



Federal Construction and Infrastructure Contracting Update

Updates to Know: Davis-Bacon Changes and Expansion of Coverage (Fall 2023)

The August 2023 Final Rule, coupled with recent legislative efforts incorporating Davis-Bacon requirements, have ushered in a new era of heightened compliance. Now is the time to make sure your entire government contracting team understands the impact of these changes and expansion of scope of coverage of Davis-Bacon!

- **Application of Davis-Bacon by Operation of Law:** Under the Final Rule, the U.S. Department of Labor (DOL) can decide that a contract was incorrectly deemed not to be a Davis-Bacon contract, then order that the contract be treated as having included those requirements since the beginning of performance, and even withhold funds for non-compliance. In essence, the risk associated with whether a contract is or is not covered by Davis-Bacon has shifted even further to the contractor.
- **Rising Davis-Bacon Wage Rates and More Frequent Updates on the Horizon:** The return of the “30-Percent Rule” and the added ability to adopt prevailing state and local wage rates under certain circumstances in the Final Rule expands the data sources DOL has at its disposal and will likely result in rising wage rates that will require a determination of applicability in existing contracts. In addition, updates to non-collectively bargained prevailing wage rates will occur more often (at most once every three years) and will be based on total compensation data from the Bureau of Labor Statistics Employment Cost Index (ECI), which tracks both wages and benefits. Determining if, when, and/or how these updates will apply to certain contract vehicle (like indefinite delivery, indefinite quantity [IDIQ] contracts) could be tricky.
- **Incremental Expansion to the Scope of “Site of Work”:** The Final Rule provides that if a significant portion of the building or work is constructed at a secondary construction site, that work will be covered by Davis-Bacon if such construction is for use specifically in the Davis-Bacon covered building or work, and if the secondary site is either established specifically for the contract or project or is dedicated exclusively (or nearly so) to the contract or project for a specific period of time. This expansion could impact the scope of personnel who are covered by Davis-Bacon and must be considered prior to submission of your proposal.
- **Expanded Application of Davis-Bacon:** The scope of application of Davis-Bacon prevailing wage requirements continues to expand beyond traditional federal construction contracts to the wide range of non-contract awards (grants, financial assistance programs, and more) awarded by state and local entities over the coming years pursuant to a number of federal legislative actions, including the Bipartisan Infrastructure Law, the Inflation Reduction Act (IRA), and the CHIPS and Science Act, along with applying to certain tax benefits under the IRA.
- **Change is Constant for Infrastructure and IRA Guidance:** Changes to carefully consider go beyond just the revisions to the Davis-Bacon Act. Guidance concerning infrastructure and IRA funded projects is ever evolving. For instance, OMB issued final guidance on August 17, 2023, regarding application of the Build America, Buy America (BABA) preference to infrastructure funded projects and the U.S. Department of Treasury just issued guidance at the end of August 2023 on the use of prevailing wages and apprentices for IRA covered projects.
- **Other Labor and Employment Changes on the Horizon:** There are other upcoming changes which could impact employee pay and hiring practices for a wide range of federally funded projects. On August 30, 2023, the DOL announced proposed changes to Fair Labor Standards Act (FLSA) regulations governing exempt employees. One of those changes, raising the salary threshold to at least \$55,068, if implemented, would result in millions of additional employees qualifying for overtime pay. In addition, the way contractors staff construction projects over \$35 million could be significantly impacted by both the forthcoming final rule for the Project Labor Agreements (PLAs) and already implemented Office of Federal Contractor Compliance Programs (OFCCP) Mega Construction Project Program.





Best Practices

Be Proactive

- Ask questions when Davis-Bacon coverage issues arise.
- Simply assuming a contract is not covered because Davis-Bacon requirements are not included is not a viable (or at least advisable) strategy.

Assess Scope of Coverage

- Underestimating the scope of personnel covered by Davis-Bacon prevailing wage requirements can have drastic financial consequences.
- Do it early in the procurement process.

Stay Current and Consider Internal Refresher Training

- Now may be the perfect time for a refresher Davis-Bacon training given the breadth of changes to Davis-Bacon and other recent changes that impact construction contracting and infrastructure/IRA projects.
- An ounce of prevention through documented training could prove to be even more valuable if you find yourself on the wrong end of an audit or investigation.

Prepare for Enforcement and Oversight

- Not surprisingly, we also expect to see a heightened level of scrutiny from many stakeholders for Davis-Bacon covered projects.
- Some are traditional, such as the DOL, OFCCP, inspector generals, and the U.S. Department of Justice (DOJ), while others are not so traditional, such as the Internal Revenue Service (IRS), the U.S. Department of Transportation (DOT), and state and local auditors and investigators.

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