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Recent Prevailing Wage Developments

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ACEC/MA

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Agenda

1. Metcalf v. BSC Summary
2. Davis-Bacon Act Summary
3. Davis-Bacon Act Implications

Metcalf v. BSC

Overview

<u>Background</u>

- Case arose from two MassDOT professional services contracts awarded to BSC Group, Inc. and BSC Companies (“BSC”) to provide surveying and related services to MassDOT over the course of several years.
- BSC provided 2- and 3-person crews of field surveyors to MassDOT to perform field surveying on public works projects as directed by MassDOT.
- Plaintiffs, Russell Metcalf and Steven Theurer, acted as field surveyors on the projects.
- Plaintiffs were not paid prevailing wages. They sued BSC for backpay under the Prevailing Wage Act.

- Prior to *Metcalf* there were conflicting, ambiguous and inconsistent court decisions in Massachusetts construing application of the PWA.
- Massachusetts' Supreme Judicial Court (SJC), took a direct appeal of summary judgment for BSC, bypassing the Appeals Court, likely because of the unsettled nature of the law's interpretation.
- Because of the importance of this issue to ACEC members, ACEC/MA asked Donovan Hatem to present the interests of all professional surveyor firms to the SJC in the form of an *amicus curiae* ("friend of court") brief.

The Contracts

- The Contracts awarded to BSC were not tied to a specific public works construction project.
- The contracts were not competitively bid (and therefore not awarded to a lowest bidder). At least one contract was issued per a then-recently enacted statute (G. L. c. 7C, § 58). BSC's compensation was only set *after* it had been awarded the Contracts.
- MassDOT did not ask the Department of Labor to determine prevailing wage rates and no prevailing wage rate schedule was provided to firms responding to MassDOT's initial Request for Responses.
- MassDOT and BSC negotiated compensation rates based on BSC's qualifications and MassDOT's determination of reasonableness and fairness.

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- Plaintiffs performed engineering field surveying services on roughly 30 bridge and roadway construction projects.
- While working under MassDOT supervision, Plaintiffs often “performed surveys requested by the on-site general contractor.”
- MassDOT supervisor submitted evidence that the Plaintiffs’ role at many sites was “to support construction operations with construction layout.”
- Evidence showed that field surveyors employed by contractors at some of the project sites were paid prevailing wages, set by DLS, for performing the same or similar work as plaintiffs.
- Plaintiffs argued that they were treated differently, i.e., paid less, than other field surveyors for performing essentially the same work.

The Relevant Statutes

<u>Section 58</u>

- The Contracts were issued pursuant to G. L. c. 7C, § 58, which sets forth the procedures Commonwealth agencies, including MassDOT, must follow to procure “architectural, engineering[,] or related professional services.”
  - NOTE: Sec. 58 only applies to contracts awarded by Commonwealth agencies, such as the DOT
- The services are defined to include “land surveying” professional services that are “"required to be performed or approved by a person licensed, registered[,] or certified to provide such services."
- Sec. 58 includes other professional services of an architectural or engineering nature or "incidental services, which members of the related professions . . . may logically or justifiably perform,” including "construction phase services.”
- Plaintiffs argued the contracts were governed by Prevailing Wage Act, *not* Sec. 58.

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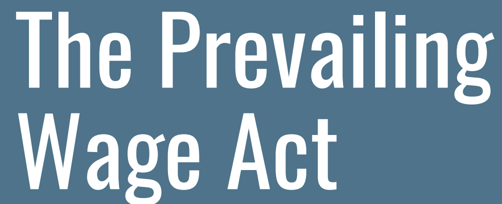

Prevailing Wage Act

- The Prevailing Wage Act ("PWA") applies to "a contract for the construction of public works."
- Under the Act, the contracting agency, here MassDOT, "shall submit to the commissioner a list of the jobs" involved in a public works project.
- The Department of Labor ("DOL") is then obliged to determine the prevailing wage for each eligible job and provide a rate schedule to the requesting agency.
- PWA specifically applies to "the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed."

Important Factors in SJC's Decision

- Professional services firms under Section 58 are selected by an agency based on their qualifications. No information about costs is required by the agency in the selection process.
- Section 58 does not require that wages for a firm's employees be set forth in the resulting contract.
- The Legislature drafted Section 58 to be incompatible with the Prevailing Wage Act. Therefore, contracts such as BSC's with MassDOT are not governed by the PWA.
- Because they are <u>not</u> low-bid contracts, Section 58 contracts do not trigger the same legislative concerns driving the PWA.

The Decision

- “Field surveying work performed under a contract for the construction of a public works project requires payment of prevailing wages but that work, when performed under a contract for professional services, does not.” 492 Mass. 676, 685.
- A 2011 DLS opinion letter “reflects that the work of field engineers (surveying) **performed under construction contracts**...is ‘construction work’...[and] is subject to the prevailing wage law.” (emphasis original)
- DLS has acknowledged the possibility that the same work, performed under two different contract regimes, could result in different wage requirements.
- Conclusion: Plaintiffs were not entitled to a prevailing wage for work performed under a professional services contract.

The Decision

- Ultimately, the SJC focused on the precise wording of the Prevailing Wage Act but there are broader implications.
- Key take-aways from *Metcalf*:
  - Job title/description is not enough to determine whether the PWA applies.
  - Context matters: The nature of the contract, and the associated projects, may determine whether the PWA applies.
  - There is no affirmative duty to request a prevailing wage schedule.
    - ***However,*** the SJC did not overrule a prior decision that found such a duty where prior contracts had included prevailing wages, which were inadvertently omitted from a subsequent contract.
    - This contrasts with the requirements of the Davis-Bacon Act.

Davis-Bacon Act

Davis-Bacon Act Updates

- The Davis-Bacon Act ("DBA") applies to workers on contracts entered into by Federal agencies that are in excess of $2,000 and for the construction, alteration or repair of public buildings or public works.
- Updates regulations issued under DB setting forth rules for the administration and enforcement of the DB labor standards that apply to Federal and federally-assisted construction projects.
- The updated rule goes into effect on October 23, 2023 and only applies to contracts entered into after that date.

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Davis-Bacon Act Updates

The DBA updates fall into 1 of 3 general categories:

1. Changes that expand the scope of the DBA to cover locations and workers not previously covered.
2. Changes that will affect the way the prevailing wage is calculated and applied.
3. Changes that will increase employers' responsibilities with regard to complying with Davis-Bacon and heighten the consequences of failing to comply.

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Davis-Bacon Act Updates

The DBA Update includes a number of amendments and rule clarifications, including the following:

- New regulations explicitly permit the Wage and Hour Division to adopt State or Local prevailing wage rates for both highway and nonhighway construction projects.
- Article 5.2 includes a number of changes, including new definitions for “contractor” and “subcontractor.”
    - The definition of subcontractor means any contractor that agrees to perform or be responsible for the performance of any part of a contract.

Davis-Bacon Act Updates

Updates to Article 5.2 also include:

- Site of Work
    - Under the updated final rule, the revised definition includes any site, including what may seem "off-site," where a significant portion of a building or work is constructed if the site is dedicated exclusively or nearly so to the performance of a single DBA-covered project or contract for a specific period of time.
    - "Significant portion" is clarified to explain that the term includes one or more portions or modules of the building or work, such as a completed room structure, but not prefab components.

Davis-Bacon Act Updates

Updates to Article 5.2 also include:

- Laborer or Mechanic
    - The final rule clarifies that, when considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker's different duties, including time spent on those duties.
    - Survey crew members who spent most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics.
    - If the work meets other required criteria, i.e., it is performed on the site of the work and immediately prior to or during construction in support of construction crews, and where employed by contractors, it is covered by DBA labor standards.

The DBRA regulations define "laborer or mechanic" with reference to FLSA regulations that provide tests for the administrative , professional, and executive exemptions from the minimum wage and overtime requirements:

"The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent."

- 5.5(a)(3): Recordkeeping
  - Updated rule clarifies the distinction between “regular payrolls” and “other basic records” that contractors and subcontractors must make and maintain and the “certified payroll” documents and statements of compliance that must be submitted weekly.
    - New requirement that contractors and subs maintain DBA contracts and related documents as well as worker telephone numbers and email addresses.
    - Required records must be retained at least 3 years after all project work is completed.

- 5.5(a)(6): Flow-Down Requirements
  - Upper-tier subcontractors (in addition to prime contractors) may be liable for lower-tier subcontractors' violations.
  - Both prime contractors and any responsible upper-tier subs are required to pay back wages on behalf of their lower-tier subs.
  - Lower-tier subs' violations may subject prime and upper-tier contractors to debarment in certain circumstances.
  - Prime contractors are responsible for back wages regardless of intent.
  - Upper-tier subs must have some degree of intent (i.e., recklessness) to be held liable for back wages of their subs.

Davis-Bacon Act – Defining the Prevailing Wage

3-Step Method to Define the Prevailing Wage:

1. The wage paid to the majority (more than 50%) of the laborers or mechanics in the classification on similar projects in the area during the period in question;
2. If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be paid to the greatest number, provided that such greatest number constitutes at least 30% of those employed; or
3. If no wage rate is paid to 30% or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification.

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Davis-Bacon Act Implications

Davis-Bacon Act Implications

- The DOL maintains that the "site of work" includes locations where significant portions of a public work or building are constructed.
- If a contract is entered into and the Administrator subsequently determines the correct wage was not incorporated, the Agency must either terminate the contract and resolicit it or issue a change order with the contractor.
  - The proper wage applies retroactively.
  - Increases in wages resulting from an improper wage determination must be paid by the contractor.
- DBA coverage does not extend to activities independent of the project.

Davis-Bacon Act Implications

- While there were no additional changes to the definition of survey crews, there was a clarification that “survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they are not exempt as professional, executive, or administrative employees under part 541).”
- “When considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker's different duties, including (but not solely) the time spent performing these duties.”
- “If their work meets other required criteria (i.e., it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews), it would be covered by the Davis-Bacon labor standards.”

Davis-Bacon Act Implications

As a general rule of thumb, a survey crew member who spends most of their time taking or assisting in taking measurements would likely be covered by Davis-Bacon (if they do not meet the test for an exempt professional) if:

1. Their work is performed on-site.
2. Their work is performed immediately prior to or during construction.
3. Their work is performed in direct support of construction crews.
4. The duties are manual/physical in nature and include the use of tools or work of a trade.

Davis-Bacon Act Implications

Licensed surveyors may otherwise be exempt as “learned professionals” depending on their licensure requirements.

- To qualify as a learned professional, one must have “advanced type of knowledge” gained through “a prolonged course of specialized intellectual instruction and study.”
- This translates to specialized academic training.
- Experience and on-the-job training are not enough to qualify.
- But note that survey workers who work under the supervision of a licensed individual, or learned professional, are still covered if they perform covered work.

Davis-Bacon Act Implications

- DBA requirements apply to contracts for work on government projects whether or not the contract explicitly includes DBA-required language/clauses.
  - The contract clauses required to be incorporated in government construction contracts for Davis-Bacon projects will be treated as if they are a part of every prime contract in order to enact Congress's intent (and by extension likely flowed down and incorporated as a matter of law into subcontracts).
  - The Final Rule reconfirms prior understanding that prime contractors (and by extension subcontractors) still have to be compensated for increases in wages that result from the accidental omission of these clauses
  - Prime contractors are responsible for paying applicable wages on all subcontracts – they must effectively advance these excess payments and then receive recovery from the agency via modification – making the prime contractor effectively the "bank" or financier for these costs

Davis-Bacon Act Implications

- Contractors assess the increases in costs and the financial implications to their responses to solicitations for bids in light of the changes to the regulations. There will likely be material impact to their pricing strategy to account for the likely increase to their cost and overhead as a result of these changes.
- Contractors should also be aware of a more robust enforcement mechanism under the DBA, including stricter penalties.
- Contractors could find Davis-Bacon obligations added to their contracts years into performance, with backpay owed as well, and a hazy-at-best path to recovery

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Davis-Bacon Act Implications

Some “best practice” considerations include:

1. Where workers will be doing covered and non-covered work, keep accurate track of their time spent in each category and report covered work on certified payroll.
2. Try not to mix workers – if some survey crews are doing covered work and others are not, interchanging those crews will complicate your recordkeeping.
3. If there is both covered and non-covered work on the same project, try to have separate contracts and contract directly with the Owner for non-covered work.
4. Minimize on-site time when possible.

Discussion and Questions