Alert

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COZEN O'CONNOR

# Changes Coming for Government Construction Contractors as DOL Revises Davis-Bacon Act Regulations


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On August 8, 2023, the U.S. Department of Labor (DOL or the Department) issued a Final Rule titled "Updating the Davis-Bacon and Related Acts Regulation" (the Final Rule), comprising 812 pages. The changes made in this Final Rule will significantly impact Davis-Bacon prevailing wage projects at both the federal and local/state federally funded levels. The Davis-Bacon and Related Acts (the Act) have been in place since the 1930s and have acted to create a minimum wage that government construction contractors must pay their hourly field employees for work performed on federal government contracts and certain projects funded in whole or part by the federal government (in excess of $2,000.00). The Final Rule changes the methodologies used by, and now available to, DOL to determine Davis-Bacon prevailing wages, which will significantly impact construction government contractors from the bidding phase all the way through final completion. Indeed, Vice President Kamala Harris recently noted that this rulemaking "will mean thousands of extra dollars per year in workers' pockets ...." It also makes significant changes in addressing those situations where the government accidentally omits the required Act-related clauses and provisions and effectively codifies what contractors and DOL had done before when such a situation arose. It is likely that this Final Rule and regulations will result in litigation and disputes associated with how DOL performs its market wage surveys. As such, understanding this new Final Rule is critical for government contractors that perform federal construction work in order to prepare for prevailing wage rates that are likely to increase.

## HOW DOL WILL DETERMINE PREVAILING WAGES GOING FORWARD

The Final Rule re-adopts a three-step process for determining prevailing wage rates, changing the definition of "prevailing wage" back to the definition used from 1935 to 1983. This definition reads as follows defining prevailing wage as:

1. The wage paid to the majority (more than 50%) of the laborers or mechanics in the classification on similar projects in the area during the period in question;
2. If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be paid to the greatest number, provided that such greatest number constitutes at least 30% of those employed; or
3. If no wage rate is paid to 30% or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification.[1]

This three-step method varies from the prior method in that the prior method dictated that a "wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise, a weighted average is used."[2] Essentially, the new Final Rule constitutes a 30% rule (rather than majority or 50%), wherein "in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30% of such workers."[3]

This new definition of "prevailing wage" relates to how DOL obtains data to determine the prevailing wage for a regional area. In other words, what is the wage paid in a given rural or civilian area? To more fully particularize the proper wage, the Final Rule revises the definition of the "area," which has major implications for what the prevailing wage rate will actually be. "Area" is defined as "the city town, village, county or other civil subdivision of the State where the work is to be performed.

1. For highway projects, the area may be State Department of Transportation highway districts

of other similar State geographic subdivisions.
2. Where a project requires work in multiple counties, the area may include all counties in which the work will be performed."[4]

This definition dictates that if a project stretches across multiple counties, the area where the prevailing wage is determined will not vary from county to county. Rather, the area considered will be all of the counties where the project is occurring. As a general rule, the "area" from which data is drawn will be the county, but if there is insufficient data for the county, the data for surrounding counties will be used.[5] If insufficient data is available for the surrounding counties, available state or state highway administration data can be used.[6]

To determine the prevailing wage rates, the administrator issues public surveys seeking contractors to voluntarily submit wage rate data regarding rates paid to workers in particular areas and classifications.[7] In making its wage determinations, the DOL will consider the following: wage rates paid on projects, signed collective bargaining agreements, state and local wage rates for public construction, wage rate data submitted by contracting agencies, and information from state highway departments (for federal-aid highway projects).[8] Importantly, "[i]n determining the prevailing wage, the Administrator may treat variable wage rates paid by a contractor or contractors to workers within the same classification as the same wage where the pay rates are functionally equivalent …."[9] Obtaining the state and local wage rates, while done before, is given more precedence and importance in the Final Rule. The Rule recognizes that local data may not always be fully accurate and/or neutral and, as such, provides a listing of preconditions that must be met to verify that data and its usability.

The Final Rule also enacts guidelines for federal adoption of prevailing wage rates set by "Little" Davis-Bacon Acts (Davis-Bacon Act equivalents codified by state and local governments). These guidelines were included in the Final Rulemaking as the result of a 2019 DOL Office of Inspector General Report, which expressed concern regarding out-of-date Davis-Bacon wage rates that were as many as 40 years old in some cases.[10] The Final Rule provides the DOL with discretion to adopt state or local prevailing wage rates as the federal rates if:

1. the local or state prevailing wage rate was set using survey or other data that all interested parties had the opportunity to participate in,
2. the local or state wage rate reflects locally prevailing bona fide fringe benefits and a basic rate or hourly pay that can be calculated separately,
3. mechanics and laborers are classified in a manner recognized throughout the construction field,
4. the local or state government's criteria for prevailing wage rates are substantially similar to the federal criteria set out in 29 CFR part 1.[11]

The Final Rule also requires the Department of Labor Wage and Hour Division Administrator (Administrator) to obtain supporting data from states and local governments prior to adopting their prevailing wage rates.[12] The Administrator is also given discretion to consider local or state prevailing wage rates holistically in making prevailing wage determinations.[13] Federal government construction contractors seeking clarity regarding prevailing wage determinations in preparing for future bids should look into how state or local prevailing wage rates were set in areas where they plan to work in the future. The more similar the local or state prevailing wage definition is to the definition set forth in 29 CFR § 1.2, the more likely the DOL is to adopt that state or local prevailing wage rate. Obtaining the state and local wage rates, while done before, is given more precedence and importance in the Final Rule. The Rule recognizes that local data may not always be fully accurate and/or neutral and, as such, provides a listing of preconditions that must be met to verify that data and its usability.

Each federal agency must furnish an annual report using Davis Bacon wage determinations containing its proposed construction programs for the upcoming three fiscal years, including proposed projects, estimated start dates, type of construction, estimated costs, and locations.[14] This may be a good tool for prospective bidders/offerors to review to determine the forward-looking budget and planning of each agency.

As written, most wage determinations are "general" in nature and applicable to all projects in a given Area. As before, but with some more particularity, agencies may seek out a "project [specific] wage determination" when the project involves work in multiple counties, it is an area or type of construction with no general wage determination, or "all or virtually all of the contract work will be performed by a classification that is not listed in the general wage determination …."[15]

Additionally, the Final Rule clarifies that contracting agencies must confirm and, where appropriate, attach and confirm that initial wage determinations are required for a project, and contractors and subcontractors must comply with DBRA labor standards in paying mechanics and laborers.[16] There are also significant changes to what wage determination applies to indefinite delivery/indefinite quantity, multiple-award, and other "umbrella"-type contracts. There are also other changes to address change orders and projects/contracts performed over durations of longer than a year or two.

> If a revised wage determination is issued before contract award (or the start of construction when there is no award), it is effective with respect to the project, except as follows: (A) For contracts entered into pursuant to sealed bidding procedures, a revised wage determination issued at least 10 calendar days before the opening of bids is effective with respect to the solicitation and contract. If a revised wage determination is issued less than 10 calendar days before the opening of bids, it is effective with respect to the solicitation and contract unless the agency finds that there is not a reasonable time still available before bid opening to notify bidders of the revision and a report of the finding is inserted in the contract file.[17]

If a contract is changed to include substantial work not within the original scope of the contract, then the contracting agency must provide the most recent revision of applicable wage determinations.[18] For indefinite-delivery-indefinite-quantity contracts and similar contracts that may take place over a long period of time, the agency is required to incorporate into the contract the most recent revisions of applicable wage determinations on each anniversary date of contract award.[19] The Final Rule also clarified that if the Administrator provides notice in writing that the wrong wage determination was included in the solicitation or bidding documents, then it may not be used for the contract.[20]

If a contract is entered into and the Administrator determines that the correct wage determination was not incorporated into the contract, then the agency must either terminate and resolicit the contract with the proper wage determination or enter a supplemental agreement or change order with the contractor, and the proper wage will apply retroactively; importantly, increases in wages resulting from an improper wage determination must be paid by the agency to the contractor.[21]

Under the Final Rule, Davis-Bacon Act coverage does not apply to activities that are independent of the particular contract or project, which is in line with well-established precedent and DOL policies — namely, the material supplier exemption and the site of work principle — which exempt material suppliers from Davis-Bacon wage requirements and restrict prevailing wage coverage of offsite facilities to those established for, or nearly exclusively dedicated to a particular project.[22] However, the DOL maintains that the "site of the work" still includes locations where significant portions of a public work or building are constructed. *Id.* Government contractors should familiarize themselves with these distinctions as they could have significant wage implications.

The Final Rule lays out some clauses that are required to be included in government construction contracts in excess of $2,000, including a minimum wages clause,[23] a withholding clause[24] (which includes a requirement that "Contractors with apprentice working under approved programs … maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs."), and an anti-retaliation clause.[25]

Importantly, whether Davis-Bacon requirements and language/clauses are explicitly included in the language of contracts for work on government buildings or not, the requirements of the Davis-Bacon Act, as carried out by 29 CFR, still apply to these contracts. 29 CFR § 3.11. 29 CFR § 3.11 refers to 29 CFR § 5.5(e) for direction on how this is carried out. 29 CFR § 5.5(e) states:

> The contract clauses set forth in this section (or their equivalent under the Federal Acquisition Regulation), along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by 29 CFR 5.1 to include such clauses and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law.

Put differently, the contract clauses required to be incorporated in government construction contracts for Davis-Bacon projects will be treated as if they are a part of every prime contract in order to enact Congress's intent (and by extension likely flowed down and incorporated as a matter of law into subcontracts). Critically, even if Act-related clauses are not incorporated, whether by accident or otherwise, the Final Rule reconfirms prior understanding that prime contractors (and by extension subcontractors) still have to be compensated for increases in wages that result from the accidental omission of these clauses, as similarly outlined in 29 CFR § 1.6(f). Importantly, under this regulatory framework, prime contractors are responsible for paying applicable wages on all subcontracts – they must effectively advance these excess payments and then receive recovery from the agency via modification – making the prime contractor effectively the "bank" or financier for these costs. The Final Rule acknowledges similarities between the proposed language in § 5.5(e) and the *Christian* Doctrine, which dictates that even if contractual provisions that are required by law or public policy to be included in a contract that are somehow not included, then the provisions may be effective by operation of law in federal government contracts.[26] However the DOL drew two contrasts between its new regulatory framework and its interpretation of the *Christian* Doctrine: first, DOL asserts that the combination of § 5.5(e) and § 1.6(f) creates a protection for contractors by requiring them to be compensated by the contracting agency where such a protection does not exist; second, DOL notes that the *Christian* Doctrine renders underlying provisions a part of the contract strictly by operation of law while these revisions "would pair the enactment of the operation-of-law language with the traditional authority of the Administrator to waive retroactive enforcement or grant a variance, tolerance, or exemption from the regulatory requirement under 29 CFR § 1.6(f) and 5.14, which the Department believes will foster a more orderly and predictable process and reduce the likelihood of any unintended consequences."[27] This should allow for greater protection for contractors if and when they have to reckon with the impact of Davis-Bacon clauses that were not included in their original contract.

Indeed, under 29 CFR § 5.6, if the contracting agency fails to include the required clauses in 29 CFR § 5.5, then the contract must either be terminated and resolicited ***or*** incorporated through a change order or supplemental agreement. Again, similar to and in line with 29 CFR § 1.6(f), the contractor must be compensated by the contracting agency for any increase in wages caused by the incorporation of these clauses.[28] Critically, the contractor must make sure before signing that modification that it includes its cost for the increased labor rates and burdens or reserve its right to seek recovery therefor.

DOL asserts that using the "30% rule" will impact wages, resulting in higher wage rates for what it characterizes as "out-of-date wage rates," which it claims will lead to improved government services, increased productivity, and reduced turnover.[29] However, the Department also acknowledges that the Final Rule could have an adverse impact on small firms due to increased payroll costs.[30]

Federal contractors, including subcontractors, should familiarize themselves with this Final Rule, ensure that they are complying with Davis-Bacon clauses in contracts that they have already entered, and be aware of this new regulatory framework that will likely lead to increased labor costs.

## Conclusion

The Final Rule reinforces a number of prior policies and procedures that DOL had, but more critically, makes a number of material changes that may place contractors and subcontractors in harm's way from the standpoint of compliance with, and payment for, prevailing wages even where

the contract inadvertently excludes those requirements. Critical for contractors is to confirm that the project/contract in question is for construction for the federal government or uses federal funding, and if so, confirm that the DBA applies and if it is missing, make sure that it and the proper wage determination with the right wage classifications are included.

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[1] 29 CFR § 1.2.

[2] Final Rule at 12.

[3] Final Rule at 12-13.

[4] 29 CFR § 1.2.

[5] 29 CFR § 1.7(a)-(b).

[6] 29 CFR § 1.7(c).

[7] 29 CFR § 1.3(a).

[8] 29 CFR § 1.3(b).

[9] 29 CFR § 1.3(e).

[10] 2019 OIG Report at 10.

[11] 29 CFR § 1.3(h).

[12] 29 CFR § 1.3(i).

[13] 29 CFR § 1.3(j).

[14] 29 CFR § 1.4.

[15] 29 CFR § 1.5(b).

[16] 29 CFR § 1.6(b)(1)-(2).

[17] 29 CFR § 1.6(c)(ii).

[18] 29 CFR § 1.6(c)(iii)(A).

[19] 29 CFR § 1.6(c)(iii)(B).

[20] 29 CFR § 1.6(e).

[21] 29 CFR § 1.6(f).

[22] Final Rule at 346-63.

[23] 29 CFR § 5.5(a)(1).

[24] 29 CFR § 5.5(a)(2).

[25] 29 CFR § 5.5(a)(11).

[26] Final Rule at 508.

[27] Final Rule at 508-09.

[28] 29 CFR § 5.5(a)(ii)(C).

[29] Final Rule at 692-97.

[30] Final Rule at 706.