Prevailing Rate of Wage Act (Davis-Bacon Act)

THE DAVIS BACON ACT:

What It Is, What It Does,

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President
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Trades Department

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1

The Davis-Bacon Act requires that every contract in excess of $2,000 to which the United States is a party—for construction, alteration, and repair, including painting and decorating, of public buildings or public works—state in its specifications the minimum wages to be paid the various classes of laborers and mechanics. The law applies whether the contract is advertised for bids or negotiated on a cost-plus basis.

The Act provides that the minimum wages stated in the contract be based on wages determined by the U.S. Secretary of Labor "to be prevailing" for the "corresponding classes of laborers and mechanics" employed on "projects of a character similar" to the contract work "in the city, town, village, or other civil subdivision of the State" in which the work is to be performed.

The four phrases in quotations deal with the wage determination process and represent the heart of the statute. None of the phrases is defined in the Act, however. It has been left, instead, to the U.S. Labor Department, which administers the law, to flesh out their meaning.

The Act requires contractors and subcontractors on federal construction projects to pay their workers at least once a week without subsequent deduction or rebate, and to post the scale of wages at the work site. Penalties for noncompliance may include, depending upon the gravity or willfulness of the violation, withholding of funds to compensate underpaid employees, cancellation of the contract,

and debarment for three years from future federal contract awards. No criminal penalties are provided in the Act.

The Davis-Bacon Act applies only to construction contracts made directly with the federal government. The Davis-Bacon provision requiring the payment of locally prevailing wages has been extended beyond construction purchased directly by the federal government, by inclusion in 55 other federal laws. These laws, in fields such as education, health, transportation and housing, specify that the provisions of the Davis-Bacon Act shall apply on construction projects involving federal grants, loans, loan insurance, and loan guarantees.

The Davis-Bacon Act is administered by the U.S. Department of Labor, Employment Standards Administration (ESA), Wage and Hour Division, Office of Government Contract Wage Standards.

The Division of Construction Wage Determinations prepares the prevailing wage determinations required under the Act. With the aid of a regional office staff, the division is supposed to conduct a continuing county-by-county survey program to determine prevailing construction wage rates across the country. Voluntary submission of wage data by contractors and contractor associations, labor unions, public officials, and other interested parties is encouraged. Where data in the division's files are not sufficient to make a determination for all the crafts needed for the

proposed construction project, the division may conduct field surveys or hold hearings in the project area to seek out the necessary payroll information.

Wage determinations issued by the Labor Department must be included by contracting agencies in invitations for bids and negotiated contracts. The applicable wage determination becomes part of the successful bidder's contract obligations.

Opponents of Davis-Bacon would like to see it repealed or its effect curtailed. Bills for such purposes have been introduced in the 96th Congress. In addition, a struggle is currently being waged within the federal government concerning the administration of the Davis-Bacon Act and its related statutes.

Nonunion contractors have mounted opposition to many of the practices and procedures developed over the years by the Department of Labor as a means of implementing the legislative purpose of the Davis-Bacon Act. They have found a willing ally in the Office of Federal Procurement Policy (OFPP), an agency of the Office of Management and Budget (OMB). In fact, OFPP claims that it, rather than the Secretary of Labor, has final authority over the application of all federal labor standards requirements, including the Davis-Bacon Act.

The primary support for repeal or substantial administrative overhaul of the Davis-Bacon Act is a draft report by the U.S. General Accounting Office (GAO).

This report is only a draft and changes may be made before it is released to the public because of the strong response filed by the Secretary of Labor in which he took issue with almost every one of GAO's conclusions and supported his arguments with strong rebuttal evidence. Nonetheless, the draft report has received a great deal of publicity and has become the rallying point for those who oppose the Davis-Bacon Act.

Despite the GAO's claims, the Davis-Bacon Act is more than a Depression measure and it is needed today as much as ever. Representative Bacon, Republican co-sponsor of the original statute, introduced the first of his prevailing wage bills in 1927. His action was related to a 10-year federal building program that had been authorized by Congress in the prosperous year of 1926. Also, the large majority of the federal statutes which incorporate the Davis-Bacon provision for federally assisted construction were enacted long after the 1930s. Moreover, only 15 of the 41 States with "mini-Davis-Bacon" statutes adopted them during the 1930's. Of the remainder, seven enacted their laws before the 1930's and the rest after that decade.

The fundamental principle of the Davis-Bacon Act was, and still is, that the federal government, under its construction programs, shall not participate in depressing local wage conditions. The effect of the Act is to reward superior managerial capabilities and worker productivity. As a result, the statute has substantially contributed to a degree of stability in the industry which otherwise would not exist.

The Labor Department's present procedures for the determination of prevailing wage rates are spelled out in 29 CFR Part 1. The Department of Labor conducts surveys of wages paid to comparable workers on comparable construction projects. The prevailing wage rate for each classification of laborer and mechanic is the rate paid in the local area to the majority of those employed in that trade or craft on construction similar to the proposed contract, or if there is no one rate paid to a majority, then the rate paid to a plurality of those employed provided this is at least 30 percent. If there is no such plurality, then the prevailing rate is the average rate computed by adding the hourly rates paid to all workers in the classification and dividing by the total number of such workers.

These standards were developed shortly after the Act was amended in 1935 and they have been in effect ever since. GAO claims, however, that many wage determinations issued by the Department of Labor are not based on an actual survey of wages paid to workers. Moreover, the draft

report was highly critical of the surveys which the Department did perform.

6 The GAO study, like most other studies of the administration of the Davis-Bacon Act, consists of a very few examples. There is no evidence that the illustrations to which GAO refers are really typical of the overall administration of the Act. For instance, a recent study by the President's Council on Wage and Price Stability (COWPS) found that the Department of Labor's wage determinations were usually a little *below* the collectively bargained wage rates in the area. In addition, COWPS estimated that the cost of conducting surveys which would meet the standards that the GAO proposes would be $200 to $400 per employer surveyed. Obviously, the administrative costs would override whatever benefits might otherwise be realized from the type of surveys called for by the GAO.

The draft report also takes issue with the standards used by the Department of Labor to determine prevailing wages. The practice of identifying the wage rate paid to 30 percent or more of the workers is regarded by GAO as inflationary because it supposedly results in the payment of wages which are higher than those actually prevailing in the area.

The GAO study based its conclusion on a finding that by averaging all of the wages paid to laborers and me-

chanics in an area, the "prevailing" wage rates were lower than if the Department's current method is applied. For the most part, however, the differences were insignificant.

Studies such as GAO's assume that the higher wages attributable to the Davis-Bacon Act have no effect on worker productivity. GAO's assumption that labor productivity is unrelated to wage levels is contrary to established microeconomic production theory. Higher wages tend to increase productivity thereby reducing overall labor costs. As a result, GAO's conclusion is wrong that the slight percentage increase in hourly labor costs which may result from the Department of Labor's administrative practices results in higher total labor costs. On the contrary, higher productivity resulting from higher hourly wages probably more than offset the hourly cost difference cited by GAO. These considerations were ignored by GAO and, consequently, undermine the validity of its study.

An intergovernmental task force, consisting of representatives from the Departments of Defense and Energy, the General Services Administration, NASA, and DOL, is now preparing a series of options relating to the administration of the Act. Many of these options, if adopted, would undoubtedly undermine the present administrative scheme, thereby detrimentally affecting local labor standards. If such changes are

recommended, the Building and Construction Trades Department is prepared to oppose them by whatever means are necessary to protect the principles of the Act.

The Building and Construction Trades Department has formulated a legislative proposal which would overhaul the Davis-Bacon Act but retain and strengthen the principles of the Act. At the same time, the proposed legislation would eliminate all of the criticisms of the Act's administration. This would be accomplished by adopting an approach similar to the procedures employed under the Service Contract Act. This approach would eliminate the need to conduct wage surveys to support every wage determination issued by DOL. Instead, local collective bargaining rates and fringe benefits would be automatically adopted by the Secretary of Labor as prevailing until and unless a determination is made, after a hearing on the record, that some other wage rates are prevailing.

The legislative proposal would also codify the procedures which the DOL has used to determine prevailing wage rates since 1935, and clarify the Secretary of Labor's exclusive authority over the interpretation and application of the Davis-Bacon Act.

Principal features of this bill should include the provision for extension of the minimum wage requirement to every federally assisted construction contract in excess of $2,000, regardless of the presence of a Davis-Bacon provision in the funding statute itself. This is similar to the way Executive Order 11246 is applied to all federally funded construction projects. Another major change should obligate contractors to pay laborers and mechanics the wages stipulated in the contract and all increases reflected in subsequent wage determinations issued by the Department which are applicable to the project.

Additional provisions in the bill would be that prevailing wage determination issued by the Department shall be based on the wage rates provided in the collective bargaining agreements applicable to the various classifications of laborers and mechanics in the county. The wage determination must be issued annually. Any variation from these wages could only result after a hearing is held on the matter. Such hearings can only be requested within 90 days after the new wage determination is issued. A hearing will not be convened unless the petitioning party submits information that the Secretary of Labor determines there is substantial evidence that the collective bargaining agreement rates are substantially at variance with those which prevail in the county.

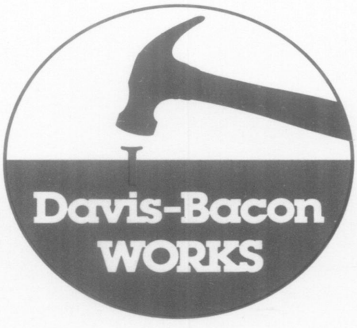
The big change in the wage determination requirement is the elimina-

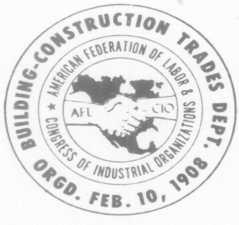
tion of any reference to "projects of a character similar." Thus, wage determinations would not be referred to as "building", "highway", "heavy", "residential", or some other category. Instead, there would be one rate for each classification unless, of course, the local building trades negotiated different wage rates for different types of construction.

The other major change is the creation of a statutory complaint procedure. This procedure not only obligates the DOL or the contracting agency to investigate employee allegations of nonpayment of wages, but gives the aggrieved employees a private right of action in federal District Court against the contractor and/or subcontractor on the project.

The legislation should also include a statutory statement which clarifies the Secretary's preeminent authority over the contracting agencies concerning the interpretation and application of the requirements of the Act.

The proposed bill also eliminates the section in the current Act upon which the Comptroller General relies for his authority to overrule the Secretary of Labor's decisions concerning the Davis-Bacon Act. Instead, the Comptroller General's role would be to distribute the list of debarred contractors to all federal agencies. The disbursement of federal funds which have been withheld from a contractor suspected of violations of the Act is within the Secretary of Labor's authority rather than the Comptroller General's authority.





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