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DOL Finalizing Significant Changes to Davis-Bacon Regulations

On August 8, the U.S. Department of Labor (DOL) issued its long-anticipated final rule updating the implementing regulations for the Davis-Bacon Act and Davis-Bacon Related Acts (DBRA). The DBRA, which applies to the majority of federal construction contracts and federally assisted construction contracts, requires payment of locally prevailing wages and fringe benefits to construction workers who perform work on a covered contract or subcontract. According to the DOL, these new DBRA requirements will apply to an estimated tens of billions of dollars in federal and federally assisted construction spending each year and provide minimum wage rates for hundreds of thousands of U.S. construction workers working on federal contracts.

The final rule, which represents the DOL's first substantive updates to the DBRA's implementing regulations in nearly 40 years, will return the DOL to its pre-1980s methodology for calculating prevailing wage and fringe benefit rates for DBRA-covered contracts. Widely known as the "30% rule," this methodology will permit the DOL to set individual prevailing wage rates using a rate that is paid to at least 30% of workers in a particular labor classification in a particular area. The 30% rule will apply if there is not otherwise a single rate paid to more than 50% of workers in the same labor classification in a particular area.

As adopted, the 30% rule represents a significant departure from the DOL's current practice in setting prevailing wage rates, where it uses a weighted average of all rates paid to workers in a particular classification if there is not a single rate paid to at least 50% of those workers. The likely impact of the new formula is that contractors and subcontractors across the country will see prevailing wage rates increase on DBRA-covered contracts, thereby imposing higher labor costs on contractors performing work under the contracts. The 30% rule will also apply to fringe benefit rate determinations, which will further increase the labor costs incurred by construction contractors and subcontractors.

While the 30% rule represents the most significant update to the DBRA, there are a number of other notable changes made by the final rule, including:

- **State and local wage rates.** The final rule will permit the DOL to set DBRA prevailing wage and fringe benefit rates by adopting similar rates set by state or local governments. Many states and localities implement their own set of prevailing wage rates that apply to state or local construction projects and that historically often may be higher than the DBRA-imposed rates for similar federal projects. The DOL will now be permitted to use those state and local rates for federal construction projects if they are consistent with the DBRA's requirements.
- **Side-step conformance process.** Under current regulations, contractors are permitted to submit a conformance request to the DOL to set prevailing wage and fringe benefit rates for positions that are not covered by one of the labor classifications listed on a wage determination. Through this process, contractors are provided the opportunity to propose a wage and fringe benefit rate and provide supporting data for the request. The final rule, however, will allow the DOL to bypass this conformance process and instead pre-establish wage and benefit rates for such positions without contractor input.
- **DBRA coverage by "operation of law."** The final rule adds an "operation-of-law" provision to the DBRA regulations, under which the DBRA will now apply to

covered contracts and subcontracts *even if* the appropriate contract clause or wage determination is omitted from the contract. In other words, contractors will be held responsible for compliance whether or not they are properly notified that the DBRA even applies to their contract.

- **Enhanced recordkeeping requirements.** The final rule requires that all payroll and related records must be kept for at least three years after work on the prime construction project is completed, and that such records must include each worker's last known email address and telephone number. Contractors are also now required to maintain copies of their DBRA-covered contracts, subcontracts and related documents.

Taken together, the changes described in the final rule are poised to impose potentially significant increased costs and compliance burdens on federal construction contractors and subcontractors. The final rule is scheduled to take effect 60 days after being published in the *Federal Register*, which is currently anticipated to occur on August 23, 2023. Construction contractors should therefore take steps to review the final rule and related DOL guidance to determine the extent to which the pending changes will impact their contracts and projects and/or bids on future federal construction contracts.

FOR MORE INFORMATION

For additional information regarding the DBRA final rule, as well as existing prevailing wage and fringe benefit obligations for federal construction contractors and subcontractors, please contact:

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