Alert

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COZEN O'CONNOR

Federal Judge Blocks Portions of Department of Labor Rulemaking on Davis-Bacon Act

On Monday, June 24, 2024, a federal judge for the US District Court for the Northern District of Texas (the Court) instituted a nationwide injunction on the enforcement of portions of the US Department of Labor's (DOL) 2023 rulemaking titled "Updating the Davis-Bacon and Related Acts Regulations," (2023 Final Rule) holding that the 2023 Final Rule had overstepped the statutory directive of the Davis-Bacon Act (DBA). For a refresher on the 2023 Final Rule, please see this alert published by Cozen O'Connor last year.

The Court found that the plaintiffs in this case had a likelihood of success on the merits because the 2023 Final Rule exceeded its statutory mandate in three main ways:

1. The 2023 Final Rule, at Section 5.5(e), which made DBA contract clauses on labor standards and wage determination effective by operation of law even when those clauses were omitted from a contract covered under the DBA, was found to be contrary to existing law;
2. The 2023 Final Rule unlawfully amended the DBA by applying it to other workers (specifically truckers) who are not laborers and mechanics performing "directly on the site of the work."[1]; and
3. The 2023 Final Rule wrongfully defined Material Supplier, thereby unlawfully expanding the scope of DBA coverage.

Each of these issues bears careful attention and review by any contractor (or subcontractor) performing under a DBA-covered contract or subcontract. Although we expect the DOL to appeal this decision, the issuance of a nationwide injunction bars the DOL from enforcing of any of these provisions.

Self-Implementing Contract Clauses

Section 5.5(e) of the 2023 Final Rule reads as follows:

> **Incorporation by operation of law.**
>
> The contract clauses set forth in this section (or their equivalent under the Federal Acquisition Regulation), along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by § 5.1 to include such clauses and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law.

This operation of law provision drew significant commentary during the comments period and raised significant concerns within the DBA community. In a nutshell, the provision made the DBA applicable to contracts even where an agency had failed to include the required DBA clauses, effectively rendering the application of the DBA as self-implementing. In effect, this shifted the burden of determining DBA coverage from agency contracting officers to contractors. After a recent oral argument and extensive briefing, the Court held that this section was contrary to law. The Court cited the fact that both the Supreme Court of the United States and the Armed Services Board of Contract Appeals have ruled that the Davis-Bacon Act is not self-implementing.[2] The Court also rejected the DOL's argument that the DBA clauses should be read into the contract under the *Christian* doctrine and found that, as written, the operation of law provision is not

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consistent with basic contract and procedural due process principles. As a result, contractors performing work covered by the DBA can, at least for now, rely on the four corners of the contract for determining coverage by the DBA.

Extending the DBA Beyond Laborers and Mechanics to Truckers

Another aspect of the new DBA regulations challenged by the plaintiffs was DOL's expansion of the scope of coverage of the rule in Section 5.2 to workers beyond laborers and mechanics and to workers not employed directly on a work site. DOL had attempted to expand the scope of covered work under the DBA by including transportation as a covered category in the 2023 Final Rule. On this issue, the Court determined that the DOL's 2023 Final Rule had overstepped its authority delegated by Congress by expanding the DBA to cover time spent by drivers on site. The Court stated in no uncertain terms that trucking is not covered by the DBA: "Expanding the DBA to apply to trucking impermissibly conflicts with the statute, which defines its coverage and is limited to "construction, alteration, or repair, including painting and decorating, of public buildings and public works..."[3] Truck drivers are not de facto "mechanics and laborers employed directly on the site of the work."[4] Citing a "substantial body of case law," the Court noted that DOL's attempt to include transportation drivers under the DBA is misplaced. Overall, the Court's clear rejection of DOL's attempt to expand the scope of DBA coverage to truck drivers prevents DOL from continuing to require truck driver coverage by way of the Court's injunction striking down relevant portions of Section 5.2 of the 2023 Final Rule.

The 2023 Final Rule Wrongfully Defined Material Supplier

One other change in the 2023 Final Rule challenged by the plaintiffs was the attempt by DOL to apply DBA coverage to certain material suppliers operated by subcontractors or contractors. Again, the Court found that the DBA only applies to mechanics and laborers employed directly on the site of work, and any attempt to expand DBA coverage to material suppliers is contrary to law and would amount to a fundamental amendment to the DBA. The Court also held that treating material suppliers as covered by the DBA would result in a reclassification of employees of material suppliers as laborers and mechanics, violating the DBA's plain language. Furthermore, from a practical standpoint, this reclassification would result in an arbitrary and capricious delineation of DBA coverage between employees who work for a material supplier operated by a subcontractor or contractor and employees who work for a material supplier unaffiliated with a contractor/subcontractor. As such, the Court included in its injunction the definition of Material Supplier set forth in 29 C.F.R. § 5.2, thus thwarting DOL's attempt to expand the scope of the DBA to include certain material suppliers.[5]

Conclusion

The Court's injunction covering Section 5.5(e) and portions of Section 5.2 of the 2023 Final Rule limits the scope of these changes and, in many ways, takes the DBA back to the basics: only mechanics and laborers are covered by the DBA. In addition, by striking down the DOL's operation of law provision, the Court also refocused DBA coverage issues back to a review of the clauses and terms included in a solicitation or contract.

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[1] *See* 40 U.S.C. § 3142(c).

[2] *Univs. Research Ass'n v. Coutu*, 450 U.S. 754,784 n. 38 (1981); *BellSouth Commc'ns Sys., Inc.*, ASBCA No. 45955, 94-3 BCA ¶ 27,231.

[3] 40 U.S.C. § 3142(a).

[4] *Id.* § 3142(c)(1).

[5] It is worth noting that the Court also struck down part of the 2023 Final Rule under the Regulatory Flexibility Act (RFA), citing a variety of deficiencies.

If you have any questions regarding how this injunction will affect your business, please feel free to contact the Cozen O'Connor team.