SPEAKING OUT— In My Opinion, It's Time to Rescind the Wage Rate Requirements (Construction) Statute

Phil Bail, CPCM, Fellow • Jul 2018 Contract Management magazine

But what is the Wage Rate Requirements (Construction) Statute?[1] It's actually a 1931 law historically known as the "Davis-Bacon Act" (DBA).[2]

(Note: I will use the historical name "Davis-Bacon" or "DBA" throughout this article instead of the new title for ease of reference. This name change is unfortunate, because the congressmen responsible for this law, and their reasons for introducing it, are lost if the historical name is forgotten, but more about this later.)

This is a good time to look at existing requirements that affect federal procurement for several reasons. First, President Trump signed an Executive Order[3] requiring the elimination of two regulations for every new regulation. Second, a Section 809 Panel[4] has been convened to streamline and improve defense acquisition. Third, Jon Huntsman Jr., former governor of Utah, and Joe Lieberman, former U.S. senator from Connecticut, have suggested that all federal regulations be reviewed every 15 years.[5] So where should we begin?

A good starting point is the DBA.

THE ORIGINS OF DAVIS-BACON

Before we begin, it is first important to look at the origins of the DBA—i.e., why was it passed into law in the first place? Put simply, the act was intended to prevent the purchasing power of the federal government from driving down construction wages during the Great Depression.[6] A noble aim, to be sure; however, evidence exists that there may have been a more sinister intent underpinning this aim.

To put it bluntly, one of the reasons the DBA was enacted was to keep non-union companies that employed a large percentage of black Americans from winning government projects. In 1930, the year before the law passed, the black jobless rate was lower than the white rate, and William Green, then president of the American Federation of Labor (half of the modern AFL-CIO), testified before Congress that "colored labor is being brought in to demoralize wage rates.[7]" In the Depression-era 1930s, black construction workers weren't usually unionized, and after its enactment, the DBA established a preference for unionized workers.

(An argument could be made that since its original enactment was motivated by discrimination against black American workers because of their race, the DBA violates equal protection and is therefore unconstitutional.[8])

WHY IS THE NAME "DAVIS-BACON" STILL IMPORTANT?

As previously mentioned, the DBA is now called the "Wage Rate Requirements (Construction) Statute." However, in using this newly minted name, the origins of the act are lost to history. Only by calling the act by the names of its sponsors—James Davis, a senator from Pennsylvania, and Robert Bacon, a representative from Long Island, New York—can the American public fully understand its origins and its intent to discriminate against black Americans.

The story of Davis-Bacon actually began in 1927, when a contractor from Alabama won a bid to build a Veterans Bureau hospital in Long Island, New York. He brought a crew of black construction workers from Alabama to work on the project. Appalled that blacks from the South were working on a federal project in his district, Rep. Robert Bacon of Long Island submitted H.R. 17069, "A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Comply with State Laws Relating to Hours of Labor and Wages of Employees on State Public Works." This bill was the antecedent of the DBA, and this is why the name "Davis-Bacon" is still important.

RESCINDING DAVIS-BACON

The Great Depression ended in the 1930s, but the DBA continues to be enforced to this day. Putting aside the DBA's controversial origins, here in the modern day, why

should the DBA be rescinded? In simple terms, because the DBA wage rate requirements discriminate against non-union contractors and increase acquisition costs to the government and the American taxpayer.

Several decades ago, Richard Nixon, among other presidents, temporarily suspended the DBA.[9] Nixon explained his actions by saying the DBA prevents "taxpayers from getting their money's worth" and harms "the construction worker himself" by hindering job creation.

Let's take a brief look at what the DBA actually says. The statute states:

> [M]inimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.[10]

According to the Heritage Foundation, however, the methodology used to calculate the "prevailing" wage sets it close to union wage scales, and well above average wages.[11]Further, a Beacon Hill Institute report states that DBA rates average 22% above market wages.[12] This needlessly inflates the cost of federal construction and wastes taxpayer dollars. Even construction projects in various states are negatively affected by "mini" DBA-type legislation, as explained in a 2015 special report from the Badger Institute, a free-market think tank.[13]

THE BOTTOM LINE—ARGUMENTS FOR OR AGAINST DAVID-BACON

The DBA increases the cost of government construction projects while causing contractors to pay its employees more on projects in which the DBA applies. A 2013 Congressional Budget Office (CBO) report estimated that repealing the law would save $13 billion between 2018 and 2026.[14]

Consider the following example to better understand the disparity between a DBA wage rate and a prevailing wage rate:

> Take prevailing wages in New York…. According to the state's payment schedule for FY2016, contractors are required to pay bricklayers a wage rate of $52.59/hour while the typical wage for a bricklayer in New York is $26 per hour. When prevailing wages (including fringe benefits) are higher than the wages and benefits that would be paid in the absence of the [DBA], the act distorts the market for construction workers. In that situation, federally funded or federally assisted construction projects are likely to use more capital and less labor than they otherwise would, thus reducing the employment of construction workers.[15]

Of course, there are the enduring arguments that if a company bids on a government construction project and doesn't have to pay its employees "prevailing wages"—

1. The project will be performed in a shoddy manner, and
2. Employees working on the project will not receive fair payment for the work they perform.

However, neither of these arguments are supportable. Whether the DBA applies to a government construction project or not, the company performing the project still must meet prescribed construction standards and the specific requirements of the government contract. The contractor will also have to pay its employees market wages for the specific task each employee performs. After all, if a company does not offer competitive pay to its employees, how can it expect to keep them? Typically, just as required by the DBA, a laborer will receive less pay/hour than a mechanical engineer.

Further, the paperwork associated with the DBA discriminates against small firms, and the DBA is difficult for the federal government to administer effectively. When I was an Air Force contracting officer, I spent at least one day per week reviewing contractors' timesheets and interviewing onsite employees to see if the pay they received matched the timesheets turned in by their employers. This is simply not productive. The CBO report previously mentioned also states that the law discriminates against small firms and a repeal would lower administrative spending on government projects. In addition to reducing the cost to taxpayers of federal construction projects, repealing the DBA will make it easier for smaller construction companies to compete against large, unionized contractors.

On the other hand, if one of the objectives of federal projects is to increase earnings for the local population, repealing the DBA might undermine that aim.

CONCLUSION

Rescinding the DBA will make federal contracting more responsive to its customers, result in lower overall costs, and open the market to companies that have been unfairly kept out of the market. It is time to recognize the DBA for what it is and encourage Congress to rescind it. ***CM***

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Endnotes

[1] FAR 1.110, Positive Law Codification.

[2] *Federal Acquisition Circular* 2005-73 (April 29, 2014).

[3] Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs" (January 30, 2017).

[4] *See* https://section809panel.org/.

[5] Jon M. Huntsman Jr. and Joe Lieberman, "Stop Fighting, Start Fixing," *Fortune* (May 1, 2016).

[6] James Sherk, "Why the Davis-Bacon Act Should Be Repealed," The Heritage Foundation (January 12, 2012).

[7] Damon Root, "Repeal the Davis-Bacon Act," Reason.com (March 24, 2010).

[8] *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

[9] President Richard Nixon, "Statement on Suspending Davis-Bacon Act Provisions for Federal Construction Projects" (February 23, 1971), The American Presidency Project, *available at*www.presendency.ucsb.edu.

[10] 40 USC 3142.

[11] Sherk, *see* note 6.

[12] Sarah Glassman *et al.*, "The Federal Davis-Bacon Act: The Prevailing Mis-measure of Wages," Beacon Hill Institute (February 2008), *available at* www.beaconhill.org/BHIStudies/

PrevWage08/DavisBaconPrevWage080207Final.pdf.

[13] Previously known as the Wisconsin Policy Research Institute, *available at*www.badgerinstitute.org/BI-Files/Special-Reports/WPRI_WageSpecial_20p.pdf.

[14] *See, generally*, Congressional Budget Office, "Options for Reducing the Deficit 2017-2027" (December 2016): 115, Option 27, "Repeal the Davis-Bacon Act."

[15] Andy Koenig, "Boost American Infrastructure by Repealing Davis-Bacon," *Forbes*(December 19, 2016).