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Prevailing Wage Requirements and the Emergency Suspension of the Davis-Bacon Act

Abstract

President Bush has, by proclamation, suspended the application of the Davis-Bacon Act to all contracts to be performed in the jurisdictions in Alabama, Florida, Louisiana, and Mississippi included in the Hurricane Katrina disaster area. This has the effect of permitting the payment of less than the locally prevailing wage on contracts entered into after September 8, 2005, for the construction or repair of public buildings and public works in the affected area. H.R. 3684 would make this type of suspension automatic for one year when a disaster is declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

Keywords

prevailing wage, Davis-Bacon Act, construction, president, labor, suspension, repair, contract, disaster

Comments

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Prevailing Wage Requirements and the Emergency Suspension of the Davis-Bacon Act

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Summary

President Bush has, by proclamation, suspended the application of the Davis-Bacon Act to all contracts to be performed in the jurisdictions in Alabama, Florida, Louisiana, and Mississippi included in the Hurricane Katrina disaster area. This has the effect of permitting the payment of less than the locally prevailing wage on contracts entered into after September 8, 2005, for the construction or repair of public buildings and public works in the affected area. H.R. 3684 would make this type of suspension automatic for one year when a disaster is declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

On September 8, 2005, President Bush issued a Proclamation suspending the application of the Davis-Bacon Act to contracts to be performed in the counties included in the Hurricane Katrina disaster area.¹

The Davis-Bacon Act, which dates back to 1931,² requires every construction contract in excess of two thousand dollars to which the federal government (or the District of Columbia) is a party to pay all laborers and mechanics not less than the locally prevailing wage. Construction includes alteration or repair (including dredging, excavation, and painting) of buildings, structures, or other real property.³ The term “construction” has been found to include many types of activities that will be included in the recovery from Hurricane Katrina such as contracts for improvements to bridges, dams,

¹ 70 F.R. 54,227 (September 8, 2005), available at [<http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html>]. The proclamation also applies to the operation of the so-called “related acts” to the extent they reference the Davis-Bacon Act. Related acts provide financial assistance for construction projects and require the payment of prevailing wages for workers on those projects.

² Ch. 411, 46 Stat. 1494 (March 3, 1931). Codified at 40 U.S.C. §§ 3141 thru 3148.

³ 40 U.S.C. § 3142(a).

highways, streets, subways, tunnels, sewers, power lines, cemeteries, pumping stations, railways, airports, docks, piers, lighthouses, jetties, breakwaters, levees, canals, and channels. The Davis-Bacon Act reflects Congress' interest in giving the government "the power to require its contractors to pay their employees the prevailing wage scales in the vicinity of the building projects."⁴

Prevailing wage is the rate of wages, including fringe benefits, paid to a majority of workers in a geographic area for the same type of work on similar projects.⁵ The Department of Labor is responsible for issuing wage determinations as to what the prevailing wage is for particular occupations in a particular type of project in a particular jurisdiction.⁶

Under section 6 of the Act, the President may suspend the requirements of the Act during a "national emergency."⁷ Over its long history the Act has been suspended several times for various types of national emergencies such as war,⁸ economic emergency,⁹ and natural disaster.¹⁰ Suspension of the Act does not require that less than the prevailing wage be paid on the covered contracts, but it does remove the bar to the payment of such wages.

In addition to the Davis-Bacon Act itself, Congress has added prevailing wage provisions to approximately thirty-eight statutes that provide financial assistance for construction projects through grants, loans, and other funding mechanisms.¹¹ These so-

⁴ S.Rept. 71-1445, at 1-2 (1931). For a more detailed history of the Davis-Bacon Act, see CRS Rept. 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*. The Davis-Bacon Act establishes a wage floor for covered construction. In practice, conditions may require contractors to pay a higher rate of wages.

⁵ 40 U.S.C. § 3142(b).

⁶ *Id.* The Department of Labor regulations governing wage determinations may be found at 29 C.F.R. parts 1 and 4. Amendments to these regulations, effective August 26, 2005, provide for online request of wage determinations. 70 F.R. 50,888 (August 26, 2005). Examples of prevailing wage determinations can be found at [<http://www.gpo.gov/davisbacon/allstates.html>].

⁷ 40 U.S.C. § 3147.

⁸ See Presidential Proclamation No. 2487, 6 F.R. 2617 (May 29, 1941) declared an unlimited national emergency which was in effect until terminated by Joint Resolution (ch. 327, § 3, 61 Stat. 451) in 1947. While the Presidential Proclamation itself did not specify the Davis-Bacon Act as being suspended, the Joint Resolution terminating national emergencies proclaimed by the President did list the Davis-Bacon Act.

⁹ See Presidential Proclamation No. 4031, 36 F.R. 3457 (February 25, 1971) which suspended the Act because of an economic emergency in the construction industry.

¹⁰ The Act was suspended for contracts in the recovery areas in Florida, Louisiana, and Hawaii in the wake of hurricanes Andrew and Iniki in 1992. See, Presidential Proclamation No. 6491, 57 F.R. 47,553 (October, 14, 1992).

¹¹ See National Housing Act, 12 U.S.C. § 1715c; Housing Act of 1959, 12 U.S.C. § 1701q(c)(3); National Foundation on the Arts and the Humanities Act, 20 U.S.C. § 956(j); General Education Provisions Act, 20 U.S.C. § 1232b; Education of the Deaf Act, 20 U.S.C. §§ 4305(b)(4), 4332(b)(5); Federal-Aid Highway Act, 23 U.S.C. § 113(a); Indians Self-Determination and

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called “related acts” involve construction in areas such as transportation, housing, air and water pollution reduction, and health. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, the federal statute that authorizes the Federal Emergency Management Agency (“FEMA”) to provide funds for the repair and reconstruction of facilities following a major disaster and for construction related to emergency preparedness, includes a prevailing wage provision.¹² Section 611(j)(8) of the Stafford Act references the Davis-Bacon Act to require the payment of locally prevailing wages to laborers and mechanics employed on construction projects related to emergency preparedness.¹³ Section 611(j)(8) does not apply to repair or reconstruction projects involving state or local public facilities, private nonprofit facilities, and owner-occupied private residences following a major disaster.¹⁴ These projects are funded by other

¹¹ (...continued)

Education Assistance Act, 25 U.S.C. § 450e; Indian Health Care Improvement Act, 25 U.S.C. § 1633(b); Federal Water Pollution Control Act, 33 U.S.C. § 1372; Postal Reorganization Act, 39 U.S.C. § 410(b)(4)(C); National Visitors Center Facilities Act of 1968, 40 U.S.C. § 808; Appalachian Regional Development Act of 1965, 40 U.S.C.App. § 402; Hospital Survey and Construction Act, 42 U.S.C. § 291e(a)(5); Safe Drinking Water Act, 42 U.S.C. § 300j-9(e); Public Health Service Act, 42 U.S.C. §§ 300s-1(b)(1)(I), 300t-12(b)(1)(D); U.S. Housing Act of 1937, 42 U.S.C. § 1437j; Demonstration Cities and Metropolitan Development Act of 1966, 12 U.S.C. § 1715c, 42 U.S.C. §§ 3310, 1437j; Housing Act of 1964, 42 U.S.C. § 1486(f); Defense Housing and Community Facilities and Services Act of 1951, 42 U.S.C. § 1592i; Headstart, Economic Opportunity, and Community Partnership Act of 1974, 42 U.S.C. § 2992a; Atomic Energy Act, 42 U.S.C. § 2297g-3; Housing and Urban Development Act of 1965, 42 U.S.C. § 3107; Public Works and Economic Development Act of 1965, 42 U.S.C. § 3222; Domestic Volunteer Service Act of 1973, 42 U.S.C. § 5046; Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5196(j)(8); Housing and Community Development Act of 1974, 42 U.S.C. §§ 1440(g), 5310; Federal Nonnuclear Energy Research and Development Act, 42 U.S.C. § 5919(x)(2); National Energy Conservation Policy Act, 42 U.S.C. § 6371j; Public Works Employment Act of 1976, 42 U.S.C. §§ 6708, 6728; Energy Conservation and Production Act, 42 U.S.C. § 6881(h); Solid Waste Disposal Act, 42 U.S.C. § 6979; Clean Air Act, 42 U.S.C. § 7614; Head Start Act, 42 U.S.C. § 9839(g)(3); Urban Mass Transportation Act, 49 U.S.C. § 5333(a); Rail Passenger Service Act, 49 U.S.C. § 24312; Airport and Airway Improvement Act, 49 U.S.C. § 47112(b); Model Secondary School for the Deaf Act, Pub. L. No. 89-694, § 4, 80 Stat. 694; Delaware River Basin Compact, Pub. L. No. 87-328, § 15.1, 75 Stat. 714.

¹² 42 U.S.C. § 5121 *et seq.*

¹³ 42 U.S.C. § 5196(j)(8). See 42 U.S.C. § 5195a(3) (The term “emergency preparedness” means “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.” Measures to be undertaken in preparation for anticipated hazards include the construction of shelters, shelter areas, and control centers.).

¹⁴ See 42 U.S.C. §§ 5172(a)(1) (The President may make contributions (1) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility which is damaged or destroyed by a major disaster and for associated expenses incurred by such government; and (2) to a person who owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of such facility and for associated expenses incurred by such person.); 5174(c)(2)(A)(i) (The President may provide financial assistance for the repair of owner-occupied private residences, utilities, and

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sections of the Stafford Act, which are not affected by the prevailing wage requirements of section 611(j)(8). In 2002, one proposal for the establishment of a homeland security agency included a provision that would have arguably required the payment of prevailing wages for workers on these kinds of projects.¹⁵ The prevailing wage language in this proposal was not included in the final version of the homeland security measure.

On September 7, 2005, Representative Jeff Flake introduced H.R. 3684, the Cleanup and Reconstruction Enhancement Act. This bill would amend the Stafford Act to automatically suspend the requirements of the Davis-Bacon Act in areas declared by the President to be major disasters. The suspension would be for a one year period from the date of the declaration.

¹⁴ (...continued)

residential infrastructure damaged by a major disaster to a safe and sanitary living or functioning condition).

¹⁵ S. 2452, 107th Cong. § 194 (2002) (Lieberman substitute).