

# The Intersection of the Bipartisan Infrastructure Law and Davis-Bacon Act Requirements for Federal Contractors and Subcontractors

Written By **Xavier D. Lightfoot** (xdlightfoot@wardandsmith.com) and **Devon D. Williams** (ddwilliams@wardandsmith.com)

June 17, 2022



**On November 15, 2021, President Joe Biden signed the \$1.2 trillion Infrastructure Investment and Jobs Act into law, which is popularly known as the Bipartisan Infrastructure Law ('BIL').**

The BIL is estimated to create an additional 800,000 jobs.

The United States Department of Labor ("DOL") contends that such new jobs will "expand the middle class, revitalize our nation's transportation, communications and utility systems and build a more resilient, reliable, and environmentally sound future." The White House asserts that the BIL will provide protection to "critical labor standards on construction projects," as a substantial portion of the construction projects included in the BIL will be subject to requirements of the Davis-Bacon Act ("DBA" or the "Act").

While the BIL provides new revenue sources and opportunities for construction projects, federal contractors and subcontractors should ensure that their businesses comply with the DBA's prevailing wage rates and labor standards requirements.

## Scope and Coverage of DBA

In its simplest form, the DBA, enacted in 1931, requires federal contractors and subcontractors to pay prevailing wage rates and fringe benefits to certain construction workers employed on certain federal contracts. The DOL's Wage and Hour Division ("WHD") administers and enforces the Act's requirements on federally funded and assisted construction projects. The DBA applies to contracts:

1. Which the Federal Government or the District of Columbia is a party;
2. For the construction, alteration, or repair, such as painting and decorating, of public buildings and public works to which the Federal Government or the District of Columbia is a party;
3. Involving the employment of mechanics, laborers, and other workers that engage in manual or physical labor (except for individuals performing administrative, clerical, professional, or management work such as superintendents, project managers, engineers, or office staff); and
4. Which are in excess of \$2,000.

With respect to the DBA applying to federal contracts above \$2,000, this value threshold *only* applies to the

initial federal contract. If the threshold is met, however, then the DBA applies to any lower-tier subcontracts even if the value of the subcontract is less than \$2,000.

## **Requirements for Contractors and Subcontractors**

There are various requirements for federal contractors and subcontractors under the DBA, which the United States Supreme Court has described as "a minimum wage law designed for the benefit of construction workers." The Act was designed to protect construction workers' wage standards from federal contractors who may base their contract bids on wage rates that are lower than the local wage level. Under the DBA, federal contractors and subcontractors are required, among other things, to do the following:

1. Pay covered workers who work on the work site the prevailing wage rates and fringe benefits that are listed in the applicable wage determinations, which are provided by the WHD (the prevailing wage rate consists of both the basic hourly rate of pay and any fringe benefits to bona fide third-party plans, which may include medical insurance; life and disability insurance; pensions on retirement or death; compensation for injuries or illness resulting from occupational activity; or other bona fide fringe benefits - bona fide fringe benefits, however, do not include payments made by employer contractors or subcontractors that are required by other federal, state, or local laws such as required contributions to unemployment insurance);
2. Maintain accurate payroll records for employees that must be submitted to the contracting agency on a weekly basis (within seven days following the regular pay date for the particular workweek), which must include the following for covered employees: (i) name; (ii) classification; (iii) daily and weekly hours worked; and (iv) deductions made and actual wages paid (there are additional recordkeeping requirements for federal contractors who employ apprentices or trainees under approved DOL programs);
  - Federal contractors and subcontractors are also required to preserve the payroll records for three years following the completion of the covered work, provide accessibility to the records upon request by the DOL or its representatives, and allow the DOL or its representatives to interview employees during work hours.
  - Federal contractors and subcontractors can use the WHD's Form WH-347 to satisfy the weekly reporting requirements.
3. With respect to prime or general contractors, they must ensure that specific contract clauses and the applicable wage determinations are inserted into any lower-tier subcontracts (the contract clauses cover the following: (i) construction wage rate requirements; (ii) withholding of funds; (iii) payrolls and basic records; (iv) apprentices and trainees; (v) compliance with requirements under the Copeland Act; (vi) requirements for subcontracts; (vii) contract termination - debarment; (viii) compliance with construction wage rate requirements and related regulations; (ix) disputes concerning labor standards; and (x) certification of eligibility); and
4. Post a notice of the prevailing wages as to every classification of worker and an "Employee Rights under the DBA" poster in a prominent location that is easily accessible to the covered workers at the work site.

## **Practical Consideration in Compliance with DBA**

Federal contractors and subcontractors should ensure that covered workers are properly classified for the work such individuals perform and paid in accordance with the prevailing wage rate for their classification.

Employers will often face recordkeeping challenges when they have nonexempt employees who perform covered (manual) work and non-covered (administrative) work in the same workweek.

In such instances, the employer must determine whether the employee is salaried or paid hourly. If the employee is salaried, the employer must determine whether the employee's salary is greater than or equal to the prevailing wage rate for the employee's classification. If not, the employer contractor is required to increase the employee's pay for the week the covered work is performed.

Likewise, if the employee is paid hourly, then the employer must ensure the employee's hourly rate is greater than or equal to the prevailing wage rate for the employee's classification.

Federal contractors and subcontractors could face various consequences due to their failure to comply with the DBA, ranging from termination of the federal contract and debarment to a contracting agency withholding money due to the contractor to cover back wages due to employees as well as criminal prosecution. Accordingly, federal contractors and subcontractors should consult with legal counsel to ensure they comply with the various DBA requirements for any covered contracts.

--

© 2022 Ward and Smith, P.A. For further information regarding the issues described above, please contact Xavier D. Lightfoot or Devon D. Williams.

*This article is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.*

*We are your established legal network with offices in Asheville, Greenville, New Bern, Raleigh, and Wilmington, NC.*