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GovCon 101 – Davis-Bacon Basics

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Sarah serves as Chair of PilieroMazza's Labor & Employment Group, one of the few legal practices in the U.S. with a multi-jurisdictional labor and employment practice dedicated to advising government contractors on their compliance obligations. She advises government contractors and commercial businesses on a wide variety of labor and employment issues, including the Fair Labor Standards Act, the National Labor Relations Act, Office of Federal Contract Compliance Programs regulations, and anti-discrimination law.

Sarah's practice also includes counseling employers on terminations, labor relations matters, employment agreements, wage and hour issues, and employment practices and policies. She regularly advises clients on compliance specific to government contracting, including offering counsel on prevailing wage laws, such as the Service Contract Act, codes of ethics, and equal employment opportunity requirements.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

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Overview

- Davis-Bacon Act applies to contractors performing on federal contracts for construction, alteration or repair must pay employees no less than the locally prevailing wages and fringe benefits.
- Contracts in excess of \$2,000
- Purpose is to “give local laborers and contractors fair opportunity to participate in building programs when federal money is involved and to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.”
- Congress has incorporated prevailing-wage requirements into many statutes that help fund construction projects, like highways and public housing. These statutes are called Davis-Bacon Related Acts (DBRAs).
- The DBA and DBRAs are regulated and enforced by the U.S. Department of Labor’s Wage and Hour Division.

Employees affected: Laborers and mechanics

- Employees who devote more than 20% of their time during a workweek to mechanic or laborer duties are laborers and mechanics for the time so spent, and must be paid at least the appropriate wage rates specified in the wage determination
- Includes apprentices and trainees
- Only applies to employees directly employed on the on the site of the work

Apprentices & Trainees

- Are laborers and mechanics, but are not listed on the WD
- Permitted to be used on covered projects and paid less than the journeyman rate when:
 - Individually registered in an approved apprenticeship or training program
 - Paid the percentage of hourly rate required by the apprenticeship or training program

Requirements include:

- Pay prevailing wage – wage plus fringe benefit (may be satisfied by making payments to a bona fide plan)
- Ensure people performing the work are paid according to correct classification
- Submit weekly payroll certifications
- Ensure all subcontractors comply
- New recordkeeping obligations
- Penalties for retaliation

Wage Determinations Effective by Operation of Law

- Previously, DOL could only enforce DBA if the FAR clauses and Wage Determination were incorporated into the contract
- Under the recent revisions, DBA applies regardless of the presence of DBA clauses and WD in the contract
- Effect
 - DOL can institute enforcement actions before clauses are incorporated if there was an error in the procurement process.
 - Contractors will be liable for back wages regardless of prospective price adjustment
- FAR clauses have yet to be updated (anticipated April 2024)

Site of the Work

- Davis-Bacon requirements will generally apply to all mechanics and laborers employed directly on the **site of the work**.
- The prior definition of “site of the work” included a site away from the location where the building or work will remain where a significant portion of a building or work is constructed at the site, provided that the site is established specifically for the performance of the contract or project.
- The revised definition also includes any site where a **significant portion** of a building or work is constructed if the site is dedicated exclusively or nearly so to the performance of a single Davis-Bacon-covered project or contract for a specific period of time.
- “Significant portion,” encompasses one or more entire portion(s) or module(s) of the building or work, such as a completed room, but does not include materials or prefabricated component parts such as prefabricated housing components.

Certified Payroll

- DBA requires submission of certified information related to the payment of workers on federally funded projects.
- Prime contractors are responsible for submitting copies of payrolls by all subcontractors and ensuring compliance by subcontractors.
- Contractors must submit payroll records weekly for each week in which any contract work is performed within 7 calendar days of the payment date.
- The prime contractor is responsible for submission of payrolls by all subcontractors.

Certified Payroll (Cont'd)

- Payroll must be accompanied by a signed "Statement of Compliance" indicating that the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon prevailing wage rate for the work performed
 - Name and worker's classification
 - Hourly rates of pay (including the rates of contributions or costs anticipated for bona fide fringe benefits, or cash equivalents paid for the benefits)
 - Daily and weekly number of hours worked
 - Deductions made
 - Actual wages paid

Certified Payroll (Cont'd)

- [Payroll Form 347](#) may be used for certified payroll records, but the required information can be submitted in any form desired
- Withholding for nonsubmission. If the contractor fails to submit copies of its or its subcontractors' payrolls promptly, the contracting officer shall, withhold approval of an amount that the contracting officer considers necessary to protect the interest of the Government and the employees of the contractor or any subcontractor.
- Full social security numbers and home addresses of each worker shall not be included on the payroll records submitted to the agency

SCA Maintenance vs. DBA Repair

- SCA Maintenance – Work is typically
 - Scheduled, regular and recurring maintenance activities
 - Routine to keep something in state of continuous utilization
 - Examples: custodial service, routine HVAC filter changes, snow removal
- DBA Repair -- Typically covers activities such as restoration of facility
 - One time fix to something not functioning
 - Restoration, alteration or replacement of fixed components
 - Examples: building structural repair, renovation, roof shingling, paving repairs

Prevailing Wages

- Return to the Three-Step Method
- A wage is prevailing in the locality if:
 - The wage is paid to 50% or more of the workers
 - If no wage is paid to 50% or more, then the wage at which 30% percent of workers are paid
 - If no rate is paid to 30% or more of the workers, DOL uses the weighted average
- Consideration of union rates vs. weighted average in locality

Prevailing Fringe

- Dependent on locality and trade; consult the WD
- Some classifications receive little or no fringe benefits (“FBs”)
- Some dominant union classifications have very high FBs based on CBAs
- May be a combination of union and non-union rates listed in wage determination
- If the same employee works on both DBA and non-DBA projects
 - Pay at least the DBA rate for all hours, or
 - If reliable, contemporaneous records exist
 - Pay DBA rate for DBA work
 - Pay regular rate for non-DBA work

Conformances

- Applies when any laborer or mechanic is to be employed in a classification not listed in the wage determination
- Contractor must submit to the contracting officer, SF 1444, with other pertinent data, listing the proposed additional classification and minimum wage rate including any fringe benefits payments.
- Contracting officer reviews to ensure:
 - The classification is appropriate and the work to be performed by the classification is not performed by any classification contained in the applicable wage determination.
 - The classification is utilized in the area by the construction industry.
 - The proposed wage rate, including any fringe benefits, bears a reasonable relationship to the wage rates in the wage determination in the contract.

New Prime Contractor Definition

- Prime Contractor
 - Expanded to include controlling shareholders or members, joint venture members, and anyone who has been delegated responsibility for overseeing all or substantially all of the construction anticipated by the prime contract.
 - Cross-withholding considerations
 - Any entity that directly enters into a contract covered by Davis-Bacon labor standards must agree to cross-withholding against it to cover liabilities for any DBA and DBRA violations on not just that contract, but also on other covered contracts entered into by the entity that directly entered into the contract or by specified affiliates.

Key Takeaways

- Contractors need to educate themselves about the DBA requirements
- Be proactive and ask questions. Simply assuming a contract is not covered because DBA requirements are not included is not a viable strategy.
- Pay the prevailing wage
- Flow down clauses to subcontractor
- Have subcontracts that protect their business
- Certify payrolls weekly

Questions?



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