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Homeland Security and the Davis-Bacon Act

name redacted
Legislative Attorney
American Law Division

Summary

This report discusses section 194 of the Lieberman substitute amendment to S. 2452, the National Homeland Security and Combating Terrorism Act of 2002. Section 194 would require all laborers and mechanics employed by contractors or subcontractors on construction projects “financed in whole or in part with assistance received under this Act” to be paid locally prevailing wages in accordance with the Davis-Bacon Act. In addition to providing background information on the Davis-Bacon Act, this report considers the effect section 194 could have on construction projects undertaken by agencies or related to programs transferred to the proposed Department of Homeland Security. This report will be updated in response to relevant legislative activity.

Section 194 of the Lieberman substitute amendment to S. 2452, the National Homeland Security and Combating Terrorism Act of 2002, would require all laborers and mechanics employed by contractors or subcontractors on construction projects “financed in whole or in part with assistance received under this Act” to be paid locally prevailing wages in accordance with the Davis-Bacon Act.¹ This section has generated concern among those who believe that the payment of locally prevailing wages would dramatically increase the cost of federally-funded homeland security construction projects. In particular, the Bush Administration contends that section 194 would undermine disaster relief efforts by increasing the cost of federal disaster relief construction by “hundreds of

¹ S.2452, 107th Cong. § 194 (2002) (Lieberman substitute). Section 194 provides, in its entirety:

(a) IN GENERAL.—All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this Act shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 276a et seq.).

(b) SECRETARY OF LABOR.—The Secretary of Labor shall have, with respect to the enforcement of labor standards under subsection (a), the authority and functions set forth in Reorganization Plan Number 14 of 1950 (5 U.S.C. App.) and section 2 of the Act of June 13, 1934 (48 Stat. 948, chapter 482; 40 U.S.C. 276c).

H.R. 5005, the House-passed homeland security measure, does not have a Davis-Bacon provision.

millions of dollars each year.”² Those who generally support the application of the Davis-Bacon Act maintain that it helps stabilize the local construction industry, and tends to assure higher quality work as more competent and productive workers will be hired if the payment of locally prevailing wages is required.³

This report provides background information on the Davis-Bacon Act, and discusses the possible effect of section 194 on construction projects undertaken by agencies or related to programs transferred to the proposed Department of Homeland Security.

Background

Passed in 1931, the Davis-Bacon Act requires the payment of not less than locally prevailing wages and fringe benefits to mechanics and/or laborers on a federally-financed project when the following conditions are met: (1) there is a contract in excess of \$2,000; (2) the United States or the District of Columbia is a party to the contract; and (3) the contract is for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the United States or the District of Columbia.⁴ The Davis-Bacon Act reflects Congress’ interest in giving the government “the power to require its contractors to pay their employees the prevailing wage scales in the vicinity of the building projects.”⁵

Locally prevailing wage rates are determined by the Secretary of Labor in light of wages paid to corresponding classes of laborers and mechanics employed on projects of a similar character to the contract work in the city, town, village, or civil subdivision of the state in which the work is performed.⁶ The government may terminate a contract with a contractor if it is discovered that locally prevailing wages have not been paid to any laborer or mechanic employed on the project.⁷ Following termination, the government may contract for the completion of the work and hold the original contractor liable for any excess costs incurred.⁸

The Comptroller General of the United States is authorized to distribute a list of individuals or firms found to have disregarded their obligations to laborers and mechanics

² Letter from Gov. Tom Ridge, Homeland Security Advisor, to Sen. Thomas Daschle (Aug. 1, 2002) (on file with author).

³ See CRS Report 94-908, *Davis-Bacon: The Act and the Literature*.

⁴ See 40 U.S.C. § 276a.

⁵ S.Rept. No. 71-1445, at 1-2 (1931). For a more detailed history of the Davis-Bacon Act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*. The Davis-Bacon Act establishes a wage floor for covered construction. In practice, conditions may require contractors to pay a higher rate of wages.

⁶ *Id.*

⁷ 40 U.S.C. § 276a-1.

⁸ *Id.*

to all departments of the government.⁹ No contract shall be awarded to the persons or firms appearing on the list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years after the date of publication of the list.¹⁰

In addition to the Davis-Bacon Act itself, Congress has added prevailing wage provisions to approximately fifty-seven statutes that provide financial assistance for construction projects through grants, loans, and other funding mechanisms.¹¹ These so-called “related acts” involve construction in areas such as transportation, housing, air and water pollution reduction, and health. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, the federal statute that authorizes the Federal Emergency Management Agency (“FEMA”) to provide funds for the repair and reconstruction of facilities following a major disaster and for construction related to emergency preparedness, also includes a prevailing wage provision.¹² Section 611(j)(8) of the Stafford Act requires the payment of locally prevailing wages to laborers and mechanics employed on construction projects related to emergency preparedness.¹³ However, section 611(j)(8) does not apply to repair or reconstruction projects involving state or local public facilities, private nonprofit facilities, and owner-occupied private residences following a major disaster.¹⁴ Opponents of section 194 maintain that if the Senate homeland security proposal was enacted, locally prevailing wages would be required for laborers and mechanics that work on these kinds of projects.¹⁵

⁹ 40 U.S.C. § 276a-2.

¹⁰ *Id.*

¹¹ See 29 C.F.R. pt. 1, app. A.

¹² 42 U.S.C. § 5121 et seq..

¹³ 42 U.S.C. § 5196(j)(8). See 42 U.S.C. § 5195a(3) (The term “emergency preparedness” means “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.” Measures to be undertaken in preparation for anticipated hazards include the construction of shelters, shelter areas, and control centers.).

¹⁴ See 42 U.S.C. §§ 5172(a) (“The President may make contributions – (1) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility which is damaged or destroyed by a major disaster and for associated expense incurred by such government; and (2) to a person who owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of such facility and for associated expenses incurred by such person.”), 5174(c)(2)(A) (“The President may provide financial or other assistance under this section to individuals and households to respond to the disaster-related housing needs of individuals and households who are displaced from their predisaster primary residences or whose predisaster primary residences are rendered uninhabitable as a result of damage caused by a major disaster.”). Section 4-203 of Executive Order No. 12148 provides for the delegation of functions vested in the President to the Director of the Federal Emergency Management Agency.

¹⁵ See Associated Builders and Contractors, *Senate Committee Ties Davis-Bacon to Homeland Security*, at <http://www.abc.org/newsline/august022002/davisbaconn102.html> (last visited Aug.

While construction that satisfies the three Davis-Bacon conditions would be covered by the Davis-Bacon Act itself, other construction would not require the payment of locally prevailing wages unless a related act imposes coverage. For example, construction on an owner-occupied private residence occurring after a major disaster and funded with assistance provided under the Stafford Act would not require the payment of locally prevailing wages. Such construction would not involve the United States or the District of Columbia as a party to the contract for construction. In addition, section 611(j)(8) of the Stafford Act applies only to construction projects related to emergency preparedness and not disaster relief projects. Thus, section 194 or a similar provision would be needed if Congress wanted to require the payment of locally prevailing wages on disaster relief projects. The Stafford Act appears to be the only related act to involve either an agency or program that would be transferred to the proposed Department of Homeland Security.

Homeland Security

The Senate homeland security proposal provides for the transfer of twenty-two agencies and programs to a new Department of Homeland Security.¹⁶ FEMA, the U.S. Coast Guard, and the Animal and Plant Health Inspection Service are among the entities that would be transferred. Section 186 of the Senate proposal provides for the transfer of assets, unexpended balances of appropriations, authorizations, and allocations to the Secretary of Homeland Security for appropriate allocation.¹⁷ Funding for fiscal year 2004 would be provided pursuant to a budget request submitted by the President for the department.¹⁸ Opponents of section 194 seem to believe that by providing for the transfer of unexpended balances of appropriations and authorizations, and because future funding for the transferred agencies and programs would appear to flow from budget requests for the department, disaster relief construction would be “financed in whole or in part with assistance received under this Act,” subject to the prevailing wage requirement.¹⁹

¹⁵ (...continued)

22, 2002) (“The legislation . . . would require Davis-Bacon to cover everything from disaster relief funds to preparedness grants.”).

¹⁶ For additional discussion on the organization of the proposed new department, see CRS Report RL31493, *Homeland Security: Department Organization and Management*.

¹⁷ S.2452, 107th Cong. § 186 (2002) (Lieberman substitute) (“Except as otherwise provided in this title, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the agencies transferred under this title, shall be transferred to the Secretary for appropriate allocation, subject to the approval of the Director of the Office of Management and Budget and to section 1531 of title 31, United States Code. Unexpended funds transferred under this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.”). For additional discussion on the transfer of appropriations, see CRS Report RL31514, *Department of Homeland Security: Appropriations Transfer Authority*.

¹⁸ S. 2452, 107th Cong. § 189(g) (2002) (Lieberman substitute) (“Under section 105 of title 31, United States Code, the President shall submit to Congress a detailed budget request for the Department for fiscal year 2004.”). Reference to the department’s fiscal year 1995 budget request is made in section 197(c) of the Senate proposal.

¹⁹ The basis for finding disaster relief construction to require the payment of locally prevailing (continued...)

The operative language of section 194 would seem to be “assistance received under this Act.” The U.S. Supreme Court has observed that “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”²⁰ The ordinary meaning of the verb “receive” is “to come into possession of” or to “acquire.”²¹ Here, it could be argued that funding for disaster relief projects would be acquired following the transfers prescribed by the Senate proposal and as a result of future budget requests. However, an alternate argument may be available.

The Senate proposal authorizes appropriations for at least two new programs. Section 135(d) provides for the creation of an Acceleration Fund to support research and the development of technologies relevant to homeland security.²² The proposal authorizes to be appropriated \$200,000,000 for the fund for fiscal year 2003, and such sums as are necessary in subsequent fiscal years. Section 153 establishes the Emergency Preparedness Enhancement Pilot Program.²³ Under the program, the department shall award grants to private entities to “pay for the Federal share of the cost of improving emergency preparedness, and educating employees and other individuals using the entities’ facilities about emergency preparedness.”²⁴ The proposal authorizes to be appropriated \$5,000,000 for each of fiscal years 2003 through 2005. It may be argued that section 194 applies only to construction undertaken in relation to these new programs. Such construction would be financed with assistance acquired under the proposal. In this case, with funds specifically authorized by the Act. Section 194 would seem to ensure that locally prevailing wages are paid to laborers and mechanics that work on these projects.

Whether section 194 is meant to apply to all construction receiving funds under the proposal, including construction funded through transfers of authorizations and unexpended appropriations, or simply to construction related to programs specifically authorized by the proposal is not clear. The ordinary meaning of the verb “receive” would suggest the payment of not less than locally prevailing wages on all construction projects so long as assistance was somehow acquired under the proposal. Senator Joseph I. Lieberman, sponsor of the Senate proposal, is reported to have said that the proposal requires prevailing wages for construction workers so long as federal money is spent on “substantial renovation projects.”²⁵ It is not clear how much construction would be

¹⁹ (...continued)

wages pursuant to section 194 does not appear to have been articulated by the Administration, the Associated Builders and Contractors, or any other organization. However, the most likely argument for finding a requirement to pay locally prevailing wages would seem to be the one provided here.

²⁰ *Park ‘n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). See also *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

²¹ Miriam-Webster’s Collegiate Dictionary 975 (10th ed. 1997).

²² S. 2452, 107th Cong. § 135(d) (2002) (Lieberman substitute).

²³ S. 2452, 107th Cong. § 153 (2002) (Lieberman substitute).

²⁴ S.2452, 107th Cong. § 153(a) (2002) (Lieberman substitute).

²⁵ *Senate Gears Up For Union Rights Debate Regarding New Homeland Security Employees*, (continued...)

undertaken to further the objectives of the Acceleration Fund or the Emergency Preparedness Enhancement Pilot Program. Further, if locally prevailing wages were to be paid only on construction projects related to the new programs, alternate language could have been used. Section 194 could have specified construction work financed in whole or in part with assistance *authorized* under the Act rather than assistance *received* under the Act.

Because the Senate proposal was amended at business meetings of the Senate Committee on Governmental Affairs, and not during a proceeding where a formal report would be prepared, there is no explanatory language to assist with interpreting section 194. If section 194 is meant to apply only to construction related to the new programs authorized by the proposal, language that specifies the use of assistance authorized by the proposal may be appropriate.

²⁵ (...continued)

Daily Lab. Rep. (BNA), July 30, 2002, at A-7.

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