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Davis-Bacon Act

GAO Report Finds Flaws in Davis-Bacon Act Prevailing Wage Determinations

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Over the past several years, the current business conditions have had an impact on all areas and aspects of the economy. Recent reports indicate that no industry has been harder hit than that of construction, an industry possessing one of the highest national levels of unemployment.¹ Unemployment in the construction industry has spiked from 7.1 percent in 2000 to around 20 percent in early 2011.² Tied to this issue is the fact that the commercial and private construction and real estate markets substantially dried up as a result of the economy and underlying bank crises. This, in effect, resulted in government construction and real es-

¹ See, U.S. Department of Labor, Bureau of Labor Statistics Data, <http://www.bls.gov/iag/tgs/iag23.htm>

² Id. at http://data.bls.gov/timeseries/LNU04032231?data_tool=XGtable

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tate projects being the predominant area in which work was available; forcing contractors to enter the federal market, often for the first time, and “learn on the fly.”

The current economic problems have also resulted in Congress increasing or maintaining spending levels for a number of years on construction and related projects to try and bolster the economy. These expenditures and stimulus efforts have led to an increased curiosity and concern for how government monies are being spent. Coupled with the inauguration of President Obama in 2009, there has been a significant uptick in the amount of government regulation and oversight regarding government contracting and the construction industry. As part of that effort, the United States Government Accountability Office and other governmental organizations have conducted investigations and released reports dealing with government expenditures and budgeting. This article discusses one such report.

On March 22, 2011, GAO released a report (the “Report”) raising several issues and concerns with the U.S. Department of Labor’s (“DOL”) methodology for making Davis-Bacon Act wage determinations.³ The Report is noteworthy, in that the Davis-Bacon Act plays a significant role in federal and federally funded construc-

³ U.S. Government Accountability Office, GAO-11-152, Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey (2011), available at <http://www.gao.gov/new.items/d11152.pdf>.

tion projects throughout the United States.⁴ This article provides a brief background on the Davis-Bacon Act, a description of the Report and its recommendations, a discussion of the potential implications of the Report on the Service Contract Act, and a list of practical tips that construction contractors should consider in light of the Report.

I. Background on the Davis-Bacon Act The Davis-Bacon Act, 40 U.S.C. 3141 *et seq.*⁵, was enacted in 1931 to ensure that construction workers receiving hourly wages were, in fact, paid a fair wage on federal projects; that federal construction projects were performed by local employees; and that communities were protected from economic problems caused by contractors hiring (or importing) lower-wage non-local workers. The Davis-Bacon Act accomplishes these goals by requiring contractors on federally-funded construction projects in excess of \$2,000 to pay locally “prevailing wages” and benefits to their hourly paid field employees performing work on the project site.⁶

In order to bid on federal construction projects, construction contractors and subcontractors alike must pay their field employees⁷ who will work on that federal project at least as much as the wages earned by other construction workers in the area in which the project is located. With little exception, the Davis-Bacon Act has continued forward with almost no changes since its initial enactment.

The America Recovery and Reinvestment Act of 2009 (“ARRA”), sometimes referred to as the Stimulus Act, extended the Davis-Bacon Act prevailing wage requirements to “all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to” the ARRA.⁸ Because of the enormous amount of money set aside pursuant to the ARRA for federal projects subject to the Davis-Bacon Act,⁹ there has been an increased focus and oversight by Congress, and in turn, GAO, on the accuracy of the DOL’s Davis-Bacon Act prevailing wage determinations.

A. Who Determines Prevailing Wages & How? The DOL’s Wage-Hour Division determines prevailing wages by conducting voluntary regional and statewide surveys of construction contractors and interested third parties on federal, state, and private construction projects to obtain wage information. DOL’s prevailing wage determinations are based upon specific job classifications that fall within four sectors of the construction industry; with DOL basing those prevailing wage determinations on similar projects in the “civil subdivision of the

state.”¹⁰ Pursuant to DOL regulations, the term “civil subdivision” generally refers to a county, unless there is insufficient wage data within that county alone; in which case DOL will look at a group of contiguous counties, a “supergroup” of counties, or the entire state, depending on how much data is available.¹¹ Traditionally, these surveys have been sent to local contractors and subcontractors for response.

Under the Davis-Bacon Act and the DOL wage determination regulations, DOL (through use of the wage surveys) determines the prevailing wage to be the wage paid to a majority of workers employed in the applicable job classification in the local area.¹² If the same rate is not paid to a majority of workers in that job classification, DOL will determine the prevailing wage to be the average wage rate weighted by the number of employees for which that rate was reported.¹³ Under its regulations, if the prevailing wage rate was the same or equal to the local union rate for the area, DOL would determine the rate to be “union-prevailing.”¹⁴ As relates to this article and the Report, this is important because DOL will update the union-based prevailing wage without conducting a new survey when new union rates are established in the relevant area pursuant to a collective bargaining agreement.¹⁵ Non-union prevailing wages, however, are only updated through new DOL wage surveys.¹⁶ In other words, if a union is present, DOL has traditionally defaulted to the union’s hourly burdened wage to establish the local prevailing wage, even if non-union contractors are performing the same type of work. This has, in effect, forced non-union contractors to pay union wages to its employees on federal construction projects. This has also been a significant complaint of open shop contractors for some time, as it nullifies a possible competitive advantage they have over union contractors, particularly where union contractors in the subject region are in the minority. As a result, the accuracy (or in this case inaccuracy) of DOL’s wage data has long been an issue of concern for Congress, employers and workers. Moreover, while the DOL’s traditional practices may make sense in areas that are heavily unionized, these practices make little sense in areas with little union representation and, in fact, may result in a competitive disadvantage upon non-union contractors in those affected areas.

In response to such criticisms, GAO investigated DOL’s procedures in determining the prevailing wage rates and released the Report, which found DOL’s methodology to be severely flawed.

II. The Report’s Findings. The Report finds that DOL’s wage determinations are often inaccurate, largely because of issues surrounding timeliness, reliance on inappropriately small and unrepresentative data, and survey response errors.¹⁷ In the Report, GAO states that DOL is literally years behind on many of its wage surveys due to problems with technology and staffing and noted that timeliness problems are particularly extreme

⁴ The Act also serves as a model for state and local/county prevailing wage acts on projects funded at those government levels. The findings in the Report may very well have a comparable impact on those projects and the underlying laws and regulations relating thereto.

⁵ Also discussed at 48 C.F.R. (or “FAR”) Subpart 22.4.

⁶ 40 U.S.C. § 3141; *see also*, 48 C.F.R. § 22.403-1.

⁷ An important consideration is that, in general, the Davis-Bacon Act applies to workers that work on the project site, not in off-site locations such as a supplier’s manufacturing facility.

⁸ Pub. L. No. 111-5, 123 Stat. 115, § 1606 (2009).

⁹ U.S. Government Accountability Office, GAO-11-152, at 1-2.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 9-10.

¹² *Id.* at 9 (citing 29 C.F.R. § 1.2(a)(1)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

in non-union wage rate surveys, where 46 percent of prevailing rates are 10 or more years old.¹⁸

In addition to issues of timeliness, GAO concludes that the Davis-Bacon wage determinations frequently are based on inadequate sample size. In particular, the Report finds that 75 percent of wage rates are based on surveys of less than 29 workers.¹⁹ More than a quarter of the wage rates are based on surveys of 6 or fewer workers.²⁰ The inadequacy of these sample sizes is apparently not news to the DOL, as DOL's OIG reported in 1997 that issuing rates by county may result in wage determinations based on an inadequate number of survey responses.²¹

In addition to the accuracy concerns, the Report further finds DOL's wage determinations to be unrepresentative, noting that DOL does not calculate response rates or analyze how survey non-respondents affect the quality of the information obtained from the survey.²² As highlighted by GAO, response calculation is important because a low response rate may result in misleading survey results if those who respond differ from those who do not.²³ In addition to extremely low response rates, GAO also notes that the businesses that do respond are typically non-representative of the construction industry as a whole.²⁴ For example, the Report states that 63 percent of Davis-Bacon wage determinations are based upon union prevailing wages, notwithstanding the fact that unions only represent 14 percent of construction workers nationwide.²⁵ This overrepresentation is a result of the fact that unions actively mobilize their members to complete and return DOL wage surveys. From prior experience and discussions that the authors have had, non-union contractors frequently do not respond to DOL wage rate surveys because they see such responses as a waste of time because they believe that DOL automatically defaults to the union wage, thereby making the open shops' responses ineffectual. Non-union contractors have also viewed providing wage survey responses to DOL as representing both (a) a release of competition-sensitive information and (b) opening them up to union attack as those wages are then made available to unions to review and use as fodder to pursue organizing labor.

The GAO Report appears to support these widely held beliefs, further noting that many contractors do not respond to wage survey because they lack time, do not understand the purpose of the surveys, and do not understand that contractors should respond even if they do not work on federal contracts.²⁶

Finally, the Report finds that responses to DOL's surveys contained numerous errors when verified against actual payroll data, specifically with respect to areas such as number of employees and hourly and fringe benefit rates.²⁷ GAO suggests that lack of transparency

and understanding in how wage rates are set could be the cause of inaccurate survey responses.²⁸

III. The GAO's Recommendations To ensure greater timeliness and quality of wage surveys, GAO recommends that DOL obtain objective expert advice on its survey design and methodology; the collection, processing, and tracking of surveys; and efforts to promote survey awareness.²⁹

The Report further recommends that Congress remove its statutory requirement that DOL issue wage rates by "civil subdivision of the state" to allow for greater flexibility.³⁰ Currently, the Davis-Bacon Act's "civil subdivision" requirement limits DOL to issuing its wage rates by a single county or an aggregation of counties. But as DOL's OIG reported, issuing rates by county may cause wage decisions to be based on an inadequate number of responses.³¹ Even when DOL combines counties to issue wage rates, the amount of wage data is still often insufficient.³² The Report suggests that DOL should have the option of augmenting its data from sources drawn from other geographic regions, such as metropolitan statistical areas or economic areas used by the Bureau of Economic Analysis.³³

Finally, the Report recommends that DOL take steps to improve the transparency of its wage determinations.³⁴ In the Report, GAO opines that, given the voluntary nature of wage rate surveys, participants should have confidence that their information will be used in determining prevailing wages.³⁵ The Report suggests that greater transparency will help participants understand how their information is being used and lead to increased participation in the surveys and confidence in the accuracy of wage determinations.³⁶

IV. DOL's Response to the Report When confronted with the Report, DOL admitted that there are problems with its wage determination methodologies.³⁷ Specifically, DOL agreed that it needs to increase the transparency of its wage determinations.³⁸ DOL indicated, however, that it is addressing its wage determination problems internally and would prefer not to rely on expert survey advice in implementing necessary changes.³⁹ What is disconcerting is that these problems, including those recognized by DOL, have been pervasive and well-known for years with no real effort being made to alleviate, mitigate or address them.

V. Davis-Bacon Act Implications Upon Projects Subject to the Service Contract Act While the Report dealt solely with the DOL's wage determinations under the Davis-Bacon Act, one can see that the implications of the Report may have much farther-reaching effect.

One significant impact may involve the Davis-Bacon Act's "brother", the Service Contract Act ("SCA"), 41 U.S.C. § 351, *et seq.* The SCA applies to federal con-

¹⁸ *Id.* at 17-18.

¹⁹ *Id.* at 23.

²⁰ *Id.* at 22.

²¹ *Id.*

²² *Id.* at 19.

²³ *Id.*

²⁴ *Id.* at 20.

²⁵ *Id.*

²⁶ *Id.* at 24-25.

²⁷ *Id.* at 27.

²⁸ *Id.* at 28.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 22.

³² *Id.* 20-24, 35.

³³ *Id.* at 20-24.

³⁴ *Id.* at 35-36.

³⁵ *Id.* at 35.

³⁶ *Id.* at 35-36.

³⁷ *Id.* at 36-37.

³⁸ *Id.*

³⁹ *Id.* at 36-37.

tracts in excess of \$2,500 that furnish services (as distinguished from construction in this scenario) to the federal government through the use of hourly waged service employees. Similar to the Davis-Bacon Act, the SCA requires contractors and subcontractors on covered federal contracts to pay service employees in various classes the prevailing hourly wages and benefits that exist in their local area. As with Davis-Bacon, the DOL's Wage-Hour Division also administers the SCA and is responsible for making prevailing wage determinations thereunder.

DOL typically utilizes information from the Bureau of Labor Statistics' wage surveys and other sources to set local prevailing wages. GAO has identified issues with the transparency of DOL's SCA prevailing wage determinations in the past.⁴⁰ It is possible that, if DOL's SCA prevailing wage determinations were reviewed today, GAO would likely reach many of the same conclusions as it did with respect to the Davis-Bacon Act prevailing wage determinations. In particular, we suspect that SCA prevailing wage determinations are similarly based on an overrepresentation of union wage data versus non-union wage data. This is particularly likely given that SCA prevailing wage determinations are made on a similar locality basis as Davis-Bacon Act wage determinations. While that analysis has not been performed by the authors, logic dictates that such a similar conclusion could be reached.

VI. Practical Tips for Contractors It is too early to determine how or if the Report will affect DOL and its Davis-Bacon Act prevailing wage determinations. Nonetheless, the potential implications that the Report may have on both future congressional actions dealing with government contracting and federal government contracts as well as localities utilizing federal funding on projects may be significant. What is clear is that prudent contractors should continue to monitor the most current applicable wage determinations and to use those wages as a minimum in their bids for federal construction projects. In the event that legislation and regulations are promulgated to require that wage determinations be made on some basis other than by "civil subdivision of state" or that preclude DOL from defaulting to a given union wage, a further leveling of the "playing field" will likely occur from the wage perspective, as such wages would likely be representative of a broader geographical or contractor/employer body of data and could more accurately reflect actual market conditions. At the same time, however, if GAO is correct in suggesting that unions represent a significant minority of covered workers, then efforts to use a broader and more representative field of data (e.g., union and non-union wage rates) may result in non-union employers/contractors gaining a competitive edge, as prevailing

wage rates could be reduced in certain areas such that union contractors would not be able to meet the lower non-union wage.

To improve the accuracy of prevailing wage determinations and to ensure compliance with federal (and for that matter state and local) prevailing wage requirements, we recommend that all contractors be cognizant of the following considerations:

- All contractors bidding or working on federal projects should familiarize themselves with the Davis-Bacon Act, SCA, FAR and other applicable laws and regulations associated with wages and prevailing wage determinations as applicable to the type and scope of work they perform.

- If you bid a contract that requires prevailing wage rates and one of the rates listed in the procurement's wage determination is either inaccurate or an applicable wage category is simply missing, you should make a timely request to the contracting officer to modify, correct, or incorporate the correct wage determination. See FAR 22.404-6 to 404-9. We recommend that all contractors familiarize themselves with these provisions and procedures, as they are both particular and strict in nature, and could have significant impacts on your likelihood of successfully winning that contract competition.

- If you are working on a federal job, make sure that you know whether your job is covered by the Davis-Bacon Act or SCA. It is important to understand the difference between these laws and to make sure that your bid and wage rates comply with the applicable law and wage determination. It bears noting that while unlikely, it is possible that both laws could apply to different portions of a given contract.

- If you receive a wage survey from the DOL, regardless of whether you are a union or non-union business, and regardless of whether you are working on any federal contracts at the time, you should respond to the survey despite any reservations you may have in doing so. The accuracy of prevailing wage rates can best be ensured by participation by as many contractors as possible.

VII. Conclusion With particular respect to federal building construction, one constant has remained. Each contractor and subcontractor must bid work based on the local prevailing wage rates and burden associated with their work category. While this should not change in the future, the methods for determining those wages and burdens may be subject to future revision and updating, as it appears that the time has come to take an 80 year old law and bring it into the 21st century from both a data collection and analysis perspective. GAO has reached this conclusion; it appears DOL may as well. The only remaining questions is will DOL act, and if so when.

Note from the authors: This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

⁴⁰ See U.S. Government Accountability Office, GAO-06-27, Service Contract Act: Wage Determination Process Could Benefit from Greater Transparency, and Better Use of Violation Data Could Improve Enforcement (2005), available at <http://www.gao.gov/new.items/d0627.pdf>.