

HOT POTATO: DAVIS-BACON PAYROLL REPORTING AMONG MULTI-TIER CONTRACTORS

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The Davis-Bacon and Related Acts have applied to federal contracting for many years and require, among other things, the payment of prevailing wages. The federal payroll reporting requirements ensure the proper payment of prevailing wages. See *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175-76 (1994) (citing 29 C.F.R. § 5.5(a)(3)) (“These clauses [F.A.R. §§ 52.222-6 and 52.222-8] ensure compliance with the Davis-Bacon Act . . .”).

In a contract with the federal government, the contractor must submit copies of weekly payrolls. Under F.A.R. 52.222-8(b)(2), a “Statement of Compliance” must accompany each regular submission of a payroll report. That Statement must certify, among other things, that “the prevailing wage rates” have been paid. Each Statement must be “signed by the Contractor or subcontractor . . . who pays or supervises the payment of the persons employed under the contract.”

Copies of payrolls and Statements of Compliance are also required of all contractors working on projects funded in any part by the American Recovery and Reinvestment of 2009 (“ARRA”). This includes projects where the contracting agency is a state or local public entity, but the project receives any federal funding from the ARRA. Even the lowest-tier subcontractor working on such a project must comply with the federal reporting requirements and is subject to audit by the federal government.

Failure to properly report can have significant adverse effects including, but not limited to, termination, fines and/or imprisonment. With the potential for such adverse effects, the responsibility to properly report should be carefully and seriously addressed. But, upon whom does that responsibility fall?

To comply with the reporting requirements, the U.S. Department of Labor suggests using Form WH-347. The instructions accompanying Form WH-347 recommend that “the party signing this statement should have knowledge of the facts.” Logically, the party with “knowledge of the facts” would also be the party “who pays or supervises the payment of the persons employed.” The party “who pays or supervises the payment” is the immediate employer. That immediate employer is the subcontractor directly employing the laborer or mechanic. Therefore, a subcontractor should sign a statement listing its direct employees and a prime contractor should sign a statement listing its direct employees.

However, under F.A.R. 52.222-8(b)(1), the “Prime Contractor is responsible for the submission of copies of payrolls by all subcontractors.” Further, under F.A.R. 52.222-11(c), “[t]he prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor. . . .” Therefore, should the Prime Contractor be subject to a fine, imprisonment or both for information that the subcontractor has reported in its payroll Statement of Compliance?

The answer for prime contractors is no, but it should nevertheless act diligently. The penalties arise for “willful falsification” of the payroll reports and Statements of Compliance. Willful falsification requires actual or reckless disregard for the truth. Therefore, unless the prime contractor actually or recklessly disregarded the accuracy of the statement, the party signing the statement bears the responsibility. That signing party with “knowledge of the facts” who “pays or supervises the payment” is the subcontractor.

However, a higher-tier contractor should not blindly pass through a lower-tier contractor’s payroll reports without making a good faith effort to ensure the “submission of copies of payrolls by all subcontractors” is complete and not obviously inaccurate. Similarly, a prime contractor’s good faith effort in this regard should meet the prime contractor’s responsibility to ensure the subcontractor’s submission and compliance with the payroll reporting requirements.

While the possibility for significant adverse effect remains, payroll reporting errors and discrepancies are typically solved in short order by a field audit and corrective payment issued or a simple modification to the contractor’s internal reporting system. Nevertheless, these reporting requirements remain to ensure the prevailing wages are properly paid. Accordingly, all tiers of contractors should diligently strive to meet these requirements.

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