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Understanding the Davis-Bacon Act

Know the laws to survive an audit and avoid compliance issues.

Contractors who work on publicly-funded projects must deal with many regulations, especially involving how they compensate employees. Some states even have their own regulations. Understanding which laws apply to which projects—and where to seek advice—is enough to frustrate the most savvy construction business owner.

Over the past two and a half years, more contractors have started working on government projects, partly due to the economy. Understanding how to comply with laws that apply to public works jobs can be overwhelming.

The Davis-Bacon Act is one of the most important laws open-shop contractors must follow. This law requires all contractors and subcontractors performing work on federally-funded construction contracts to pay their laborers and mechanics no less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area.

The U.S. Secretary of Labor determines prevailing wage rates and fringe benefits, and the benefits are specified in the terms of the request for bid. Thirty-one states have also enacted state prevailing wage legislation (commonly referred to as “Little Davis-Bacon” provisions). These laws require prevailing wage and fringe benefit payments on state and federal projects.

Not only do these laws protect contractors, but they also save them money on payroll. Contractors typically pay



employees the base amount in cash and then choose from one of the following areas to pay the fringe portion:

1. Increased vacation time and holidays
2. Paying into an approved apprenticeship program
3. Furnishing bona fide fringe benefits
4. Paying cash, and treating it as wages

Many contractors pay some or the entire mandatory fringe benefit package as wages because it is the easiest way to satisfy U.S. Department of Labor (DOL) compliance. It is also the most costly method.

When contractors use the prevailing

wage's fringe portion to provide bona fide benefit plans, it is taken off payroll, which means this money is exempt from payroll taxes [such as the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA) and the State Unemployment Tax Act (SUTA)] as well as other expenses including workers' compensation and general liability insurance.

Benefits that might be included in a bona fide benefit plan include retirement plans and medical, dental, vision, disability and life insurance.

Although rates for SUTA and workers' compensation vary among states,

these expenses easily add 25 cents to each dollar paid as additional cash wages (and this is a conservative estimate). Savings realized by using the fringe benefit portion for benefits can easily create enough savings over the project's life to make the difference between a winning bid and second place.

Scrutiny for compliance is on the rise with not only the Davis-Bacon Act but also other laws that apply to projects using taxpayer dollars. The DOL has significantly increased its enforcement staff and audit activity, and its 2012 budget includes millions of dollars earmarked for hiring more investigative staff and enforcement personnel.

Contractors who work on government projects are almost guaranteed that they will be audited, along with their subcontractors.

PREPARATION AND PREVENTION

Independent Contractor vs. Employee

When submitting its 2012 budget request, the DOL specifically mentioned that the construction industry tends to misclassify workers as independent contractors. Given the multi-departmental attention on this issue, contractors should analyze how they have classified workers, and carefully document their rationale for this classification. IRS Publication 15-A includes a section on determining whether a worker meets the criteria for classification as an independent contractor.

Timely Contributions

Another key area scrutinized is whether timely contributions are made to bona fide benefits plans for prevailing wage workers. Although the Davis-Bacon Act



requires that contributions be made at least quarterly, it is wise to make monthly contributions. This makes it easier to correct discrepancies.

Subcontractor Compliance

Another area receiving attention is whether subcontractors are compliant with the laws. Many general contractors do not realize it is their responsibility to make sure their subcontractors are compliant.

Imagine a situation in which a lower-level subcontractor works on a prevailing wage job but does not realize it is a prevailing wage job. Prime contractors should inform subcontractors, and they should consider including contract language that gives their subs the right to review records and schedules and conduct their own audits to ensure compliance.

NONCOMPLIANCE PENALTIES

Noncompliance penalties can be steep and may even include debarment from work on future contracts. In December 2010, the DOL investigated a company that had done work on three federally-funded housing construction projects in New York City. The DOL determined the company failed to do the following: pay prevailing wage rates and fringe benefits to some employees, pay some employees for all hours worked, pay employees

overtime and submit accurate certified payroll records to reflect all hours worked by employees. In addition to paying back wages, the company will be debarred from working on future federally-funded contracts for a period of three years.

To better understand the regulations, partner with a company that has both expertise and experience assisting clients with the audit process. When choosing a partner, contractors should investigate how long a bona fide benefits plan provider has worked with government contractors and whether compliance assistance is provided in-house or outsourced at an additional cost. Contractors should also look for a partner who has experience with compliance audits.

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ONLINE RESOURCE

www.irs.gov

IRS Publication 15-A, available at www.irs.gov, includes a section on determining whether a worker meets the criteria for classification as an independent contractor.