Insight

DOL Proposes Updates to Davis-Bacon Act Regulations

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EXECUTIVE SUMMARY

- The Department of Labor recently proposed the most significant overhaul of Davis-Bacon Act regulations in 40 years.
- The two most significant proposed changes are to the methodology used to calculate the prevailing wage rate in an area and occupation, and to add the ability to make changes to pay rates based on the Employment Cost Index.
- The changes, if finalized, would increase the cost of federal construction projects – adding inflationary pressures to the economy and diminishing the returns on the Infrastructure Investment and Jobs Act enacted last year.

INTRODUCTION

On March 18, 2022, the U.S. Department of Labor (DOL) proposed updating its regulations implementing the Davis-Bacon Act (DBA), which requires certain work performed on a federal government contract to be paid at a prevailing wage. The proposed rule would reconfigure the methodology used to determine the prevailing wage for occupations in a given geographic area, with the effect of increasing wages.

According to DOL, the regulations apply to some $217 billion in construction spending each year – and this estimate excludes the $550 billion in spending on projects over the next 10 years under the Infrastructure Investment and Jobs Act enacted in November. This analysis discusses the proposed rule's changes and its implications on inflation and federal infrastructure projects.

BACKGROUND

The DBA was originally passed in 1931 and established that laborers and mechanics performing work on federal construction or public works contracts valued at $2,000 or more – or other contracts funded wholly or partially with federal money – had to be paid at the prevailing wage in the area the work was taking place. Congress's intent was to prevent companies bidding for contracts from offering wages lower than those prevailing in the area in which the work was performed by hiring workers from outside the local area during the Great Depression.

From the 1930s until the early 1980s, a prevailing wage was determined by a three-step process. The first step was to determine if more than 50 percent of workers from the specific trade in question in a given area were paid at the same rate. If so, that rate would be considered the prevailing wage for DBA purposes. The second step, if the first was not satisfied, was to determine if any single rate was paid to at least 30 percent of workers. If the second step was not satisfied, then the DBA wage would be set using a weighted average rate of those workers in that area.

High rates of inflation in the 1970s led to the search for solutions to high prices. The DBA became a focus of these efforts, highlighted by a General Accounting Office (GAO, today, the Government Accountability Office) report that found the DBA to have inflationary effects on the economy and – for that and other reasons, including its impracticability in implementing – recommended its repeal. While Congress did not follow through on the recommendation, in 1982, the Reagan Administration's DOL changed the methodology by removing the second step, also known as the "30 percent rule." DOL found that the 30 percent rule contributed to higher rates than were actually prevailing and led to collectively bargained rates being used more often than was appropriate. The 30 percent rule also fails to consider the wages paid to as many as 70 percent of affected workers, even if those wage amounts are all substantially different than the 30 percent group.

This change led to the greater use of weighted average rates to calculate the DBA rate for a given area. According to the Biden Administration's DOL, "prior to the 1982 final rule, as low as 15 percent of classification rates across all wage determinations were based on averages. After the 1982 rule was implemented, the use of averages may have initially increased to approximately 26 percent of all wage determinations." Today, DOL estimates that the figure could be as high as 63 percent.

PROPOSED CHANGES

Despite current levels of inflation, the Biden Administration's DOL is proposing changes that will increase the wage rates paid on most DBA projects. The primary change would be to reinstate the 30 percent rule. The agency argues that rates determined by weighted averages run counter to the intent of the law. In its view, weighted averages depress DBA rates, and are not prevailing because in many cases few, if any, of the workers affected are actually paid the calculated rate (absent a DBA-covered contract). Further, it disputes the Reagan Administration's finding that the 30 percent rule led to a disproportionate amount of collectively bargained rates being used for DBA purposes and believes that would not be the case in today's economy.

DOL estimates that the change would have the effect of setting 36 percent of DBA wage determinations by the 50 percent rule, 33 percent by the 30 percent rule, and 31 percent by weighted average. (The preamble to the proposed rule says this determination is explained in more detail in a regulatory impact analysis – or RIA – but at the time of posting the RIA had not yet been made publicly available.)

A second significant change would be to permit DOL to periodically adjust certain non-collectively bargained prevailing DBA rates using the Bureau of Labor Statistics' Employment Cost Index. DOL's concern is that many of these rates derived from its survey data are stale, citing a 2011 GAO study that found that as many as 46 percent were 10 or more years old. The proposed rule would allow these rates to be updated "no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication, continuing until the next survey results in a new general wage determination."

The proposed rule would also make other changes to the current regulations, including enforcement provisions, definitions of geographic areas, and the types of work covered.

DOL estimates the total cost of familiarization and implementation of the proposed rule would be $35.1 million over 10 years. This does not include the cost of higher wages, however, as those are transfer costs not captured as economic costs. DOL does not estimate an aggregate transfer value, but it does find that "[d]ue to updating old rates, 94,547 Davis-Bacon total compensation hourly rates would increase by $3.65 on average."

IMPLICATIONS OF THE PROPOSED RULE

The proposed rule, if finalized, would increase the labor costs associated with federal construction projects. These increased costs would have two obvious effects: adding to present economic conditions that have led to high levels of inflation and diminishing the return on infrastructure and construction investments, in particular projects under the Infrastructure Investment and Jobs Act passed last year.

The proposed rule would result in higher construction costs and higher wages, both of which would contribute to inflation. DOL even acknowledges that the rule may have this effect. It cites a federal district court case, however, that asserted that the "basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase costs to the federal government." DOL uses this assertion to indicate it should not be taking inflation into account when setting DBA rules, concluding that "even if concerns about an inflationary effect on government contract costs or speculative effects on the national macro economy were used to justify eliminating the 30-percent rule, the Department does not believe such reasoning now provides either a factual or legal basis to maintain the current majority rule."

DOL's proposal would also diminish the federal government's return on investment on infrastructure spending. The Infrastructure Investment and Jobs Act included about $550 billion in new spending, virtually all of which would be subject to DBA contracting rules. Since the pot of money related to that spending remains the same, increasing the labor costs associated with each project necessarily reduces the total number of projects that can be funded.

CONCLUSION

The Department of Labor's proposed revisions to the Davis-Bacon Act would change the methodology used to calculate prevailing wages in a way that will increase labor costs. The revisions seem ill-timed, given the current high levels of inflation and a recently enacted infrastructure spending program. The increased labor costs that would result will contribute to higher inflation and reduce the number of infrastructure projects that can be pursued.