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Davis-Bacon Suspension and Its Legislative Aftermath

William G. Whittaker
Specialist in Labor Economics
Domestic Social Policy Division

Summary

The Davis-Bacon Act of 1931 (as amended) requires that *not less than* the locally prevailing wage be paid to workers engaged in *federal contract construction*. A higher rate may be required, under the market, in order to secure a qualified workforce.

During the last week of August 2005, Hurricane Katrina gathered strength in the Atlantic and moved against the gulf states. On September 8, 2005, amid the devastation left in Katrina's wake, President George W. Bush suspended the Davis-Bacon Act as it applies to certain jurisdictions in Florida, Alabama, Mississippi, and Louisiana. Although the President has the authority, under Section 6 of the Act, to render such suspensions during *a national emergency*, that authority has rarely been utilized.¹ This report analyzes the legislative aftermath of the suspension. It will be updated as conditions warrant.

The Davis-Bacon Act: An Introduction

During the years following World War I, various efforts were made to enhance the level of professionalism within the construction industry. Where federal contracts were concerned (with their low-bidder specifications), some contractors would bid above their level of expertise and, having won a particular contract, would then attempt to hire a workforce. Some were successful in this enterprise; others were not. Some bidders engaged in *bid-brokering*: i.e., a systematic acquisition of contracts, followed by a leasing-out of the work or its transfer to another contractor whose workforce was paid at an extremely low rate. There was, some suggested, a persistent lowering of standards and construction quality, but with no concern for the workers actually engaged in construction

¹ For a history of the suspension initiative, see CRS Report RL33100, *The Davis-Bacon Act: Suspension*, by William G. Whittaker. For legal analysis of the suspensions of the act, see CRS Report RS22265, *Prevailing Wage Requirements and the Emergency Suspension of the Davis-Bacon Act*, by John R. Luckey and Jon O. Shimabukuro.

nor with the ultimate consumer of the work.² In the process, some firms were viewed as less-than-competent and were given the opprobrious title *fly-by-night* operators.

As the Nation moved into the Great Depression of the 1930s, when government was investing substantial amounts in public construction, such itinerant jobbers and firms, basing their operations on low wages, were seen as subverting the recovery process. The economic impact of publically subsidized work, intended to spur the economy of an especially depressed area, was defused: the effort to provide work (and contracts) for distressed communities was frustrated.

In 1931, Representative Robert Bacon (R-NY) and Senator James Davis (R-PA), the latter having served as Labor Secretary in the cabinets of Presidents Harding, Coolidge and Hoover, proposed what would become known as the Davis-Bacon Act.³ The initial enactment seems to have satisfied very few; but, given an Executive Order (No. 5778) by President Hoover in 1932 and a restructuring of the statute by Congress in 1935 (P.L. 74-324), the Davis-Bacon Act was modified and quickly became a *generally* accepted part of federal labor-management policy. Gradually, the provisions of Davis-Bacon came to be added to a diverse number of statutes involving public works and related construction.

By the late 1970s, President Carter commenced a further restructuring of the act — a process carried on by President Reagan in the 1980s. During subsequent years, criticism of the act has tended to reflect ideological positions: some, generally conservative, in opposition; some, mostly trade unionists and contractors operating with union crews, in support.⁴

Among labor laws, Davis-Bacon is *widely* known but it may not be *well* known. The Act provides a wage floor and is geared to specific types of construction: i.e., residential, building, highway, and heavy construction. Wage levels are calculated on a locality basis, generally on a county level. Although often mislabeled, the Davis-Bacon wage *is not necessarily the union wage* — though, in cases where the union wage actually prevails, it may be that the Davis-Bacon rate is indeed the union rate. Conversely, the wages paid on Davis-Bacon projects may be somewhat higher than prescribed by the Act because of market considerations. Finally, Davis-Bacon applies only to federally contracted

² Inter alia, see: Lloyd Smith, “To Eliminate Irresponsible Bidders,” *The Constructor*, Jan. 1925, pp. 23 and 64; “When Low Bids Are Too Expensive,” *The Constructor*, Feb. 1930, pp. 40-41 and 58; C. W. Butts, “The Necessity for Prequalification: Over Optimism on the Part of Contractors Requires a Check,” *The Constructor*, Mar. 1930, pp. 40-41; E. A. St. John, “Cooperation Eliminating Irresponsibility,” *The Constructor*, Apr. 1930, pp. 35-36; and Hard Facts About Contractors,” *The Constructor*, Sept. 1930, pp. 28-30.

³ P.L. 72-798, signed into law by President Hoover on Mar. 3, 1931.

⁴ See testimony of Labor Secretary William N. Doak in U.S. Congress, Senate Committee on Manufactures, *Wages of Laborers and Mechanics on Public Buildings*, hearings on S. 5904, 71st Cong., 3rd sess., Feb. 1931, pp. 2-3. See also: “Proclamations and Executive Orders, Herbert Hoover, Mar. 4, 1929 to Mar. 4, 1933,” Washington, GPO., 1974, vol. II, pp. 1066-1067; editorial, “Reinterpreting the Davis-Bacon Law,” *The Constructor*, Jan. 1932, pp. 15-16; and *Federal Register*, May 28, 1982, p. 23644. For a summary history of the act, see CRS Report 94-408 E, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whitaker.

construction — though its impact may spill over into the non-federal sector, depending upon the market and general conditions of employment.

Perhaps the most frequently asked question concerning the Davis-Bacon Act is: Would the federal government (and the taxpayers) save money if the Davis-Bacon Act were repealed or modified to narrow its scope? The short answer is: No one really knows. Conversely, might Davis-Bacon result in savings to the federal government in its purchases of construction. That, too, would seem to be an open question. One might like to say, forthrightly, that a change in the statute could have a positive or a negative impact. However, the state of current research would probably be insufficient to justify just an assertion.⁵

Suspension of Davis-Bacon

As the implications of Hurricane Katrina became known, there were increasing pressures upon the Administration for a suspension of the Davis-Bacon Act. There was controversy with some suggesting that Republicans in Congress were using the disaster as a means of advancing an agenda which they could not do under normal circumstances.⁶ Others affirmed that a “[t]emporary suspension of Davis-Bacon will help avoid costly delays that impede clean-up and reconstruction efforts along the Gulf Coast.”⁷ In addition, it was stated that “...we need to be as flexible as possible in helping the Gulf Coast region and ease the burden on state and local officials as we begin one of the largest reconstruction projects in modern history.”⁸ Others, citing the “massive rebuilding challenges ahead” urged the President to issue “a presidential proclamation to suspend Davis-Bacon until our country is once again whole.”⁹

On September 8, 2005, President George W. Bush, citing potential inflationary wage pressures, suspended the Davis-Bacon Act *as it relates to specific segments of the country*: i.e., to portions of Florida, Alabama, Mississippi, and Louisiana.¹⁰ The proclamation of suspension specified that both the act and “provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor” would be suspended.¹¹

⁵ There is an extensive literature on the Davis-Bacon Act, pro and con. See CRS Report 94-908 E, *Davis-Bacon: The Act and the Literature*, by William G. Whitaker.

⁶ Rep. George Miller, Statement to the Press, Sept. 8, 2005. See also Jonathan Weisman and Amy Goldstein, “In the Floods, Parties’ Agendas Surface,” *Washington Post*, Sept. 10, 2005, p. A4.

⁷ Rep. Tom Feeney, Statement to the Press, Sept. 7, 2005.

⁸ Letter from Reps. Charlie Norwood and Charles W. Boustany to George W. Bush, Sept. 8, 2005.

⁹ Rep. Jeff Flake, Statement to the Press, Sept. 7, 2005.

¹⁰ Concerning the procedure for suspension of such acts as the Davis-Bacon Act, see CRS Report 98-505 GOV, *National Emergency Powers*, by Harold C. Relyea.

¹¹ White House press releases, Sept. 8, 2005. Davis-Bacon has been incorporated within a series (continued...)

Post Suspension Legislation

Following the September 2005 suspension of the Davis-Bacon Act, a number of pieces of legislation were introduced that would deal in various ways with that action. Some would broaden the suspension or make it mandatory. Others would overturn that suspension.

The Flake Bill: H.R. 3684

Representative Jeff Flake was first to emerge with a Davis-Bacon proposal — a day before the President suspended the act.¹² The bill, cited as the “Cleanup and Reconstruction Enhancement Act (CARE Act),” would amend Section 3147 of Title 40 (the provision that allows the President to suspend Davis-Bacon) by adding at the end the following:

In any area that the President determines to be a major disaster under section 102(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(2)), the provisions of this subchapter shall not apply for a period of 1 year from the date on which the President makes such determination.

H.R. 3684 is short and direct. Whenever the President, in the national interest, finds it necessary to declare a “major disaster” under the Stafford Act, the Davis-Bacon Act would *automatically* be suspended for one year — in the area of concern — from the date on which the determination is made.

The bill would remove from the President what has been a discretionary policy and render it automatic — if a “major disaster” is declared. Under 42 U.S.C. 5122(2) of the the Stafford Act, a *major disaster* is defined as “including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought” or “regardless of cause, any fire, flood, or explosion” in which the President determines there is a need for “major disaster assistance.” In a statement subsequently applauding the President’s action, Representative Flake affirmed that compliance with Davis-Bacon “can add weeks to federally financed construction projects ... often driving up costs.”¹³

H.R. 3684 was introduced on September 7, 2005, and referred to the House Committee on Education and the Workforce.

¹¹ (...continued)

of other statutes, specifically or by inference, to which the Secretary’s determinations refers.

¹² The Flake bill had 29 original co-sponsors: now raised to 33. No Democrats signed onto the bill. There appears to have been no explanatory documents or introductory statement.

¹³ Rep. Flake, Statement to the Press, Sept. 8, 2005.

The Miller Bill: H.R. 3763

Introduced on September 14, 2005, the proposal by Representative George Miller would basically overturn the President's authority with respect to *the particular case of Hurricane Katrina*.¹⁴

H.R. 3763 states that, the proclamation of the President, dated September 8, 2005, or any other provision of law notwithstanding:

... the provisions of subchapter IV of chapter 31 of title 40, United States Code (and the provisions of all other related Acts to the extent they depend upon a determination by the Secretary of Labor under section 3142 of such title, whether or not the President has the authority to suspend the operation of such provisions) shall apply to all contracts to which such provisions would otherwise apply that are entered into on or after the date of enactment of this Act, to be performed in the counties affected by Hurricane Katrina and described in such proclamation.

In short, the Davis-Bacon Act (and related federal statutes) would be made to apply, after the enactment of the Miller bill, to the counties specified in the President's September 8, 2005, message. Of course, the act would continue to be applicable to other U.S. jurisdictions.

In an introductory statement, Representative Miller explained that the Davis-Bacon Act "requires that Federal contractors pay their workers at least the prevailing wage — simply the wage that is typical for their kind of job in their community." Miller continued: "Many of the workers subjected to these wage cuts [under the President's Proclamation] have lost everything — their homes, their property, their jobs, and even family members." We owe it to these "American workers" to pay them "a wage that will allow them and their families to get back on their feet."¹⁵

The Miller bill, cited as the "Fair Wages for Hurricane Victims Act," was referred to the Committee on Education and the Workforce.

The Pallone Bill: H.R. 3834

Introduced on September 20, 2005, by Representative Pallone, H.R. 3834 essentially duplicates the Miller bill except that one phrase, "...whether or not the President has the authority to suspend the operations of such provisions," has been omitted. The measure was referred to the Committee on Education and the Workforce.¹⁶

In a letter to President Bush, Pallone reportedly cited an "anti-worker, anti-union attitude that your administration has perpetuated for the past five years." And, further: "At a time when the federal government and the country should be showing compassion

¹⁴ The Miller bill had 161 original co-sponsors (now raised to 188) including one independent. One Republican was an initial co-sponsor, but has since withdrawn his name.

¹⁵ *Congressional Record*, Sept. 14, 2005, p. E1845.

¹⁶ There were no other original co-sponsors.

for the middle class and the working poor you have chosen to strip away worker's rights...."¹⁷

The Kennedy Bill: S. 1749

Introduced on September 21, 2005, by Senator Kennedy, S. 1749 is a companion to the Miller bill. The measure was referred to the Committee on Health, Education, Labor, and Pensions.¹⁸

In an introductory statement, Senator Kennedy observed that, in rebuilding the Gulf Coast, "...we are rebuilding communities and neighborhoods. And the foundation of such communities is good jobs with fair wages." Senator Kennedy estimated that from "400,000 to 1 million workers may become unemployed as a result of the hurricane, with the unemployment rate reaching 25 percent or higher in the gulf region. Many affected workers will be unemployed for 9 months or longer." The rebuilding of the Gulf Coast communities "...will be a major source of new employment, and we need to be sure that they pay decent wages. This is all that Davis-Bacon does: it simply ensures that workers on Federal Government projects earn a typical wage."¹⁹

The Boxer Bill: S. 1763

On September 22, 2005, Senator Boxer introduced S. 1763, a bill cited as the "Hurricane Katrina Reconstruction and Displaced Worker Assistance Act of 2005." The bill, essentially, has two parts. *First*: It would have the "head of an executive agency" "give a preference" in hiring for hurricane "reconstruction efforts" to workers who have been displaced by the storm: "not less than 25 percent of the workforce that will perform such services" are to be such displaced workers. *Second*. Notwithstanding the President's proclamation of September 8, 2005, "...all laborers and mechanics employed by contractors or subcontractors in the performance of Federal contracts for the procurement of services in connection with Hurricane Katrina reconstruction efforts shall be paid wages at rates not less than those prevailing for similar work in the locality involved...." The bill was referred to the Committee on Health, Education, Labor, and Pensions.

In an introductory statement, Senator Boxer suggested that "tens of thousands of people in the Gulf States have lost their jobs" and that "over 200,000 have filed for unemployment benefits." Further, taking note of the President's suspension of the Davis-Bacon Act, she stated: "The tragedy of Hurricane Katrina should not be used as an excuse to take advantage of working people."²⁰

¹⁷ *Daily Labor Report*, Sept. 22, 2005, p. A6.

¹⁸ The Kennedy bill had 25 original co-sponsors (now raised to 28), all of them Democratic.

¹⁹ *Congressional Record*, Sept. 21, 2005, pp. S10302-S10303.

²⁰ *Congressional Record*, Sept. 22, 2005, p. S10382. Senator Boxer also introduced S. 1644 (Sept. 8, 2005), which provides for a preference for workers displaced by the hurricane. The bill was introduced prior to the President's proclamation.