



OHIO DEPARTMENT OF TRANSPORTATION
Mike DeWine, Governor

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July 16, 2021

Christopher Runyan, PE
President
Ohio Contractors Association
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Re: July 6 Davis Bacon Letter

Dear Mr. Runyan:

This letter is in response to your correspondence of July 6, 2021, wherein you express concern, on behalf of your membership, with recent revisions to the ODOT Trucking Guidelines. Specifically, you are concerned with the manner in which the revisions were made as well as the substantive revisions themselves. I hope that this letter will provide clarity on the changes that were made, their potential impact to your membership, and the legal basis for these revisions.

As you are aware, ODOT's Division of Opportunity, Diversity and Inclusion (ODI) is charged with evaluating whether any off-site facility is considered within the site of work, as that term is defined by the Davis Bacon and Related Acts (DBRA). Your letter provided an analysis of the three primary cases that discuss "site of work" in the context of an off-site facility. It is important to note, however, that the courts have yet to definitively rule on the 2000 regulatory amendment, which changed the definition of site of work to include off-site facilities that were "adjacent or virtually adjacent" to the project. While dicta in *L.P. Cavett* indicates that the courts would determine that this is a reasonable interpretation of the statute, there has been no direct holding on this issue. The courts have not elaborated on the scope of "adjacent or virtually adjacent," other than an indication that it is something beyond the physical limits of the project but within 2 miles of the project limits.

ODOT is therefore left to balance the need of the contractor to know definitively what will be considered "site of work" at bid time, versus enforcing a definition of "site of work" that has been ambiguously defined in the federal regulations. While ODOT will continue to evaluate site of work on a case by case basis, the newest iteration of the Trucking Guidelines is intended to provide a more definitive policy regarding site of work, in order to aid the contractor when making bidding decisions.

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The Trucking Guidelines were last updated and published on July 1, 2021. Specifically, we updated to

1. Clarify that ODOT will only consider an off-site location within a two (2) mile circumference from the project limits as potentially within the scope of DBRA enforcement; and
2. Set forth documentation that ODI will request when determining site of work from the contractor.

These updates aim to help the industry understand what ODI reviews when determining these situations. The mileage clarification will ultimately help even the playing field when contractors are calculating their bids. While I understand your concern with regard to the implementation of these changes, and notice to the contractor, it should be noted that there was nothing preventing ODOT from enforcing the DBRA at a location either within or beyond two miles prior to the clarification. Indeed, since 2016, ODOT has enforced the DBRA on off-site facilities beyond 2 miles from the project limits. Contractors have been on notice that an off-site location, at any distance from the project limits, could be considered within the "site of work" if it was dedicated exclusively to the project. This most recent clarification does not add any further restrictions to the contractor - to the contrary, it actually limits ODOT enforcing any location that is further than 2 miles from the project limits.

I would also like to address your concern regarding the contractor who most recently brought their site of work concerns to the OCA. When bidding the project, this contractor erroneously relied on an outdated 2017 Construction Administration Manual of Procedures (MOP), which still referenced the "one mile rule" in its definitions section. The subject dump site was just beyond a mile from the project limits, but under 2 miles of the project limits. As you reference in your letter, ODI revoked the "one mile rule" in 2016 and updated the Trucking Guidelines to state that adjacency would be determined on a case by case basis, without any further clarification as to maximum distance from the project site. Therefore, even if the previous version of the Trucking Guidelines (those issued in 2016) had been applied in this instance, it would not have changed the determination in this matter. In addition, the contractor failed to timely provide ODI records that had been requested in order to determine if the dump site was considered site of work. This delayed ODI's evaluation of site of work and determination on this issue.

I hope that this letter adequately answers your inquiry and provides further clarification and context related to your concerns. ODOT is very cognizant of the impact its policies have to the contracting community and strives to ensure that proper notice is provided, and input is sought, when appropriate. In this particular instance, the change was for the benefit of the contracting community, and only limited the reach of ODOT's enforcement efforts.

Respectfully,



Jack Marchbanks
Director, ODOT

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