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. _____
	)	
With Respect To Applicability	)	
of the Davis-Bacon Act To Construction at	)	
Space Launch Complex 40 at Cape Canaveral	)	
Air Force Station	)	

SPACE EXPLORATION TECHNOLOGIES CORP.'S PETITION FOR REVIEW OF A FINAL RULING OF THE DEPUTY ADMINISTRATOR UNDER THE DAVIS-BACON ACT

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Dated: October 9, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. CONCISE STATEMENT OF POINTS RELIED UPON IN THE PETITION

Pursuant to 29 C.F.R. § 7.9, Space Exploration Technologies Corp. ("SpaceX") hereby petitions the Administrative Review Board (the "Board") to review the September 10, 2013 Final Ruling of the Deputy Administrator applying the wage requirements of the Davis-Bacon Act, 40 U.S.C.A. § 3141, *et seq.*, (the "Act") to the construction of SpaceX's facilities located at Cape Canaveral Air Force Space Station, Space Launch Complex 40 ("SLC-40" or "Project").

The Deputy Administrator's Final Ruling applied Act coverage to the private construction of the structures that compose the Project, *notwithstanding the complete absence of any Government funding, ownership, direct use or occupancy of the structures being constructed.* As further explained below, the Act has never before in its history been applied to such private construction work, with the exception of a matter currently pending review by the District Court for the District of Columbia. The Petitioner relies upon the following concise statement of points, with supporting reasons detailed in the remainder of the Petition, as called for by 29 C.F.R. § 7.9.

The Deputy Administrator's Final Ruling that certain construction work funded entirely by SpaceX at SLC-40 by and for the private economic gain of SpaceX nevertheless constitutes "construction of public buildings or public works" within the meaning of the Act constitutes an abuse of discretion and violates the plain language of the Act and the Department's regulations.

While purporting to rely on the regulatory definition of "public buildings or public works" set forth in 29 C.F.R. § 5.2(k), the Deputy Administrator misapplied the appropriate interpretive criteria, *i.e.,* whether the Project is being carried out "directly by the authority of a Federal agency" and whether the Project's purpose is to "serve the interest of the general public" as opposed to private economic gain. The legislative history of the Act, as well as the legal framework of court and administrative rulings over many decades make clear that the Project does not satisfy either of the above criteria. Indeed, extending the Act's coverage to the Project,

in the absence of any expenditures of Government funds thereon, violates the constitutional authority for the Act under the Spending Clause, Art. I, § 8.

Contrary to the Deputy Administrator's Final Ruling, construction of the Project is not being carried out "directly by the authority of a Federal agency" as that phrase has been previously interpreted and understood. The Government has not itself carried out or paid for any construction work at the Project, but has merely provided access to SLC-40 to SpaceX for SpaceX to design and construct facilities specifically tailored to its launch service requirements. In addition, neither the License Agreement between SpaceX and the Air Force (as defined below) nor any other agreement committed the Government to contract with SpaceX to use the facilities constructed by SpaceX at SLC-40.

The Deputy Administrator also erred in finding that the License Agreement between SpaceX and the United States, Department of the Air Force constituted a "contract for construction" under the Act. The License Agreement is an agreement whereby payment is made *by* SpaceX *to* the Air Force for access to SLC-40. In addition, under the License Agreement and related Commercial Space Operations Support Agreement ("CSOSA"), SpaceX is required to reimburse the Air Force for all costs that may be incurred by the Air Force as a result of SpaceX's use of SLC-40. There simply were no expenditures made by the Air Force relating to any construction work performed by SpaceX, and SpaceX was required to reimburse the Air Force for any incidental costs the Air Force might incur as a result of the SpaceX's work at the Project. Further, the Air Force is not occupying or using and does not own the structures composing the Project.

The Deputy Administrator further erred by ruling that the Air Force had plenary control over the construction and related activities by SpaceX at the Project. This finding is completely

contradicted by representations made by the Air Force that, "[a]s none of these [construction] activities were performed at the request of the AF [Air Force], under the direction of the AF, or for the benefit of the AF, the Air Force was not involved in actions which pertained to the award or execution of any SpaceX construction efforts." The Air Force did not exert control sufficient to find that the construction at the Project was "directly by authority of a Federal agency" to warrant coverage by the Act.

Also contrary to the Deputy Administrator's Final Ruling, the Project does not "serve the interest of the general public." In order to be a "public work," case precedent requires that the public benefit must be the "principal" goal of the Project, as opposed to a merely incidental goal. Any public benefits achieved by the Project are not materially different from the benefits attendant to any large private undertaking, are subordinate to the primary economic motivation of the private entity funding the entire cost of the Project, and are plainly insufficient to transform this private Project into a "public work." The construction work at the Project is not open to the general public, is never directly used by the public (absent a wholly separate and distinct contract for launch services to carry an object into space), and the Project was built by SpaceX for its own commercial and pecuniary benefit to serve those who desire launch services, whether private corporations (both domestic and foreign), the Government, or foreign governments. Although the Project may provide incidental benefit to the Government when and if it decides to contract with SpaceX for launch services, there is no direct benefit to the general public sufficient to meet the requirement that the Project serves the interest of the general public.

Finally, the Deputy Administrator ruled that any Act coverage would apply prospectively starting with the first pay period week immediately following the date of her Final Ruling, despite the fact no prevailing wage determination has yet been issued by the Department of

Labor ("DOL") to notify construction contractors as to what the applicable prevailing wages will be. Work at the Project went on for several years and numerous financial commitments have been incurred by SpaceX in reliance on the Air Force's express representations and its own good faith belief that the Act did not apply to the Project. Therefore, pursuant to 29 C.F.R. § 1.6(f), the Deputy Administrator should have exercised her discretion not to apply the Act to any existing contracts that had already been awarded for the Project at the time the Final Ruling was issued.

Pursuant to Section 7.9 of the Board's rules of procedure, SpaceX states that it does not consent to disposition of this Petition by a single member of the Board, and it requests an oral hearing.

II. JURISDICTION AND STANDARD OF REVIEW

The Deputy Administrator's September 10, 2013 decision is considered a final ruling under 29 C.F.R. § 5.13, giving the Board jurisdiction to hear SpaceX's Petition for Review pursuant to 29 C.F.R. § 7.9.

The Board's review of final rulings in Davis-Bacon Act cases is in the nature of an appellate proceeding, 29 C.F.R. § 7.9, and the Board will assess the Deputy Administrator's ruling to determine whether it is consistent with statute and regulations and is a reasonable exercise of the discretion delegated to the Deputy Administrator to implement and enforce the Davis-Bacon Act. See Paper, Allied-Industrial, Chemical and Energy Workers International Union and Local No. 8-652, ARB Case No. 04-033, 2005 WL 3263821, at *2 (Nov. 30, 2005) (citing Miami Elevator Co., ARB Nos. 98-086, 97-145, slip op. at 16 (Apr. 25, 2000)); see also Laborers Int'l Union of N. Am., ARB Case No. 04-011, 2005 WL 1028214, at * 7 (Apr. 29, 2005) (finding that the Administrator's failure to act in accordance with applicable rules constituted an abuse of discretion).

III. STATEMENT OF THE CASE AND FACTS

A. Facts Related to the Construction of the Project

In order to commence its activities at SLC-40, SpaceX entered into the CSOSA with the Air Force on November 13, 2007. This agreement set forth the terms and conditions governing SpaceX's commercial space activities, including the production and launching of private, commercial launch vehicles. Significantly, the CSOSA provided that SpaceX would reimburse the Air Force for any costs it may incur related to the SLC-40 Project and established the terms under which *SpaceX would compensate the Air Force* for access and use of the facilities. (CSOSA, p. 25)("The User shall reimburse the Government for all direct costs incurred by the Government").

In May 2008, SpaceX entered into a license with the Air Force for the right to use SLC-40 for its private, commercial purposes for a period of five years commencing on June 1, 2008 and ending on May 31, 2013 ("License Agreement"). In November 2012, the Air Force and SpaceX extended the period of the License Agreement until May 31, 2018.

Pursuant to the License Agreement, SpaceX performed certain work at SLC-40 in order to support future launches of SpaceX's own commercial launch vehicles and to service a variety of private commercial and governmental customers. This work included the demolition of certain existing facilities, the construction of new liquid oxygen ground handling and storage systems, and the construction of a horizontal integration hangar. All demolition and construction work was carried out in accordance with specifications developed and implemented by SpaceX.

Importantly, the Project was funded entirely by SpaceX and no Government funding was used. In fact, in accordance with the License Agreement, SpaceX paid the Government for access to the facility and conducted the construction at its own cost for its own commercial purposes. As consideration for the use of SLC-40, SpaceX agreed to "pay all direct costs

associated with its use of the facilities," which costs are defined as "the actual costs that can unambiguously be associated with [SpaceX's] commercial launch operations." (License Agreement, ¶ 1).

Although the Air Force maintained certain generic approval and access rights, SpaceX was generally free to construct the facility to meet its own unique commercial needs. The Air Force did not provide any design or construction criteria that SpaceX was obligated to follow. And in the event that the Air Force required access to the facility for any military operations, for example, the License Agreement provided that the Air Force and SpaceX would "to the extent practicable, coordinate their respective operations." (License Agreement, ¶ 17(b)).

B. Procedural History of the Principal Deputy Administrator's Final Ruling

On July 1, 2008, in response to a request from Florida Senator Bill Nelson, the Chief of Programs and Legislation Division for the Department of the Air Force, Colonel Hal Hoxie, concluded that the wage requirements of the Act did not apply to the SLC-40 Project. Colonel Hoxie explained that the Act "is only applicable to public works projects" and that "[n]one of the Air Force/SpaceX agreements are in this category"; instead, the "SpaceX construction activities at LC-40 are privately funded." He ultimately concluded correctly that "the fact that the construction is being performed on Government land does not cause Davis-Bacon to apply."

On October 13, 2010, the Florida State Building and Construction Trades Council, AFL-CIO ("Trades Council") requested that the Deputy Administrator of the DOL Wage and Hour Division, Ms. Nancy Leppink, issue a ruling relating to the application of the Act to the SLC-40 Project. In its request, the Trades Council asserted, among other things, that the Davis-Bacon Act is applicable to "all construction, repair and alteration work performed on the SLC-40 launch facilities." (Trades Council Oct. 13, 2010 Request, p. 7). Moreover, the Trades Council contended that the SLC-40 launch facilities constituted "public works of the Government," even

though SpaceX was obligated to pay the Air Force for access to the site and developed the site for its own commercial use. (Id. at 7-10). Finally, the Trades Council argued that the License Agreement constituted a "contract for construction" even though the Air Force was not purchasing a construction project or mandating the construction of any structure or building. (Id. at 10-15).

As a result of the Trades Council's request, on July 8, 2011, the Chief of DOL's Branch of Government Contracts Enforcement, Mr. Timothy Helm, notified SpaceX that the DOL would be making a coverage determination shortly, and requested factual and documentary information from SpaceX related to the SLC-40 Project. Specifically, Mr. Helm requested information concerning the construction of the facilities, including the production of various Air Force guides, plans, and specifications. SpaceX was also asked to respond to several questions regarding, for example, the specific costs and benefits for both the Government and SpaceX associated with the launch facility, the ownership of the facilities, and SpaceX's rights upon the termination of the License Agreement.

SpaceX responded to Mr. Helm's request for information on August 17, 2011. In its response, SpaceX provided information and documentation to aid in the DOL's coverage determination and noted, as described above, that the Air Force had already concluded in July 2008 that the Act did not apply to SpaceX's activities at SLC-40. Moreover, SpaceX informed Mr. Helm that the Commercial Space Launch Act, 49 U.S.C.A. §§ 70101, *et seq.* (now 51 U.S.C.A. § 50903), specifically encouraged private companies to acquire launch or reentry property of the United States Government that is excess or otherwise "not needed for public use." (SpaceX Aug. 17, 2011 Response, p. 1); see also 51 U.S.C.A. § 50913(a)(1)(A).

In its August 17 response, SpaceX further explained that there was no connection between SpaceX's separate, competitively-awarded Commercial Orbital Transportation Services ("COTS") Agreement with the National Aeronautics and Space Administration ("NASA") and the License Agreement with the Air Force. (SpaceX Aug. 17, 2011 Response, p. 5). The NASA COTS Agreement had nothing to do with the Air Force, and was just one of many SpaceX agreements. The COTS Agreement called for a technology development and, ultimately, demonstrations yielding cargo carriage capabilities to the International Space Station using the SpaceX Falcon 9 rocket and Dragon capsule. The COTS Agreement did not concern in any fashion the specific access granted to SpaceX to construct its SLC-40 facilities under the License Agreement. Pursuant to its separate agreement with NASA, SpaceX was free to launch from any of its existing facilities or to develop new facilities, if necessary. SpaceX also informed Mr. Helms that, before the expiration of the License Agreement, SpaceX intended to remove its unique property and restore the SLC-40 Project site to the condition that existed prior to the parties' License Agreement, as required by the License Agreement. (Id.)(citing License Agreement ¶ 9).

SpaceX concluded its August 17 response by analyzing and distinguishing the legal precedent relied on by the Trades Council in its October 13, 2010 request to Mr. Helm. (Id. at 6-9). Specifically, SpaceX answered that the Davis-Bacon Act did not apply to the SLC-40 Project for several reasons, including because: (1) the License Agreement did not result from a Government procurement; (2) the construction work was performed in accordance with specifications developed by SpaceX based on the unique requirements of its own launch vehicle and operations; (3) the License Agreement involved the licensing of Government facilities to SpaceX, not the acquisition by the Government of facilities by lease or otherwise; (4) SpaceX

paid for the construction of the launch facilities with its own private funds with no corresponding expenditure of public funds; and, (5) the launch facilities were designed for the special purpose of supporting SpaceX's commercial launch operations. (Id. at 8-9).

On October 24, 2011, the Trades Council submitted a reply to SpaceX's August 17 communication to Mr. Helm. In its reply, the Trades Council asserted, among other things, that the SLC-40 Project constituted "public works" under the Act, despite acknowledging that the Project was not funded by the Government. (Trades Council Oct. 24, 201 Reply, p. 2). The Trades Council argued that the Davis-Bacon Act broadly applied to projects that were carried on directly by authority of *or* with funds of a federal agency. (Id.) The Trades Council's reply focused on the word "or" of the controlling regulations (29 C.F.R. § 5.2) because, even though the Government did not expend any funds for the Project, the Act, according to the Trades Council, could still apply where the project was "carried on directly by authority of a Federal agency." (Id.)

The Trades Council then made various responses to SpaceX's contention that SpaceX developed and implemented its own designs for the construction of its own private commercial launch facility. (Id. at 3-6). The reply ended with the Trades Council calling for an expansive interpretation of the term "public works" that would cover private construction activities that in any indirect manner whatsoever related to some undefined and oblique public benefit. (Id. at 6-10). Under the Trades Council's interpretation, the work of an almost unlimited number of commercial entities would somehow benefit the public, regardless of the specialized or private nature of their commercial activity.

SpaceX submitted a detailed response to the Trades Council's October 24 letter on November 18, 2011 outlining several reasons why the Act did not apply to the SLC-40 Project.

Specifically, SpaceX stated that the Trades Council had wrongly dismissed the pertinent and controlling fact that the Government expended no funds for the construction of the SLC-40 launch facilities. (SpaceX Nov. 18, 2011 Response, pp. 3-5). In addition, SpaceX explained that the Trades Council failed to show that the construction of SLC-40 was "carried on directly by authority of" the Air Force, as the Trades Council merely argued that the Air Force had limited approval rights over some aspects of the construction. (Id. at 5). SpaceX further responded that its unique launch equipment would be removed at the termination of the License Agreement, and that prior to termination the facilities constructed by SpaceX would only be used for SpaceX's own private, commercial benefit. (Id. at 8-9). SpaceX concluded that any incidental benefit that might be conferred by its launch operations did not warrant application of the Act's wage requirements to the construction of SpaceX's own launch facilities intended for SpaceX's commercial gain. (Id. at 9).

On March 14, 2012, Mr. Helm submitted a request to Air Force Brigadier General, Mr. B. Edwin Wilson, seeking additional documentation concerning the construction activities at SLC-40. And on March 15, 2012, he made a similar request for additional information from NASA Contracting/Labor Relations Officer, Mr. Richard G. Quinn.

On March 29, 2012, at the request of Mr. Helm, SpaceX provided the DOL with copies of launch service contracts between SpaceX and NASA, and SpaceX and the Air Force, respectively. In its submission, SpaceX reiterated that it had received no Government funding for the construction work it performed at the Project and that the launch facility was intended to be a private commercial operation that provided launch services to a mix of commercial and governmental customers – with the vast majority of launches being performed for commercial customers, as evidenced by SpaceX's enclosed launch manifest.

On May 29, 2012 and July 16, 2012, Mr. Helm asked SpaceX to identify any proprietary documents that were submitted by the Air Force in response to his requests for further information.

On December 4, 2012, the Air Force responded to several questions posed by Mr. Helm related to the applicability of the Davis-Bacon Act's wage requirements to the SLC-40 Project. The Air Force's answers to DOL's questions support SpaceX's understanding of the SLC-40 licensing arrangement. For example, in response to Mr. Helm's general question regarding the nature of the construction work performed at the launch facility, the Air Force pointedly responded that "[q]uestions regarding SpaceX's activities at SLC-40 should be directed to SpaceX" as the Air Force "has no supervision, control, or management over SpaceX's business decisions." (Air Force Dec. 4, 2012 Response, p. 2).

The Air Force reiterated to Mr. Helm its earlier-stated position that the activities performed by SpaceX at SLC-40 were not "performed at the request," "under the direction of," or "for the benefit" of the Air Force, and that the Air Force "was not involved in the ... award or execution of any of the SpaceX construction efforts." (Id.) The Air Force also informed DOL that it could not provide copies of related construction contracts because it "had no involvement in the construction" of the facilities. (Id. at 2-3). Regarding any use of Government funds, the Air Force stated that it was "unaware of any direct costs that would be attributable to construction" and that "no costs were paid by the Federal Government, as under current legislation commercial companies may only use launch property and launch services not currently needed for government use at no cost to the government." (Id. at 5). The Air Force then described the review and approval process under the License Agreement, which description confirmed that the Air Force's oversight was minimal and largely limited to safety-related

matters and ensuring compatibility of utility interconnections between SpaceX's facilities and Air Force facilities. (Id.)

On September 10, 2013, the DOL's Principal Deputy Administrator, Ms. Laura Fortman, issued a Final Ruling finding that the Act's wage requirements applied to the SLC-40 Project.

IV. STATEMENT OF REASONS SUPPORTING THE PETITION

A. Legal Framework

As recognized in the Deputy Administrator's Final Ruling, the Act applies only to "contracts 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 or public works of the Government." (Final Ruling at 4, citing 40 U.S.C.A. § 3142(a)). In order to find that a particular contract is covered by the Act, there must therefore be a sustainable finding that the contract at issue is a "contract...for construction... of public buildings or public works."[1] 40 U.S.C.A. § 3142(a). In order for the Act to apply in this case, the Deputy Administrator was required to determine that the Air Force was a party to a contract for construction and that the construction specified in that contract was for a public building or public work.

The Constitutional authority for passage of the Act was the Spending Clause, Art. I, § 8, which authorizes certain laws that are not otherwise constitutionally permitted. Such instances involve a situation where federal funds are spent, and the recipient agrees to abide by the law as a condition for receiving such funds. See Shotz v. American Airlines, Inc., 420 F. 3d 1332, 1336

[1] The phrase "public buildings or public works" is not further defined in the Act itself, but there are examples of such projects referenced in the legislative history of the Act. See Legislative History Of The Davis-Bacon Act, Prepared by Division of Wage Determinations, Office of the Solicitor, U.S. Dept. of Labor (1962). In every instance where the sponsors of the legislation referred to the Act's coverage of "public buildings or public works," the types of projects referred to were those that were paid for, owned and occupied by the Government. These included public dams and locks (Id. at 31-33, House Hearing, Jan. 1932), public shipyards (Id. at 36-38, House Hearing, April-May 1932), and similar structures. *The legislative history of the Act contains no indication that Congress intended the Act to apply to private projects that were not paid for, owned, or occupied by the Government; and especially not in the matter at issue where SpaceX is actually paying the Government for the use of the licensed property.*

(11th Cir. 2005). Accordingly, as matter of Constitutional law, unless federal spending is involved, there can be no enforcement of Spending Clause legislation, such as the Act. See id. As discussed in more detail below, there is no federal spending under the License Agreement between SpaceX and the Air Force. As such, there is no basis for applying the Act to the work performed by SpaceX at SLC-40.

In addition, prior to passing the Act, Congress enacted the Heard Act, later renamed the Miller Act, 40 U.S.C. § 3131, which used identical language to establish bonding requirements for covered contracts for construction of public buildings or public works. In an analogous case concerning the application of the Miller Act, the Sixth Circuit explained that:

> [t]he term 'public work' as used in the [A]ct 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 [A]ct 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 v. United States, 119 F.2d 145, 147 (6th Cir. 1941) (emphasis added).

Relying on the Sixth Circuit decision in Peterson, the Supreme Court later interpreted the Miller Act's reference to public works to include any project constructed or carried on either directly by the public authority or with public aid, to serve the public interest. United States ex rel. Noland Co. v. Irwin, 316 U.S. 23, 24 (1942). The Irwin Court ultimately held that the Miller Act applied to a library built with federal funds for a private university, regardless of whether title to the library was held by the Government or the private university. Id. ("The library ... had been directly and specifically authorized by Congress in 1931 and money had actually been appropriated for it.").

In 1947, the DOL promulgated a definition of "public building or public work" in the regulations implementing the Act and related acts as including "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).

According to this Board's opinion in Phoenix Field Office, Bureau of Land Management, ARB No. 01-010 2001 WL 767573, at *8-9 (June 29, 2001), the foregoing definition "paraphrases" the holding in Peterson. The Phoenix case was one of a series of decisions beginning in 1985 that construed the definition of "public building or public work" in the context of lease agreements in which the Government leased privately-owned buildings that had been constructed to Government specifications, were designed for the use of the Government, and would be substantially occupied by the Government as the primary tenant. In each case, construction was undertaken by the private entity only after the Government had entered into a long-term lease for the facility in question, thereby obligating public funds via lease payments that effectively financed the cost of construction. This Board found that construction of such buildings constituted "public buildings or public works." See Military Housing Fort Drum, New York, WAB Case No. 85-16 (Aug. 23, 1985), and Outpatient Clinic, Crown Point, Indiana, WAB Case No. 86-33 (June 26, 1987).

Significantly, these cases involved contracts of buildings or works that were paid for, owned and/or occupied by the Government. The Deputy Administrator has cited no case or opinion in which the Act has been applied to contracts under which a private entity leased or licensed the use of federal property for the private entity's use in the construction of facilities to be used by the private entity for its commercial activities – with the exception of the recently decided matter, Application of the Davis Bacon Act to the Construction of the City Center Project in the District of

Columbia, ARB Case Nos. 11-074,11-078, 11-082 (the "City Center Matter"). The City Center Matter is currently pending review before the District Court of the District of Columbia.

SpaceX is therefore challenging the Deputy Administrator's Final Ruling that the Act covers the construction performed by SpaceX under its License Agreement with the Air Force. As further explained below, SpaceX submits that the Deputy Administrator abused her discretion in holding that the Air Force is a party to a "contract for construction" of the buildings and structures which constitute the Project. In addition, the Deputy Administrator abused her discretion by finding that the Project's privately owned, privately funded, and privately used launch facilities constitute "public works" within the meaning of the Act.

B. The Deputy Administrator Committed Error and Abused her Discretion in Finding that the License Agreement with the Air Force Constitutes a "Contract For Construction" under the Act.

The Deputy Administrator, citing 1994 OLC Op., 1994 WL 810699, asserts that the term "contract for construction" must simply "call[] for the construction of public work." (Final Ruling at 4). Relying on the Board's holdings in Phoenix, ARB No. 01-010 and Fort Drum, WAB No. 85-16, the Deputy Administrator equated the License Agreement to prior cases where the Government leased property from private entities and found that the License Agreement between the Air Force and SpaceX constituted a "contract for construction." (Id. at 5). This holding violates the plain language of the Act and should be set aside.

The License Agreement is not a contract for construction. To the contrary, the License Agreement is an agreement whereby payment is made *by* SpaceX *to* the Air Force for access to SLC-40. To this end, the License Agreement incorporates the CSOSA, under which SpaceX is entitled to *purchase* space-related services *from the Air Force*. (Attachment 3 to SpaceX's November 18, 2011 Reply, p. 25)("The User [SpaceX] shall reimburse the Government for all direct costs incurred by the Government" and "[t]he User shall either make a deposit in the

Government's accounting system or, with approval of the Wing Commander, open a Letter of Credit ... with the Government's accounting and finance office."). Such an arrangement demonstrates that the Air Force is not a party to a contract for construction. Moreover, the contract in question ensures that federal funds *are not spent* in connection with SpaceX's construction or other activities.

In addition, SpaceX is under no obligation under the License Agreement to perform any construction or alteration work at the facility for the benefit of the Air Force. The Air Force has not issued any required designs or plans for the construction of SpaceX's facilities at SLC-40. Instead, the License Agreement contemplates that SpaceX will independently, with separate third-party agreements, design, construct and alter SLC-40 to SpaceX's own specifications tailored exclusively for its commercial launch operations. The Air Force is not a party to these separate design or construction contracts, and the design is not tailored to any Air Force or Government needs.

In finding that there was a contract for construction, the Deputy Administrator asserted that "the fact the Air Force itself is not a party to a contract for construction does not negate the existence of a contract for construction, as the ARB 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 the Government agency is not a party to the contract with the construction contractor." (Final Ruling at 5). Apart from the novel and unprecedented expansion of the Act's coverage in the pending City Center Matter, the other two cited decisions, Phoenix and Fort Drum are easily distinguishable inasmuch as those cases involved the expenditure of federal funds in the form of lease payments for structures designed to be exclusively used and occupied by the Government.

Here, there is clearly no lease or other agreement between the Air Force and SpaceX relative to the construction work composing the Project through which the Government will directly compensate SpaceX for the construction cost of the Project. In fact, the License Agreement provides that the consideration for SpaceX's use of SLC-40 is SpaceX's agreement "*to pay* all direct costs associated with [SpaceX's] use of the facilities" to the Air Force, which costs are defined as "the actual costs that can unambiguously be associated with [SpaceX's] *commercial* launch operations." (License Agreement ¶ 1, emphasis added). Unlike a property lease arrangement whereby the Government pays for the lease construction build out costs amortized over the life of the lease, there is no such arrangement providing for a pre-arranged payment by the Government for SpaceX to directly recoup its construction costs for the Project.

Citing terms within the License Agreement, the Deputy Administrator found that the purpose of the license was for "construction, establishment and maintenance of a space launch complex for the Falcon 9 launch vehicle to support commercial and *possibly* Government space launches." (Final Ruling at 4, emphasis added). The construction identified in the License Agreement was for the purpose of supporting SpaceX's private, "commercial" operations and also "possibly" Government space launches. In short, the construction envisioned in the License Agreement was intended by both SpaceX and the Air Force to be exclusively for SpaceX's private launch operations use, with "possible" use by SpaceX to provide services to the Government on an as-purchased basis. In addition, neither the License Agreement nor any other contemporaneous agreement between SpaceX and the Government required SpaceX to ever use its facilities at SLC-40 to provide launch services to the Government. Accordingly, SpaceX's construction at the Project was not a "contract for construction" as defined under the Act.

Therefore, the Deputy Administrator erred in finding that the License Agreement constitutes a contract for construction for purposes of Act coverage.

C. The Deputy Administrator's Final Ruling that the Project is A "Public Work" Within the Meaning of the Act is in Error, Arbitrary and Capricious and an Abuse of Discretion.

1. No Public Funds were Authorized or Expended for the Project.

Apart from the pending City Center Matter, the Deputy Administrator has failed to cite a single instance in the history of the Act where a construction project that was entirely financed, owned and occupied by a private entity was found to be covered by the Act. Such a finding is contrary to the Spending Clause of the Constitution, the Act's plain language, the Legislative History discussed above, the Department's own regulations, and prior controlling case law. As such, the Deputy Administrator's Final Ruling that the Project is a public work is arbitrary and capricious and constitutes an abuse of discretion inasmuch as no public funds have been authorized or expended for the Project.

2. Contrary to the Administrator's Final Ruling, Construction of the Project is not being Carried On "Directly by Authority of or with Funds of a Federal Agency."

As explained above, the Act applies only to contracts to which the Government is a party "for construction... of public buildings or public works" of the Government. 40 U.S.C. 3142(a). Further, 29 C.F.R. § 5.2(k) defines the term "public building or public work" as including "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." This definition contains two prongs that must both be satisfied in order to find a construction project to be a public building or work: (1) the construction must be "carried on directly by authority of" or "with funds of" the

Government; and (2) the construction must "serve the interest of the general public."[2] The Deputy Administrator in her Final Ruling has misconstrued both of these prongs in light of controlling case law and the plain language of the Act itself, leading to a clearly erroneous result.

Concerning the first prong, as discussed above, the legislative history of the Act makes clear that Congress intended the Act to apply only to construction of projects that were paid for, owned and/or occupied by the Government. Moreover, the Sixth Circuit's holding in Peterson made clear that the term "public work" is to be understood in its plain, obvious and rational sense, holding that the term "includes any work in which the [Government] is interested and which is done for the public *and for which the [Government] is authorized to expend funds.*" 119 F.2d at 147 (emphasis added). Further, contrary to the holding of the Peterson court, it is undisputed here that the Air Force is *not* "authorized to expend funds" on the Project and has not done so. In fact, the License Agreement provides for no expenditure of federal funds and that all costs and expenditures relating to the Project shall be borne by SpaceX. Finally, the Deputy Administrator cited but ultimately disregarded the holding of the Supreme Court in Irwin, 316 U.S. 23. (Final Ruling at 5). The Supreme Court there defined public work to include any project "constructed or carried on either directly by the public authority or with public aid." Id. at 24. It is undisputed that the current Project is not being constructed or carried on either directly by authority of the Air Force or with funds from the Air Force.[3]

The Deputy Administrator's misreading of the holdings of the Peterson and Irwin cases contradicts the "authority" prong contained in the Department's regulation Section 5.2(k), which this Board has declared to be a paraphrase of the Peterson and Irwin holdings. See Phoenix, ARB No.

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[2] The second prong is discussed in Section IV, C, 5, infra.

[3] As noted in Section III, B, supra, the Air Force has stated that the "SpaceX construction activities at LC-40 are privately funded" and that the construction work at SLC-40 was not "performed at the request of," "under the direction of," or "for the benefit of" the Government.

01-010, at *8-9. Peterson and Irwin make clear that in order to be "carried on directly by authority of" the Air Force, there must be at a minimum the authorization to expend Government funds on the Project. That is why, except in the single instance of the City Center Matter, neither the Department nor any court has ever previously found a project to be "carried on directly by authority of the Government" so as to invoke Act coverage in the absence of Government funding, ownership and/or occupancy of a construction project. In this matter, the Deputy Administrator erroneously held the current Project to be a "public work" based on her finding that the Air Force has "extensive authority over the construction at issue." (Final Ruling at 5). This holding is not only contrary to the Act's plain language and prior controlling case law but also the undisputed facts regarding the Air Force's limited insight into and control over SpaceX's construction activities at SLC-40. (Air Force Dec. 4, 2012 Response).

3. The Project Was Not Carried on Directly by Authority of the Government as a Result of any Federal Statute or Commercial Agreement.

Ignoring the Peterson and Irwin precedent, the Deputy Administrator found that the Project was "carried on directly by authority" of the Air Force and would not have been constructed without the Government's exercise of legislative and contractual authority, specifically the Commercial Space Launch Act, 49 U.S.C. §§ 70101, *et seq.*, (now 51 U.S.C. § 50903). (Final Ruling at 6). That act directs the Secretary of Transportation to encourage, facilitate and promote commercial space launches and reentries by the private sector utilizing Government properties deemed as excess or not needed for public use. The fact that the Government is promoting certain policy goals via law or regulation, however, cannot mean that any construction project undertaken by a private entity within that general sphere of economic activity constitutes a public work carried out directly by authority of the Government. To hold otherwise would subject almost every construction project in the United States to the Davis-Bacon Act given the

plethora of laws and regulations promoting various forms of economic activity. For example, even the private construction of a grain silo would be covered by the Davis-Bacon Act in light of the Government's efforts to encourage the development and expansion of our nation's renewable fuels sector under the auspices of the Energy Act of 2005.

As farfetched as that may sound, a similar argument and ruling has been made by the Deputy Administrator in this matter. The purpose of the Commercial Space Launch Act and the License Agreement was to incentivize private companies like SpaceX to spend their own private funds to construct launch facilities and undertake launch operations. Imposing the requirement that prevailing wages be paid under these circumstances is contrary to the clear congressional intent, as evidenced by the Commercial Space Launch Act, to turn over certain excess Government property to private commercial entities.

The Deputy Administrator further supports her ruling that the Project was "carried on directly by authority" of the Air Force by arguing that there is no evidence "that SpaceX would have undertaken the reconstruction of the launch complex without the definite expectation of government launches paid for by NASA" (Final Ruling at 6). In fact, there is ample evidence that SpaceX would have constructed new launch facilities, even absent any prospect of future business with the Government. At the time SpaceX entered into the License Agreement, SpaceX had entered into contracts or was in negotiations with multiple private, commercial customers for launch services, which services could only be performed from launch facilities designed and built specifically to support SpaceX's Falcon 9 launch vehicle. Thus, SpaceX had a compelling commercial rationale for entering into the License Agreement.

Neither the License Agreement nor the CSOSA between SpaceX and the Air Force contain any agreement or commitment by the Air Force or NASA that either of them will

contract with SpaceX for any launches. There is no contractual *quid pro quo* whereby the Government agreed to reimburse or otherwise indirectly compensate SpaceX for the cost of its construction activities by firmly committing to use SpaceX's launch facilities. At the time the License Agreement was granted, SpaceX had no commitments from the Government to purchase any launch services originating from SLC-40.[4]

Although after execution of the License Agreement, NASA did decide to enter into contracts with SpaceX for launch services following competitive procurements, that subsequent and unrelated event cannot support the Deputy Administrator's conclusion that the "definite expectation" of "possible" Government launches suffices to meet the Act's requirement that the Project was performed under the direct authority of the Air Force. The subsequent award of NASA contracts for launch services to SpaceX simply does not support the Deputy Administrator's conclusion that at the time the License Agreement was granted, the construction of the Project was carried on under the direct authority of the Air Force.

4. The Air Force Has Not Exerted Substantive Control over SpaceX's Construction Activities.

The Deputy Administrator erroneously found that 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 the authority of the Government." (Final Ruling at 7). The Deputy Administrator cites provisions in the License Agreement providing for Air Force review of SpaceX's construction and related plans and specifications. The Final Ruling completely ignores responses provided to the Department by the Air Force's Chief of Space Operations Division, Colonel Scott D. Peel, in a letter written in response to a

[4] As noted in II, B, supra, the NASA COTS Agreement called for three demonstration launches yielding cargo carriage capabilities to the International Space Station, but the COTS Agreement was contingent on appropriation of sufficient funding and could be unilaterally terminated by NASA at any time. Pursuant to the COTS Agreement with NASA, SpaceX was free to launch from any of its existing facilities or to develop new facilities, if necessary.

Department request dated August 14, 2012. In his response, Colonel Peel made the following statements confirming that the Air Force did not exert the control claimed by the Deputy Administrator:

> A1. Questions regarding SpaceX's activities at SLC-40 should be directed to SpaceX. The AF has no supervision, control or management over SpaceX's business decisions. Work accomplished at SLC-40 by SpaceX since issuance of the subject license has included demolition, construction of new facilities and repair of existing licensed facilities... **As none of these activities were performed at the request of the AF, under the direction of the AF, or for the benefit of the AF**, the AF was not involved in actions which pertained to the award or execution of any of the SpaceX construction efforts.
>
> ***
>
> A1.a. ...The AF did not certify the designs or direct SpaceX in any way. The AF cannot provide copies of the referenced contracts because the AF had no involvement in the construction. AS none of these activities were performed at the request of the AF, under the direction of the AF, or for the benefit of the AF, the AF was not a party to any contracts that SpaceX may have entered into.
>
> ***
>
> A1.b. ....SpaceX moved one existing LOX tank. Siting plans for the move were reviewed and approved by our civil engineers and the wing's facilities board IAW AFSPCI 32-1008 for safety purposes only.
>
> ***
>
> A3. ...No costs were paid by the Federal Government, as under current legislation commercial companies may only use launch property and launch services not currently needed for governmental use at no cost to the government.

(Air Force Dec. 4, 2012 Response, emphasis added).

When asked by the Department for copies of the master plan, construction specifications or similar documents for SpaceX's construction, Colonel Peel's response was that the Air Force

did not have any such documents and does not retain any such documents because of their proprietary nature "and the fact that none of these activities were performed at the request of the AF, under the direction of the AF or for the benefit of the AF." (Air Force Dec. 4, 2012 Response, Document Requests Responses 1-3). The Deputy Administrator completely ignored Colonel Peel's responses concerning the extent of purported control the Air Force had over the Project in her finding.

The Deputy Administrator admitted that the express terms of the License Agreement do not support her finding of Air Force control when she stated "[i]n short, although the License Agreement 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." (Final Ruling at 7). This conclusion is directly contradicted by the Air Force's Chief of Space Operations Division, Colonel Peel, who confirmed that the Air Force's oversight was minimal and largely limited to safety-related matters and ensuring compatibility of utility interconnections between SpaceX's facilities and Air Force facilities. (Air Force Dec. 4, 2012 Response).

As shown, the Principal Deputy Administrator erred and abused her discretion and her finding that SpaceX's work at the Project was performed under the authority and control of the Air Force.

5. The Project Does Not "Serve the Interest of the General Public" Sufficient to Require Coverage by the Act.

Even if the Deputy Administrator had properly found that the Project is being carried out directly by the Air Force's authority, the Final Ruling would still have to be set aside because of the Deputy Administrator's erroneous finding with regard to the second prong of the regulatory

definition: *i.e.*, the finding that the Project "sufficiently" serves the interest of the general public, as opposed to the "not insubstantial" private interests of SpaceX.

Contrary to the Final Ruling, any public benefits achieved by the Project are not materially different from the benefits attendant to any large private undertaking, are subordinate to the primary economic motivation of the private entity funding the entire cost of the Project, and are plainly insufficient to transform this private project into a "public work." Citing the City Center Matter ARB decision, the Deputy Director stated that the requirement under 29 C.F.R § 5.2(k) that the Project "will serve the interests of the general public" refers to construction 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." (Final Ruling at 8). The public benefit test which the Deputy Administrator should have applied was set forth in Peterson. 119 F.2d at 147. There the Sixth Circuit held that in order to be a public work, the public benefit must be the "principal" goal of the project, as opposed to a merely incidental goal. See also Crown Point, 1987 WL 247049, at *4 (describing the project at issue as being built for the "sole purpose" of serving the needs of the government).

The construction work at the Project is not open to the general public, is never directly used by the public (absent a separate contract for launch services), and was built by SpaceX for its own commercial and pecuniary benefit to serve those who desire launch services including private entities, foreign governments and the Government. As stated in the License Agreement, the purpose of the license was for "construction, establishment and maintenance of a space launch complex for the Falcon 9 launch vehicle to support *commercial* and *possibly* Government space launches." (Final Ruling at 4, emphasis added). Thus, it is clear that the principal goal of the Project was the private, commercial benefit of SpaceX, not the public benefit. Although the

Project provides incidental benefit to the Government when the Government decides to contract with SpaceX for launch services, there is no direct benefit to the general public sufficient to meet the requirement that the Project serves the interest of the general public.

The Deputy Administrator erred and abused her discretion in finding that SpaceX's work at the Project sufficiently serves the general public warranting coverage by the Act.

D. Any Finding of Act Coverage in this Case Should Not Be Applied to Contracts for Construction that Were Awarded Prior to the Deputy Administrator's Final Ruling.

Section 1.6(f) of the Department's rules, 29 C.F.R. § 1.6(f), empowers the Administrator to decide on a case-by-case basis whether to incorporate a wage determination in a contract where an agency has failed to include Act coverage in a contract that is later determined to require such coverage. See Ruling Letter to Ms. Miriam Moses by Administrator McCutcheon, 2004-1 (deciding not to apply the Act retroactively to an INS contract). The Administrator may consider a number of factors that vary on a case-by-case basis in determining the application of Section 1.6(f) to a particular case. Factors that may be considered by the Administrator include the reasonableness or good faith of the contracting agency's coverage, the status of the procurement (*i.e.*, to what extent the construction work has been undertaken), the understanding of the contractual parties as to the possible retroactive application of the Act provisions, and the possible disruptions to procurement in deciding on remedies.

In the present case, it is evident that the Air Force and the SpaceX reasonably believed in good faith that the Act was not applicable. There was never any wage determination issued by the Government for the Project. The Air Force in a letter dated July 1, 2008 from Air Force Colonel, Hal V. Hoxie, Chief Programs and Legislative Division, Office of Legislative Liaison, to Senator Bill Nelson answered the Senator's question as to whether the Act applied to SpaceX's construction as follows:

> No. The Davis Bacon Act is only applicable to public works projects. None of the Air Force/SpaceX agreements are in this category. The SpaceX construction activities at LC-40 are privately funded.

(See Exhibit 4 to Letter from SpaceX's counsel dated November 18, 2011 to Acting Wage and Hour Division).

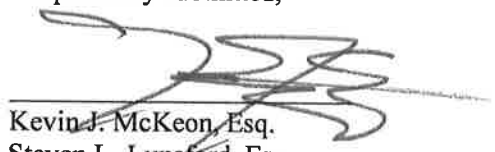
The Deputy Administrator ruled that any Act coverage would apply prospectively starting with the first pay period week immediately following the date of her Final Ruling, despite the fact no prevailing wage determination has yet been issued by the Department of Labor to permit a construction contractor to know what the applicable prevailing wages will be.

Work at the Project has been ongoing for several years. Numerous financial commitments have been incurred by SpaceX in reliance on the Air Force's representations and its own good faith belief that the Act did not apply to the Project. Therefore, pursuant to Section 1.6 of the Department's rules, the Deputy Administrator should have exercised her discretion not to apply the Act to any existing contracts that had already been awarded for the Project at the time the Final Ruling was issued.

V. CONCLUSION

For each of the foregoing reasons, the decision of the Deputy Administrator with regard to the applicability of the Act to the SLC-40 Project should be set aside.

Respectfully submitted,



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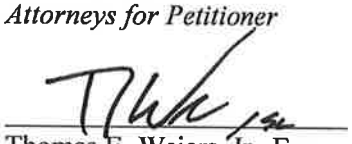

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review have been served by first-class mail on the following, this 9th day of October 2013:

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