FILED
United States Court of Appeals
Tenth Circuit

August 6, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 113,

Plaintiff - Appellant,

v.

T & H SERVICES, a wholly owned subsidiary of Tlingit Haida Tribal Business Corporation,

Defendant - Appellee.

No. 20-1187

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CV-03159-LTB-KMT)

Terrence A. Johnson, Snyder, Colorado, for Appellant.

Todd A. Fredrickson (Micah D. Dawson with him on the brief), Fisher and Phillips, LLP, Denver, Colorado, for Appellee.

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

HARTZ, Circuit Judge.

T & H Services performed operation and maintenance services at Fort Carson Army base in Colorado Springs, Colorado, under a contract with the United States Army (the Army Contract) that was governed by several federal labor-standards

statutes, including the Service Contract Act, 41 U.S.C. §§ 6701–07, and the Davis-Bacon Act, 40 U.S.C. §§ 3141–44, 3146–47. The International Brotherhood of Electrical Workers, Local 113 (the Union) represented some T&H employees under a collective-bargaining agreement (the CBA) that included a provision for binding arbitration of disputes "limited to matters of interpretation or application of express provisions of [the CBA]." Aplt. App. at 29.

Several Union members who repaired weather-damaged roofs at Fort Carson in the summer of 2018 were paid the hourly rate for general maintenance workers under Schedule A of the CBA. The Union, believing that the workers should have been classified as roofers under the Davis-Bacon Act and paid the corresponding hourly rate under the schedule, filed a grievance and sought arbitration of the dispute. When T&H refused, claiming that the dispute was not arbitrable under the CBA, the Union filed suit in the United States District Court for the District of Colorado to compel arbitration under § 4 of the Federal Arbitration Act (FAA), which allows a "party aggrieved by the . . . refusal of another to arbitrate under a written agreement for arbitration [to] petition [a] court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."[1] 9 U.S.C. § 4. The district court agreed with T&H that the dispute was not arbitrable and granted summary

[1] The Union also sought to compel arbitration over a second unresolved grievance, but the parties later reached a settlement regarding this grievance and filed a stipulation of partial dismissal, which the district court granted.

judgment to the company. The Union appeals. Exercising jurisdiction under 9 U.S.C. § 16 and 28 U.S.C. § 1291, we affirm.

The essence of the dispute is whether the workers who repaired the roof should have been classified as general maintenance workers or roofers for that labor; the hourly rate owed to workers under either classification is not in question. As we explain in greater depth below, when the CBA is read in the context of the Davis-Bacon Act, it is clear that the CBA does not govern the classification of workers under the Act. The United States Department of Labor (DOL) has a robust system authorized by the Davis-Bacon Act and DOL regulations promulgated thereunder for determining job classifications for Davis-Bacon work and resolving disputes over classifications. *See* 29 C.F.R. Parts 1, 5–7; *Universities Rsch. Ass'n v. Coutu*, 450 U.S. 754, 759–61 (1981). The CBA recognizes this system, and the natural reading of that agreement is that Davis-Bacon job classifications are to be decided by the government, not by the parties to the CBA through negotiation, grievance proceedings, or otherwise. This reading of the CBA should not be surprising; what would be surprising is a CBA that provided for grieving and arbitrating Davis-Bacon job-classification disputes. Long-recognized policy reasons support not leaving Davis-Bacon job classifications to arbitration; and these policy reasons would likely dissuade those who negotiate collective-bargaining agreements from providing for arbitration of disputes over Davis-Bacon job classifications (and might well make such an arbitration agreement unenforceable).

I. BACKGROUND

Although most of the work under the Army Contract was apparently governed by the Service Contract Act, the Union contends that the roofing work in dispute was governed by the Davis-Bacon Act. The two acts are quite similar in operation, setting minimum wages for those who work on federal contracts. *See* 40 U.S.C. § 3142; 41 U.S.C. § 6703; *Carpet, Linoleum & Resilient Tile Layers, Loc. Union No. 419, Brotherhood of Painters & Allied Trades, AFL-CIO v. Brown*, 656 F.2d 564, 565 n.1 (10th Cir. 1981) ("The Davis-Bacon Act and the Service Contract Act . . . direct the Secretary of Labor to . . . write [a] wage standard as a minimum into the specifications of federal contracts."). But we will focus on the Davis-Bacon Act.

The Davis-Bacon Act governs federally funded contracts for construction. *See* 40 U.S.C. § 3142(a); *Universities Rsch. Ass'n*, 450 U.S. at 756 (Davis-Bacon Act applies to "certain federal construction contracts"). The Act requires the contractor to pay each worker on the contract at least the prevailing wage in the locality for the type of work performed by the worker. *See* 40 U.S.C. § 3142; *Universities Rsch. Ass'n*, 450 U.S. at 756–57. The DOL periodically determines the prevailing wage for each type of work in each locality.[2] Then the federal contracting officer for the contract determines the category for each of the types of work to be performed

[2] *See* 29 C.F.R. § 1.3 ("For the purpose of making wage determinations, the Administrator [of the DOL Wage and Hour Division] will conduct a continuing program for the obtaining and compiling of wage rate information."); *id.* § 1.6(c)(1) ("Project and general wage determinations may be modified from time to time to keep them current."); U.S. Dep't of Lab., U.S. Department of Labor Prevailing Wage Resource Book, *Chapter 6: Davis-Bacon Wage Determinations*, at 4 (May 2015),

under the contract.[3] This establishes the minimum wage, *see* 40 U.S.C. § 3142(a)–(b); 29 C.F.R. § 5.5(a), although the contractor may decide to pay higher wages.[4]

The category determinations and corresponding wage-rate calculations are made before the contract is awarded. *See Universities Rsch. Ass'n*, 450 U.S. at 760–61; 29 C.F.R. § 1.6. Any potential contractor, worker, or union for the project can then challenge a determination by requesting reconsideration or ultimately appealing to the DOL's Administrative Review Board (ARB), formerly the Wage Appeals

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available at https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book.

[3] *See* 29 C.F.R. § 1.6(b) ("Contracting agencies are responsible for insuring that . . . the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and for designating specifically the work to which such wage determinations will apply."); *id.* § 1.5; 48 C.F.R. § 22.404-2(a) ("The contracting officer must incorporate . . . the appropriate wage determinations in solicitations and contracts and must designate the work to which each determination or part thereof applies."); *Universities Rsch. Ass'n*, 450 U.S. at 760 ("The contracting agency has the initial responsibility for determining whether a particular contract is subject to the Davis-Bacon Act. If the agency determines that the contract is subject to the Act, it must determine the appropriate prevailing wage rate." (citation omitted)).

[4] *See Frank Bros. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 887 (7th Cir. 2005) ("[T]he Davis-Bacon Act . . . allow[s] for the payment of higher wages if the states, the market or individual employers conclude[] that supplemental wages [are] in order."); *see also Universities Rsch. Ass'n*, 450 U.S. at 771 ("[T]he [Davis-Bacon] Act is a *minimum* wage law designed for the benefit of construction workers." (emphasis added) (internal quotation marks omitted)).

Board (WAB).[5] [6] Typically, challenges to wage determinations "must be made prior to contract award or prior to the start of construction if there is no award." *ICA Const. Corp. v. Reich*, 60 F.3d 1495, 1498–99 (11th Cir. 1995) (referring to long-standing rule of WAB). The WAB stated that this rule is "to ensure that contractors competing for federally-assisted construction contracts know their required labor costs in advance of bidding. Manifest injustice to bidders would result if the successful bidder on a project could challenge (the) contract's wage determination after all other competitors were excluded from participation." *Modernization of the John F. Kennedy Fed. Bldg.*, WAB Case No. 94-09, 1994 WL 574115, at *7 (Aug. 19, 1994) (internal quotation marks omitted); *see Universities Rsch. Ass'n*, 450 U.S. at 782 (Congress provided for determination of wages before the letting of contracts

[5] *See* 29 C.F.R. § 1.8 ("Any interested person may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination."); *id.* § 1.9 ("Any interested person may appeal to the [ARB] for a review of a wage determination or its application."). The term *interested person* includes "any contractor . . . who is likely to seek or to work under a contract containing a particular wage determination, or any laborer or mechanic, or any labor organization which represents a laborer or mechanic, who is likely to be employed or to seek employment under a contract containing a particular wage determination." *Id.* § 7.2; *see id.* § 1.9 (incorporating 29 C.F.R. Part 7); *N. Georgia Bldg. & Const. Trades Council v. Goldschmidt*, 621 F.2d 697, 704 (5th Cir. 1980) ("A wage determination may be appealed by any 'interested person,' including a contractor or labor organization, who has unsuccessfully sought reconsideration of the contested decision.").

[6] In 1996 the DOL "establishe[d] the [ARB] and transfer[red] to it the authorities and responsibilities previously delegated to the [WAB] and the Board of Service Contract Appeals." Establishment of the Administrative Review Board, 61 Fed. Reg. 19982–01 (May 3, 1996). "[T]he functions previously performed by the [DOL's] Office of Administrative Appeals" were also assigned to the ARB. *Id.*

so that the contractor may "know definitely in advance of submitting his bid what his approximate labor costs will be" (internal quotation marks omitted)).

There are exceptions to this rule for certain circumstances, however, such as when a contractor requests a "conformance" to add a new wage classification to a contract after the contract has been let, 29 C.F.R. § 5.5(a)(1)(ii); *see Swanson's Glass*, WAB Case No. 89-20, 1991 WL 494715, at *3 (Apr. 29, 1991) ("Once the contract is awarded," "the conformance procedure" allows "for establishing an additional classification and wage rate"),[7] or when the DOL exercises its strictly limited authority under 29 C.F.R. § 1.6(f) to incorporate a new wage determination "retroactive to the beginning of construction."[8] When the DOL incorporates a new

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[7] The ARB has described the conformance procedure in 29 C.F.R. § 5.5(a)(1)(ii) as follows:

> Occasionally a class of laborers or mechanics is required on a construction project that is not found in the wage determination. In such instances, Wage and Hour is authorized to add an additional job classification and wage rate after the award of the construction contract through a process known as a conformance. The conformance procedure is designed to be a simple, expedited process for adding wage rates needed for job classifications not found in the wage determination. To protect the integrity of the competitive bidding system, the requirements for the addition of a conformed classification and wage rate are narrowly limited, and a conformed classification will be recognized only if it meets the following three-part test: (1) The work to be performed by the classification is not performed by a classification in the wage determination; (2) The classification is used in the area by the construction industry; and (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

Selco Air Conditioning, Inc., ARB Case No. 14-078, 2016 WL 4258213, at *5 (July 27, 2016).

[8] Section 1.6(f) provides, in full:

wage rate into a contract, the contractor typically will be "compensated for any increases in wages resulting from such change." 29 C.F.R. § 1.6(f).[9]

> The Administrator may issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may issue a wage determination which shall be applicable to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination. Under any of the above circumstances, the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, *Provided* That the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.

29 C.F.R. § 1.6(f).

[9] *See Cox v. Bland*, No. CIV 300 CV 311 CFD, 2006 WL 3059988, at *7 (D. Conn. Oct. 27, 2006) (recognizing that § 1.6(f) allows for the incorporation of a new wage rate retroactive to the beginning of construction so long as "the contractor is compensated for any increases in wages resulting from such change," but finding that no such increased compensation was warranted "since the wage rate increase did not itself increase the cost of contract performance"); *Central Energy Plant*, ARB Case No. 01-057, 2003 WL 22312694, at *11 (Sept. 30, 2003) ("since the [agency] failed to include a proper wage determination in the . . . contract, [the DOL had] the authority [under § 1.6(f)] to modify the contract after contract award and after construction began," thereby increasing the agency's costs by $3 million); *Inland Waters Pollution Control, Inc.*, WAB Case No. 94-12, 1994 WL 596585, at *4 (Sept. 30, 1994) ("When a contracting agency fails to incorporate a wage determination into a contract, the DOL may retroactively incorporate the appropriate wage determination into the contract provided that the contractor is compensated for any increase in wages resulting from the change."); *E & M Sales, Inc.*, WAB Case No. 91-17, 1991 WL 523855, at *3 (Oct. 4, 1991) ("The utilization of [§ 1.6(f) to

Violations of the Davis-Bacon Act can result in withheld payments, contract termination, and debarment. *See* 40 U.S.C. §§ 3142–44; 29 C.F.R. §§ 5.9, 5.12; 48 C.F.R. §§ 22.406–9, 22.406–11. If withheld sums are insufficient to adequately compensate employees who have been underpaid, the Act also creates a limited right of action for employees to sue on the "payment bond" that government contractors must post for "the protection" of workers. *Universities Rsch. Ass'n*, 450 U.S. at 758; *see* 40 U.S.C. § 3144(a)(2).

Enforcement of the Davis-Bacon Act is the responsibility of both the contracting agency and the DOL.[10] Employees can submit complaints regarding alleged violations of the Davis-Bacon Act to the contracting officer,[11] who can investigate and take action against an offending contractor, and refer disputes to the

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retroactively modify a contract to include a higher wage] would compensate the workers at the appropriate rate, preserve and enhance the contract proceeds payable to [the contractor], and prevent unjust enrichment of the [agency]."); *see also D.C. v. Dep't of Lab.*, 819 F.3d 444, 451 (D.C. Cir. 2016) (Kavanaugh, J.) ("[I]f we were to rule that the Davis-Bacon Act applied to CityCenterDC, D.C. would suddenly owe approximately $20 million in backpay." (citing 29 C.F.R. § 1.6(f))).

[10] *See* 40 U.S.C. §§ 3143–45; 29 C.F.R. § 5.6; 48 C.F.R. § 22.406-1(a) ("Contracting agencies are responsible for ensuring the full and impartial enforcement of labor standards in the administration of construction contracts."); DOL Field Operations Handbook, Chapter 15, § 15a00(b), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf ("[T]he federal contracting or other administering agency has the primary responsibility for the enforcement of the [Davis-Bacon Act] labor standards provisions included in its contracts. The Secretary of Labor (Secretary) has coordination and oversight responsibilities.").

[11] *See* U.S. Dep't of Lab., Wage & Hour Div., *Employee Rights under the Davis-Bacon Act*, WH1321 (Oct. 2017), https://www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf; 48 C.F.R. § 22.404-10.

DOL.[12] Complaints specifically regarding classification must be submitted to the DOL for resolution.[13] The procedures by which the DOL resolves such disputes, which are set forth in 29 C.F.R. § 5.11, include notification of the affected parties by the Administrator of the DOL Wage and Hour Division, potential referral to an administrative law judge for factfinding, and eventual appeal of Administrator decisions to the ARB.[14] *See* 29 C.F.R. § 7.9(a) ("Any party or aggrieved person" may seek review with the ARB "from any final decision in any agency action under" Part 5 of the DOL regulations); *id.* § 7.1(b) (ARB jurisdiction includes review of final decisions regarding debarment and the payment of prevailing wage rates or proper classifications).

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[12] *See* 29 C.F.R. § 5.6(a)(3) (authorizing investigations); *id.* § 5.11(a) ("The [dispute-resolution] procedures in this section may be initiated upon . . . referral of the dispute by a Federal agency."); 48 C.F.R. §§ 22.406-7–22.406-12.

[13] *See* 29 C.F.R. § 5.11 (setting forth the DOL's "procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification"); *id.* § 5.13 ("All questions relating to the application and interpretation of wage determinations (including the classifications therein) . . . and of the labor standards provisions of [the Davis-Bacon Act] shall be referred to the Administrator [of the DOL Wage and Hour Division] for appropriate ruling or interpretation."); 48 C.F.R. § 22.403-6(c) ("Refer all questions relating to the application and interpretation of wage determinations (including the classifications therein) and the interpretation of the Department of Labor regulations in this subsection to the Administrator, Wage and Hour Division.").

[14] *See, e.g.*, *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1056–57 (D.C. Cir. 2007) (describing the course of the DOL's administrative proceedings in that case, including investigation by the Wage and Hour Division, findings by the Administrator that the employer had misclassified its employees, review of the Administrator's findings by an administrative law judge, and appeal to the ARB).

Overall, this "elaborate administrative scheme" is meant to provide "consistency" and "uniformity" in "the administration and enforcement of the [Davis-Bacon] Act," and "balances the interests of contractors and their employees." *Universities Rsch. Ass'n*, 450 U.S. at 782–83; *see* 5 U.S.C. App. 1 Reorg. Plan 14 (1950) (to "assure coordination of administration and consistency of enforcement," the "Secretary of Labor shall prescribe appropriate standards, regulations, and procedures" for the Davis-Bacon Act). Contractors know in advance of their bids what their approximate labor costs will be, and employees have recourse to enforce the stipulated wages. *See Universities Rsch. Ass'n*, 450 U.S. at 782. Of particular relevance to this case, the administrative scheme—in recognition of the inefficiency and potential unfairness of changing classifications or prevailing wage rates after construction has begun—strictly limits such changes and provides for additional compensation to the contractor in the event of such a change.

The Service Contract Act operates similarly to the Davis-Bacon Act. The Act applies to certain government contracts that "ha[ve] as [their] principal purpose the furnishing of services in the United States through the use of service employees." 41 U.S.C. § 6702(a). It requires that covered contracts include specific provisions "specifying the minimum wage to be paid to each class of service employee engaged in the performance of the contract," and it empowers the Secretary of Labor to "determine[]" the minimum wage. *Id.* § 6703(1). "[A]uthority to enforce" the Act is vested in the DOL, *id.* § 6707(a), and, in accordance with DOL regulations, "the head of a [contracting] Federal agency," *id.* § 6705(d), which can withhold payments from

a contractor, cancel the contract, or debar the contractor, *see id.* §§ 6705–06. The DOL has established an administrative scheme for administering the Act similar to that for the Davis-Bacon Act, under which "[a]ny interested party affected by a wage determination . . . may request review and reconsideration by the Administrator [of the Wage and Hour Division of the DOL]," 29 C.F.R. § 4.56(a)(1), or "may report to any office of the Wage and Hour Division . . . a violation, or apparent violation, of the Act," *id.* § 4.191(a).

II. DISCUSSION

We review *de novo* the district court's decision on arbitrability. *See Loc. 5-857 Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Conoco, Inc.*, 320 F.3d 1123, 1125 (10th Cir. 2003). "[W]hether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010) (original brackets and internal quotation marks omitted); *see id.* at 301 (ordinarily, "it is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning a particular matter" (internal quotation marks omitted)). "[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* at 297. There is a presumption in favor of arbitrability, *see id.* at 300, but a court "appl[ies] the presumption . . . only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and . . . [the court] adher[es] to the presumption and order[s] arbitration only where the presumption is not rebutted," *id.*

at 301. Thus, "the presumption favoring arbitration" applies "in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate . . . [is] best construed to encompass the dispute." *Id.* at 303. This framework vindicates "the first principle that underscores all [the Supreme Court's] arbitration decisions: Arbitration is strictly a matter of consent." *Id.* at 299 (internal quotation marks omitted).

Turning to the dispute before us, the CBA sets forth the following dispute-resolution procedure:

> **ARTICLE 22: GRIEVANCE PROCEDURE**
> **Section 1.** A grievance is a dispute, claim or complaint arising by and between the parties during the term of this Agreement. Grievances are limited to matters of interpretation or application of express provisions of this contract.
>
> . . . .
>
> **ARTICLE 23: ARBITRATION**
> **Section 1.** If either party desires Arbitration concerning any grievance or dispute, it shall make a request for a panel of arbitrators for Arbitration with the Federal Mediation and Conciliation Service . . . .

Aplt. App. at 29–30.[15] The Union argues primarily that the dispute concerns the interpretation of Schedule A and Article 28 of the CBA. Schedule A contains the

[15] The dispute-resolution provisions of the CBA provide, in full:

> **ARTICLE 22: GRIEVANCE PROCEDURE**
> **Section 1.** A grievance is a dispute, claim or complaint arising by and between the parties during the term of this Agreement. Grievances are limited to matters of interpretation or application of express provisions of this contract.
> **Section 2.** Grievances shall be handled in the following manner:
> Step 1 – An employee having a grievance under the terms of this Agreement shall within five (5) working days after the occurrence

agreed-upon rates of pay for work performed by various classifications of T&H employees at Fort Carson, including general maintenance workers and roofers.

Article 28 concerns Davis-Bacon work:

> **ARTICLE 28: SPECIAL ASSIGNMENTS**
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> from which the grievance arose, discuss the grievance with the Steward and the immediate Supervisor designated by the Company. Step 2 – If the parties fail to resolve the grievance in Step 1, the grievance shall be reduced to writing and discussed between a Business Representative of the Union and the Project Manager or his designated representative. This meeting shall take place within Seven (7) working days of the Step 1 meeting. If the matter is not satisfactorily resolved within Seven (7) working days, it may be submitted to arbitration in accordance with the procedures hereafter.
>
> **Section 3.** Grievances involving discharges may be processed at any step of the grievance procedure in order to facilitate their handling. Any employee who is discharged shall leave the premises immediately.
>
> **ARTICLE 23: ARBITRATION**
>
> **Section 1.** If either party desires Arbitration concerning any grievance or dispute, it shall make a request for a panel of arbitrators for Arbitration with the Federal Mediation and Conciliation Service (FMCS) within ten (10) working days of the conclusion of Step two (2) of the grievance procedure. Once the panel is received, the parties will have ten (10) working days to make a selection. The parties will jointly share the cost of the panel of arbitrators and will strike from this panel to select the arbitrator to hear the case (the last arbitrator remaining will be selected). FMCS will be notified and will contact the arbitrator.
>
> **Section 2.** The arbitrator shall have jurisdiction and authority to interpret and apply the provisions of this Agreement insofar as shall be necessary to the determination of the grievance, but he/she shall have no power or authority to add to, change, or modify any of the terms of this Agreement or any supplementary agreements.
>
> **Section 3.** The cost of the arbitration process (other than counsel fees and witness fees which shall be borne by the respective party incurring them) shall be borne by the losing party.
>
> **Section 4.** The decision of the arbitrator within the purview of this authority is final and binding on the Company, the Union and the Grievant.

Aplt. App. at 29–30.

> **Davis Bacon Work** The parties agree that *the Company has the prerogative to perform the Davis-Bacon work as it deems appropriate* as modified under the provisions below:
> **Provision 1 – Work Day and Work Week.** Effective each contract option year following authorization from the government, *the Davis-Bacon rates, as provided by the Contracting Officer at Fort Carson, will be in effect until new Davis-Bacon wage rates are provided and will be paid to employees doing Davis-Bacon work*. In addition, employees that perform a combination of Service Contract Act and Davis-Bacon work will be paid at the appropriate rate for the hours worked under each classification of work. Any Davis Bacon that is worked as overtime, in accordance with all overtime provisions provided in this agreement, will be paid at 1 ½ times the appropriate rate for the hours worked under each classification of work.

Id. at 33 (emphasis added).

The Union also relies in part on two other provisions, while acknowledging that they do not "specifically address" the grievance, Aplt. Br. at 23: (1) the preamble to the CBA, which states, "[I]t is the intent and purpose of the Company and the Union to set forth herein the entire Agreement with respect to wages, hours and working conditions as it relates to operation and maintenance activities . . . and to facilitate peaceful adjustment of grievances," Aplt. App. at 18; and (2) Article 30 of the CBA, which says, "This Agreement . . . shall be deemed to define the wages, hours, rate of pay and conditions of employment of the employees covered," *id.* at 33.

The Union's reliance on the above provisions of the CBA is misplaced. The natural reading of the language of Article 28—"the Davis-Bacon rates, as provided by the Contracting Officer at Fort Carson, will be in effect until new Davis-Bacon wage rates are provided and will be paid to employees doing Davis-Bacon work," *id.*—is that the Davis-Bacon rates come from the Contracting Officer. That is, the Contracting Officer

determines how to categorize the Davis-Bacon jobs being performed under the contract and announces the wage rate applicable to each job. The dispute here does not involve the wage rate for either the general-maintenance or roofing category; it relates to how to categorize the roof-repair work performed by Union members. And that is the job of the Contracting Officer. *See* 29 C.F.R. § 1.6(b) ("*Contracting agencies* are responsible for . . . designating specifically the work to which . . . wage determinations will apply." (emphasis added)); 48 C.F.R. § 22.404-2(a) ("*The contracting officer* . . . must designate the work to which each [wage] determination or part thereof applies." (emphasis added)). Nothing else in the CBA can reasonably be read as authorizing, or imposing any duty on, the Union, T&H, or the two together to determine the proper categorization of any job. In short, determining the categorization is not a "matter[] of interpretation or application of [any] express provision[] of [the CBA]." Aplt. App. at 29.

Nor should we be surprised that the CBA declines to provide for arbitration of disputes regarding Davis-Bacon categorizations. As previously described, the task of categorizing jobs on federal construction projects under the Davis-Bacon Act is a highly developed process under the guidance and ultimate control of the DOL. *See* 29 C.F.R. Parts 1, 5–7; *Universities Rsch. Ass'n*, 450 U.S. at 759–61; *Abhe & Svoboda*, 508 F.3d at 1061–62 ("The [DOL's] regulations further underscore that contractors do not have the authority to determine the scope of job classifications based on their own methodologies, providing a means for contractors to obtain clarification from the [DOL] about the proper scope of jobs under wage determinations."). This process ensures national uniformity on which workers and employers can rely. *See*

Universities Rsch. Ass'n, 450 U.S. at 782–83 (the DOL's administrative scheme "foster[s]" "uniformity" and "carefully balances the interests of contractors and their employees"). It reduces transaction costs (in setting wage rates) and allows contractors to rely on the rates established before contract awards. *See id.*; *Mistick PBT v. Chao*, 440 F.3d 503, 507 (D.C. Cir. 2006) (the DOL's administrative scheme "ensures an equitable procurement process in order that competing contractors know in advance of bidding what rates must be paid so that they can bid on an equal basis"). Absent this system, contractors would likely have to raise their bids to protect against adverse decisions that might issue after construction begins. *See Universities Rsch. Ass'n*, 450 U.S. at 783 (uncertainty in wage determination procedure would "likely" cause contractors to "submit inflated bids to take into account the possibility that they would have to pay wages higher than those set forth in the specifications"). Thus, the Supreme Court decades ago declared that "disputes over the proper classification of workers under a contract containing Davis-Bacon provisions must be referred to the [DOL] for determination," *id.* at 761, and held that if there are no such provisions in a contract because it was administratively determined that the contract does not call for Davis-Bacon work, an employee has no private judicial right of action under the Davis-Bacon Act for back wages, *see id.* at 756. Since then, the circuit courts have been virtually unanimous in holding that

there is no private right of action to challenge worker classifications under the Davis-Bacon Act, because of the need for a uniform, reliable determination.[16] [17]

Arbitration of Davis-Bacon classification disputes would be even more problematic. The advantages of uniform, reliable determinations would be completely undermined by leaving the decisions to the idiosyncrasies of a multitude

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[16] *See United States ex rel. Glynn v. Capeletti Bros.*, 621 F.2d 1309, 1317 (5th Cir. 1980) ("[N]either the language, the history, nor the structure of the [Davis-Bacon Act] supports the implication of a private right of action in this case."); *Weber v. Heat Control Co.*, 728 F.2d 599, 599 (3d Cir. 1984) (no "implied private right of action to enforce a contract that . . . contain[s] [Davis-Bacon] Act specifications"); *Operating Eng'rs Health & Welfare Tr. Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998) ("The Davis-Bacon Act . . . does not generally grant a private cause of action directly to employees."); *Grochowski v. Phoenix Const.*, 318 F.3d 80, 85 (2d Cir. 2003) ("Although the Supreme Court has not considered whether the [Davis-Bacon Act] confers a private right of action on an aggrieved employee for back wages, the great weight of authority indicates that it does not."); *Bane v. Radio Corp. of Am.*, 811 F.2d 1504, 1987 WL 35851, at *1 (4th Cir. 1987) (unpublished table decision) ("[T]here is no implied right of private action under the Davis-Bacon Act."). The Seventh Circuit reached the opposite conclusion in *McDaniel v. University of Chicago*, recognizing an implied private right of action in the Davis-Bacon Act. *See* 548 F.2d 689, 695 (7th Cir. 1977). But the Seventh Circuit later cast doubt on its own opinion, noting that *McDaniel* had been decided "without the guidance of the Supreme Court's pronouncements in *Cannon v. University of Chicago*, [441 U.S. 677 (1979),]" which addressed the proper analysis for determining whether to infer a private right of action from a statute. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1240 n.27 (7th Cir. 1980).

[17] The lack of an implied private right of action under the Davis-Bacon Act does not preclude litigation over agency decision-making under the Administrative Procedure Act, but review is deferential and occurs only after the agency has spoken. *See Mistick PBT*, 440 F.3d at 505 ("[T]he Davis-Bacon Act does not provide clear and convincing evidence that Congress sought to preclude review under the Administrative Procedure Act . . . of violations of Department regulations."); *Universities Rsch. Ass'n*, 450 U.S. at 761 n.10 ("At least two Courts of Appeals have held . . . that the practices and procedures of the Secretary [of Labor] are reviewable under the standards of the Administrative Procedure Act.").

of arbitrators. *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO Loc. 2-652 v. EG & G Idaho, Inc.*, 769 P.2d 548, 552 (Idaho 1989) ("[R]eview of [agency] Davis-Bacon determinations in [an] arbitration proceeding . . . would undermine the administrative review process provided in federal law."); *cf. Universities Rsch. Ass'n*, 450 U.S. at 783 (discussing how "[t]he implication of private right of action [in the Davis-Bacon Act] . . . would undercut . . . the [Act's] elaborate administrative scheme . . . [and how] [t]he uniformity fostered by [that scheme] would be short-lived if courts were free to make postcontract coverage rulings"). And contractors would need to adjust their bids even higher since the arbitration process, which would not involve the DOL, could provide no mechanism for compensation to the contractor if it loses a classification dispute. *Cf.* 29 C.F.R. § 1.6(f) (permitting DOL to compensate contractor if it increases wage rate after construction begins).

Further support for our conclusion can be found in cases declaring that the primary-jurisdiction doctrine prevents a federal court from resolving Davis-Bacon classification disputes in litigation under the False Claims Act, even though a worker does have the right to bring such litigation. The primary-jurisdiction doctrine provides in very limited circumstances that a court may refer a matter before it for initial resolution by an agency when such action will advance regulatory uniformity, enable the agency to answer a question within its discretion, or provide the court with the benefit of the agency's expertise on technical or policy matters. *See United States ex rel. Wall v. Circle C*, 697 F.3d 345, 352 (6th Cir. 2012). When the issue in a False Claims Act case is whether a government contractor has falsely certified

compliance with the Davis-Bacon Act, "the courts have drawn a dichotomy between a contractor's misrepresentation of wages and its misclassification of workers." *Id.* at 353. Determining whether the contractor has paid the wages it reported requires no agency expertise. *See id.* at 353–54. But classification of workers is another matter, and requires deferral to the DOL. *See id.* at 354; *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 431 (4th Cir. 2015) (plaintiff's allegations "that he was misclassified (that is, paid under the wrong Davis-Bacon Act wage schedule) . . . implicate primary jurisdiction"); *United States v. Dan Caputo Co.*, 152 F.3d 1060, 1062 (9th Cir. 1998) ("[T]he [DOL] should in the first instance determine how a particular type of work is classified for the purposes of wage determinations. . . . [D]eferral to the [DOL] with respect to classification determinations is proper under the doctrine of primary jurisdiction."). As one district court has explained:

> [P]ermitting [an employee's] claim [under the Davis-Bacon Act for payment on the employer's performance bond] to go forward absent an administrative determination [by the DOL that the employer had failed to pay prevailing wages] would raise the risk of inconsistent rulings by the DOL and the Court about whether a violation has occurred. This risk is especially heightened in a case like this one, where the principal dispute concerns the classification of labor, an issue on which the DOL has particular expertise. Indeed, many courts have gone so far as to rule that, in light of the complexity of the classification system, the primary jurisdiction doctrine gives the DOL *sole* jurisdiction to determine whether a laborer was properly classified.

United States ex rel. Krol v. Arch Ins. Co., 46 F. Supp. 3d 347, 354 (S.D.N.Y. 2014) (citations omitted).[18]

The parties have not pointed to any court decision ordering, or even permitting, arbitration of Davis-Bacon categorizations. The only relevant opinion we have found is to the contrary. *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO Loc. 2-652*, 769 P.2d at 551 ("Davis-Bacon determinations are clearly the province of [the contracting agency] under federal law . . . [and] [b]ecause neither [party] has any authority to make Davis-Bacon determinations, there can be no conflict leading to arbitration under [the CBA]."). And the only decision we have found by an arbitrator on the subject ruled that such matters are not arbitrable. *See Dyncorp v. Teamsters, Chauffeurs, Warehousemen Industrial and Allied Workers of America, Local Union 166*, No. 93-0129-1264, 1993 WL 13767135, at *5–6 (Dec. 1,

[18] We also note a potentially relevant Davis-Bacon regulation. It requires contracts under the Davis-Bacon Act to contain the following language (unless the DOL approves modifications to meet the needs of the federal agency):

> Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

29 C.F.R. § 5.5(a)(9). This language reflects federal policy against arbitration of a claim such as the one brought by the Union in this case and would appear to prohibit such arbitration. *See, e.g.*, *Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1429 (Fed. Cir. 1991) (interpreting § 5.5(a)(9)). But neither party has made the Army Contract available to this court; so we do not speculate on the presence or absence of this provision from the contract.

1993) (Richman, Arb.) (declining to arbitrate whether work performed by grievants was Davis-Bacon work entitled to higher rate of pay).

The Union cites *Bell v. Se. Pennsylvania Transp. Auth.*, 733 F.3d 490 (3d Cir. 2013), for the proposition that "wage disputes are arbitrable." Aplt. Reply Br. at 6. But the work at issue in that case was not construction work and, unsurprisingly, the opinion makes no mention of the Davis-Bacon Act. (Also, the court held that the dispute was not arbitrable. *See Bell*, 733 F.3d at 491.) The other cases cited by the Union in support of arbitrability are likewise inapposite. The courts compelled arbitration of grievances arising under a CBA that had nothing to do with classification of work under the Davis-Bacon Act. *See, e.g.*, *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 575, 585 (1960) (ordering arbitration of dispute over the employer's decision to lay off employees in favor of outsourcing maintenance work); *Harris Structural Steel Co. v. United Steelworkers of Am., AFL-CIO, Loc. 3682*, 298 F.2d 363, 363–65 (3d Cir. 1962) (ordering arbitration of dispute over reduction in Christmas bonus paid by employer to employees); *Suncor Energy (U.S.A.), Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC*, 474 F. App'x 729, 730 (10th Cir. 2012) (unpublished) (ordering arbitration of grievance that an employee had been discriminated against when the employer denied his request for a special assignment); *United Food & Com. Workers, Loc. 23 v. Mountaineer Park, Inc.*, 408 F. App'x 709, 710–11 (4th Cir. 2011) (unpublished) (ordering arbitration of grievance over whether employees who had voluntarily moved into lower-grade

positions were to be paid as new hires or as more senior employees, given their previous experience at the company).

In addition, we are not persuaded by these cases insofar as they are cited for the proposition that a dispute is arbitrable "[u]nless a specific CBA provision takes th[e] grievance out of the scope of arbitration." Aplt. Br. at 15; *see Warrior & Gulf*, 363 U.S. at 584–85 ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where . . . the exclusion clause is vague and the arbitration clause quite broad."); *Harris Structural*, 298 F.2d at 365 (ordering arbitration where, among other things, "the issue of bonus payments is not specifically excluded from the grievance provisions of the collective bargaining agreement"). To begin with, the dispute-resolution clause in the CBA significantly constrains what disputes are covered: "Grievances are limited to matters of interpretation or application of express provisions of this contract." Aplt. App. at 29. Yet the only "express provision" that can be said to encompass Davis-Bacon classifications implicitly assumes that the matter is left to the federal agency. As pointed out earlier in this opinion, when T&H exercises its "prerogative to perform the Davis-Bacon work," Article 28 of the CBA provides that "the Davis-Bacon rates" for such work will be "provided by the Contracting Officer at Fort Carson." *Id.* at 33. Particularly in light of the strong policy reflected in the Davis-Bacon Act and the regulations thereunder in leaving worker-classification decisions to the federal contracting agency and the DOL, we think it would be obtuse to

interpret the CBA as stating that Davis-Bacon worker classification is a "matter[] of interpretation or application of [an] express provision[] of [the CBA]." *Id.* at 29.

We conclude that the dispute is not arbitrable.[19]

III. CONCLUSION

We **AFFIRM** the order of the district court.

[19] Because we resolve this appeal on the above grounds, we have no need to address T&H's arguments that the Union's grievance is time-barred or that "an arbitrator would be required to exceed his or her jurisdiction to rule in the Union's favor." Aplee. Br. at 17.