the License arguably uses general language in describing much of the Air Force's authority over SpaceX's construction activities at SLC-40, there can be no doubt that the Air Force's authority under the License is plenary. The CSOSA between the Air Force and SpaceX likewise contains provisions reflecting Governmental authority over SpaceX's construction, including the Air Force's authority to review and approve or disapprove all

construction or modifications by SpaceX. *E.g.*, CSOSA at Annex A, art. 2b. In this circumstance, the absence of precise construction specifications in the License does not undercut the direct authority that the Air Force is entitled to exercise over SpaceX's construction at SLC-40.

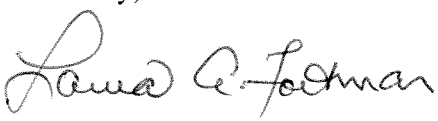
The remaining requirement for finding a public work – whether SpaceX's launch facilities "will serve the interest of the general public," 29 C.F.R. § 5.2(k) – is easily satisfied. As the ARB explained in *CityCenterDC*, 2013 WL 1874818, at *11, this regulatory definition refers to construction of a work that "serve[s] the interest of the general public" and does not impose any requirement that the interest of the general public be the "primary purpose" of the work. The Congressional findings in the Commercial Space Launch Act reflect the myriad public benefits that are expected to be achieved through governmental promotion of commercial space activities. (To identify but one, Congress determined that "the development of commercial launch vehicles . . . would enable the United States to retain its competitive position internationally, contributing to the national interest and economic well-being of the United States.") Moreover, SpaceX's reconstruction of the launch complex creates immense public benefits, as evidenced by the use of SLC-40 for numerous supply missions to the International Space Station. Indeed, the SpaceX launch manifest lists a total of 32 Falcon 9 launches at SLC-40 from 2010 through 2016, 17 of which are U.S. Government launches, with 12 of those being NASA launches to resupply the International Space Station. The Government's initial and ongoing authorization of SpaceX's construction at SLC-40, as reflected in the terms of the License, along with the public's clear interest in the launches – particularly the many launches to resupply the International Space Station – underscores the inherently public aspects of the launch facilities that SpaceX constructed at SLC-40.

That the Air Force deemed SLC-40 to be excess property not needed for public use does not, as SpaceX contends, alter the conclusion that SpaceX's construction will serve the interest of the general public. Indeed, the ARB considered and rejected a similar argument in *CityCenterDC*, finding that the construction at issue constituted a "public work" even though the District of Columbia Council had found that the site was "no longer required for public purposes." Although SLC-40 apparently is "excess property" in the sense that the Federal Government does not need the site to conduct launch activities itself, it remains that the Air Force entered into a carefully crafted License Agreement to ensure that SLC-40 is used (and that SpaceX's construction was conducted) in a manner that advances important governmental objectives. SpaceX's construction at SLC-40 furthers the CSLA's goal of promoting commercial space launches to achieve overwhelmingly public objectives, and the Federal Government is the most frequent and substantial user of SpaceX's launch services at SLC-40. Given these facts, the Air Force's designation of SLC-40 as "excess property" merely reflects that the Federal Government recognized that construction of a launch facility on SLC-40 by a private entity was the most effective means to advance the quintessentially public goals of developing launch capabilities and serving the International Space Station and other governmental missions. For this reason, the relationship between SpaceX and the Air Force (and NASA) at SLC-40 does not reflect the "privatization" of space; rather, it reflects a public/private partnership, authorized by Congress and implemented by the Air Force and NASA, to provide for the construction of launch facilities at SLC-40 that serve the interest of the United States.

For all of these reasons, we conclude that the completed construction at SLC-40 serves the interest of the general public and therefore is a public work for purposes of coverage under the DBA. We also conclude that in light of the particular circumstances of this case, it is in the public interest to apply DBA requirements and obligations to SpaceX construction activities at the SLC-40 site prospectively, starting with the first pay period week immediately following the date of this final ruling. However, all existing, relevant contracts, obligations, and other agreements will have to be amended, as necessary, in accordance with the DBA.

This letter constitutes a final ruling under 29 C.F.R. § 5.13. A petition for review may be filed with the Department of Labor's Administrative Review Board pursuant to 29 C.F.R. § 7.9.

Sincerely,



Laura A. Fortman
Principal Deputy Administrator

cc: Leon C. Partee, USAF
Richard G. Quinn, NASA