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MEMORANDUM

TO: American Council of Engineering Companies

FROM: Andrew J Martone
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SUBJECT: Davis Bacon application to survey workers and inspectors

DATE: October 10, 2023

Executive Summary

Given the new, broad definition of “subcontractor” issued in a Final Rule by the Department of Labor, the question of whether a specific survey crew member – regardless of his or her employer - is covered by the Davis Bacon Act will be a question of fact which takes into account the actual duties performed by the worker.

Survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be covered by Davis Bacon (if they do not meet the test for a professional exemption) if their work is:

1. Performed on the site of construction;
2. Immediately prior to or during construction; and
3. In direct support of construction crews.

With regards to inspectors/material testers, the DOL’s current Field Operations Handbook includes a specific, but limited, exception that would exempt them from Davis Bacon coverage. The DOL’s Handbook is subject to revision without notice or warning, but we have seen no sign indicating that the DOL is revisiting its current policy at this time.

Analysis

The Davis Bacon Act requires Federal Government and District of Columbia contracts exceeding \$2,000 “for construction, alteration, or repair, including painting and decorating, of public buildings and public works” that involve “employment of mechanics or laborers” to contain a provision requiring payment of the prevailing wage to the “various classes of laborers and mechanics.” 40 U.S.C. § 3142(a).

This obligation is limited to mechanics and laborers “employed directly on the site of work” by contractors and subcontractors. 40 U.S.C. §§ 3142(c)(1), 3143. The Department of Labor was granted authority to prescribe reasonable rules and regulations relating to the application of Davis Bacon. 40 U.S.C. § 3145.

The DOL has defined many of the terms left undefined by Davis Bacon. “Laborer or mechanic” is defined to include “at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial.” 29 C.F.R. § 5.2. The definition excludes bona fide executive, administrative, or professional employees (as defined under the Fair Labor Standards Act). 29 C.F.R. § 5.2.

The DOL’s recent rulemaking resulted in a Final Rule (officially released in August of this year) that expands both the scope of work that will be considered covered by Davis Bacon and the definition of “site of work” to include areas beyond the actual site of construction.

I. The Department of Labor’s changing position on survey workers.

In 1960, the U.S. Department of Labor (“DOL”) issued a memorandum concluding that chainmen, rodmen, and instrument men were covered laborers and mechanics because they performed physical and manual tasks such as clearing brush, sharpening and setting stakes, handling the rod and the tape, and other comparable activities. The DOL noted that party chiefs generally are not covered because they are supervising two or more individuals and so are executives or professionals. In the middle, and ultimately typically covered, are instrument men under the supervision of a party chief because they do not have supervisory duties.

The DOL noted that “preliminary survey work such as the preparation of boundary surveys and topographical maps is not a part of construction covered by the Act, especially if performed pursuant to a separate contract.” Covered survey work includes that “undertaken immediately prior to or during construction which involves laying off distances and angles to locate construction lines and other layout measurement[s], including setting of stakes, determination of grades and levels, and other work which is performed as an aid to the crafts which are engaged in the actual physical construction of projects.”

In 1962, the Department of Labor considered the application of Davis Bacon to members of survey crews in Memorandum 39. The DOL opined that preliminary survey work is not

generally covered because it affects construction without being a part of it. U.S. Dept. of Labor Memo. No. 39 (Aug. 2, 1962). The DOL determined that surveying “performed immediately prior to and during actual construction, in direct support of construction crews” is construction work within Davis Bacon coverage. *Id.* The DOL stated that for covered surveying work, whether the individuals performing the work are covered depends on their status as laborers or mechanics. *Id.*

The DOL cited a Comptroller General's definition of a laborer as “one who performs manual labor or labors at a toilsome occupation requiring physical strength as distinguished from mental training and equipment” and of a mechanic as “any skilled worker with tools, one who has learned a trade.” *Id.* The DOL provided that whether or not a survey crew member fits within these definitions is largely one of fact taking into account the actual duties performed by the employees involved. *Id.*

The DOL further opined that where the work of a survey crew member is professional or sub-professional in character, the individual is not a covered laborer or mechanic. The DOL contrasted this with one who performs “primarily manual work, such as clearing brush and sharpening stakes.” *Id.* The DOL classified the latter situation as “not commonplace.” *Id.*

In 2013, the DOL opined that only “survey crew members who perform primarily physical and/or manual work on a Davis-Bacon covered project on the ‘site of work’ immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards.” U.S. Dept. of Labor Memo. No. 212 (Mar. 23, 2013); *see also*, U.S. Dept. of Labor Field Operations Handbook § 15e20.

In Memorandum 212, the DOL explained further that “whether a survey crew member performs primarily physical and/or manual duties (including those workers who use tools or who are performing the work of a trade), the principal, main, major or most important duty or duties that the individual performs are considered to be his or her ‘primary duty.’ Determination of a survey crew member's primary duty must be based on the facts in a particular case, with the major emphasis on the character of the worker's job as a whole.” U.S. Dept. of Labor Memo. No. 212 (Mar. 23, 2013).

The DOL’s Memorandum 212 was viewed as expanding the circumstances under which a survey crew member would be deemed a covered laborer or mechanic. After it was issued, the Senate wrote a letter questioning Memorandum 212 and its apparent expansion of Davis Bacon coverage. U.S. Senate letter to the U.S. Department of Labor dated October 31, 2013.

Following the Senate letter, the Department of Labor issued a letter indicating that the DOL has long held the survey crew members “performing primarily physical and/or manual work on a Davis-Bacon covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers and mechanics subject to the [DBA] which is a question of fact based on the actual duties performed.” U.S. Dept. of Labor letter dated December 2, 2013. The DOL wrote that the touchstone of coverage is “whether the worker’s duties ‘are manual or physical in nature (including those workers who use tools or who are performing the work of a trade.)’” *Id.* The letter recognized that its wage determinations do not currently include a survey worker classification, but that the contracting officer must require

any class of covered laborers or mechanics to be classified and that the DOL would also accept requests for new classifications. *Id.*

The DOL also listed the following instances when survey crew members would generally not be covered:

- Survey work performed during the design phase in which construction projects are envisioned and engineering plans are developed by architectural and engineering firms.
- Those not employed by a construction contractor or subcontractor.
- Those who meet the FLSA professional, executive, or administrative exemptions.

The Field Operations Handbook provides specifics about covered and excluded survey work. The following survey work is generally excluded from the prevailing wage law: “members of the survey party who hold the leveling staff while measurements of distance and elevation are made, who help measure distance with a surveyor chain or other device, who adjust and read instruments for measurement or who direct the work.” Conversely, the following is considered covered work: “a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.”

This said, survey workers who are *bona fide* professional employees working within the scope of their profession are not covered by Davis Bacon. The DOL has determined by regulation that Davis Bacon does not apply to the work of “individuals employed in a *bona fide* executive, administrative, or professional capacity” as defined by the Fair Labor Standards Act (“FLSA”). The FLSA professional exemption is the most likely to apply to survey workers.

The FLSA professional exemption applies to employees who are paid on a salary basis that exceeds \$684 per week and provide work requiring “knowledge of an advanced type in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction.” 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.300. The regulations list several professionals that are exempt, including engineers, but do not list surveyors. A federal district court ruled a land surveyor in Colorado was not an exempt professional, in part, because the state land surveyor law did not require a college education, only graduation from surveying curriculum and experience. *Goebel v. Colorado*, 1999 WL 35141269 (D. Col. Feb. 26, 1999).

II. The Department of Labor’s analysis of the Davis Bacon Act coverage of survey crew members in its most recent rulemaking.

In its March 18, 2022, Notice of Proposed Rulemaking, the DOL reiterated that:

- Survey crew members who perform primarily physical and/or manual work on a covered project on the site of work immediately prior to or during construction in direct support of construction crews may be covered.

- Whether survey crew member is covered is a question of fact considering actual duties performed and whether they are physical or manual including use of the tools or work of a trade.
- Consideration is given to the relative importance of the worker's different duties, including the time spent performing each duty.
- Survey crew members who spend most of their time on a covered project taking or assisting in taking measurements are likely covered (provided they are not professional, executive, or administrative exempt employee).

The DOL also commented that:

- Surveyor duties off the site, such as preparing design information for use in the field; uploading design information to the total station, GPS device, or data collector; research; and postliminary work, such as downloading and reviewing information from the day's fieldwork, is not covered.
- Commenters varied widely on the duties performed by survey crew members, which supports the DOL's interpretation that coverage is a question of fact based on each survey crew member's actual duties.
- Technology improvement supports that survey crew members who spend most of their time on a covered project taking or assisting in taking measurements are likely covered (as long as it is not a professional employee and the other criteria are met, i.e., performed on site and immediately prior to or during construction in direct support of construction crews.
- DOL views walking, carrying equipment, and setting stakes to be physical or manual.
- Licensed professional surveyors will typically be excluded; but those that work under their supervision are not excluded on that basis.

A. The Davis Bacon Act applies to a broad range of contracts.

The Davis Bacon Act regulations apply to a broad range of projects because there are many "related acts" that require payment of the prevailing wage. Typically, these include contracts with the Federal Government (through its various agencies and departments) or states, municipal, and local projects that receive federal funding. Typically, the projects are those for "construction, alteration, or repair, including painting and decorating, of public buildings and public works." However, it is possible the Davis Bacon Act would be incorporated into non-construction projects through a "related act." Typically, private projects would not be covered, but there are scenarios where tax credits are given for a particular project which may require payment of the prevailing wage.

The best way to determine whether the Davis Bacon Act regulations apply is to review the project specifications which are required to contain language adopting the Davis Bacon Act.

While the revised regulation's effective date is 60 days after publication in the Federal Register, which is slated for August 23, the Department of Labor claims that the survey work interpretation is an existing interpretation, and it is not made part of the regulations. Therefore, it can be applied immediately.

B. A professional survey firm can probably be considered a covered subcontractor.

The new Rules define "subcontractor" as "any contractor that agrees to perform or to be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of Davis Bacon and Davis Bacon related Acts.

This definition is not limited to construction subcontracts and provides for only two specific exclusions. First, certain material suppliers have been excluded from the definition of "contractor and subcontractor" -- provided that the materials suppliers meet a specific test. Second, truck owner-operators who are bona fide independent contractors are not subject to the requirements of Davis Bacon, although it is important to note that any employees hired by truck owner-operators are covered by Davis Bacon and that owner-operators of other construction equipment such as bulldozers are covered by Davis Bacon.

Therefore, survey companies employing survey crew members who perform work considered covered are likely subject to the Davis Bacon Act if they meet the DOL's other criteria for coverage.

C. The test for Davis Bacon Coverage is fairly specific.

In the DOL's Final Rule, it adopted the Notice of Proposed Rulemaking guidance "with an additional clarification" that the determination of whether the survey crew member performs primarily physical and/or manual duties appropriately considers the relative importance of the worker's different duties, which includes consideration of the time spent performing the duties.

Therefore, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would be covered by Davis Bacon if their work is:

- 1) on the site of construction;
- 2) immediately prior to or during construction; and
- 3) in direct support of construction crews.

II. The effect of the new Davis Bacon Rule on inspectors and material testers.

The DOL's expansion of Davis Bacon coverage to individuals who perform some onsite work that has not traditionally been considered covered work raises questions about the coverage of other, similar individuals, such as construction inspectors, construction testers (such as concrete testing, casting concrete cylinders, soil testing and sampling, etc.), and utility locators (aka distribution technicians) who are in the field to mark where power lines are prior to

construction.

In Illinois, the state prevailing wage includes classifications for “material testers” in Chicago and surrounding counties defined to include:

MATERIAL TESTER I: Hand coring and drilling for testing of materials; field inspection of uncured concrete and asphalt.

MATERIAL TESTER II: Field inspection of welds, structural steel, fireproofing, masonry, soil, facade, reinforcing steel, formwork, cured concrete, and concrete and asphalt batch plants; adjusting proportions of bituminous mixtures.

However, currently, there are no such classifications under Davis Bacon, and the DOL’s Field Operations Handbook contains an exception for “inspectors.”

A. The Department of Labor Field Operations Handbook excludes inspectors who do not also perform the work of laborers and mechanics.

To date, there is little guidance regarding construction inspectors, concrete testers, or utility locators. Davis Bacon and regulations do not address coverage of individuals performing these duties. There are no administrative decisions or cases addressing their coverage under the Davis Bacon Act. The DOL Field Operations Handbook (“Handbook”) provides the DOL’s guidance of various aspects of Davis Bacon application. The Handbook excludes “inspectors” as follows:

Employees who make inspections at a covered construction site to see that the work meets the specifications and requirements of the contract or established standards and codes are not usually considered to be laborers or mechanics for purposes of DBRA. However, if such workers perform other duties as laborers or mechanics, they must be paid the wage determination rate for the particular classification involved for the time so spent.

[Handbook at 15e14](#). If the construction inspectors meet this test, then they are currently excluded from coverage. While the DOL could revise the Handbook to change this interpretation, DOL did not give any indication of doing so in the Final Rule.

B. Construction Testing.

Construction testers, described as those who perform concrete testing, casting concrete cylinders, soil testing and sampling, etc. are likely also excluded under the “inspector” exclusion contained in the Handbook.

There is also a “material supplier” exception in the DOL Final Rule. If a material supplier’s employee is performing the testing as part of the delivery process, the employee may be excluded under this exception.

C. Distribution Technicians.

Although not specifically addressed in the new Davis Bacon Rule, there is a substantial likelihood that if distribution technicians – employees who are in the field to mark where power lines are located – would be covered if they meet the general criteria for survey workers.

This would mean that if distribution technicians are employed by an entity that is signatory to a covered contract or subcontract and perform their work on the site of construction, immediately prior to or during construction in direct support of construction crews, their work would be covered.

D. Prognosis for material testers and inspectors.

Much of this analysis is extrapolation based on the DOL's past guidance and the analysis contained in its 812-page Final Rule. The final resolution of these issues may not come about for 12-18 months as legal challenges are resolved and as the new Rule is applied on projects.

It would be beneficial to seek official DOL Guidance on these issues after the Rule takes effect on October 23 through the guidance process, although there is no guarantee that the DOL would respond promptly.