Legal Update Article

Court Enjoins Key Provisions of Davis-Bacon Prevailing Wage Final Rule for Construction Contractors

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June 26, 2024

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A federal judge in Texas has blocked the U.S. Department of Labor (DOL) from enforcing several provisions of its prevailing wage final rule under the Davis-Bacon and Related Acts (DBA) for construction contractors. *Associated General Contractors v. U.S. Department of Labor,* No. 5:23-CY-0272-C (N.D. Tex. June 24, 2024).

The court found the plaintiffs, a coalition of construction industry groups, were likely to succeed on the merits of their claims that DOL lacked statutory authority to adopt:

- A provision that would read the DBA's prevailing wage requirements into all federal contracts by operation of law;
- A provision narrowing the rule's "material supplier" exemption; and
- A provision applying the DBA's prevailing wage requirements to truck drivers and others not employed at the worksite.

Therefore, the court imposed a nationwide preliminary injunction preventing the DOL from implementing and enforcing them.

Background

The DBA applies to federal contractors and subcontractors performing on contracts in excess of $2,000 for construction, alteration, or repair of public buildings or public works. It requires certain employees be paid no less than local prevailing wages and fringe benefits for corresponding work on similar projects in the area.

The final rule Updating the Davis-Bacon and Related Acts Regulations, published on Aug. 23, 2023, entailed hundreds of pages of sweeping revisions to the DBA standards. The rule, estimated to impact over 1 million construction workers, took effect on Oct. 23, 2023. It applied to new federal contracts entered into after that date (as well as a subset of existing contracts).

The industry groups challenged the rule on its face, arguing it was inconsistent with the DBA and the DOL exceeded its statutory authority. The plaintiffs alleged Constitutional claims and violations of the Administrative Procedures Act and Regulatory Flexibility Act.

Operation-of-Law Provision

The operation-of-law provision would apply the DBA labor standards, reporting requirements, or applicable wage determinations to any DBA-covered contract (retroactively to the date of the contract award or beginning of construction, whichever occurs first), regardless of whether the appropriate contract clause or wage

determination was actually incorporated into the contract. Under this provision, if the DOL determines a contractor should have paid employees in accordance with DBA requirements but did not, the contractor would be required to petition the contracting agency for additional compensation for any increase in the contractor's costs caused by the application of the wage determination.

The plaintiffs argued DOL failed to account for the significant expenditures and legal exposure associated with attempting to retroactively comply with the DBA — costs the contractor would have to bear. The court agreed. It found the DOL acted beyond its authority in attempting to amend the DBA "by imposing a stealth self-implementing DBA requirement into contracts by an operation-of-law provision that contradicts the express statutory language of the Act."

As the court noted, the statute "expressly requires" that covered contracts "contain specific provisions concerning the minimum wages to be paid." Moreover, the operation-of-law provision "creates uncertainty for bidders on competitively bid contracts, as to what the contract terms are and whether the DBA requirements apply," wrote the court. It continued:

> This is particularly a real-world concern as demonstrated by state and local public agencies that receive federal funds triggering the DBA requirements but fail to include the DBA requirements in the contract documents, causing the contractor expense and time to ensure compliance by the contractor and subcontractors with the DBA after the project is completed.

Material Supplier Provision

Material suppliers are generally excluded from DBA requirements, but the definition of "material supplier" excludes an entity that engages in any construction, alteration, completion, or repair work that is not incidental to material supply at the site of the work. Under the final rule, such entities would be considered a contractor or subcontractor, not an exempt material supplier, and therefore must follow DBA's requirements, subject to a *de minimis* exception. This new definition eliminates a longstanding 20-percent threshold for material suppliers that had been set previously in subregulatory guidance, including the DOL's Field Operations Handbook.

The court held that the DOL's material supplier provision ignored the statutory language of the DBA by reclassifying employees of bona fide material suppliers as "mechanics and laborers" covered by the DBA "based simply upon [their] connection to a contractor of subcontractor." As a practical matter, the court said, this arbitrarily punishes contractors that also maintain commercial material supplier operations of their own. The final rule also subjects delivery drivers for contractors maintaining their own material supply services to the DBA's administrative and wage requirement, while not covering delivery drivers employed by other commercial delivery services. Because the work performed by the drivers is the same in each case, the rule placed contractors with in-house material supplier services at a competitive disadvantage, the court found.

Trucking Provision

Finally, the court invalidated a rule provision extending the prevailing wage requirements to "covered transportation," including workers who are not mechanics and laborers (such as truck drivers) and to work that it not performed directly on the

covered worksite (again, tempered only by a *de minimis* exception).

The final rule articulates circumstances under which contractors and subcontractors must pay DBA wages to delivery drivers for on-site activities if those activities are "essential or incidental to offsite transportation … of materials or supplies to or from the site of work, such as loading, unloading, or waiting for materials to be loaded or unloaded," when such time is not *de minimis.* However, the final rule does not define what constitutes *de minimis* time for purposes of these requirements. Such language violated the "simple and unambiguous" language of the DBA applying its terms "only to mechanics and laborers, and only if they are employed directly on the site of the work," the court concluded.

Moreover, the court continued, the provision:

> places the contractor in the Hobson's choice of either (1) treating all time spent on-site by drivers performing delivery services as compensable time under the DBA and maintaining and submitting certified payroll records for such workers, thereby ensuring DBA compliance, but also increasing labor costs which may materially impact success on competitively bid contracts, or (2) ascertaining what constitutes *de minimis* time, which remains undefined by the DOL, and determining when the driver's time on the site, aggregated over the day or workweek, exceeds a *de minimis* period of time.

In addition, the court explained, because it bases application of the DBA on the nature of the function a worker performs (whether the worker is performing duties of a laborer or mechanic on site), the rule fundamentally and impermissibly changes the Act, "contrary to the Congressional limitations of [the] DBA" and "the substantial body of case law interpreting the application of DBA to transportation drivers."

Nationwide Relief Appropriate

The DOL claimed that the challenged material supplier and trucking provisions merely codified the DOL's longstanding subregulation, with minor changes. The court disagreed, finding these were "in fact broad substantive changes to the DBA that will affect large numbers of contractors across the country." The DOL's admitted failure to conduct an impact analysis was further grounds to hold these provisions invalid, the court reasoned.

Moreover, the plaintiffs adequately demonstrated the likelihood of irreparable harm, in the form of "uncertainty caused to the competitive bidding and contracting process," a competitive disadvantage to contractors with material supply operations, and "uncertainty of what constitutes *de minimis* time" for purposes of the on-site trucking provisions. Finally, because the court found the scope of this irreparable injury was national, it imposed a nationwide injunction prohibiting DOL from enforcing these provisions.

Contracting agencies and contractors should contact a Jackson Lewis attorney with questions regarding the court's injunction and its impact on existing contracts.