Breaking Ground

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MBA

SIGNIFICANT CHANGES ARE COMING TO THE DAVIS-BACON ACT

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Significant changes to the David-Bacon Act that will impact many in the construction industry are expected to be put into place in December 2022.

The Davis-Bacon Act ("DBA") was enacted in 1931, amended in 1935, amended again in 1964, and is now in the process of being updated and modernized with the goal of providing greater clarity and usefulness in current times. The DBA applies to contracts in excess of $2,000 to which the Federal Government or the District of Columbia is a party for the construction, alteration, or repair, including painting and decorating, of public buildings or public works, and requires the payment of locally prevailing wages and fringe benefits to laborers and mechanics as determined by the Department of Labor. Congress has built DBA prevailing wage requirements into many statutes that provide for Federal financing assistance for construction projects in the form of grants, loans and guarantees.

For purposes of the DBA, a contract is for construction if "more than an incidental amount of construction-type of activity is involved in the performance of the government contract." "Construction" includes all types of work done on a particular building or work at the site, as set forth in the regulations at section 5.2(j)(1). Currently, a "public building" or "public work" includes a building or work which the construction, prosecution, completion, or repair of is done directly under the authority of or with the funds of a Federal agency to serve the interest of the general public. Without the proposed 2022 update, the DBA applies only to laborers and mechanics employed "directly on the site of the work." Currently, the DBA "site of the work" definition does not include a contractor's or subcontractor's permanent home office, branch locations, fabrication plants, tool yards, etc. whose location and continuance of operation are determined without regard to a particular covered project. As a result, it is common and accepted to perform a significant part of a project otherwise covered by the DBA at off-site locations without applying DBA wage rates.

Simply put, the DBA requires contractors and subcontractors working on federally funded public works projects over $2,000 to pay employees no less than local prevailing wages and fringe benefits for corresponding work on similar projects in the area. The idea behind the DBA is to level the playing field and protect workers by ensuring that all contractors working on the projects that receive federal funding pay the same wage rates, which are determined by state and federal agencies. The Supreme Court has described the DBA as "a minimum wage law designed for the benefit of construction workers." United States v. Binghamton Constr. Co., 347 U.S. 171, 178 (1954). The purpose of the DBA has been stated as a way "to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 773 (1981). Congress sought to "ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards" by requiring the payment of minimum prevailing wages. Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts, 5 Op. O.L.C. 174, 176 (1981).

In March of 2022, the Department of Labor published a Notice of Proposed Rulemaking ("NPR") that will dramatically expand the scope of the DBA. If passed, the DBA will apply to most projects arising from the $1.2 trillion Infrastructure and Jobs Act. The NPR comment period ended on May 17, 2022, and the Department of Labor received over 40,000 comments – with very mixed reviews.

The Final Rule implementing these changes is expected to be adopted in December of 2022.

Proposed Changes

With this vast expansion of the scope of the DBA, there are obviously noteworthy changes. One major change is the expanding of the definition of "building or work" from "construction, prosecution, completion, or repair" to include renovation work. Further, the Department of Labor proposes to modernize the definition of "building or work." Solar panels, wind turbines, broadband installation, and installation of electric car chargers will now be included among the construction activities covered by the definition. The change to the definition is intended to relay the significance of energy infrastructure and related projects to modern construction activities that are subject to the DBA. The Department of Labor also proposes adding language to the definition of "building or work" in order to clarify that these definitions encompass construction activity that involves only a portion of an overall building, structure, or improvement.

Of particular significance, the definition of "site of the work" will be expanded to include "significant portions" of the work that are constructed off-site, instead of only applying to laborers and mechanics employed directly on the site of the work. This change would appear to have a direct and material impact to labor costs on those portions of work traditionally performed off-site without DBA wages.

Further, a large part of the change would be to adjust the way in which the prevailing wages are calculated and determined in a specific area. The Department of Labor proposes returning to a three-step process to define prevailing wages. Currently, a single wage rate may only be identified as prevailing in the area if it is paid to a majority of the workers in a classification on the wage survey, otherwise a weighted average is used. Under the proposed three-step process that the Department of Labor proposes returning to, the first step would have any wage rate paid to a majority of workers be used as the prevailing wage. The second step would have the wage rate paid to the greatest number of workers be used if there is no wage rate paid to a majority of workers, provided the wage rate is paid to at least 30 percent of workers. The second step would be known as the "30 percent rule." The third step would have a weighted average wage rate be used if the 30 percent rule is not met.

Those that take issue with the calculating of prevailing wages aspect of the proposal, including Congressional Republicans, predict that unions will have an inflated role in determining a particular area's or county's wage rates, and have voiced their frustration revolving around the Department of Labor's failure to consider methods that would improve the accuracy of calculating wage rates. A method that they contend would result in more accurate calculations than wage surveys is using Bureau of Labor Statistics data. Congressional Republicans contend that the proposed rule reverts back to a decades-old definition of prevailing wage, via the 30 percent rule, in order to reward labor support for the current administration. They further contend that "lowering the threshold for what is considered prevailing to less than a majority of responses is nonsensical and is clearly aimed at making it easier for union wage rates to prevail because collective bargaining agreements often set a uniform wage for an entire group of workers." Associated Builders and Contractors ("ABC") surveyed its members in order to gather their opinions on the proposal and to assist in drafting informed comments. The survey revealed that members of ABC oppose current DBA regulations and strongly support repeal or reform. ABC members disagree with the opinions set forth by the unions and other DBA advocates that DBA regulations result in better quality projects, cost savings for taxpayers, and increased safety and other benefits. ABC members also indicated through the survey that the DBA increases administrative burdens and costs, artificially inflates wages, and discourages competition. Further, the survey revealed that the majority of ABC members do not participate in wage surveys and feel this exhibits the failure of the Wage and Hour Division to engage the full contractor community and collect accurate wage data.

On the flip side, and unsurprisingly, the construction labor unions are very much in favor of the proposal. Specifically, the United Brotherhood of Carpenters and Joiners of America believe the proposal holds general contractors liable and establishes an important principle on federal and federally assisted construction projects revolving around the "rampant and growing abuse of construction workers." The Center for American Progress Action Fund also supports the proposal and opines that the new regulations are necessary to restore a balance for workers through the 30 percent rule as it will help to ensure that the DBA rates reflect the actual wage rates paid in a specific area.

Should these changes be implemented in December 2022, as anticipated, those in the industry will need to carefully review the significant changes to ensure compliance. BG

https://www.federalregister.gov/documents/2022/03/18/2022-05346/updating-the-davis-bacon-and-related-acts-regulations

https://www.jdsupra.com/legalnews/comments-on-proposed-davis-bacon-act-9454992/

https://www.abc.org/News-Media/Newsline/entryid/19424/abc-survey-indicates-members-oppose-davis-bacon-regulations-and-proposed-changes-submit-your-comments-by-may-17

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