

## Davis-Bacon Act Subcontractor's Obligation to Pay Prevailing Wages

Must all subcontractors on federal projects that require the payment of prevailing wages pay them? While the law seems to indicate they do, closer examination of the statutes, regulations and cases may reveal something different in certain situations.

The Davis-Bacon Act provides that every government contract (which is based upon specifications requiring prevailing wages) shall contain stipulations that the contractor *or subcontractor* shall pay all laborers employed directly on the site of the work, prevailing wages. The Act also provides that there may be withheld from the contractor so much of accrued prevailing wage payments necessary to pay the laborers employed by the contractor *or any subcontractor*. Further, the Act states that every contract shall contain a provision that if any laborer employed by the contractor *or any subcontractor* directly on the site is not paid prevailing wages, then the contracting officer may terminate the contractor's right to proceed. The contractor *and subcontractor* must furnish a statement on the wages paid.

Reading these statutory sections together, the intent is apparent that all laborers working on a site subject to the Davis-Bacon Act are to be paid prevailing wages; and that both the contractor *and any subcontractor* are required to pay and report those wages. However, the statutes are unclear regarding the contractual relationships between the prime contractor and the first tier subcontractor and among the lower tier subcontractors, and whether those relationships bear on a subcontractor's duty to pay the prevailing wages.

The Davis-Bacon Act and related Acts requires the contracting officer to place contract provisions in each contract where minimum prevailing wages are required. The Act requires the government to withhold from payment to the contractor any monies needed to assure the payment of prevailing wages by the contractor *and/or any subcontractor*, and requires the submission of certified weekly payrolls of the subcontractor and the contractor, and finally that the contractor *or subcontractor* make the required records available for inspection and copying by the government.

This regulatory scheme seems to indicate that both the contractor and the subcontractor are obligated to pay prevailing wages on the project; but that the prime contractor is responsible for collecting and submitting the subcontractor's payroll records. Again, nothing is said about the contractual relationships between the prime contractor and the first-tier subcontractor and the obligations of the lower tier subcontractor to pay the prevailing wages.

29 CFR §5.5(6) begins to address this issue:

"The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR §5.5(a)(1) through (10) . . . and also a clause requiring a subcontractor to include those clauses in any lower tier subcontracts."; and

"The prime contractor shall be responsible for the compliance by any subcontractor or any lower tier subcontractor with all clauses in 29 CFR §5.5."

However, what happens in the event that the prime contractor, or any lower tier subcontractor, fails to insert such a clause in a contract; and, what if there is no written contract at all between the prime and the subcontractor or between lower tier subcontractors?

At least one court has ruled that the Davis-Bacon minimum wage requirements which are deemed incorporated into prime contracts involving construction of federal buildings did not apply to subcontracts to perform certain work on a time and material basis, which contained no provision binding the sub-subcontractor to pay wages in accordance with the Act. The reason stated was that there exists no contractual assumption of responsibility by lower tier subcontractors to pay Davis-Bacon wages, thus implying that unless the requirements of 48 U.S.C. §3141, *et seq.* are passed down to the lower tier subcontractors by virtue of a written subcontract requirement, the obligation set forth in the statutes for the prime

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contractor and lower tier subcontractors to pay prevailing wages does not apply to those subcontractors.

In conclusion, it seems clear from the court's ruling that:

1. The prime contractor is accountable for a lower tier subcontractor's failure to pay prevailing wages; and

2. Unless the prime contract obligation to pay prevailing wages is passed down to the first tier subcontractor, and lower tier subcontractors, by written contract (incorporating the provisions of 29 CFR §5.5(a)(6)-(10)), neither the first tier subcontractor nor lower tier subcontractors are responsible for payment of prevailing wages; and

3. Actual notice of the statutory requirements that the job is a prevailing wage job does not create liability under the prevailing wage act without the corresponding contractual obligation being passed down by written contract; and

4. Finally, arguments of general fairness and equity will not trump the absence of the contractual provisions required by the regulations.

In addition, contractors should be mindful that 29 CFR §5.5(a) mandates that the contractor and lower tier subcontractor *shall insert the prevailing wage clauses* found in 29 CFR §5.5(a) in the contracts. There is a serious issue as to whether simply incorporating those clauses by reference will suffice.

Therefore, despite the clear wording of the statute, the passing down of contractual requirements in writing is a must. Prudence dictates that bonded prime contractors and subcontractors be careful about placing any lower tier subcontractors on prevailing wage projects without binding them to the prevailing wage requirements of the statute.

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