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BLOG

Nationwide Injunction on Sections of Davis-Bacon Act Final Rule Affects Government Contracts and Grants

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With the Davis-Bacon Act (DBA) as a significant consideration for many federal contractors and grant recipients on federally funded construction contracts, grants, and loans, compliance with the Department of Labor's (DOL) 2023 updates to the DBA regulations (the DOL Final Rule) is now hanging in the balance. On June 24, 2024, a federal court in the Northern District of Texas issued a nationwide preliminary injunction partially preventing the enforcement of certain parts of the DOL Final Rule. In *Associated General Contractors of America v. U.S. Dept of Labor*, Case No. 5:23-CV-0272-C (N.D. Tex. Jun. 24, 2024), the court enjoined, in part, performance of sections 5.2 and 5.5 of the DOL Final Rule, based on a finding that the DOL Final Rule adversely affects construction contractors.

The Court first rejected the DOL's Final Rule's "operation of law" provision. The "operation of law" provision stated that new DBA wage determinations "will be effective *by operation of law*, whether or not they are included or incorporated by reference into [a DBA covered contract], unless the Administrator grants a variance, tolerance, or exemption . . . ." 29 C.F.R. § 5.5(e) (emphasis added). Thus, the "operation of law" provision would effectively read the DBA into any federally funded construction contract, grant, or loan, by implication through the *Christian* Doctrine, even if the responsible contracting officer declined to include it in the solicitation or contract award.

The court's decision appeared to be rooted in principles of fairness: "Contractors bidding on a contract need to know up front what the requirements are for the contract so they can bid accordingly." Preliminary Injunction, ¶ 17 at 7. With respect to the "operation of law" provision, the plaintiffs testified to the practical challenges faced with bringing subcontractors into compliance with the DBA after the project started or after a contract is completed, based on the subsequent inclusion of the DBA into a covered contract. The court agreed, finding that "doing so to be in full compliance with the DBA is nearly impossible." *Id.* ¶ 20 at 9-10. The court explained, "when it comes to DBA, contractors must know if the DBA requirements are in the contract or not," and "Contractors need to know this so they can inform their subcontractors that they must abide by Davis-Bacon prevailing wages and file certified payrolls." *Id.* ¶ 17 at 7. The court also found that the DOL Final Rule conflicted with the DBA statute, which expressly requires that all covered contracts "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics." *Id*. ¶ 42 at 26 (citing 40 U.S.C. § 3142(a)). The court found that the DOL Final Rule's "operation of law" provision cannot be reconciled with this requirement of the DBA. *Id*. ¶ 45 at 27.

The court also partially enjoined material supplier provisions of Section 5.2 of the DOL Final Rule, which expanded DBA coverage to contractors that use their own material suppliers on a DBA-covered contract. *Id*. ¶ 55 at 30. The

court took issue with the fact that the DOL Rule imposed the DBA requirements on contractors that used their own material suppliers, but it did not similarly impose the rule on material suppliers that do not otherwise provide construction services. "Contractors that have made a business investment in their business by expanding to include commercial material supply are now competitively disadvantaged because they must pay prevailing wages and administer the DBA requirements where they use their own material supply operations on their projects, where their competitors who only provide material supply on the project are not subject to the DBA under the Final Rule." *Id*. ¶ 58 at 30-31.

Lastly, the court invalidated the DOL Final Rule transportation provisions of Section 5.2, which imposed DBA requirements on drivers engaged in "covered transportation," including pickup, dropoff, loading of materials, and waiting time, so long as time is not *de minimus*. The court held that the DOL improperly expanded the scope of the DBA coverage beyond the statutory purview. Specifically, DBA coverage under the statute is for:

> *mechanics and laborers* employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.

40 U.S.C. § 3142(c)(1) (emphasis added). In addition, the DBA limits coverage to mechanics and laborers working in "construction, alteration, or repair, including painting and decorating, of public buildings and public works . . . ." 40 U.S.C. § 3142(a). The court reasoned that truck drivers "are not de facto 'mechanics and laborers employed directly on the site of the work,'" Preliminary Injunction, ¶ 51 at 28, and they do not perform work in any of the covered fields. The court reasoned that "[t]he essence of the material delivery exemption is the *function* that is being performed. That function is not a 'construction' one within the meaning of the DBA." *Id.* ¶ 54 at 29. Therefore, the court found that the DOL exceeded the plain language of Congress in issuing the new regulations.

PRACTICAL EFFECTS FOR CONTRACTORS AND GRANT RECIPIENTS

Importantly, the court found that because the DOL Final Rule exceeded the plain language of Congress, the regulations violate the law, and the court did not defer to the DOL's interpretation of the DBA. This is significant because on June 28, 2024, four days after the court's ruling, the United States Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* put an end to the practice of *Chevron* deference, which required courts to defer to an agency's interpretation of ambiguous statutes. Given that the court did not defer to the DOL's interpretation of the DBA, it is now more likely that the court's ruling enjoining the enforcement of the new DBA regulations will prevail.

Given the influx in federally funded infrastructure projects under the Bipartisan Infrastructure Law, CHIPS Act, and Inflation Reduction Act, the impact of the preliminary injunction—if it holds—is likely to be far-reaching. The impact will be felt by contractors, subcontractors, recipients, and subrecipients of any federal contracts, grants, and loans for federally funded infrastructure projects—particularly those that do not expressly incorporate the DBA requirements.

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Please contact our Winston Government Contracts & Grants team if you have questions about this legislation or its implications for your business: Elizabeth Leavy, Lawrence Sher, Lawrence Block, William Kirkwood, Frank DiNicola, and Michael Hill.

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