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## SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### COMPLYING WITH THE DAVIS-BACON ACT

By Paul Greenberg, Daniel Abrahams, and Shlomo Katz

The Davis-Bacon Act (DBA)<sup>1</sup> provides minimum wage and fringe benefit protections for workers on federal construction contracts. Enacted in 1931, the DBA was the template for modern regulation of the wage-and-hour practices of contractors doing business with the Federal Government. The DBA was followed in 1936 by the Walsh-Healey Public Contracts Act<sup>2</sup> (covering federal supply contracts) and much later in 1965 by the Service Contract Act<sup>3</sup> (covering federal service contracts), both of which rely on structures pioneered under the DBA.

Originally enacted during the twilight of the Herbert Hoover presidency and before the New Deal, the DBA was designed to prevent a specific evil—wage busting by contractors that used imported labor and paid the workers wages below those prevailing in the community. Typically,

Government construction contracts are awarded to the lowest-priced responsive, responsible bidder. Left unrestrained, the offeror that cuts wages to the greatest extent possible can gain a competitive advantage, producing a deflationary “race to the bottom” of the wage scale. Thus, the original Act (sponsored by two Republican legislators, Senator James Davis of Pennsylvania and Representative Robert Bacon of New York) had the twin goals of protecting workers from the wage predations of unbridled competition while simultaneously protecting the business interests of local construction contractors from out-of-town competitors that had lower labor costs.

From these seeds was born an elaborate statutory and regulatory scheme. The DBA was

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amended in 1935 to improvement its administrative and enforcement provisions and again in 1964 to include a prevailing fringe benefit requirement. Although there have been periodic efforts to repeal the Act, including in the current Congress,<sup>4</sup> the DBA has proved politically resilient, with support from legislators that cuts across traditional party and ideological lines. There may be a million construction workers who are touched by the Act and thousands of construction contractors; together, they constitute a potent political block. Thus, the DBA soldiers on into a new century.

This Briefing Paper discusses (1) the DBA's basic requirements, (2) what contracts and workers are covered by the Act, (3) the wage determination process, (4) bona fide fringe benefits, (5) the relationship of the DBA to other laws, (6) the role of role of judicial and quasi-judicial bodies in DBA administration and enforcement, and (7) sanctions for violations of the Act.

## Basic Requirements

The DBA regulates the minimum wage and fringe benefit rates paid to workers laboring on construction contracts with the Federal Government. The Act requires that the "advertised specifications for every contract in excess of \$2,000 to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings or public works...shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics."<sup>5</sup> These "minimum

wages," which include fringe benefits,<sup>6</sup> "shall be based on the wages the Secretary of Labor determines to be prevailing" in the locality.<sup>7</sup>

Under the DBA, the minimum wages and fringe benefits must be paid at the rates set by Secretary of Labor in a wage determination to "all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week."<sup>8</sup> These requirements extend to all workers on a project, whether employed by the prime contractor or a subcontractor at any tier. Significantly, the prime contractor is responsible for ensuring overall compliance with DBA prevailing wage requirements on a project and can be held financially liable for violations of subcontractors.<sup>9</sup> In addition to liability for backpay,<sup>10</sup> contractors or subcontractors that violate the DBA may be subject to other sanctions, including contract termination<sup>11</sup> and debarment.<sup>12</sup> Under some circumstances, debarment may extend beyond the contracting company and can be imposed on individual corporate officers and even on other companies with which these officers are affiliated.<sup>13</sup>

Contractors must post a DBA notice at the site of the work that includes the wage determination setting the prevailing wage rates that apply to the project.<sup>14</sup> A copy of the Department of Labor Form WH-1321 poster can be found at <http://www.dol.gov/esa/programs/dbra/forms.htm>

The DOL has central authority for implementing the DBA, including setting prevailing wage rates by issuing wage determinations and developing policy.<sup>15</sup> Organizationally, the



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DBA program at the DOL is located within the Wage and Hour Division. The DOL's DBA regulations can be found in Title 29 of the *Code of Federal Regulations* at Parts 1, 3, and 5; other helpful compliance information can be found on the DOL website at <http://www.dol.gov/esa/programs/dbra>.

Contracting agencies also play a major day-to-day role in the Act's enforcement by including DBA requirements in contract specifications and monitoring DBA compliance. In the Federal Acquisition Regulation, provisions covering DBA requirements are found in Subpart 22.4.

Even though the DBA literally applies only to direct contracts between contractors and the Federal or D.C. Governments, Congress frequently mandates that the Act's prevailing wage requirements also be applied to a wide variety of state and local projects that are funded using federal grants or loan guarantees, such as highways, airports, Government-funded housing, and water treatment facilities.<sup>16</sup> Even some privately constructed buildings may be subject to DBA requirements if they are federally supported. The statutes that expand DBA requirements beyond direct federal procurements are known as Davis-Bacon Related Acts (DBRAs). It bears noting that special requirements apply to some of the Davis-Bacon Related Acts, most notably projects subject to the National Housing Act and the Federal Aid Highway Act. These special requirements are not addressed in this PAPER.

Other related statutes governing contractors and subcontractors on federal construction projects include the Contract Work Hours and Safety Standards Act,<sup>17</sup> the Copeland Anti-Kickback Act (including the certified payroll program),<sup>18</sup> and the Miller Act (requiring payment bonds on federal construction contracts).<sup>19</sup> Relevant requirements of these laws are discussed below.

## Covered Contracts

### ■ Construction, Alteration, Or Repair

The DBA applies to any federal or D.C. contract for "construction, alteration, or repair"

of a public building or public work that exceeds \$2,000 in value, including painting and decorating contracts.<sup>20</sup> Significantly, unlike the Service Contract Act (which applies to contracts that have the "principal purpose" of furnishing services),<sup>21</sup> there is no "principal purpose" test to DBA contract coverage. As a result, the DBA may apply even to relatively small construction tasks that are incidental to much larger service or supply contracts (see discussion below).

Most DBA-covered contracts are easily identifiable because they plainly are construction-type contracts. The DOL regulations define "building" or "work" subject to the Act as including the following:<sup>22</sup>

[B]uildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping.

The DBA may also apply to other types of projects that are not as obvious. For example, the DOL has concluded that the DBA applies to most asbestos abatement work and to environmental remediation projects that involve significant movement of earth. The Comptroller General once determined that a contract for painting mailboxes ("public works") was covered by the DBA.<sup>23</sup> Federal contracts to erect temporary structures can be covered under the Act.<sup>24</sup> As a general proposition, the DBA also applies to federal contracts for ship construction and repair, although contracts to build naval vessels (i.e., Navy or Coast Guard ships) are subject not to the DBA but to the Walsh-Healey Act.<sup>25</sup>

Service or maintenance of construction equipment that is performed as part of the construction or repair of public buildings generally is covered by the DBA, as is warranty work.<sup>26</sup> Other construction-related activities such as demolition or dismantling or drilling exploratory wells may also be covered, but only if these activities immediately precede construction;<sup>27</sup> freestanding contracts for demolition without subsequent construction or contracts

for drilling exploratory wells that are purely part of a land surveying activity are viewed as services subject to the Service Contract Act.<sup>28</sup>

In most instances, projects that are covered by the DBA are paid for with federal funds. It should be noted, though, that the statute does not actually speak to direct federal funding of a construction project, but instead covers all federal *contracts* that call for more than \$2,000 in construction, alteration, or repair costs.<sup>29</sup> As a consequence, privately built buildings that are constructed to fulfill the requirements of a federal lease may be covered (discussed below). In addition, there have been occasions when the DOL has found privately funded construction projects on military bases (such as privately operated branch banks or fast-food restaurants) to be covered by the DBA where the facility was built pursuant to a *contract* between the Government and a private operator, the facility was integral to the Government's operations, and the Government ultimately reserved the right to acquire ownership of the facility.

#### ■ Overlap With Other Contracts

One area of long-running debate involves DBA coverage of incidental construction-type activities that appear in service or supply contracts. For example, a contract to operate a Government power plant or military base plainly is a service contract, but is a building engineer engaged in "construction, alteration, or repair" (and subject to the DBA) if he replaces a broken pane of glass, installs a new valve, or does some touchup painting? A contract to buy telephone switchgear is a supply purchase, but does it become subject to the DBA if the supplier installs the equipment and runs new electrical and telephone lines? Over the years, these types of questions have been addressed in a variety of contexts using several different formulations.

Contracts for routine maintenance of family housing, including incidental painting, are not subject to the DBA and are instead covered by the Service Contract Act.<sup>30</sup> The DOL draws the distinction between "maintenance painting contracts" (like the mailbox contract noted above), which are subject to the DBA,

and "contracts for overall maintenance of housing units" (including touchup painting), which are not subject to the DBA.<sup>31</sup>

Maintenance contracts frequently also involve work that the DOL characterizes as "construction, alteration, or repair" and deems to be covered by the DBA. Thus, such contracts include both the SCA and DBA contract clauses and wage determinations. In 1990, the Army Labor Advisor issued guidance to resolve disagreements over the proper application of the DBA to individual maintenance and repair work orders. Under this guidance, which is now incorporated in the Department of Defense FAR Supplement, both the SCA and the DBA apply to installation support contracts if (a) "the contract is principally for services but also requires a substantial and segregable amount of construction, alteration, renovation, painting, or repair work," and (b) "the aggregate dollar value of such construction work exceeds or is expected to exceed \$2,000."<sup>32</sup> Moreover, the SCA applies to facility support requirements such as operating power and water plants and snow removal, while construction, alteration, renovation, painting, and repairs under the contract are subject to the DBA.<sup>33</sup> In cases where the work could be deemed either maintenance (SCA) or repairs (DBA), the CO is advised to follow these rules: service calls requiring fewer than 32 work-hours are subject to the SCA, while work orders requiring 32 or more work-hours are subject to the DBA.<sup>34</sup> With regard to painting requisitions, any painting work of 200 square feet or more is subject to the DBA, regardless of the time expended.<sup>35</sup> COs are prohibited from splitting individual task orders to avoid application of the DBA.<sup>36</sup>

While for defense contracts, to the extent that a task order can be deemed either SCA or DBA work, the DFARS criteria apply, for nondefense contracts, there are no implementing rules comparable to the DFARS provisions. The contracting agency or the DOL makes the decision as to which Act applies, applying what criteria it wishes. However, since the DOL has approved the DFARS criteria,<sup>37</sup> a civilian procuring agency presumably should be safe if it follows the DFARS standards, although that is not required.

Disagreements also frequently arise about whether supply contracts are within the coverage of the DBA. At one time, the Solicitor of Labor apparently considered any contract containing construction-type work of \$2,000 or more to be covered by the DBA as to that work.<sup>38</sup> On the other hand, the Comptroller General contended that the test for coverage of the Act is not the specific work but the overall nature of the contract, that is, whether the contract essentially or substantially contemplates the performance of work described by the enumerated items of the DBA (“construction, alteration, or repair, including painting and decorating”). The Comptroller General therefore has sustained decisions of COs not to apply the DBA to contracts involving construction work over \$2,000 when that work was incidental to the primary contract work.<sup>39</sup> For example, many contracts that are for manufacture and delivery of equipment require the contractor to perform substantial amounts of “brick and mortar” construction work in installing the equipment. These contracts are not “construction contracts” within the Comptroller General’s definition.<sup>40</sup>

The DOL’s present position is somewhere in between the Comptroller General’s test and the DOL’s original position. The DOL’s *Field Operations Handbook* states that installation work performed in conjunction with supply or service contracts is covered by the DBA where it involves more than an incidental amount of construction activity and such work is physically or functionally separate from, and can be performed on a segregated basis from, the other nonconstruction work called for by the contract. According to the *Handbook*, DBA coverage has been extended to installing a security system or an intrusion detection system, installing permanent shelving that is attached to a structure, installing air-conditioning ducts, excavating outside cable trenches and laying cable, installing heavy generators, mounting radar antenna, and installing instrumentation grounding systems where a substantial amount of construction work is involved. The DOL states that whether installation work involves more than an incidental amount of construction activity depends upon the specific circumstances of each particular case and no fixed

rules can be established that would accommodate every fact situation.<sup>41</sup>

#### ■ Leases

There has been a long-running debate as to whether a lease that requires the lessor to build-out the Government tenant’s space is covered by the DBA.<sup>42</sup> The DOL Administrative Review Board has held that whether the Act applies to a contract under which the Government leases a building and renovations are made to prepare for the Government’s occupancy depends on the use of the building under the lease, not on the ultimate use of the property after the lease expires.<sup>43</sup> Thus, the fact that the building may not be used by the Government for the long term does not affect its status as a public building covered by the Act. Also, coverage depends on the practical manner of contracting actually chosen by the agency—for example, a lease with build-out provisions—not on the range of hypothetical contract types that the agency could have chosen (e.g., buying a ready-made property).

#### ■ “Christian” Doctrine

The Supreme Court has ruled that the DBA is “not self-implementing.”<sup>44</sup> This means that for the Act to apply, the Government must place the proper stipulations in the procurement contract. Notwithstanding this ruling, DBA contract clauses and even wage determinations have been read into contracts by operation of law<sup>45</sup> under the so-called “*Christian*” doctrine.<sup>46</sup>

### Covered Workers

#### ■ Laborers & Mechanics Employed Directly On The Worksite

The DBA requires payment of prevailing wages and fringe benefits (as established by the DOL) to all “laborers and mechanics” who are employed “directly on the site of the work.”<sup>47</sup> Under the DOL’s regulations, the term “laborer” or “mechanic” includes the following workers:<sup>48</sup>

[A]t 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 22 C.F.R. ] Part 541 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 [defining bona fide executive, administrative or professional employees], are laborers and mechanics for the time so spent.

Contractors and subcontractors must ensure that *all* laborers and mechanics performing work on a DBA-covered project are paid the prevailing wages and fringe benefits, even if they are not technically classified as a contractor's "employees."<sup>49</sup> For example, a contractor cannot avoid liability for DBA requirements by characterizing workers as independent contractors, partners, or owners.<sup>50</sup>

Determining which workers are employed "directly on the site of the work" has created some special problems regarding coverage of workers at ancillary facilities such as batch plants, borrow pits, and yards. For many years, the DOL viewed work at these support facilities (and transportation between the support sites and the primary worksites) as being DBA-covered if these sites were (a) located in *close proximity* to the main construction site and (b) the facilities were dedicated exclusively (or nearly so) to the construction project.<sup>51</sup> "How close is close" became a matter of some debate in the early 1990s after two federal courts ruled that support facilities two or three miles from the main construction site were too distant to be considered part of the worksite.<sup>52</sup> In contrast, in a 1996 decision, the DOL's Administrative Review Board ruled that a batch plant located less than half a mile from a large aqueduct project was covered by the DBA because the support site was in "actual or virtual adjacency" to the construction site.<sup>53</sup> The DOL revised the regulations governing DBA coverage at ancillary support sites late in 2000, abandoning the "close proximity" test and sub-

stituting the "adjacent or virtually adjacent" requirement for DBA coverage.<sup>54</sup>

A second change in the 2000 revisions to the DOL rules was to expand DBA coverage to include some secondary worksites where major portions of a project are assembled. The definition of the term "site of the work" provides:<sup>55</sup>

The site of the work is the physical place or places where the building or work called for in the contract will remain; *and 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....

Under this regulation, construction workers employed at the permanent location where the structure will be located (sometimes referred to as the "primary worksite") plainly are covered by the DBA. But in addition, workers are covered at *secondary worksites* (specifically established to service a construction project) where major components will be built and later transported to the permanent location. An example of such a secondary worksite offered by the DOL is a concrete lock and dam that might be constructed at one location on a river and then floated downstream to its final site. Under this scenario, workers at both the primary and secondary locations are covered by the DBA, as are the workers performing the transportation work between the two sites.<sup>56</sup>

Coverage of truck drivers under the DBA has been especially problematic. Traditionally, employees of material suppliers (i.e., commercial vendors that sell supplies to a contractor and deliver them to the construction site) have not been covered by the Act. However, it was the DOL's longstanding view that the Act covered truck drivers directly employed by construction contractors or subcontractors who were physically present on the construction site, even if only for short periods of time. This view was rejected by the U.S. Court of Appeals for D.C. Circuit in a 1991 decision,<sup>57</sup> with the court concluding that the drivers were not employed "directly on the site of the work." The DOL's current view is that a contractor's truck drivers will be covered by the DBA if the amount of time spent on a worksite is more than *de minimis*.<sup>58</sup>

Note that certain locations (such as a construction contractor's "permanent home offices, branch plant establishments, fabrication plants, tool yards, etc.") by definition are *not* considered to be the "site of the work" if their operation is "determined wholly without regard to a particular Federal or federally assisted contract or project."<sup>59</sup> Similarly, "fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc.," of a commercial or material supplier that are established before the opening of bids and that are not located on the project site are not included in the "site of the work" and thus are not covered by the DBA.<sup>60</sup>

#### ■ Apprentices, Trainees & Helpers

The DBA directs the Secretary to establish local prevailing wage rates for "various classes of laborers and mechanics" to be employed on covered construction projects. The statute itself does not identify what classifications of construction workers are encompassed within the universe of "laborers and mechanics," but leaves this to the DOL's discretion.

Two general classes of subjourneyman workers are recognized by regulation. The primary subjourneyman classification consists of apprentices enrolled in formal apprenticeship programs registered with federal or state agencies.<sup>61</sup> This special recognition of apprentices dates back to the first promulgation of the DBA regulations in 1951.<sup>62</sup> In addition, since 1971, the DOL has allowed trainees participating in certain federally approved trainee programs to work on DBA jobs at their normal wage rate (i.e., a rate less than the journeyman rate for their craft).<sup>63</sup> The approved trainee programs were developed at the end of the Vietnam war period to smooth the entrance of returning veterans into the domestic job market and to promote recruitment of minority workers into construction crafts. Unlike apprenticeship programs, approved trainee programs today are relatively rare.

A contractor is entitled to employ either apprentices or trainees on federally funded projects "as a matter of right," i.e., without special apprentice or trainee wage and fringe

benefit rates being included in the wage determination. It is important to make sure that the ratio of these lower-paid workers to the journeyman classification is never exceeded (except for errors due to inadvertent employee absences); otherwise, the contractor may be required to pay the "out of ratio" apprentices or trainees at the full journeyman rate.

The employment of "helpers" on DBA-covered jobs has been an area of considerable controversy. By the late 1970s, the DOL had developed an uncodified practice of recognizing "helper" (or "tender") classifications under limited circumstances and publishing these helper classifications in the wage determinations along with the other classifications of "mechanics and laborers." Under the DOL's policy, a three-part test had to be met before a helper classification and wage rate would be published: (1) a helper classification needed to have duties distinct and differentiable from the tasks performed by journeymen, (2) the use of the helper classification needed to reflect prevailing local practice, and (3) helpers would not be recognized if they were merely informal (i.e., unregistered) trainees or apprentices learning a trade.<sup>64</sup> In essence, these helper or tender classifications were the functional equivalent of independent serving crafts, frequently a specialized classification of laborer such as a mason tender or a carpenter helper.

New DBA regulations were promulgated early in the Reagan Administration in May 1982 that would have substantially expanded the use of helpers on DBA projects.<sup>65</sup> The 1982 regulations allowed lower-wage helpers to be employed widely, performing traditional craft work as long as they were supervised by journeymen. The regulations were challenged by the building trades unions, and the helper regulation was the subject of litigation for many years throughout the 1980s.<sup>66</sup> Although the courts finally approved the implementation of the expanded helper program in 1992,<sup>67</sup> the program was never fully implemented. The Clinton Administration suspended the 1982 helper regulation in 1993,<sup>68</sup> and repealed it entirely in 1996.<sup>69</sup> A new helper regulation was issued in 2000 codifying the pre-1982 three-part test (above).<sup>70</sup>

A special problem exists with the “elevator constructor helper” classification, which is nearly universal in the elevator construction industry. For decades both before and after the 1982 helper regulation, the DOL Wage and Hour Division routinely issued elevator constructor helper wage rates as part of the DBA wage determination program. During the 1990s, the Division concluded that the elevator constructor helper classification did not meet the requirements of the “old” (and now codified) three-part helper test because the helpers did not perform duties distinct from journeymen elevator mechanics and they were not part of a formal apprenticeship program. As a result, the DOL ceased publishing wage rates for elevator constructor helpers. This practice was appealed to the DOL’s Administrative Review Board, which upheld the policy.<sup>71</sup>

#### ■ Volunteers

Traditionally, there were no exceptions under the DBA to permit volunteers to perform labor on covered contracts, unless it was specifically provided for in a particular DBA.<sup>72</sup> However, as part of the Federal Acquisition Streamlining Act of 1994, Congress enacted a provision allowing the Secretary of Labor to waive the application of the DBA to persons who wished to volunteer for state or local governments, public agencies, or nonprofit charitable organizations performing work at certain federal or federally funded construction sites.<sup>73</sup> These volunteers can be paid a nominal fee, subject to the DOL’s approval.<sup>74</sup> This statute thus makes it theoretically possible for workers to volunteer on some federally funded construction that may benefit their local communities. The exemption generally is limited to projects relating to housing and community development, libraries, public health, and Indian health care and education.<sup>75</sup>

## Wage Determination Procedures

#### ■ Wage Determinations

A core DOL function under the DBA is to establish the locally prevailing wage and fringe benefit rates, which are issued as “wage de-

terminations.”<sup>76</sup> Contracting Officers at the various contracting agencies are responsible for making sure that the correct, current DOL wage determinations are included in every set of bid specifications for a DBA-covered contract. “General wage determinations”—the most common type—are issued for each county or city nationwide, and are published online at <http://www.access.gpo.gov/davisbacon>. This website also includes information about pending modifications to wage determinations that are awaiting publication.

For DBA purposes, the DOL subdivides the construction industry into four broad classes of projects for which it issues four different schedules of wage determinations: building, residential, heavy, and highway. Extensive guidelines describing what types of projects fall within these different classifications were published by the DOL in 1978 as All Agency Memoranda 130 and 131; these Memoranda are available on the DOL website at <http://www.dol.gov/esa/programs/dbra/memorand.htm>. On large projects, it is possible that two or more different wage determinations may apply on a single contract. For example, a wastewater treatment plant ordinarily would be subject to the “heavy” wage determination; however, a separate administration building constructed as part of the same project would be subject to the “building” wage determination.<sup>77</sup>

A wage determination is simply a list of the various job classifications that have been recognized by the DOL in a particular community, along with the prevailing wage and fringe benefit rates. Ordinarily, the wage determination rates that are in effect when a contract is bid will be effective for the life of the construction contract. However, a new wage determination may be required in the event that the contract is later modified by adding substantial new work.

The wage determinations are based on surveys conducted by the DOL. The DBA survey program in the past was frequently the subject of criticism, for several reasons. The surveys were conducted sporadically, and many communities had not been surveyed in years. As a result, wage determination rates often

were outdated. In addition, the surveys were heavily dependent on contractors, trade associations, and labor unions for voluntarily gathering wage data; in many instances, so little data for some construction crafts would be submitted that the DOL could not determine a prevailing rate, and therefore would issue a wage determination omitting wage and fringe benefit rates for various crafts entirely. Finally, in 1995, questions were raised about whether some wage determinations were being based on inaccurate or fraudulent wage data.<sup>78</sup>

In response to this criticism, in the late 1990s the DOL initiated a major multiyear effort to improve its survey methodology, relying on advanced technology to reach a larger universe of survey respondents and initiating an audit program to confirm the accuracy of the reported data. In addition, new DBA surveys are being implemented on a statewide basis, with the DOL soliciting wage data from all localities in a state and on all types of work simultaneously. Whereas the old survey program relied on paper reports, the new program accepts online electronic submissions. The DOL predicts that the updated survey methodology will produce wage determinations that are more accurate, comprehensive, and timely; however, this new wage determination program has not yet reached full implementation.

In addition to the published general wage determinations, the DOL will issue a "project wage determination" when requested by a contracting agency. Unlike the general wage determinations, which have no expiration date, project wage determinations are effective only for 180 days.<sup>79</sup> Both project wage determinations and general wage determinations are subject to modification by the DOL throughout the period leading up to a bid opening. Any such modifications must be incorporated into the bid specifications unless they are received by the agency less than 10 days before bidding.<sup>80</sup> Wage determinations may also need to be modified if a contract is not awarded within 90 days after bid opening.<sup>81</sup>

It is essential that contractors with questions about the wage determinations seek clarifica-

tion from the DOL early in the bidding process, even though it can be extremely difficult to obtain reliable and authoritative answers. Such inquiries might include questions about local trade practice or doubts about the accuracy of the wage rates themselves. Contractors bidding on Government contracts are presumed to have knowledge of local trade practices (i.e., which craft performs each type of work),<sup>82</sup> and contractors will have little success *after* contract award claiming that they bid on the project under the mistaken belief that various tasks would be performed by lower-wage trade classifications.<sup>83</sup> Similarly, any interested party that believes that the wage determination rates are incorrect can file a request for review and reconsideration with the Wage and Hour Division, but only *before* the contract award.<sup>84</sup> Note that the DOL is not bound by erroneous advice that a contractor may receive from contracting agency personnel.<sup>85</sup>

#### ■ Conformances

Job classifications that are needed on a construction project but are missing from the wage determination can be added postaward through a process known as "conformance."<sup>86</sup> The procedure is intentionally designed to be narrow in scope, and it is not a vehicle for challenging the underlying wage determination.<sup>87</sup>

A conformance action to add a job classification and wage and fringe benefit rates is initiated by the contractor submitting a conformance request to the agency CO, proposing a job title and wage and fringe benefit rates. The contractor must consult with the employees or their representative (i.e., a labor union) and indicate to the CO whether the workers agree with the new classification and rates. The agency then transmits the conformance package to the national office of the DOL, indicating whether the CO recommends that the new classification and rate be approved. Under the regulations, the DOL is supposed to issue a conformance decision within 30 days or notify the CO that additional time is needed.<sup>88</sup> The DOL frequently does not meet the 30-day time limit of the regulations; on occasion, a conformance decision can take years.

A “conformed classification” must meet three criteria before it will be approved by the DOL: (1) the work to be performed by the classification requested is not performed by a classification in the wage determination, (2) the classification is utilized in the area by the construction industry, and (3) the proposed wage and fringe benefit rate bears a reasonable relationship to the wage rates already contained in the wage determination.<sup>89</sup> If a major job classification routinely used in the construction industry is missing from a wage determination (e.g., plumber, painter, or mason), adding the classification through a conformance request is relatively straightforward. However, it can be much more difficult to add specialty classifications through the conformance procedure (e.g., “metal building assembler “ or “automation and controls technician”) because the DOL is likely to conclude that the work of the proposed classification is already performed by one of the major craft groups.<sup>90</sup> This is especially true where the prevailing wage rates in the existing wage determination are based on collectively bargained rates because the trade practices of such rates are viewed by the DOL to be prevailing local practice.<sup>91</sup>

#### ■ Application Of Wage Determinations To Options

On December 9, 1992, the DOL’s Wage and Hour Division issued All Agency Memorandum No. 157 clarifying the application of DBA wage determinations to contracts containing option clauses. The memorandum states that every contract exercising an option or otherwise renewing a contract must contain a current wage determination. Although there is no explicit statutory mandate for such a requirement, the DOL has found (by analogy to the Service Contract Act regulations, which do have such a requirement<sup>92</sup>) that this rule is appropriate. The Army mounted an unsuccessful challenge to the memorandum in 1996;<sup>93</sup> DOD has since acceded to the DOL’s position.

A final rule issued in 2001 amended the FAR to address the application of the DBA to multiyear contracts that include options to ex-

tend the term of the contract.<sup>94</sup> The FAR now requires that when exercising an option to extend the term of a construction contract, the CO must select the most current DBA wage determination from the same schedule as the wage determination that was initially incorporated into the contract.<sup>95</sup> Also, when issuing the solicitation, the FAR requires the CO to choose one of four methods to allow the contractor to be compensated for an increase or decrease in the contract price at each option period as the result of changed DBA wage rates: (1) allowing bidders to propose separate prices for each option period, (2) providing a method for adjusting the contract price by an amount tied to the annual changes in published construction unit pricing books, (3) allowing the CO to increase the contract price based on a percentage rate tied to a published economic indicator, or (4) identifying a method that will be used to adjust the contract price based on the actual increase or decrease in the DBA wage rates.<sup>96</sup>

#### Bona Fide Fringe Benefits

In 1964, the DBA was amended to include fringe benefits in the meaning of the terms “wages” or “prevailing wages.”<sup>97</sup> Thereafter, DOL wage determinations have included both monetary wage rates and a rate per hour for one or more fringe benefits. Under the Act, contractors or subcontractors may make contributions to a trustee or a third person, pursuant to a fund, plan, or program for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, defraying costs of apprenticeship or other similar programs, and other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.<sup>98</sup>

The Act states that these fringe benefit contributions may be provided in several different ways:<sup>99</sup>

The obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor... may be discharged by making payments in cash, by the making of contributions [irrevocably made to a trustee or to a third person pursuant to a fund, plan, or program], by assuming an enforceable commitment to bear the costs of a [financially responsible] plan or program..., or by any combination of payment, contribution, and assumption, where the aggregate of such payments, contributions, and costs is not less than the [required sums].

By including “other bona fide fringe benefits,” Congress specifically left open the possibility that new fringe benefits that were not common to the industry at the time the Act was amended can be recognized by the DOL as they become prevailing. For a particular benefit to be prevailing, the fringe benefit need not be recognized beyond a particular area for the DOL to find that it is prevailing in that area.<sup>100</sup> If the contractor or subcontractor wishes to receive credit under the Act for costs incurred for a fringe benefit not listed in the Act, it must request specific permission from the Secretary of Labor. The Secretary must then examine the facts and circumstances to determine whether the fringe benefit is bona fide.<sup>101</sup>

The DOL’s Wage Appeals Board (the predecessor to the Administrative Review Board) held that items not listed in the Act—such as job-related tools and truck expenses, personal items such as payment of loans, rent, phone and other personal bills, and vehicles not used for work—are *not* bona fide fringe benefits because they were not common to the industry at the time the Act was amended. In addition, the Board stated that some of these benefits (e.g., paying for work-related tools and vehicle expenses) are considered business expenses of the employer and are therefore not bona fide fringe benefits.<sup>102</sup>

Benefits that the contractor or subcontractor is obligated to provide under other federal, state, or local laws are excluded from being “fringe benefits” under the Act, and no credit may be taken for payments made for such benefits.<sup>103</sup> For example, payment for workers’ compensation insurance under either a compulsory or elective state statute are

not considered payments for fringe benefits under the Act.<sup>104</sup>

The rate of cost of a fringe benefit is usually an hourly rate that is reflected in the wage determination. Sometimes, however, the fringe benefits contribution or cost may be expressed in a formula or method of payment other than an hourly rate. When this happens, the wage determination may reflect the rate of contribution or cost used in the formula or method, or it may be converted to an hourly rate if to do so would facilitate administration of the Act.<sup>105</sup> The contractor must either pay the benefit as stated in the wage determination or pay another bona fide fringe benefit or an hourly cash equivalent thereof.<sup>106</sup> Note that if the contractor is able to recapture or divert monies paid into a fringe benefit plan, the plan is not bona fide for DBA purposes.

Contractors and subcontractors have significant flexibility in meeting the DBA wage and fringe benefit requirements. A contractor may discharge its minimum wage obligations for the payment of both straight time wages and fringe benefits by paying cash, making payments or incurring costs for bona fide fringe benefits of the types listed in the Act, or by a combination of both.<sup>107</sup> Where both the basic hourly rates and the fringe benefits payments are contained in the wage determination, a contractor or subcontractor may discharge its obligations in one of three ways: (1) by paying employees the specified basic hourly rate and by making the specified contributions for each listed fringe benefit, (2) by paying employees the specified basic hourly rate and by making one total contribution for all the specified fringe benefits in one total amount, or (3) by making a cash payment to the employees for both the basic hourly rate and the benefits in lieu of providing the actual fringe benefits themselves.<sup>108</sup> In the alternative, the contractor or subcontractor may use a combination of any one of the three methods.<sup>109</sup>

Fringe benefit payments paid on DBA-covered jobs cannot be used to subsidize a contractor’s fringe benefit program on non-DBA jobs. When a contractor makes uniform benefit contributions on a “cents-per-hour-worked” basis, both

on covered and noncovered projects, this is not a problem. However, problems determining the allowable DBA fringe benefit credit can arise if a contractor pays a single flat monthly benefit premium or provides unfunded benefits, and the employees work on both DBA-covered and noncovered jobs. In this situation, a contractor is only allowed to claim DBA credit for fringe benefit payments proportionate to the amount of time worked on DBA-covered jobs, a concept referred to as the “annualization principle.” In essence, the DOL requires contractors to annualize or average out all fringe benefits paid for Government and commercial work to individual workers over a year’s period (called the “effective annual rate”); the contractor can only claim fringe benefit credit for the portion of the workers’ time employed on DBA-covered jobs.<sup>110</sup>

## Relationship To Other Laws

### ■ Fair Labor Standards Act

Labor standards requirements are a confusing web of state and federal laws and regulations. At the federal level, the primary legislation in this area is the Fair Labor Standards Act (FLSA).<sup>111</sup> The FLSA sets minimum standards for the hours of work and wages of employees engaged in interstate commerce on the part of a covered enterprise. Workers covered by the DBA are usually also covered by the FLSA.<sup>112</sup>

Under the DBA, contractors must pay prescribed wage rates and benefits only for time during which contractor employees are working on the DBA-covered construction site. Thus, determining exactly what constitutes “hours worked” is essential in determining an employee’s compensation. The DBA itself contains no working time rules. Instead, the statutes, cases, and regulations that define what is compensable working time under the FLSA also apply to DBA-covered contractors. Both the FLSA and the DBA are covered by the Portal-to-Portal Act provisions on walking, riding, traveling to and from the place of performance, and other preliminary and postliminary activities.<sup>113</sup> Generally “hours worked” is broadly

defined to include all hours that an employee is “suffered or permitted to work” for the employer.<sup>114</sup> Hours worked also include time during which an employee is necessarily required to be on the employer’s premises, on duty, or at a prescribed work place.<sup>115</sup> Many cases deal specifically with such working time issues as whether and under what circumstances meal time, travel time, idle time, sleep time, rest periods, and on call time are compensable.

### ■ State “Little Davis-Bacon Acts”

The FLSA and the DBA set minimum standards for covered employees but do not preempt state law in the area. States are free to set higher standards that would govern employees.<sup>116</sup> Besides general wage and hour laws, many states have also enacted their own public works statutes, often called “Little Davis-Bacon Acts.” The DBA has been held not to preempt state laws or rulings calling for higher wages or fringe benefits or different requirements in part because there is no express statement in the Act of congressional intent to preempt.<sup>117</sup> By contrast, state labor standards laws may be preempted by the federal Employee Retirement Income Security Act.<sup>118</sup>

The Federal Government has sought to limit the reach of state prevailing wage laws on certain federal projects. The Department of Housing and Urban Development proposed a regulation that would preempt state laws requiring a higher state-prescribed wage from being paid on public housing or Indian housing projects.<sup>119</sup> The proposal was aimed at six states including New York, California, and Washington, and a final rule was issued in 1988.<sup>120</sup> A suit to block the rule was filed. The U.S. Court of Appeals for the Second Circuit affirmed the lower court finding that the federal preemption of state law was logical and in accord with the statutory purpose.<sup>121</sup>

### ■ National Labor Relations Act

The National Labor Relations Board oversees the implementation of the National Labor Relations Act,<sup>122</sup> the statute whereby many management and union disputes are resolved. The NLRB’s authority does not extend to the

DBA and Related Acts and involves a separate and distinct area of labor law. Nevertheless, there are areas where DBA issues spill over into the NLRB's domain.

The NLRB, for example, decides issues of union jurisdiction—i.e., which trade or craft is entitled to perform the work for a particular employer. Under the DBA, the Secretary of Labor, in making classification decisions, does not purport to make decisions on work “jurisdiction.”<sup>123</sup> All the DOL decides is the wage rate prevailing in the area for work of that nature. However, to determine the prevailing wage rate for such work, the DOL must first decide which craft normally performs the work and for what prevailing wage rate. Therefore, to make DBA classification decisions, the Secretary inevitably must reach some conclusions about questions of trade jurisdiction.<sup>124</sup> Since the construction (building trades) unions are well aware of this, they normally view the Secretary's decision as being tantamount to deciding jurisdiction and regard such decisions as a basis for claiming the right to have their members perform the work.

#### ■ **Contract Work Hours & Safety Standards Act**

The Contract Work Hours and Safety Standards Act<sup>125</sup> (CWHSSA) contains weekly (after 40 hours) premium overtime pay requirements<sup>126</sup> and applies to most federal contracts that may require or involve the employment of laborers or mechanics, including watchmen and guards.<sup>127</sup> Where there are violations of the minimum prevailing wage set in the DBA, there may also be a violation of the overtime provisions of the CWHSSA.

Contracts for construction in excess of \$100,000 are covered by the CWHSSA.<sup>128</sup> This statute also extends to federally assisted contracts subject to DBA wage standards to which the Federal Government is not a direct party, except where the federal assistance is only in the nature of a loan guarantee or insurance.<sup>129</sup> The CWHSSA provides for liquidated damages in the sum of \$10 for each calendar day (with respect to each employee employed in violation) on which an employee was required or permitted to work overtime hours without

the payment of overtime; these damages are payable to the United States, not to the worker.<sup>130</sup> The CWHSSA also provides for health and safety standards on covered construction work.<sup>131</sup>

#### ■ **Copeland Anti-Kickback Act**

The “anti-kickback” section of the Copeland Act makes it punishable by a fine of up to \$5,000 or by imprisonment of up to 5 years, or both, to induce any person working on a federally funded or assisted construction project to “give up any part of the compensation to which he is entitled under his contract of employment.”<sup>132</sup> Regulations pertaining to Copeland Act payroll deductions are contained in 29 C.F.R. Part 3. The Copeland Act and its regulations require as a contract stipulation that the contractor submit weekly to the contracting agency a copy of all payrolls, along with a weekly “Statement of Compliance.”<sup>133</sup> This is sometimes misnamed as “Davis-Bacon certified payrolls,” but the requirement originates with the Copeland Act. Contractors may use Optional Form WH-347, available at the Government Printing Office at a nominal price, for this purpose or file equivalent payroll documents with the required certification.<sup>134</sup> The willful falsification of a payroll report or a Statement of Compliance may subject the employer to civil or criminal prosecution for false claims or false statements<sup>135</sup> and may also be a cause for debarment.<sup>136</sup>

Note that the Freedom of Information Act does not require the public release of Copeland Act/DBA payroll records in violation of workers' privacy rights.<sup>137</sup> The U.S. Court of Appeals for the Second Circuit, for example, has held that a contractor's certified payroll records containing individualized employee information were exempt from disclosure under FOIA.<sup>138</sup>

#### **Role Of Judicial & Quasi-Judicial Bodies**

While most DBA problems are addressed administratively at the DOL, and particularly by the Wage and Hour Division, DBA questions surface in a number of different contexts that provide for adjudication in several different forums.

### ■ Administrative Review Board

Although the primary responsibility for DBA implementation at the DOL is assigned to the Wage and Hour Administrator and her staff, since the early 1960s there has been an internal administrative review process for challenging the Administrator's rulings. Initially, this function was assigned to the Wage Appeals Board. In 1996, the Secretary of Labor eliminated the WAB and created the Administrative Review Board, transferring WAB's authorities and responsibilities to the new Board.<sup>139</sup>

The ARB has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from certain final decisions of the Wage Hour Administrator, including decisions relating to (1) wage determinations issued under the DBA and its related minimum wage statutes, (2) debarment cases arising under the Act, (3) controversies concerning the payment of prevailing wage rates or proper classifications that involve significant sums of money, large groups of employees, or novel or unusual situations, and (4) recommendations of a federal agency for appropriate adjustment of liquidated damages that are assessed under the Contract Work Hours and Safety Standards Act.<sup>140</sup> In exercising its discretion to hear and decide appeals, the Board considers, among other things, timeliness, the nature of the relief sought, matters of undue hardship or injustice, and the public interest.<sup>141</sup>

The ARB does not conduct *de novo* hearings, except upon a showing of extraordinary circumstances.<sup>142</sup> (No hint is given in the regulations about what those circumstances might be.) Instead, the ARB assesses the Wage and Hour Administrator's rulings to determine whether they are consistent with the statute and regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA.<sup>143</sup> In short, in cases involving wage determinations and policy decisions, the ARB conducts an appellate proceeding based on the record before it without affording the opportunity to have witnesses testify. The old WAB's identical procedure was attacked by an employer on due process grounds but was upheld by the courts.<sup>144</sup>

Requests for review by the ARB must be made at "an appropriate time." Thus, a contractor cannot assert that the wage determinations were erroneous after the construction projects are completed.<sup>145</sup>

An administrative proceeding on issues of back wages and debarment under the DBA is not an "adversary adjudication" within the meaning of the Equal Access to Justice Act.<sup>146</sup> Thus, a prevailing party otherwise qualified under the EAJA is still not ordinarily entitled to recover its attorney fees after an ARB proceeding.<sup>147</sup>

### ■ Judicial Review

The Supreme Court has held that federal courts may not review the correctness of the Secretary of Labor's wage determination.<sup>148</sup> Thus, the sole remedy for a contractor dissatisfied with a wage determination issued by the Wage and Hour Division is a timely request for review and reconsideration<sup>149</sup> followed by an appeal to the ARB.<sup>150</sup> However, the practices and procedures the DOL uses in making such determinations are reviewable pursuant to the Administrative Procedure Act.<sup>151</sup>

The U.S. District Court for the District of Columbia in 1974 refused to review the Secretary of Labor's decision not to issue a separate wage determination schedule for high rise residential construction. (The Secretary had decided to issue only a single schedule for general building construction.) The court held that the Secretary's decision was not open to attack on judicial review, noting that Congress had indicated its desire for administrative rather than judicial review and that the WAB (whose review function is now performed by the ARB) was created to implement this congressional policy.<sup>152</sup>

### ■ Comptroller General

The Comptroller General will decide bid protests that raise DBA issues, including whether the Act applies to a procurement. For example, the Comptroller General has found that an agency reasonably classified painting work as covered by the Service Contract Act rather than the DBA where the vast majority of painting

work was to be performed in conjunction with change of occupancy maintenance services for military housing, rather than as part of construction projects.<sup>153</sup>

The Comptroller General has refused to sustain protests alleging that an awardee's price was too low to allow it to comply with the DBA. As long as the awardee promises to comply with the Act, it is not the Government's concern whether the contractor loses money performing the contract.<sup>154</sup>

#### ■ **Boards Of Contract Appeals & Court of Federal Claims**

DBA issues surface periodically in connection with Government procurement claims. The Armed Services Board of Contract Appeals has held that it has no jurisdiction in an appeal from a CO's decision to withhold payment because of alleged violations of the DBA.<sup>155</sup> However, those claims that can be characterized as based on the contractual rights and obligations of the parties, and not on the DBA labor standards provisions or the wage determination, may be heard by the boards of contract appeals.<sup>156</sup> The ASBCA has held that the contractor's claim that an agency had improperly withheld payment was really a disguised attack on a wage determination, over which ASBCA has no jurisdiction.<sup>157</sup>

The U.S. Court of Appeals for the Federal Circuit has held that a dispute over which wage rate applied to certain workers was within the jurisdiction of the DOL and not the boards or the Court of Federal Claims.<sup>158</sup> The Federal Circuit subsequently clarified that holding, saying that the FAR "Disputes Concerning Labor Standards"<sup>159</sup> contract clause prevents the Court of Federal Claims and boards from entertaining jurisdiction only where the claim arises "exclusively" out of the labor standards provision of the contract.<sup>160</sup>

#### ■ **Attorney General Legal Opinions**

The U.S. Attorney General, through the Office of Legal Counsel, occasionally issues legal opinions interpreting the DBA. The most recent example is the Office of Legal Counsel's 1994

opinion that the Act applies to leases that require the landlord to build-out the space.<sup>161</sup> The Office of Legal Counsel performs this function pursuant to 28 U.S.C. § 512, which states: "The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."<sup>162</sup>

## **Sanctions For Violations**

Sanctions for violating the DBA can include withholding and suspension of contract payments, direct suit by laborers under the Miller Act, possibly a private cause of action, a three-year debarment from federal contracting, termination of the contract for default, and criminal prosecution for false statements.

#### ■ **Actions On Contract Payments**

The DBA authorizes the Government to withhold from the contractor so much of accrued payments as may be considered necessary by the CO to pay to laborers and mechanics the amount of wage underpayment.<sup>163</sup> The Act authorizes the Comptroller General to make direct payments from the withheld amounts to the laborers and mechanics.<sup>164</sup> The "Withholding of Funds" contract clause at FAR 52.222-7, which is required for all DBA-covered contracts, requires the CO to withhold accrued payments and to suspend any further payments for DBA violations.<sup>165</sup> Under this clause, the CO must give written notice before any suspension of payments. According to the DOL regulations, the suspension of payments may continue until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled.<sup>166</sup>

Under the terms of the "Withholding" clause, the CO may withhold payments for violations of DBA requirements under *other* federal contracts or federally assisted contracts held by the same contractor.<sup>167</sup> This is known as a right of set-off.

(a) *Procedure*—The regulations impose enforcement and investigatory responsibility on both the contracting agency and the DOL.<sup>168</sup>

Specifically, the regulations state that such investigations must include interviews with employees (which are to be taken in confidence) and the examination of payroll data and evidence of registration and certification with respect to apprenticeship and training plans.<sup>169</sup> Upon a finding by the DOL investigator or the contracting agency that violations have occurred, the CO is authorized, upon the CO's own action or at the written request of an authorized representative of the DOL, to take action to suspend further payments.<sup>170</sup>

If a dispute exists as to the payment of wages, an administrative adjudication process may be initiated by the Wage and Hour Administrator, by the contracting agency, or upon the request of the contractor.<sup>171</sup> If the contractor requests a hearing and the Administrator finds that there are disputed issues of fact, or in any case in which debarment is contemplated, the case is referred to a DOL Administrative Law Judge for a full hearing and decision.<sup>172</sup> Part 6 of 29 C.F.R. sets forth the rules of practice for such hearings. Proceedings under this part are not subject to the provisions of the Equal Access to Justice Act.<sup>173</sup> Failure to appear at the hearing may result in entry of a default judgment or dismissal of the case.<sup>174</sup> ALJ decisions are subject to review by the ARB.<sup>175</sup> If the Administrator believes there are no disputed factual issues and no debarment is contemplated, the Administrator may refuse to refer the dispute to an ALJ and the contractor may appeal directly to the ARB.<sup>176</sup>

At least one federal court has held that the Government's suspension of payments for alleged violations of the DBA could constitute a "deprivation of property" subject to the due process clause of the Fifth Amendment.<sup>177</sup> The court rejected the Government's argument that since the contractor's right to payment existed solely by function of its contract and such contract clearly authorized withholding, no constitutionally significant property interest existed.<sup>178</sup> Nevertheless, the court denied the contractor's request for a preliminary injunction to force the release of the payments withheld since it appeared that it was unlikely to prevail in its due process claim.<sup>179</sup> Accord-

ing to the court, Supreme Court precedent conclusively establishes that a contractor is not entitled to a pre-suspension-of-payment hearing and thus no further process was due.<sup>180</sup>

Contractors have successfully argued that the withholding of payments by a CO due to DBA violations postpones the date of final payment under the contract and thus extends the period for claim submission under the contract.<sup>181</sup>

(b) *Priority Claims to Withheld Funds*—The Comptroller General has held that the Internal Revenue Service does not have a right to set off its claim for tax indebtedness against funds withheld to cover DBA underpayment.<sup>182</sup> A bank to which contract payments had been assigned in exchange for financing the project also did not have priority to the withheld amounts over the claims of the contractor's employees.<sup>183</sup>

(c) *Interest*—Boards of contract appeals are split over whether a contractor is entitled to interest on the amount withheld when the amount is clearly excessive. One board allowed interest where only \$5,965 was owed, yet \$50,000 was withheld.<sup>184</sup> On the other hand, another board held that a claim for interest on withholdings in excess of the amount needed to cover DBA violations was not redressable under the Prompt Payment Act. Such a claim would require the boards of contract appeals to examine the reasonableness of a DOL investigation and of the DOL's backpay and overtime calculations, none of which the boards have jurisdiction to do.<sup>185</sup>

#### ■ Court Actions For Underpayment

(1) *Miller Act Suits*—If the accrued payments withheld are insufficient to compensate laborers for the underpayment, the workers have the same right of action or intervention against the contractor and his sureties that is conferred by law upon persons furnishing labor or materials.<sup>186</sup> The law conferring such a right of action upon laborers and materialmen is known as the Miller Act.<sup>187</sup>

The Miller Act provides that before the award of every contract in excess of \$100,000 with

the United States for construction, the contractor must furnish a performance bond and a payment bond for the protection of all those supplying labor and materials.<sup>188</sup> Any person who provides materials or labor to the prime or a subcontractor on the bond-covered project and who is not paid within 90 days of the last day of performance may sue on the bond.<sup>189</sup> However, employees of a sub-subcontractor (i.e., a second tier subcontractor) having no direct contractual relationship with the prime contractor cannot sue on the bond.<sup>190</sup>

All suits to recover under the Miller Act must be commenced within one year after the last date of performance in the federal district court in the district where the contract was to be performed and executed.<sup>191</sup> The individual laborer must bring the action in the name of the United States for the laborer's benefit, and the suit is prosecuted by the worker's own attorney.<sup>192</sup> Failure to observe the Miller Act procedural requirements defeats this type of action.<sup>193</sup>

The DBA makes clear that in such laborer causes of action for underpayment, it shall not be a defense that the laborer accepted or agreed to accept less than the required rate of wages or that the laborer voluntarily made refunds.<sup>194</sup>

One federal court, on somewhat dubious grounds, has ruled that Miller Act actions may only be brought after there has been an administrative determination by the DOL that DBA wages are owed to the laborer and insufficient funds have been withheld to satisfy the claim.<sup>195</sup>

(2) *Sureties*—While the DBA provides that an action may be brought against a surety to recover underpayment of compensation,<sup>196</sup> there is no statutory provision in the Act itself requiring that contractors furnish either payment or performance bonds before an award can be made. Such a bond is usually furnished under the Miller Act. Courts have held, however, that when such a bond has been given, including one denominated as a performance rather than payment bond, and such a bond guarantees that the principal shall fulfill “all the undertakings, covenants, terms, conditions, and agreements” of the contract, or words to

the same effect, the surety-guarantor is jointly liable for underpayment by the contractor of the wages and fringe benefits required by the Act up to the amount of the bond.<sup>197</sup> Accordingly, the Government's acceptance of the surety's check to cover the excess costs in completing the unfinished portion of a contract did not absolve the contractor from further liability for unpaid wages.<sup>198</sup>

(3) *Statute of Limitations*—The Portal-to-Portal Act creates a two-year statute of limitations for any judicial action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Labor Standards Act, the Walsh-Healey Act, or the DBA.<sup>199</sup> Every such action is forever barred unless commenced within two years after the cause of action accrued. However, a “willful” violation of these Acts increases the statute of limitations to three years.<sup>200</sup> Thus, a willful violator may be liable for substantial additional sums in a potential back wage award. The standard of “willfulness” is whether the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the Act.<sup>201</sup>

The ARB has held that the Portal-to-Portal Act two-year statute of limitations bars court actions, but it does not bar administrative enforcement actions.<sup>202</sup>

#### ■ Employee Private Cause Of Action

When there is no surety bond or when the stringent procedural requirements of the Miller Act are not met and the withheld amounts are insufficient to cover the underpayment, individual workers may attempt to bring private actions directly against the construction contractor under an *implied* DBA cause of action. In a 1977 decision, the U.S. Court of Appeals for the Seventh Circuit held that such an implied right of action existed. Specifically, the court found that implying such an action is necessary to effectuate the intention of Congress in passing the DBA.<sup>203</sup> Other courts, including the Fifth Circuit have disapproved the Seventh Circuit's holding and analysis.<sup>204</sup>

In a 1980 case in which an employee of a construction contractor sued for violations of

DBA requirements, the U.S. Supreme Court denied an implied right of action under the Act. The Court noted that the DBA “is not self-implementing.”<sup>205</sup> Although the case is perhaps distinguishable from Seventh Circuit case in that the contract in question omitted the DBA clause entirely, many of the Supreme Court’s determinations as to the intent of Congress in passing the DBA seem to contradict the Seventh Circuit’s analysis. Nevertheless, some courts have followed the Seventh Circuit’s decision.<sup>206</sup>

#### ■ Ineligibility Listing/Debarment

The DBA directs the Comptroller General to distribute a list to all departments of the Government containing the names of contractors that the Comptroller has found to have “disregarded their obligations to employees.”<sup>207</sup> In applying this statutory directive, the DOL has recommended debarment for those contractors that have willfully violated the DBA requirements.<sup>208</sup> No Federal Government contract may be awarded to firms or persons appearing on the debarred bidders list or to any firm in which such persons have an interest.<sup>209</sup>

A DBA violation invites a mandatory three-year debarment.<sup>210</sup> Once a party has been placed on the ineligible list for a direct DBA violation, there is no possibility of a reduction in this mandatory three-year period or for a removal from this list, absent a court order.<sup>211</sup> The DBRA violations do not require the same result, although in practice, most Related Act debarments are also for three years, absent extraordinary circumstances.<sup>212</sup> Debarment is the possible consequence of any violation of the DBA, except when the contractor relied in good faith on an authoritative ruling. Even the fact that an employer-subcontractor did not know that the DBA applied at the time he submitted his bid to the prime contractor will not avoid debarment, nor will the fact that he made complete restitution to his employees.<sup>213</sup> Even when there was no wage underpayment, debarment may still be appropriate for a contractor’s failure to maintain appropriate records.<sup>214</sup>

In addition, a contractor can be debarred for statutory wage and payroll violations committed by a managing partner or agent. Ac-

ording to the WAB, the contractor is responsible for the actions of his employees in fulfilling the requirements of Government construction contracts, and partners are likewise responsible for their acts within the partnership.<sup>215</sup> Thus, a company president cannot escape debarment by blaming his contract administrator for the violations.<sup>216</sup> Use of an outside accounting firm to prepare payroll does not demonstrate an intent to comply with the DBA (for purposes of avoiding debarment) because a payroll service is only as good as the records that the contractor submits to the accountant.<sup>217</sup>

The Wage and Hour Administrator has the authority to determine whether a debarred firm or person has an interest in a prospective contractor.<sup>218</sup> The Administrator may refer this issue to an Administrative Law Judge for evidence gathering.<sup>219</sup> Such a finding by the Administrator may be disputed by the affected party, who may request a hearing within 20 days from the date of the Administrator’s determination.<sup>220</sup> If the Administrator still does not believe there is a factual dispute, the issue will be referred to the ARB.<sup>221</sup>

According to the DOL regulations, the Administrator, upon a finding that a construction contractor has disregarded its obligations to employees or subcontractors under the DBA, must afford such contractors an opportunity for a hearing as to whether debarment action should be taken.<sup>222</sup> If such a hearing is desired, the contractor must request it within 30 days after receipt of the summary of the DOL’s investigative findings. In its request, the contractor must respond to the findings and assert any defenses.<sup>223</sup> The ALJ to whom the case is referred for the hearing then issues a recommendation as to whether the contractor should be debarred.<sup>224</sup>

Because debarment may cause substantial injury to prospective bidders in Government contracting, federal courts have allowed declaratory judgment actions contesting the propriety of the DOL’s debarment proceedings pursuant to labor standards laws.<sup>225</sup> However, such judicial review cannot be instituted until all administrative remedies proceedings available to the contractor have been exhausted.<sup>226</sup>

This exhaustion doctrine is not absolute.<sup>227</sup> When the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights, when resort to administrative procedures is clearly shown to be inadequate to prevent irreparable injury, or when exhaustion is futile, the court may in its discretion review the DOL's actions before a final administrative determination has been made.<sup>228</sup> At least one court has reviewed the adequacy of debarment hearings for violations of constitutional due process requirements.<sup>229</sup>

#### ■ Termination For Default

Under the DBA,<sup>230</sup> all covered contracts contain a provision that authorizes the Government, by written notice to the contractor, to terminate the contractor's right to proceed with the work when laborers have

been paid wages lower than those required by the Act.<sup>231</sup> The failure to pay the correct wages and/or fringe benefits is a substantive breach of contract. The Federal Circuit also has held that a contractor can be terminated for default for recordkeeping violations under the DBA.<sup>232</sup>

#### ■ Criminal Prosecution

All construction contractors are required by the Copeland Anti-Kickback Act to furnish every week a written statement asserting that all their employees on the Government project have been paid their full wages for work performed the previous week without rebate.<sup>233</sup> This payroll reporting requirement applies to all construction contracts and, if the submission is not true, may be the basis for a criminal prosecution for false statements.<sup>234</sup>

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## GUIDELINES

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These *Guidelines* are designed to assist you in understanding the requirements of the Davis-Bacon Act. They are not, however, a substitute for professional representation in any specific situation.

1. Determine whether the contract is for work covered by the DBA. Is it *construction, alteration, or repair*, including painting and decorating, of a public building or a public work? Are the workers performing work "*on the site*" and are they "*laborers or mechanics*" rather than exempt?

2. Identify what *job classification* will be performing the work, examine the wage determination's *wage rates* and *prevailing fringe benefits* for that position, and make certain that workers will be correctly classified and paid consistent with *local trade practices*.

3. Determine whether *helpers* can be used at the project by reviewing the wage determination and any conformance decisions that have been issued.

4. If the contract contains *more than one* labor standards clause (e.g., both DBA and SCA provisions or multiple DBA wage determinations), determine which portions

of the contract and which workers will be subject to the different provisions. For *multiyear contracts*, review the contract specifications carefully to determine what method the CO has selected for making *annual price adjustments*.

5. Make sure that you are working with the most *up-to-date wage determinations* found in the contract and *accurately certify* the weekly payroll.

6. Before starting work, determine if there are any missing or unique job classifications that will need to be added to the project through the *conformance process* and work with the CO to submit the required conformance action to the DOL.

7. Comply with the *posting, certified payroll, and other requirements* of the DBA and related laws, and be certain that workers are paid expeditiously.

8. Cooperate with Government officials to resolve any DBA compliance problems quickly and fairly to avoid a *debarment dispute*.

9. Comply with all related laws including *overtime requirements* and *state laws*.

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- 8/ 40 U.S.C. § 3142(c)(1).
- 9/ 29 C.F.R. § 5.5(a)(6).
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- 12/ 40 U.S.C. § 3144(b).
- 13/ See e.g., 29 C.F.R. § 5.12(d).
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- 33/ DFARS 222.402-70(b), (c).
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- 41/ DOL, Field Operations Handbook § 15d10.
- 42/ See 12 Op. Off. Legal Counsel 89 (1988); 18 Op. Off. Legal Counsel 109 (1994).
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- 44/ Universities Research Ass’n v. Coutu, 450 U.S. 754, 784 n.38 (1981).
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- 218/ 29 C.F.R. § 5.12(d)(2).
- 219/ 29 C.F.R. § 5.12(d)(2)(ii).
- 220/ 29 C.F.R. § 5.12(d)(2)(iv)(B).
- 221/ 29 C.F.R. § 5.12(d)(5).
- 222/ 29 C.F.R. § 5.12(b)(1).
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- 225/ *George v. Mitchell*, 282 F.2d 486 (D.C. Cir. 1960) (*Walsh-Healey debarment*).
- 226/ *Delzer Constr. Co. v. United States*, 487 F.2d 908 (8th Cir. 1973).
- 227/ *Facchiano v. Department of Labor*, 859 F.2d 1163 (3d Cir. 1988).
- 228/ 859 F.2d at 1167–68.
- 229/ *ATL, Inc. v. United States*, 4 Cl. Ct. 374 (1984).
- 230/ 40 U.S.C. § 3143.
- 231/ 40 U.S.C. § 3143; see FAR 52.222-12; see also *Conway Elec. Co.*, ASBCA No. 6256, 61-1 BCA ¶ 2991.
- 232/ *Kelso v. Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173 (Fed. Cir. 1994).
- 233/ 40 U.S.C. § 3145(a); 29 C.F.R. § 3.3(b).
- 234/ See 18 U.S.C §§ 371, 1001; *United States v. Zambito*, 28 W.H. Cas. (BNA) 1425 (W.D.N.Y. 1988).

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