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ALERT

District Court Rejects Novel Extension of the Davis-Bacon Act

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On March 31, 2014 the U.S. District Court for the District of Columbia rejected a determination by the U.S. Department of Labor (DOL) applying the Davis-Bacon Act (DBA) to a privately-funded construction project. In *District of Columbia v. Department of Labor et al.,* 1:13-cv-00730, the court held that development of CityCenter DC, a large-scale urban redevelopment project in downtown Washington, DC, did not involve construction of a "public building or public work" and therefore was not subject to DBA coverage. This decision is important because, as the court explained, "the DBA has never before been applied to a project that, like CityCenter DC, is privately financed, privately owned, and privately maintained." Slip op. at 16.

The DBA, 40 U.S.C. § 3141 *et seq.*, requires that a "provision stating the minimum wages to be paid various classes of laborers and mechanics" be inserted in "advertised specifications for every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction of . . . public buildings and public works of the Government or the District of Columbia." 40 U.S.C. § 3142(a). DOL has issued regulations implementing the DBA, *see* 29 C.F.R. ch. 5, which defines a 'public work' as government construction project "carried on . . . to serve the interests of the public." 29 C.F.R. §5.2(k).

In the project at issue, the District of Columbia had entered into a ground lease for District-owned land with a developer that in turn contracted for construction of buildings for private use, such as a hotel and an office building. The District imposed numerous requirements on the project (as detailed as the width of sidewalks) and participated in the planning effort. But the District did not contribute any funds for construction, did not contract with any of the

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firms performing the construction, and would not under the ground lease occupy any of the buildings that were to be constructed.

Nonetheless, DOL's Administrative Review Board determined that the CityCenter DC project was a "public work" subject to the DBA. DOL explained that to qualify as a "public work" under its regulations, the project need only serve the public interest "in some manner." Slip Op. at 20 (quoting DOL). DOL held that the project was a public work because the District was involved in planning and "design particulars," the District was a party to the ground lease, the project "serve[s] the interest of the general public," and several similar factors. *Id.* at 18-19 (quoting DOL).

The district court rejected this ruling, finding that DOL had misconstrued the DBA's statutory text and its own regulations. The court held that "the plain and obvious meaning of the statutory phrase 'public buildings and public works' does not encompass a boutique hotel, a private office building, a condominium, or an apartment building . . . ." *Id.* at 18. These private functions were the purpose of the development, and thus the resulting construction was not of a public work.

The court acknowledged the public benefits identified in the DOL's ruling but found those public benefits to be incidental to the project's purpose; they did not change the project's character from a private to a public construction project. As the court explained, borrowing from interpretations of similar statutory schemes, a "public work" is a concept that is "not technical but plain and specific." Slip Op. at 17 (quoting *United States v. Irwin*, 316 U.S. 23, 30 (1942). DOL had "lost the forest in the trees" by compiling individual benefits rather than considering the project's overall nature and purpose. *Id.* at 18.

The court also found that the DBA did not apply to CityCenter DC because "the plain language of the [DBA] suggests that Congress intended it to apply only to projects procured and funded by the government." *Id.* at 23. The court focused on the DBA's use of "advertised specifications" and its requirement that the federal or District government be a "party" to a "contract" for construction for the DBA to apply. *Id.* (quoting 40 U.S.C. § 3142(a)). The court also noted that the DBA's enforcement scheme contemplated the DBA's application only to government-funded contracts. *Id.* at 23-24. Thus, even setting aside whether CityCenter DC was a public work, the project still was not subject to DBA requirements because the District of Columbia government was not a party to any contracts for construction of the buildings.

Contractors can take some comfort in the court's ruling, which applies commonsense limits to the DBA's application. The ruling may have further reach because it may influence application of "Little Davis Bacon Acts" that set prevailing wage laws for construction projects in 32 states. Indeed, the court's decision sets an important limitation as the federal government becomes increasingly creative in putting surplus real estate to use and private companies similarly look for more creative infill development opportunities.