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The Davis-Bacon Act : Issues and Legislation During the 108th Congress

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The Davis-Bacon Act : Issues and Legislation During the 108th Congress

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CRS Report for Congress

The Davis-Bacon Act: Issues and Legislation During the 108th Congress

Updated March 19, 2004

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**Prepared for Members and
Committees of Congress**



The Davis-Bacon Act: Issues and Legislation During the 108th Congress

Summary

The Davis-Bacon Act (1931, as amended) requires, among other things, that *not less than* the locally prevailing wage be paid to workers employed in federal contract construction. Through recent decades, the Act has become a continuing source of contention. Some ask: What is the impact of the Act? Should it be modified? Strengthened? Repealed? Is it being administered effectively? These and other questions continue to be raised.

Adopted in 1931 at the urging of the Hoover Administration, the Act was regarded as an emergency measure intended to help stabilize the construction industry and to encourage employment at *fair* wages (i.e., not less than those prevailing in the locality of the covered work). The statute was amended in 1935 and its scope broadened. Subsequently, Davis-Bacon provisions have been incorporated within more than 50 federal program statutes.

The original Davis-Bacon Act (even with the 1935 amendments) was a relatively simple statute which, it was assumed, the Secretary of Labor would have little difficulty administering. However, the nature of the statute, changes within the construction industry, and extension of the Act to a wide range of program statutes seem to have added complications. By the 1950s, some had begun to urge major amendment or repeal of the Act. Through the rulemaking process, the Department of Labor has modified application of the statute — but controversies continue.

Serious oversight of the statute was undertaken during the early 1960s; then, recommenced in the late 1970s. Among the issues raised have been the following: revision of the database upon which prevailing wage rates are based; expansion of the conditions under which “helpers” (generally, unskilled or semi-skilled workers) can be employed on Davis-Bacon projects; revision of the operational concept of “site of the work” for Davis-Bacon purposes; and *updating* of the “prevailing wage” determination process and of the coverage threshold.

Oversight, however, has not resulted in conclusive resolution of the issues surrounding the Davis-Bacon Act. Debate continues with respect to application of the Act to specific program statutes. Should all (or most) federal and/or federally-assisted contract construction be covered by a prevailing wage requirement? Should the Act apply in cases where indirect federal funding mechanisms are used (i.e., tax credits, revolving loan funds, etc.)? What *is* (or has been) the economic impact of the prevailing wage requirement?

This report does not trace every occasion in which the Davis-Bacon prevailing wage requirement became an issue during recent Congresses. Such cases are numerous. Rather, it provides a series of case studies by way of example. (Among Davis-Bacon related bills of the 108th Congress, see H.R. 2283 and H.R. 895.)

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The Davis-Bacon Act: Issues and Legislation During the 108th Congress

Most Recent Developments

The Davis-Bacon Act of 1931 (as amended) requires that *not less than* the locally prevailing wage be paid to workers employed under federal construction contracts.¹ It also affects manpower utilization on such projects: for example, the employment of *helpers* or unskilled/semi-skilled general utility workers. With respect to the implementation of the Act, Congress has assigned wide administrative responsibility to the Secretary of Labor. Congressional concern with Davis-Bacon — oversight and legislative proposals — has been more or less continuous at least since the 1950s.

In the 108th Congress, only one bill, H.R. 2283 (Blackburn), deals singularly with the Davis-Bacon Act: a proposal to establish a separate worker classification of *helper* for Davis-Bacon prevailing wage rate determination purposes. No action has yet been taken on the Blackburn proposal.

Through the years, Davis-Bacon provisions have been written into more than 50 program statutes. Application of the Act to these (and to new legislative programs) has continued to spark congressional interest. Some have urged that the prevailing wage requirement be set aside in the name of economy: to stretch construction dollars by permitting paying of less than locally prevailing rates. During recent years, the prevailing wage issue has variously been considered in the context of legislative proposals in which there was a Davis-Bacon component — but in which Davis-Bacon was not the core (substantive) concern.

Introducing the Davis-Bacon Act

In 1931, at the urging of the Hoover Administration, Congress enacted prevailing wage legislation for federal contract construction — legislation cosponsored by Representative Robert Bacon (R-N.Y.) and Senator James Davis (R-Pa.), i.e., the Davis-Bacon Act.² The Act was significantly amended in 1935 and its

¹ 40 U.S.C. 3141-3148. Davis-Bacon provides a wage floor. To recruit and retain a skilled workforce, contractors may be forced, by the market, to pay wages in excess of those found, under Davis-Bacon, to be prevailing in the locality of the construction work.

² Robert Bacon had engaged in banking in New York prior to his election to the House of
(continued...)

scope broadened. In 1964, the definition of prevailing wage was expanded to include a fringe benefit component. Otherwise, the Act remains essentially in its 1935 form.³ Although there have been intermittent efforts to repeal the Davis-Bacon Act and the related Copeland “anti-kickback” Act (1934),⁴ such initiatives have been consistently rejected by Congress — which has, through the years, added Davis-Bacon requirements to numerous individual program statutes.

The Structure and Context of Davis-Bacon

The Davis-Bacon Act requires that federal (and some federally assisted) construction contracts specify the minimum wage rates to be paid to the various categories of laborers working under those contracts. *Minimum wages* are defined as those rates of pay found by the Secretary of Labor (a) to be prevailing (b) in the locality of the project (c) for similar crafts and skills (d) on comparable construction work. The concept of *locality* is usually (but not necessarily always) a county or metropolitan area. Normally, construction work is divided into four categories: residential, non-residential buildings, highway, and heavy construction.

The Act *does not* require that collectively bargained (union) wages be paid unless such wages happen to be prevailing in the locality where the work takes place. Further, the prevailing rate for Davis-Bacon purposes represents *a floor*, not necessarily the rate that a construction firm will have to pay in order to recruit and retain qualified workers.⁵

Typically, the Department of Labor (DOL) conducts two types of wage rate determinations: general area determinations and, where necessary, specific project determinations. DOL sometimes collects data through a direct survey process. More often, it works from data provided by contractors, trade unions and other interested parties. It may use both methods, jointly.

The Act requires that the “advertised specifications for every [construction] contract in excess of \$2,000, to which the United States or the District of Columbia is a party,” must specify the wage that the Secretary of Labor determines to be prevailing in the locality for the “various classes of laborers and mechanics” employed on the covered work. Speaking generally, DOL does not recognize

² (...continued)

Representatives in 1922. James Davis had served as Secretary of Labor in the cabinets of Presidents Harding, Coolidge and Hoover prior to his election to the Senate in 1930.

³ For a quick historical overview of the Act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whittaker.

⁴ Some employers, it was alleged, had paid the prevailing wage to their workers but then demanded rebates or kickbacks. To end this practice, Congress passed the Copeland “anti-kickback” Act in 1934 (P.L. 73-324). Though not a part of the Davis-Bacon Act, it operates in tandem with that statute and, in policy terms, is usually a part of the Davis-Bacon debate.

⁵ There does not appear to be any systematic analysis of the gap, if any, between the floor provided by the Davis-Bacon Act and the wages actually paid to construction workers on covered projects.

unskilled or semi-skilled “helpers” as a class of workers for wage rate determination purposes. Rather, it evaluates workers by craft. Thus, employers are discouraged from employing helpers on Davis-Bacon projects, turning to more skilled craftspersons instead. DOL does, however, recognize apprentices and encourages the employment on Davis-Bacon projects of persons enrolled in *bona fide* apprenticeship programs.⁶

Supplemented by other statutes, work under Davis-Bacon is covered by workhours and health and safety standards legislation — though the latter are not part of the Davis-Bacon Act, *per se*. The related 1934 Copeland “anti-kickback” Act requires weekly reporting of wages actually paid, with an affirmation from employers that any deductions from wages due to employees were proper.

Davis-Bacon applies to direct federal construction, alteration, or repair of public buildings and public works, including painting and decorating, where the contract is in excess of \$2,000. Further, Davis-Bacon provisions have been written into over 50 federal program statutes. Some states have enacted “little Davis-Bacon” acts. These state statutes, however, normally differ from each other and from the federal Davis-Bacon Act.⁷

In general, labor standards for *federal contract procurement* are governed by three statutes. The Davis-Bacon Act applies only to federal contract construction. The *Walsh-Healey Public Contracts Act* (1936) deals with labor standards with respect to goods produced under contract for the federal government. The *McNamara-O’Hara Act* (1965), popularly known as the Service Contract Act, deals with labor standards under federal service contracts. In addition, there is the more general *Contract Work Hours and Safety Standards Act* (1969) — the latter an amalgam of earlier federal workhours and safety enactments. (These statutes do not apply to fully private sector work.) Although the federal contract labor standards statutes supplement each other (i.e., for construction, goods, and services), they have different wage floors, different triggering mechanisms and other requirements, and are applied differently with respect to the various types of federal contract work.⁸

⁶ With the Fitzgerald Act in 1937 (29 U.S.C. 50 ff.), the federal government assumed an oversight role with respect to apprentice training. Workers enrolled in programs recognized by the Department of Labor (or in cooperating state programs) receive specified training which, when complete, results in a credential certifying the competence of the graduate (journeyman). The credential is portable (i.e., recognized throughout the country). Such programs are usually funded jointly by the employer and the apprentice (through a temporarily reduced wage) and, often, by a contribution from the trade union in the craft. The reduced wage option, which increases normally with the systematic improvement in the skills of the apprentice, tends to encourage employment of apprentices on Davis-Bacon projects. Some open shop firms, however, prefer to train workers independently.

⁷ See CRS Report RS20940, *The “Little Davis-Bacon” Acts and State Prevailing Wage Standards*, by William G. Whittaker.

⁸ For a more extended (but critical) account of these statutes and their administration, see Armand J. Thieblot, Jr., *Prevailing Wage Legislation: The Davis-Bacon Act, State “Little Davis-Bacon” Acts, the Walsh-Healey Act, and the Service Contract Act* (Philadelphia, (continued...))

The Purposes of the Act

In the 1920s, the federal government undertook a major program of public works. As the nation moved into a depression after 1929, this program had important implications for the areas where the work was to be performed. However, given the depth of the economic catastrophe and the scope of unemployment, any opportunity for work — almost without regard to wage rates or conditions under which the work was to be performed — was attractive both to workers and to struggling firms.

Federal construction contracts were normally awarded to the lowest responsible bidder — a process that appears to have limited the options of the various federal agencies when selecting a contractor. Treatment of workers and payment of *fair* wages were not taken into account. The result, some argued, was the sacrifice of product quality (and labor standards) for short-term economy. Certain itinerant contractors, employing workers imported from low-wage parts of the country, were able (or believed to be able) to underbid local contractors for federal construction work. In this way, it was alleged, *fly-by-night* operators would win contracts, based upon the payment of sub-standard wages (to workers desperate for employment but sometimes lacking mature skills), and then produce an inferior quality of construction. In that manner, the positive rehabilitative economic impact of public building and public works projects for the various localities was reduced — to the disadvantage both of local contractors and local workers alike.⁹

In drafting the Davis-Bacon Act, Congress was not searching for the cheapest available labor for federal construction work. Rather, it prescribed payment of not less than the locally prevailing wage in order, in part, to protect *fair* local contractors and workers, residing in and employed in local markets, from contractors and low-wage crews from outside of the area of construction work. Thus, the original Davis-Bacon Act was as much a protection for fair contractors as for workers.¹⁰ However, supporters have contended there is no essential conflict between the purposes of the statute and securing a bargain for the public agency consumer (the taxpayer).

⁸ (...continued)

University of Pennsylvania Press, 1986). See also CRS Report RL32086, *Federal Contract Labor Standards Statutes: An Overview*, by William G. Whittaker.

⁹ During the late 1920s and early 1930s, the contracting community appears to have been very much concerned about establishment of quality controls, ethical standards, and fair competition. See, for example G.F. Schlesinger, "Responsibility as a Pre-Requisite," *The Constructor*, Aug. 1928, pp. 24-25, 55-61; "'Irresponsible Contractor' Defined," *The Constructor*, Aug. 1928, pp. 35-36, 51; A. E. Horst, "Accomplishments in Cooperation: Elimination of Irresponsibility Marks Progress of the Industry," *The Constructor*, Nov. 1929, pp. 28-30, 56; "When Low Bids Are Too Expensive," *The Constructor*, Feb. 1930, pp. 40-41, and 58; and E. A. St. John, "Cooperation Eliminating Irresponsibility," *The Constructor*, Apr. 1930, pp. 35-36.

¹⁰ The prevailing wage requirement did not preclude award of contracts to *outside* contractors. It simply assured that local labor standards would not be undercut.

The prevailing wage statute preceded the Fair Labor Standards Act (1938) with its minimum wage provisions and was, thus, a somewhat new concept in federal labor standards law.¹¹ Davis-Bacon was viewed as a device that might help to assure quality of construction, to stabilize the local economy and industry, and to make the federal government, indirectly through its power as a consumer, a model for private sector employers with respect to labor standards.¹²

A Continuing Process

In 1931, the Davis-Bacon legislation was regarded as an emergency measure. It sparked little controversy at the time of its enactment and, from a review of the hearings and debates of that period, it seems clear that Congress anticipated none of the administrative problems that would ensue. Few of the terms or concepts embodied within the statute were defined. No provision was made for predetermination of the prevailing wage rate: only after a bid was submitted and a contract awarded would a contractor learn what his wage obligations might be. How disputes were to be adjusted was not specified: it was assumed that the Secretary of Labor would have little difficulty enforcing the Act. But, complications were soon to arise.

Almost immediately, restructuring of the Act commenced as Congress and the Administration each began a process of reassessment. In early 1932, in an effort to preempt action by the Congress, President Hoover moved to strengthen administration of the statute through Executive Order No. 5778.¹³ Although Congress proceeded with general oversight of the Act and, ultimately, adopted reform legislation, that initiative was vetoed by President Hoover.¹⁴ The Copeland "anti-kickback" Act (1934) helped assure that the appropriate rates would be paid without improper deductions. Then, in 1935, Congress approved basic changes to the statute. The 1935 amendments: (a) reduced the coverage threshold from \$5,000 to \$2,000; (b) extended coverage from only public buildings as in the original enactment to "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works"; and (c) required that the locally prevailing (Davis-Bacon) wage rates be predetermined — that is, prior to solicitation of bids — and that they be written into bid solicitations.¹⁵

¹¹ Late in the 19th century, the states had begun to enact prevailing wage laws with respect to public construction. See David B. Johnson, "Prevailing Wage Legislation in the State," *Monthly Labor Review*, Aug. 1961, pp. 839-845.

¹² Some have questioned whether, given the Fair Labor Standards Act after 1938, there was a continuing need for Davis-Bacon prevailing wage protection.

¹³ *Proclamations and Executive Orders: Herbert Hoover, March 4, 1929 to March 4, 1933* (Washington, GPO, 1974), vol. II, pp. 1066-1067.

¹⁴ These reform initiatives are discussed in U.S. Congress. Senate, *Relationship Between Employees and Contractors on Public Works, Report Pursuant to S.Res. 228*, H.Rept. 74-332, Part 2, 74th Cong., 1st sess., (Washington: GPO), May 13, 1935, pp. 7-9.

¹⁵ Reduction of the coverage threshold appears to have been motivated by at least two considerations. *First*. Contracts for painting and decorating were often too small to come
(continued...)

The Debate Over Davis-Bacon

By the 1950s, Congress had begun to add Davis-Bacon provisions to various program statutes in which federal funding made the work possible. But, such extensions of coverage (which would involve new and different types of contract work — and a new body of contractors) seem to have sparked increased uneasiness with the Act. Despite numerous efforts by Davis-Bacon critics, however, proposals to weaken the prevailing wage legislation were uniformly rejected by Congress.

Through the years, arguments for and against Davis-Bacon have become largely fixed; so have counter arguments of defenders and critics. The logic and many of the assumptions these arguments contain have been questioned at length. In the evolving debate, few contentions about the Act have gone (or are likely to go) unchallenged. On both sides, there are *truths* that advocates tend to accept without question.

Current policy debate has focused upon change: to amend the Act, whether to strengthen it or to diminish its impact — or to repeal the statute outright. Outlined below are some of the arguments advanced by critics and by defenders of Davis-Bacon expressed in summary as each side in the ongoing debate might state them. Some of these arguments, pro and con, may not appear on the surface to be consistent; but, then, not all critics or defenders of the Act can be expected to make precisely the same assumptions. Further, hardly a phrase of either set of arguments has passed without refutation (and counter-refutation).¹⁶

Perspectives of Davis-Bacon Critics

Some critics of Davis-Bacon argue that the Act is inflationary (unnecessarily increasing public construction costs), that it is difficult to administer (that it has frequently been inequitably administered), and that it hampers competition — especially with respect to small and minority-owned businesses that may be unfamiliar with federal contracting procedures and lack the staff to deal with the requirements such procedures impose. They contend that the Act impedes efficient manpower utilization, limiting the use of “helpers” or general utility workers. Some argue, were Davis-Bacon restrictions absent, that contractors would be able to restructure the work to be performed, dividing tasks into less complex assignments, in order to make practical the employment of workers who may be less skilled — and who are also less expensive to employ. The result, they argue, would be increased efficiency. And, they suggest, this would likely open more employment opportunities

¹⁵ (...continued)

under the \$5,000 figure. *Second.* It appears that some contractors artfully divided work into small parcels in order to avoid Davis-Bacon coverage. Reducing the threshold to \$2,000 was viewed as a means through which to extend coverage.

¹⁶ Among trade unionists, the Davis-Bacon Act affects primarily persons involved in the building and construction trades where the statute seems to have general support. Critics of the Act, however, are a more diverse group. In some measure, industry is split. In policy terms, the division of opinion seems to be more often philosophical, reflecting basic attitudes toward labor-management relations rather than a division along partisan political lines. The distinctions are not always neatly drawn.

to minorities and women, allowing them to gain work experience and on-the-job training, while reducing the costs of public construction.

Besides, critics note, the Davis-Bacon Act (1931, 1935) was enacted before there were federal minimum wage standards. With the general minimum wage floor established under the Fair Labor Standards Act (1938), they suggest, the Davis-Bacon Act is no longer needed: that is, that a “super minimum wage” for federal construction work is both unnecessary and inequitable. They assert that labor costs for federal construction could be reduced (with savings for the taxpayer) if actual local market wages were paid rather than administratively determined locally prevailing wages which, some argue, may often be union rates.¹⁷ In addition, they urge simplification of the Copeland Act’s reporting requirements, arguing that a simple declaration of compliance would have equal effect: that compliance with existing law is onerous, bureaucratic, and that reports are rarely even examined.

Perspectives of Davis-Bacon Supporters

Supporters of Davis-Bacon often contend that the Act prevents cutthroat competition from *fly-by-night* firms that undercut local wages and working conditions and compete *unfairly* with local contractors: that the Act helps stabilize the local construction industry, an advantage to workers and employers alike. The Act, they suggest, may tend to assure the consuming agency of higher quality work since employers, required to pay at least the locally prevailing wage, are likely to hire more competent and productive workers — resulting in better workmanship, less waste, reduced need for supervision, and fewer mistakes requiring corrective action.¹⁸ This may lead to fewer cost overruns and more timely completion of public construction — and, in the long-term, lower rehabilitation and repair needs down the line. Thus, some argue, the Davis-Bacon Act could actually save the taxpayer money on public construction.

Supporters of the Act also argue that Davis-Bacon deters contractors from fragmenting construction tasks in order to utilize low-wage (and low-skill) “helpers” or pick-up crews. Some argue that without Davis-Bacon (and in the absence of a collective bargaining agreement), contractors would probably be unlikely to provide training beyond the necessary and narrow requirements of the job — and would not likely enter into a formal program such as those monitored by DOL’s Bureau of Apprenticeship and Training. Reducing or eliminating apprenticeship programs in the construction industry might work to the disadvantage of minority and women workers who are entering the building trades in growing numbers. In addition, some assert that if “helpers” are substituted for skilled craft workers, it would likely be minorities (and, to a lesser extent, women) who would be laid off or forced into lower-wage jobs.

¹⁷ Again, one needs to recall that the Davis-Bacon prevailing rate is a floor, not necessarily the rate that employers will actually have to pay. DOL suggests that union rates are used only where they are found to be prevailing in a locality.

¹⁸ Conversely, some argue that, in the fully private sector, there is a significant amount of quality construction work that is performed without Davis-Bacon protection.

What Do We Really Know About the Impact of the Davis-Bacon Act?

Perhaps the most frequently asked question concerning the Davis-Bacon Act is: How much money could be saved if Davis-Bacon were repealed or modified to narrow its scope? The short (and honest) answer is probably: no one really knows.

Conversely, does Davis-Bacon save money for the federal government in its purchases of construction — for example, employment of more highly skilled workers on Davis-Bacon projects? Here again, a response may also be uncertain.

Davis-Bacon literature is extensive and diverse, much of it in the form of public materials (i.e., agency reports and analyses). Journalists have taken a continuing interest in the Act, resulting in a substantial popular literature. Serious academic studies may be fewer. It is extremely difficult for an independent scholar to review the administration of the Act to assess its impact. *First*. There is the scope of the task: vast numbers of projects scattered throughout the United States, administered by different agencies and involving hundreds of contractors and subcontractors, working under dissimilar circumstances and in diverse labor markets. *Second*. There is the problem of the availability of documentation. Since the contractors involved are of the private sector, how much information has been preserved? *Third*. Access presents a problem. Assuming that the data and documents have been preserved and could be made available, securing such documentation (and access to administrative personnel) may be problematic — both from the private sector (contractors, workers and unions) and from the various public agencies.

If one assumes that documentation exists, access is allowed, that all of the parties are cooperative, and that the means, financial and other, are available for such an undertaking, there remains a *fourth* complication. *The analyst would be comparing something that did happen with something that in fact, for whatever reasons, did not happen.* Payroll records, labor-management relationships, availability of skilled workers, quality of supervision, internal agency memoranda, etc., all relate to an actual project and not to what might have happened under other circumstances.

In the absence of a Davis-Bacon requirement, would the contract have gone to the same contractor? If so (or if not), would the contract have been managed in the same way? Did the Act have any impact upon the wages *actually* paid or upon workforce utilization? Without Davis-Bacon, would different workers have been employed? The work of a governmental researcher may be further complicated by political or public policy considerations.¹⁹

For all of these reasons, there appear to be significant gaps in our knowledge of the Act and of its administration despite oversight by Congress, extensive study by public and private agencies, and the work of individual scholars. Further, few studies

¹⁹ See also CRS Report 94-908, *Davis-Bacon: The Act and the Literature*, by William G. Whittaker.

of the Act, whether public or private, have escaped criticism on grounds of flawed methodology or inadequate sample size. Thus, precise estimates of impacts ought to be viewed with considerable caution.²⁰

Some Areas of Continuing Concern

The Davis-Bacon Act has been a focus *both* of legislative and administrative consideration — and of litigation. DOL has instituted its own reform initiatives — most notably during the Reagan Administration — but these have often proven contentious and have resulted in prolonged litigation. *Among* areas of continuing concern and controversy are those discussed below.

The “Helper” Issue

The Davis-Bacon Act makes no mention of “helpers,” nor does it refer to “trainees,” “apprentices,” or other skill groups. Rather, it refers to “various classes of laborers and mechanics” and then leaves up to the Secretary of Labor the determination of just what those “various classes” might be and how they might be distinguished one from the other. But, just what is a “helper” — and how might he or she be differentiated from a “laborer” or skilled construction worker? Equally contentious has been whether the use of helpers is a common or prevailing practice in the locality of a proposed federal construction project.²¹

Setting Out the Issue. Under Davis-Bacon, before bids are solicited, the minimum locally prevailing wage rate is determined for each category of worker that might be used on the project. Where a “helper” category is not recognized in the locality of the projected construction, craft or laborer rates have to be paid, potentially (but not necessarily) increasing the labor cost of such construction. On the other hand, recognition of a helper category where it is not common or prevailing area practice could defeat the purposes of the Act (i.e., allowing contractors to fragment tasks so that low-skilled, low-wage helpers could be employed instead of laborers and craft workers) resulting in a downward wage spiral. Further, some

²⁰ A distinction needs to be made between *labor costs* and *project costs*. Higher labor costs could result in lower project costs if more efficient and more skilled workers are employed. But, as a practical matter, to what extent are actual project costs governed by the requirements of the Davis-Bacon Act? Might they reflect the manner of federal agency oversight and monitoring of the progress of the work? Is federal construction work supervised as closely as that of the private sector? What might be the impact of other federal requirements: style of construction/architecture, especially for ceremonial buildings? Is cost impacted by various “set asides” for sheltered contractors — small and minority business, etc.? For an example of the problems private research involves, see Martha Norby Fraundorf, with John P. Farrell, and Robert Mason, *Effect of the Davis-Bacon Act on Construction Costs in Non-metropolitan Areas of the United States* (Corvallis: Oregon State University), Jan. 1982.

²¹ For general background, see Herbert R. Northrup, “The “helper” Controversy in the Construction Industry,” *Journal of Labor Research*, fall 1992, pp. 421-435.

argue, employment of helpers would undercut apprenticeship programs with a generally deleterious impact upon skills transfer.

Several questions are immediately apparent: (a) Are helpers commonly employed in the area of the projected construction? (b) Is a clear distinction made between a "helper" and a "laborer" or other craft workers? (c) What is the technical distinction between such groups of workers? Upon what is that distinction based? (d) What might be the economic impact of the recognition and utilization of a distinct category of "helpers" on Davis-Bacon covered projects. Such questions have remained a part of the debate over the helper issue through more than two decades and, with the dawn of the 21st century, they remain largely unresolved. The position of DOL on the issue has varied over time.

Efforts to Revise the "Helper" Requirement. Through the years, helpers have been employed on Davis-Bacon construction where their use was common in the area of the projected work and where they were clearly distinguished from "laborers" and from skilled craft workers. However, such use of helpers appears to have been infrequent. During the late 1970s, the Carter Administration opened the general issue of Davis-Bacon implementation for debate and public comment. Seizing the opportunity, industry urged a closer adherence to area practice when establishing worker classifications — "especially 'helper' classifications."²² But, before new Davis-Bacon regulations could be given effect, President Carter was replaced in office by President Reagan: regulations proposed by the former Administration were withdrawn and their substance reconsidered.

New Davis-Bacon regulations, proposed by the Reagan Administration in May 1982, redefined the concept of helper and, potentially, expanded their use: a change applauded by industry and objected to by the building trades unions.²³ Litigation followed. In order to circumvent objections raised by the courts, DOL redrafted the helper regulations. In January 1989, during the Bush Administration, the courts acquiesced in the judgment of the Department and cleared the regulations for implementation. At that juncture, Congress objected, refusing to appropriate funds for implementation and enforcement of the regulation. This restraint continued into the 1990s, disappearing during fiscal 1996. Then, another impediment was raised: DOL, under the Clinton Administration, declined to act.

In June 1996, the Associated Builders and Contractors brought suit to require DOL to enforce its helper regulations. DOL responded quickly and, in late July, Assistant Secretary Bernard Anderson affirmed that the helper regulation (approved, but still suspended) was "simply ... non-administratable." Anderson explained that the distinction between helpers and other workers in terms of their role and duties was insufficiently clear, and that DOL had no intention of implementing the regulation in its current form.²⁴ In a *Federal Register* notice of August 2, 1996, DOL noted that during the 14 years that had passed since the regulation was first

²² *The Constructor*, Dec. 1980, p. 61.

²³ *Federal Register*, May 28, 1982, p. 23644 ff.

²⁴ Bureau of National Affairs, *Daily Labor Report*, July 29, 1996, pp. A9-A10.

published, “additional information has become available which warrants review of the suspended rule.” Therefore, the regulation remained in abeyance while DOL engaged “in substantive rulemaking” on the issue.²⁵

Through the next five months, DOL reassessed the data and, in December 1996, it announced that the helper regulation would remain suspended “until the Department either (1) issues a final rule amending (and superseding) the suspended helper regulations; or (2) determines that no further rulemaking is appropriate, and issues a final rule reinstating the suspended regulations.”²⁶ In July 1997, the U.S. District Court for the District of Columbia ruled that the Department was within its rights to issue an indefinite suspension of the helper regulation.²⁷ Then, in April 1999, DOL issued a new proposed rule that would, essentially, reaffirm the *status quo* prior to the Carter Administration initiatives of the late 1970s — two decades earlier.²⁸ Thus, the use of helpers would be limited to demonstrated common area practice where they were clearly differentiated from “laborers” and other craft workers. Under the proposed rule, their use could be expected to be infrequent.

Late in the 105th Congress, Representative Charlie Norwood (R-GA) introduced legislation that would have created a special category of workers (i.e., “helpers”) for Davis-Bacon purposes, but no action was taken on the proposal. Early in the 106th Congress (in March 1999), the Congressman introduced new legislation that would have established a separate helper classification under the Davis-Bacon Act. On July 21, 1999, the House Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, conducted a general hearing on the impact of Davis-Bacon helper rules for job opportunities in the construction industry. The Subcommittee, however, took no further action: the Norwood bill was not reported.

The “helper” issue also arose during committee consideration of the Labor, Health and Human Services, and Education Appropriations for FY2000. In that instance, Representative Anne Northup (R-KY) raised objection to the helper regulation that DOL had proposed in April 1999. At the Congresswoman’s request, language was added during mark-up that would have denied funding “to implement, administer, or enforce” the helper rule proposed by the Clinton Administration. However, through the legislative process, the provision was dropped. What impact inclusion would have had may not be entirely clear since, in essence, it would have codified *then existing practice*.

As the 106th Congress was drawing to a close, DOL issued a new final regulation governing the use of helpers. It was dated November 14, 2000, and was set to take effect 60 days after its publication in the *Federal Register* — just hours prior to the end of the Clinton Administration. The regulation provides that helpers

²⁵ *Federal Register*, Aug. 2, 1996, p. 40367; and Bureau of National Affairs. *Daily Labor Report*, Aug. 1, 1996, pp. A2-A3.

²⁶ *Federal Register*, Dec. 30, 1996, p. 68646.

²⁷ Bureau of National Affairs, *Daily Labor Report*, Aug. 4, 1997, pp. A10-A11.

²⁸ *Federal Register*, Apr. 9, 1999, pp. 17442-17458.

will be recognized as a “distinct classification ... only where” the following conditions occur:

- (i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;
- (ii) The use of such helpers is an established prevailing practice in the area; and
- (iii) The helper is not employed as a trainee in an informal training program.

The work of a “helper” is not to be performed by any other classification of worker “in the wage determination.”²⁹

While this final regulation from the Clinton Administration has now gone into effect, it may not be the end of the process. On the one hand, the Department could, at its discretion, reevaluate the “helper” question and issue a new proposed rule. Or, conversely, Congress could attempt to resolve the issue through new legislation.

On May 23, 2001, Representative Norwood introduced legislation that, had it been passed, would have redefined the concept of “helper” and would have permitted the use of “helpers” on Davis-Bacon projects. The bill was referred to the Subcommittee on Workforce Protections where it remained at the close of the 107th Congress.

Initiatives of the 108th Congress. In the 108th Congress, the issue was raised again by Representative Marsha Blackburn (R-TN) with the introduction of H.R. 2283. The Blackburn bill would (a) mandate recognition, for wage rate determination purposes, of *helpers* as a separate workforce classification, and (b) require that a helper “be paid the prevailing wage of helpers ... employed on projects which are of a character similar to the project on which the helper is employed” in the locality “in which the helper is employed.” The bill continues:

... the term “helper” means a semi-skilled worker (other than a skilled journeyman mechanic) who —

- (1) works under the direction of and assists a journeyman;
- (2) under the journeyman’s direction and supervision, performs a variety of duties to assist the journeyman, such as preparing, carrying, and furnishing materials, tools, equipment, and supplies, maintaining them in order, cleaning and preparing work areas, lifting, positioning, and holding materials or tools, and other related semi-skilled tasks as directed by the journeyman; and
- (3) may use tools of the trade at and under the direction and supervision of the journeyman.

The Blackburn bill was referred to the Committee on Education and the Workforce and to the Subcommittee on Workforce Protections.

²⁹ Bureau of National Affairs, *Daily Labor Review*, Nov. 20, 2000, pp. E1 forward. For a more detailed discussion of this issue, see also CRS Report 96-228, *Davis-Bacon: Employment of Helpers on Federal Contract Construction*, by William G. Whittaker.

The “Site of the Work” Coverage Issue

The initial Davis-Bacon Act of 1931 was a relatively simple statute: one paragraph, with a statement indicating the date that it would take effect. With experience, the statute was substantially modified in 1935 and, *inter alia*, language was added providing that the Act’s prevailing wage requirements should apply to “the contractor or his subcontractor” and to “all mechanics and laborers employed directly upon the site of the work.”³⁰

Through the years, with implementation of the Act, questions have arisen with respect to this seemingly simple provision. For example, what is the “site of the work” and how is “directly” to be defined? By whom must the workers in question be employed? These concepts have changed over time with altered technology and industry practice. But, rather than being quietly resolved, the “site of the work” issue would become a subject of administrative review and, ultimately, of litigation.³¹ Rulemaking in this area would continue until near the close of the Clinton Administration late in 2000. Litigation would be extensive.

Questions of Interpretation. Interpretive variations are numerous. For example, given the specific wording of the statute, if workers engaged in the construction of a building (working on the structure itself) were covered by Davis-Bacon, would workers in *an adjoining space* mixing mortar, etc., be similarly covered? How far removed from the actual structure could such work take place and still be regarded as “directly upon the site of the work?” Where some assembly of components is undertaken in a holding area *down the street a little way*, would workers engaged in such assembly be regarded as employed “directly upon the site of the work” for Davis-Bacon coverage purposes? If prefabricated units to be used at a construction site in Alaska were assembled at a site in Seattle (a *thousand miles* away), would the Seattle workshop be considered part of the site of the work?

As one begins to apply the statute, questions multiply. For example, using the case above: Is the site in Seattle owned by the firm operating in Alaska? Are the employees, engaged in the work in Seattle, direct employees of the Alaska firm? Is the Seattle site *dedicated solely* to the Alaska project? Or, is the work in Seattle being performed by a manufacturing plant that makes and sells components to any construction firm engaging in work, public or private? Are the components, thus, purchased in the open market? Or, are they developed and fabricated under a specific federal contract? When do the fabricated goods change ownership — from the manufacturer to the construction firm? Are they installed by workers employed by the construction firm or by employees of the manufacturer? And, if the latter, would

³⁰ P.L. 74-403. The provision remains a part of the statute.

³¹ See, for example, *Building and Construction Trades Department, AFL-CIO v. United States Department of Labor Wage Appeals Board*, 932 F. 2d 985 (D.C. Cir. 1991) (*Midway*); *Ball, Ball and Brosamer v. Reich*, 24 F. 3d 1447 (D.C. Cir. 1994); *L. P. Cavett Company v. U.S. Department of Labor*, 101 F. 3d 1111 (6th Cir. 1996).

these non-construction workers (installers) be Davis-Bacon covered?³² Was the support facility created solely to serve the federal project (did it have prior existence) and will it, likely, close when the federal project is completed?

If a contractor, engaged in work covered by Davis-Bacon, has concrete hauled to the construction site (the permanent location of the structure, in this instance), how are the drivers hauling the concrete to be treated? Does it matter by whom the drivers are employed? Or, how long they are directly involved on the construction site (however defined) as opposed to actual hours spent driving? If the construction contractor sets up a separate firm to haul material, would this device insulate the drivers from Davis-Bacon coverage?

Such questions may seem tedious, but they have been, through decades, the subject of rulings from the Comptroller General and a focus of litigation and/or of appeals through the hierarchy of DOL. Among federal contracting agencies, there has not always been agreement on these matters. They have also been a focus of attention for those who wish to extend Davis-Bacon coverage broadly — and for those who favor a narrower application of the Act. DOL has sought to deal with these issues through the regulatory process (and continues to do so) but with mixed results. Even precise judicial rulings have been insufficient to prevent partisans from finding nuances of meaning, either in the statute or in the regulations, from which further litigation might blossom.³³

A New Rule Is Issued. On September 21, 2000, DOL published in the *Federal Register* a proposed rule redefining the concept of “site of the work” and calling for public comment through October 23, 2000. Under the proposed regulation, “site of the work” would be defined to include, in addition to the common

³² Several options could come into play. The components in this hypothetical case could be off-the-shelf purchases in which federal labor standards requirements may not be an issue. They could be contract purchases of goods, covered by the Walsh-Healey Public Contracts Act rather than the Davis-Bacon Act. Or, if purchased from the manufacturer and installed by employees of the manufacturer, the work could be regarded as an adjunct to the purchase of the goods (possibly Walsh-Healey covered) or part of a service contract covered under the McNamara-O'Hara Service Contract Act. The particular circumstances, likely different in each case, would seem to be determinative. These issues were the subject of extensive hearings during the early 1960s with respect to missile site development. See U.S. Congress, House Committee on Education and Labor, Special Subcommittee on Labor, *Administration of the Davis-Bacon Act*, hearings, 87th Cong., 2nd sess., Part 1, June 6, 1962ff (Washington: GPO, 1962); and, U.S. Congress, Senate Committee on Government Operations, Permanent Subcommittee on Investigations, *Work Stoppage at Missile Bases*, hearings, 87th Cong., 1st sess., Parts 1 and 2, Apr. 25, 1961ff (Washington: GPO, 1961). More generally, see CRS Report RL32086, *Federal Contract Labor Standards Statutes: An Overview*, by William G. Whittaker.

³³ Concerning recent litigation, see the following, all authored by William A. Isokait: “Davis-Bacon Developments after *Midway Excavators*,” *The Constructor*, July 1991, pp. 100-102; “What *Midway Excavators* Means for Federal Construction Contractors,” *The Constructor*, Aug. 1992, pp. 27-29; and “Anatomy of a Victory: Reason Restored, Courts Rule Davis-Bacon Act Language Means What It Says,” *The Constructor*, Aug. 1994, pp. 20-22.

concept of a construction site, "... any other site where a significant portion of the building or work is constructed, *provided* that such site is established specifically for the performance of the contract or project." This would include, further, "job headquarters, tool yards, batch plants, borrow pits, etc.," where they are "dedicated exclusively, or nearly so" to the performance of the contract and are "adjacent or virtually adjacent to" the site of work. It *would not include* "permanent home offices, branch plant establishments, fabrication plants, tool yards, etc.," the existence of which is not dependent upon the federal or federally-assisted project. Pre-established facilities (those extant prior to opening of project bids) are not to be regarded as part of the site of the work.³⁴

The proposed rule was opposed by certain construction industry groups but supported by the building trades unions.³⁵ On December 20, 2000, DOL published the final rule in the *Federal Register*. Unchanged (in this respect) from the proposed rule, it took effect on January 19, 2001.³⁶ But, like the "helper" case, the issue of the "site of the work" could be addressed further through departmental rulemaking, through legislation — neither, a simple task — or through further litigation.

School Construction and Davis-Bacon

Since 1931, the Davis-Bacon Act has applied to contracts for public construction "to which the United States or the District of Columbia is a party." School construction has involved the federal government less directly than with respect to other types of construction, with primary funding coming from local school districts and, in some instances, from the states. Federal funding may be involved where schools are located at federal installations, where there is impact aid from the federal government, where certain types of tax credits help fund educational programs requiring construction — and with respect to the schools of the District of Columbia. On such projects, however infrequent, contractors engaged in school construction where there is federal funding are assured *a level playing field* in so far as labor standards are concerned — and the construction workers, employed for such projects, are afforded at least a locally prevailing wage and related standards.

That arrangement, however, has had its critics. Assuming that the Davis-Bacon requirement increases the cost of public construction (an assumption that continues as a subject of dispute), some have urged that the Act be waived in order to reduce costs and stretch appropriated funding. That savings would result, were the Davis-Bacon requirement eliminated, may not be entirely clear. And, if there were savings resulting from elimination of the prevailing wage requirement, it may not be obvious that they would be passed along by the contractor to the government and, ultimately, to the taxpayer.³⁷

³⁴ Bureau of National Affairs, *Daily Labor Report*, Sept. 21, 2000, pp. A8-A9; and *Federal Register*, Sept. 21, 2000, pp. 57269-57276.

³⁵ Bureau of National Affairs, *Daily Labor Report*, Oct. 26, 2000, pp. C1 forward.

³⁶ *Federal Register*, Dec. 20, 2000, pp. 80268-80278.

³⁷ The debate, both pro and con, seems to rest more on logic than on hard data. See Armand
(continued...)

Davis-Bacon and the District of Columbia Schools. In the 105th Congress, during consideration of the District of Columbia Appropriations bill (FY1998), it was suggested that the Davis-Bacon requirement be set aside with respect to school construction: to allow construction employers, as an economy measure, to pay wages lower than those prevailing in the area to workers engaged in the construction, renovation, and repair of the District's schools. A provision to that effect was included in the bill as reported.

Discussion of the provision was relatively brief and developed along well established lines. Representative Anne Northup (R-KY) pointed to the District's need "to stretch their construction money." Representative Frank Riggs (R-CA) argued that, by waiving Davis-Bacon, "the District could gain more construction for the dollar and be able to allocate more resources to better meet students' needs." It was a "simple choice," suggested Representative Tom Delay (R-TX). "We can vote to support schools and public education or we can vote to support corruption and Washington union bosses." Conversely, Representative Frank LoBiondo (R-N.J.) reasoned: "It is not as simple as some claim, that there would be a major cost saving by eliminating this requirement." He stated: "... in general you truly do get what you pay for." Representative Jack Quinn (R-NY) affirmed: "... Davis-Bacon simply ensures that wages and working conditions at a given locality are observed on federally funded construction programs."

As debate proceeded, Representative Martin Sabo (D-MN), disagreeing both with the substance of the Davis-Bacon waiver provision and with its legislative appropriateness, proposed that the language setting aside the prevailing wage requirement be deleted.³⁸ On a vote of 234 yeas to 188 nays, the Sabo amendment was approved. Davis-Bacon coverage for District of Columbia school construction was retained.³⁹

Davis-Bacon and School Finance. In the 106th Congress, it was proposed to assist the public schools by allowing interest from bonds designated for school construction to be paid by the federal government through tax credits for the bondholder. In effect, the federal government would pay the interest cost for states and local governments on bonds for construction of classrooms and related facilities. Would this *subsidy*, some questioned, establish the federal government as "a party"

³⁷ (...continued)

J. Thieblot, Jr., *Prevailing Wage Laws and School Construction Costs*, (Washington, Merit Shop Foundation, undated), 16 p.; and Steven G. Allen, and David Reich, *Prevailing Wage Laws Are Not Inflationary: A Case Study of Public School Construction Costs* (Washington, Center to Protect Workers' Rights, Dec. 1980), 24 p. See also Peter Philips, *Square Foot Construction Costs for Newly Constructed State and Local Schools, Offices and Warehouses in Nine Southwestern and Intermountain States, 1992-1994*. Paper prepared for the Legislative Education Study Committee of the New Mexico State Legislature, Sept. 6, 1996. 43 p.

³⁸ *Congressional Record*, Oct. 9, 1997, p. H8780.

³⁹ *Ibid.*, pp. H8780-H8783.

to school construction, alteration, etc.? And, if so, would it trigger applicability of the Davis-Bacon Act?⁴⁰

Debate ensued. The Building and Construction Trades Department, AFL-CIO, saw Davis-Bacon coverage as “a high priority” and asserted a need “to establish [a] precedent” for cases involving such “indirect financing.” Conversely, the Associated Builders and Contractors (ABC), a predominantly open shop trade association, urged the House leadership “not even [to] consider moving a school construction bill with Davis-Bacon attached.”⁴¹ The issues were broader than just education policy. Ultimately, none of the proposals was approved; the status of Davis-Bacon coverage for school construction was not altered during the 106th Congress.⁴²

Early in the 107th Congress, Representative Randy “Duke” Cunningham (R-CA) introduced legislation to exempt from Davis-Bacon and Copeland Act coverage “any contract which is entered into to construct or repair facilities of an educational agency or library.”⁴³ Conversely, Representative Major Owens (D-NY) proposed a system of grants to states “to enable local educational agencies to finance the costs associated with the construction, repair, and modernization technology of school facilities within their jurisdictions” — with Davis-Bacon coverage included as part of the program.⁴⁴ Similarly, legislation was introduced by Representatives Nancy Johnson (R-CT) and Charles Rangel (D-NY) to provide funding for school construction and modernization through a system of tax credits — to which Davis-

⁴⁰ The General Educational Provisions Act (20 U.S.C.1232(b)) provides that “[a]ll laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under any applicable program shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality” as provided under the Davis-Bacon Act. The term “applicable program” is defined (20 U.S.C. 1221(c)(1)) as “any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law.” Even language so broadly worded may not place Davis-Bacon coverage in all instances beyond the possibility of challenge. On the one hand, it could be argued that the a tax credit approach went beyond the normal concept of a federally funded project. But, conversely, one might argue that the arrangement was merely a different approach to the same result: building schools and related structures with federal assistance — and, thus, that the work should be covered under Davis-Bacon.

⁴¹ Bureau of National Affairs, *Daily Labor Report*, May 26, 1999, pp. A2-A3.

⁴² At large concerning school construction issues, see CRS Report RS20171, *School Facilities Infrastructure: Background and Legislative Proposals*, by Susan Boren. Much of the recent debate concerning Davis-Bacon and schools has revolved around tax credit issues. In that area, see CRS Report RS20606, *Qualified Zone Academy Bonds: A Description of Tax Credit Bonds*, by Steven R. Maguire; and CRS Report RS20699, *Funding School Renovation: Qualified Zone Academy Bonds vs. Traditional Tax-Exempt Bonds*, by Steven R. Maguire.

⁴³ See H.R. 331 (107th Congress).

⁴⁴ See H.R. 469 (107th Congress).

Bacon would also have been applicable.⁴⁵ The several bills died at the close of the 107th Congress.⁴⁶

New Initiatives in the 108th Congress? Early in the 108th Congress, Representative Owens introduced new legislation “to provide Federal funds to enable local educational agencies to finance the costs associated with the construction, repair, and modernization for information technology of school facilities within their jurisdictions.” Introduced on March 24, 2003, the bill (H.R. 599), which includes a Davis-Bacon requirement, was referred to the Committee on Education and the Workforce.

The Clean Water Act and Prevailing Wage

In 1961, Congress passed federal water quality legislation that would emerge as what is now popularly known as the Clean Water Act (CWA). Included in the 1961 legislation was a provision applying Davis-Bacon prevailing wage requirements to construction of sewage treatment facilities where there was a federal involvement (i.e., direct federal assistance), notably through grants to the states.

An Altered Requirement? In 1987, Congress shifted its focus. Rather than continuing with a program of direct federal funding (grants) of such construction, it established a structure of state revolving loan funds (SRFs), about 80% federally funded with 20% non-federal matching funds. Congress expected that, by FY1995, the SRFs would provide a continuing source of financing for pollution abatement and that the federal role (further appropriations) would end. In authorizing legislation (1987), Congress mandated Davis-Bacon coverage for such work commenced prior to FY1995.

Things did not work out as anticipated, however. *First*, the SRFs did not provide an adequate source of funding for pollution abatement work. *Second*, Congress continued to fund this work — though channeling much its support through the SRFs. *Third*, because of a series of unrelated environmental controversies (for example, a dispute concerning the environmental approach to *wetlands*), no new authorizing legislation was adopted after 1987. *However*, Congress continued to appropriate funds for the CWA and the SRF program continued.

Thus, a question arose. If the abatement program remained federal in terms of funding and priorities (notwithstanding the absence of authorizing legislation), should the statutorily mandated administrative requirements of that program — including the prevailing wage requirement — remain in place? In 1995, the Environmental Protection Agency (EPA) declared that Davis-Bacon would no longer apply to SRF-related construction: that the requirement (but not the funding) had

⁴⁵ See H.R. 1076 (107th Congress).

⁴⁶ Although no action was taken on H.R. 469, *per se*, the concept was considered in connection with other education-related legislation. Legislative proposals of the 107th Congress, dealing with educational matters, were diverse — not all of them are considered here. See CRS Report RS20171, *School Facilities Infrastructure: Background and Legislative Proposals*, by Susan Boren.

terminated at the end of the period covered by the 1987 authorization (i.e., by FY1995). Thereafter, agencies involved in such work would be permitted to pay contract construction workers *less than* the locally prevailing wage (the market permitting) and to avoid any other perceived disadvantages associated with Davis-Bacon coverage.

The Building and Construction Trades Department (AFL-CIO), or BCTD, protested and, following extended negotiation, EPA changed its position. In May 2000, it proposed a “settlement agreement” under which Davis-Bacon would once more apply to certain CWA/SRF construction and, in an announcement published in the *Federal Register* of June 22, 2000, called for comment. Comment was sharply divided: some industry groups and local governmental entities (users of construction labor) urged that Davis-Bacon not apply — and, for the most part, argued that EPA was moving beyond its statutory authority in attempting to reinstate that requirement. The BCTD, conversely, held that Davis-Bacon *did* apply and, ultimately with the concurrence of EPA, that the environmental agency was statutorily bound to enforce the prevailing wage requirement. In the *Federal Register* of January 25, 2001, EPA decided that Davis-Bacon did (and should) apply and would be applied effective on July 1, 2001. Subsequently, EPA moved the effective date back to September 1, 2001 — and then to October 1, 2001. The situation then became somewhat ambiguous.⁴⁷

Consideration During the 107th Congress. Debate on the Davis-Bacon provision of the Clean Water Act continued into the 107th Congress as the House and Senate commenced consideration of new clean water legislation. In each instance, the prevailing wage provision was a relatively minor — *though contentious* — part of an otherwise comprehensive legislative package. The committees in the House and Senate would proceed independently — though they would cover much of the same ground.

Senate Action. On February 26 and 28, 2002, hearings were conducted in the Senate by Subcommittees of the Committee on Environment and Public Works. Two proposals were under consideration. S. 252 was presented by Senator George Voinovich (R-OH) that, *inter alia*, would have deleted certain of the administrative requirements of the 1987 CWA legislation but would have left the Davis-Bacon requirement in place. S. 1961, introduced by Senators James Jeffords (I-VT) and Bob Graham (D-FL), was silent on the Davis-Bacon issue.

As the Committee moved forward with the CWA legislation, the Davis-Bacon issue became a focus of attention — and remained so during full Committee mark-up in May 2002. An amendment, proposed by Senator Harry Reid (D-NV), resulted in applying Davis-Bacon coverage to all CWA and Safe Drinking Water SRFs.⁴⁸

⁴⁷ For a more extended sketch of this issue, see CRS Report RL31491, *Davis-Bacon Act Coverage and the State Revolving Fund Program under the Clean Water Act*, by William G. Whittaker.

⁴⁸ U.S. Congress, Senate Committee on Environment and Public Works, *Water Investment Act of 2002*, report to accompany S. 1961, S.Rept. 107-228, 107th Cong., 2nd sess. (continued...)

According to the *National Journal*, Senator Robert Smith (R-NH) argued that the amendment might be self-defeating. “If Davis-Bacon is added to this bill,” Smith predicted, “it’ll be dead as a mackerel ... dead, dead, dead!”⁴⁹ The bill was reported on July 29, 2002, with the Davis-Bacon requirement, but it died at the close of the 107th Congress.

House Action. In the House, a somewhat different bill (H.R. 3930) was introduced by Representative John Duncan (R-TN). The Duncan bill, in eliminating certain administrative requirements, also deleted Davis-Bacon coverage.

During markup by the Committee on Transportation and Infrastructure on March 20, 2002, Representatives Sue Kelly (R-NY), Ellen Tauscher (D-CA) and Peter DeFazio (D-OR) proposed an amendment restoring the Davis-Bacon requirement and making it apply to SRFs — including recycled funds.⁵⁰ The amendment was approved and the bill, as amended, was ordered to be reported (March 20, 2002).⁵¹

The result, it appears, was a stalemate. According to the *Daily Labor Report*, House Majority Leader Richard Armey (R-TX) declared that he “will not allow a bill to authorize appropriations for state water pollution control projects to come to the House floor because of a Davis-Bacon Act amendment included in the measure.” At the same time, House Transportation and Infrastructure Committee Chairman Don Young (R-AK) was said to have “pledged that no legislation would be reported out of his committee without Davis-Bacon coverage.”⁵² No further action had been taken on H.R. 3930 by the close of the 107th Congress.

Consideration in the 108th Congress.⁵³ With the opening of the 108th Congress (January 7, 2003), Representative Kelly of New York introduced new

⁴⁸ (...continued)

(Washington: GPO, 2002), p. 45. (Hereafter cited as Senate Committee on Environment and Public Works, *Water Investment Act of 2002*.) The *Daily Labor Report*, May 20, 2002, p. A10, stated that under the Reid amendment to S. 1961, the prevailing wage requirements “would apply to second and subsequent rounds of funding” for projects under the legislation.

⁴⁹ David Hell, “Environment Panel Slogging Ahead on \$35 Billion Water Quality Bill,” *National Journal*, May 16, 2002.

⁵⁰ CRS Issue Brief IB10069, *Clean Water Act Issues in the 107th Congress*, by Claudia Copeland, p. 7. Representative Michael Rogers (R-MI) proposed an amendment to weaken the Kelly-Tauscher-DeFazio amendment on the ground that the stronger language, according to “a leadership office” would “stop the bill.” The *National Journal* stated: “Young replied that he would be ‘surprised’ if the bill were stalled, and Rogers’ amendment was defeated on another voice vote.” Michael Steel, “\$20 Billion Loan Fund Approved for Wastewater Projects,” *National Journal News Service*, Mar. 20, 2002.

⁵¹ H.R. 3930 was also referred to the Committee on Ways and Means and reported on Apr. 17, 2002.

⁵² *Daily Labor Report*, Apr. 18, 2002, p. A7.

⁵³ See CRS IB10108, *Clean Water Act Issues in the 108th Congress*, by Claudia Copeland.

Clean Water Act legislation (H.R. 20) which, among its other provisions, affirmed Davis-Bacon coverage for SRF projects. In April, an alternative proposal, the "Water Quality Financing Act of 2003" (H.R. 1560) was introduced by Representative Duncan of Tennessee — a bill that was silent on the prevailing wage issue. Hearings were held on June 19 by the Subcommittee on Water Resources and Environment and, on July 17, 2003, the Duncan bill was unanimously approved and sent on to the full Committee on Transportation and Infrastructure.⁵⁴

Representative Kelly, with the Committee's ranking Democrat, Representative Jerry Costello of Illinois, reportedly indicated that they would reintroduce the Davis-Bacon issue in full Committee — a putative action to which some employers objected.⁵⁵ Although it supported an expanded CWA program, the Associated Builders and Contractors (ABC) stated its opposition to H.R. 20 "because it applies federal Davis-Bacon Act provisions to both federal capitalization grants as well as subsequent state repayment funds" which ABC termed both "a gross expansion of the Davis-Bacon Act" and "an egregious infringement upon states' rights." Still, the largely open shop (merit shop) contractor group endorsed H.R. 1560.⁵⁶ What action the full Committee may take remains uncertain.

Meanwhile, Senator Voinovich introduced S. 170 (January 15, 2003), the "Clean Water Infrastructure Financing Act of 2003." The bill was referred to the Committee on Environment and Public Works. S. 170 would authorize \$15 billion over five years for the CWA State Revolving Fund. The Voinovich bill is silent on the Davis-Bacon issue.⁵⁷

Raising the Davis-Bacon Threshold

As noted above, the original threshold for Davis-Bacon coverage, in 1931, had been set at \$5,000. The result, in practice, was that smaller contracts (for painting and decorating, notably) fell below the threshold amount and were, thus, Davis-Bacon exempt. Further, some contractors (and, presumably, with the concurrence of agencies with which they dealt) allegedly structured their bids for public work in a manner that allowed portions of the work to fall below the threshold.⁵⁸ Thus, after

⁵⁴ U.S. Congress, House Committee on Transportation and Infrastructure, "Water Quality Financing Act of 2003 Unanimously Approved by House Subcommittee," press release, July 17, 2003.

⁵⁵ See Juliana Gruenwald, "House Subcommittee Boosts Wastewater Treatment Loan Program," *National Journal*, July 17, 2003; and Kathryn A. Wolfe, "Subcommittee Endorses Water Development Bills," *CQ.com*, July 17, 2003.

⁵⁶ See the Associated Builders and Contractors web site [<http://www.abc.org/ga>].

⁵⁷ *Congressional Record*, Jan. 15, 2003, p. S855.

⁵⁸ Procurement officers, in order to stretch agency funding, may tend to associate themselves, perhaps informally, with contractor concerns for keeping labor costs as low as feasible even where that may mean reducing the wages of workers. This raises several questions, among which are: Would the payment of lower wage rates, although it *may* reduce labor costs, result in lower project costs? (Reduced labor costs should not
(continued...)

extensive hearings, Congress amended the Act in 1935 to lower the threshold to \$2,000 — the current threshold level.

Through the years, there have been various proposals to raise the Davis-Bacon threshold. Some appear to have been urged by forces, often hostile to the Davis-Bacon Act, as a discrete means through which to reduce coverage. Others have argued that there was a need to adjust the threshold to offset the impact of inflation: that a \$2,000 figure, which may have been reasonable in 1935, was *de minimis* nearly seven decades later. At the same time, some who support the concept of a prevailing wage requirement may urge the widest possible coverage and, therefore, may oppose any adjustment of the threshold.

If one assumes that the prevailing wage requirement is still appropriate but that an increase in the threshold is needed, then several questions might be raised. What is the result that a change of threshold level seeks to effect? To what level should the threshold be raised?⁵⁹ How have changes in construction methods and technology — and factors associated with the economics of construction — affected manpower utilization and compensation? Is a straight adjustment for constant dollars an appropriate approach to establishment of a new Davis-Bacon threshold?

On June 7, 2001, Representative Cass Ballenger (R-NC) introduced the “Davis-Bacon Modernization Act” (H.R. 2094) which, had it been enacted, would have raised the Davis-Bacon threshold from \$2,000 to \$100,000. The Act’s requirement that *not less than* the locally prevailing wage be paid to workers engaged on federal contract construction Mr. Ballenger viewed as an “enormous waste.” He argued that the requirement “inflated” the cost of federally-assisted projects and hindered their development.⁶⁰ The bill was referred to the Committee on Education and the Workforce and to the Subcommittee on Workforce Protections. No further action was taken on H.R. 2094.

⁵⁸ (...continued)

necessarily be equated with lower overall project costs.) Would any savings, realized through reduced wages, actually be passed through to the agency/consumer? And, what is the nature of the relationship between the federal procurement officer (who must monitor a contract and assure that a project remains within budget) and a contractor? The answers are not immediately clear.

⁵⁹ As a collateral issue, some may question why prevailing wage protections are appropriate for workers employed on large projects where they can be dispensed with when workers are employed on small jobs. There would appear to be no obvious differential in the cost-of-living for the workers involved. Can it be assumed that employers, engaged in work under small contracts, would be more solicitous of the welfare of their employees than would firms engaged for larger projects — and that labor standards protections are less necessary when the contract amount is under \$5,000 (or, were the threshold to be raised, under \$100,000 or \$500,000 or \$1,000,000)? What are the purposes that Congress has intended to achieve by continuing to require a prevailing wage on federal construction?

⁶⁰ *Congressional Record*, June 26, 2001, p. H3526.

The “CALFED” Water Resources Legislation

During the 107th Congress, committees both of the House and the Senate considered legislation that would have authorized the Secretary of the Interior and certain other agencies to pursue a program “to achieve increased water yield and environmental benefits, as well as improved water system reliability, water quality, water use efficiency, watershed management, water transfers, and levee protection.”⁶¹ The focus of the legislation was on “the region east of San Francisco Bay, where the Sacramento and San Joaquin Rivers converge,” with certain related areas.⁶²

Through the 107th Congress. Of various CALFED-related proposals⁶³ that were introduced, two were reported during the second session of the 107th Congress: S. 1768, sponsored by Senators Diane Feinstein (D-CA) and Barbara Boxer (D-CA); and H.R. 3208, sponsored by Representatives Ken Calvert (R-CA) and Calvin Dooley (D-CA). The two bills proceeded along somewhat different tracks and neither was passed by the 107th Congress.

As introduced, H.R. 3208 was silent on the prevailing wage issue. During markup, Representative Nick Rahall (D-WV) offered an amendment that, *inter alia*, would have included, specifically, a Davis-Bacon requirement. The Rahall amendment failed on a roll call vote of 17 yeas to 20 nays. Later, Representative George Miller (D-CA) offered an amendment, focused narrowly upon Davis-Bacon coverage, which was approved by a roll call vote of 23 yeas to 18 nays.⁶⁴ As reported, H.R. 3208 provided:

Any contract under which laborers or mechanics may be employed, for a project or activity funded in whole or in part under Title I or II (or under an amendment made by such title), shall contain reasonable assurances that each contractor or subcontractor involved shall pay laborers and mechanics employed by such contractor or subcontractor wages equivalent to those applicable under the Act of March 3, 1931 (... commonly known as the Davis-Bacon Act).⁶⁵

⁶¹ U.S. Congress, House Committee on Resources, *Western Water Security Enhancement Act*, 107th Cong., 2nd sess., H.Rept. 107-360, Part 1, (Washington: GPO, 2002), p. 19. (Hereafter cited as House Committee on Resources, *Western Water Security Enhancement Act*.)

⁶² U.S. Congress, Senate Committee on Energy and Natural Resources, *CALFED Bay-Delta Authorization Act*, 107th Cong., 2nd sess., S.Rept. 107-171 (Washington: GPO, 2002), p. 7. (Hereafter cited as Senate Committee on Energy and Natural Resources, *CALFED Bay-Delta Authorization Act*.) On this general issue, see CRS Issue Brief IB10019, *Western Water Resources Issues*, by Betsy A. Cody.

⁶³ “CALFED,” here, refers to the “Calfed Bay-Delta Program” which means “programs, projects, complementary actions, and activities taken through coordinated planning, implementation, and assessment activities of the State and Federal agencies....” The project does not exclusively impact California. See S. 1768 of the 107th Congress.

⁶⁴ House Committee on Resources, *Western Water Security Enhancement Act*, pp. 36-39.

⁶⁵ The wording of the prevailing wage provision of H.R. 3208 is somewhat different from Davis-Bacon provisions in other statutes.

In comments attached to the Committee's report, Representatives Rahall and Miller voiced strong support for the prevailing wage provision. "For over seven decades, the Davis-Bacon Act has mandated that prevailing wages be paid when the federal government funds construction projects," they stated. "Over many years, the Davis-Bacon law has applied to traditional Bureau of Reclamation construction projects including dams." The Davis-Bacon amendment to H.R. 3208, they affirmed, offers added assurance that CALFED projects will actually be covered and workers thereon protected. The provision, they averred, would "... eliminate any potential confusion or debate as to whether Davis-Bacon wages are mandated for projects or activities authorized by titles I and II of this legislation."⁶⁶ The Committee's report (H.Rept. No. 107-360, Part I) was dated February 14, 2002. On March 14, 2002, both the Committee on Transportation and the Committee on Education and the Workforce (to which the bill had been referred, sequentially) were discharged from further consideration of the measure and the bill was placed on the Union Calendar (Calendar No. 217). No further action was taken.

The Senate bill (S. 1768) was silent on the Davis-Bacon issue, both as introduced and as reported. The Senate report (S.Rept. 107-171) was dated June 24, 2002; and, on that date, the bill was placed on the Senate Legislative Calendar under General Orders (Calendar No. 436). No further action was taken.

In the 108th Congress. During the first session of the 108th Congress, three bills were introduced that deal with the CALFED issue: H.R. 2641 (George Miller), H.R. 2828 (Calvert), and S. 1097 (Feinstein and Boxer). The Water and Power Subcommittee, with Mr. Calvert as Chairman, conducted hearings on the legislation on July 24, 2003. By a voice vote on September 25, 2003, the Subcommittee approved H.R. 2828, forwarding the measure to the full Committee on Transportation and Infrastructure. On October 30, 2003, hearings were conducted by the Senate Subcommittee on Water and Power on S. 1097. No further action has been taken on these proposals.⁶⁷

Modernization of America's Railroads

Upgrading of America's rail transportation system has been a continuing concern of the Congress. But, programs of rail expansion and/or rehabilitation have involved measures to protect workers employed on such projects.

Through the 107th Congress. Early in the 107th Congress (on March 14, 2001), Representative Jack Quinn (R-NY) introduced H.R. 1020. The bill would have directed the Secretary of Transportation, among other things, to "establish a program of capital grants for the rehabilitation, preservation, or improvement of

⁶⁶ House Committee on Resources, *Western Water Security Enhancement Act*, pp. 71-72. Even with the Davis-Bacon provision added, however, "most Democrats on the panel opposed the bill and warned that it would never reach the president's desk without major modifications." See Molly M. Peterson, "Massive Western Water Bill Clears House Committee," *National Journal News Service*, Nov. 7, 2001.

⁶⁷ See CRS Report RL31975, *CALFED Bay-Delta Program: Overview of Institutional and Water Use Issues*, by Betsy A. Cody and Pervaze A. Sheikh.

railroad track.” Companion legislation, S. 1220, was introduced by Senator John Breaux (D-LA) on July 23, 2001.

H.R. 1020 was referred to the Committee on Transportation and Infrastructure. Following hearings, it was marked up and reported — and, on June 12, 2001, placed on the Union Calendar. It would have required, *inter alia*, that “laborers and mechanics employed by contractors and subcontractors in construction work financed by a grant made under this section will be paid wages not less than those prevailing on similar construction in the locality” (i.e., the Davis-Bacon requirement). And, further, that: “The Secretary [of Transportation] shall make a grant under this section only after being assured that required labor standards will be maintained on the construction work.”⁶⁸

S. 1220, which was referred to the Committee on Commerce, Science, and Transportation, contains parallel language with respect to Davis-Bacon coverage. Under date of August 1, 2002, S. 1220 was reported from Committee.⁶⁹ Both bills died at the close of the 107th Congress.

In the 108th Congress. On January 7, 2003, early in the 108th Congress, Senator Ernest Hollings (D-SC) introduced S. 104, the “National Defense Rail Act.” The bill directs that an assessment be made of security risks associated with rail transportation and that prioritized recommendations for improvements be developed. Further, it directs the Secretary of Transportation to develop high-speed rail facilities and to make certain upgrades in existing rail infrastructure. The bill, Senator Hollings explained, “is the same bill that the Commerce Committee reported” in the 107th Congress. “It is critical that the Senate take this bill up, and pass it, to ensure that our railroads are secure and we have adequate investment in both Amtrak and the development of high speed rail corridors....”⁷⁰ A companion bill, H.R. 2726, was introduced in the House by Representative on July 15, 2003, by Representative Julia Carson (D-IN).

Each of the bills contained a Davis-Bacon requirement. No immediate action was taken on either bill.

⁶⁸ U.S. Congress, House Committee on Transportation and Infrastructure, *Railroad Track Modernization Act of 2001*, report to accompany H.R. 1020, 107th Cong., 1st sess., H.Rept. 107-96 (Washington, GPO, June 12, 2001), pp. 2 and 11.

⁶⁹ U.S. Congress, Senate Committee on Commerce, Science, and Transportation, *Railroad Track Modernization Act of 2002*, report to accompany S. 1220, 107th Cong., 2nd sess., S.Rept. 107-238 (Washington, GPO, Aug. 1, 2002), pp. 7, 10-11. Concerning rail transportation issues at large, see CRS Issue Brief IB10030, *Federal Railroad Safety Program and Reauthorization Issues*, by Paul Rothberg and John Williamson.

⁷⁰ *Congressional Record*, Jan. 7, 2003, p. S80.

Other Davis-Bacon Legislative Issues of the 108th Congress

Program legislation that has a construction component often includes a Davis-Bacon prevailing wage provision — even though the legislation would not, ordinarily, be regarded as a labor bill. One such proposal is discussed below.

Child Care Construction and Renovation Act

On February 25, 2003, Representative Carolyn McCarthy (D-NY) introduced H.R. 895, the “Child Care Construction and Renovation Act.” The bill, which authorizes various programs to assist in the development and/or renovation of child care facilities, includes a provision applying the Davis-Bacon Act “to actions taken under this Act.” The bill was referred to the Committee on Financial Services and to the Subcommittee on Housing and Community Opportunity. No action has been taken on the McCarthy proposal.