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## **Prevailing Wage Requirements and the Emergency Suspension of the Davis-Bacon Act**

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# Prevailing Wage Requirements and the Emergency Suspension of the Davis-Bacon Act

## Summary

On September 8, 2005, President Bush issued a Proclamation suspending the application of the Davis-Bacon Act to all contracts to be performed in specified jurisdictions in Alabama, Florida, Louisiana, and Mississippi included in the Hurricane Katrina disaster area. The Proclamation permitted the payment of less than the locally prevailing wage on contracts entered into after September 8, 2005 for the construction or repair of public buildings and public works in the affected area. Although concern over the validity and effect of the Proclamation arose soon after its issuance, that concern seemed to disappear once the President revoked the Proclamation on November 3, 2005. This report provides background on the Davis-Bacon Act and discusses the President's September 8, 2005 Proclamation and its revocation on November 3, 2005.

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# Prevailing Wage Requirements and the Emergency Suspension of the Davis-Bacon Act

On September 8, 2005, President Bush issued a Proclamation suspending the application of the Davis-Bacon Act to contracts to be performed in the counties included in the Hurricane Katrina disaster area.<sup>1</sup> The Davis-Bacon Act, which dates back to 1931,<sup>2</sup> requires every construction contract in excess of two thousand dollars to which the federal government (or the District of Columbia) is a party to pay all laborers and mechanics not less than the locally prevailing wage. Construction includes the alteration or repair (including dredging, excavation, and painting) of buildings, structures, or other real property.<sup>3</sup> Moreover, the term “construction” has been found to include many types of activities that will be included in the recovery from Hurricane Katrina such as contracts for improvements to bridges, dams, highways, streets, subways, tunnels, sewers, power lines, cemeteries, pumping stations, railways, airports, docks, piers, lighthouses, jetties, breakwaters, levees, canals, and channels.

## Background

The Davis-Bacon Act reflects Congress’s 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.”<sup>4</sup> A prevailing wage is the rate of wages, including fringe benefits, paid to a majority of workers in a geographic area for the same type of work on similar projects.<sup>5</sup> The Department of Labor is responsible for

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<sup>1</sup> Proclamation 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005), *available at* [<http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html>]. The Proclamation also applies to the operation of the so-called “related acts” to the extent they reference the Davis-Bacon Act. Related acts provide financial assistance for construction projects and require the payment of prevailing wages for workers on those projects.

<sup>2</sup> Ch. 411, 46 Stat. 1494 (March 3, 1931). Codified at 40 U.S.C. §§ 3141 thru 3148.

<sup>3</sup> 40 U.S.C. § 3142(a).

<sup>4</sup> S. Rep. No. 71-1445, at 1-2 (1931). For additional information on the Davis-Bacon Act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, and CRS Report RL33149, *Davis-Bacon Suspension and Its Legislative Aftermath*, both by William G. Whittaker. The Davis-Bacon Act establishes a wage floor for covered construction. In practice, conditions may require contractors to pay a higher rate of wages.

<sup>5</sup> 40 U.S.C. § 3142(b).

issuing wage determinations that identify what the prevailing wage is for particular occupations in a particular type of project in a particular jurisdiction.<sup>6</sup>

Under section 6 of the act, the President may suspend the requirements of the act during a “national emergency.”<sup>7</sup> Over its long history, the act has been suspended several times for various types of national emergencies such as economic emergency and natural disaster.<sup>8</sup> Suspension of the act does not require that less than the prevailing wage be paid on the covered contracts, but it does remove the bar to the payment of such wages.

In addition to the Davis-Bacon Act itself, Congress has added prevailing wage provisions to approximately thirty-eight statutes that provide financial assistance for construction projects through grants, loans, and other funding mechanisms.<sup>9</sup> These

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<sup>6</sup> *Id.* The Department of Labor regulations governing wage determinations may be found at 29 C.F.R. parts 1 and 4. Amendments to these regulations, effective August 26, 2005, provide for online request of wage determinations. 70 F.R. 50,888 (August 26, 2005). Examples of prevailing wage determinations can be found at [<http://www.gpo.gov/davisbacon/allstates.html>].

<sup>7</sup> 40 U.S.C. § 3147.

<sup>8</sup> *See* Proclamation No. 4031, 36 Fed. Reg. 3,457 (February 25, 1971) (suspending the act because of an economic emergency in the construction industry); Proclamation No. 6491, 57 Fed. Reg. 47,553 (October, 14, 1992) (suspending the act for contracts in the recovery areas of Florida, Louisiana, and Hawaii in the wake of Hurricanes Andrew and Iniki in 1992). *See also* Proclamation No. 2487, 6 Fed. Reg. 2,617 (May 29, 1941) (declaring an unlimited national emergency, which was in effect until terminated by Joint Resolution (ch. 327, § 3, 61 Stat. 451) in 1947). Although Proclamation No. 2487 itself did not specify the Davis-Bacon Act as being suspended, the Joint Resolution terminating national emergencies proclaimed by the President did list the Davis-Bacon Act.

<sup>9</sup> *See* National Housing Act, 12 U.S.C. § 1715c; Housing Act of 1959, 12 U.S.C. § 1701q(c)(3); National Foundation on the Arts and the Humanities Act, 20 U.S.C. § 956(j); General Education Provisions Act, 20 U.S.C. § 1232b; Education of the Deaf Act, 20 U.S.C. §§ 4305(b)(4), 4332(b)(5); Federal-Aid Highway Act, 23 U.S.C. § 113(a); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e; Indian Health Care Improvement Act, 25 U.S.C. § 1633(b); Federal Water Pollution Control Act, 33 U.S.C. § 1372; Postal Reorganization Act, 39 U.S.C. § 410(b)(4)(C); National Visitors Center Facilities Act of 1968, 40 U.S.C. § 808; Appalachian Regional Development Act of 1965, 40 U.S.C.App. § 402; Hospital Survey and Construction Act, 42 U.S.C. § 291e(a)(5); Safe Drinking Water Act, 42 U.S.C. § 300j-9(e); Public Health Service Act, 42 U.S.C. §§ 300s-1(b)(1)(I), 300t-12(b)(1)(D); U.S. Housing Act of 1937, 42 U.S.C. § 1437j; Demonstration Cities and Metropolitan Development Act of 1966, 12 U.S.C. § 1715c, 42 U.S.C. §§ 3310, 1437j; Housing Act of 1964, 42 U.S.C. § 1486(f); Defense Housing and Community Facilities and Services Act of 1951, 42 U.S.C. § 1592i; Headstart, Economic Opportunity, and Community Partnership Act of 1974, 42 U.S.C. § 2992a; Atomic Energy Act, 42 U.S.C. § 2297g-3; Housing and Urban Development Act of 1965, 42 U.S.C. § 3107; Public Works and Economic Development Act of 1965, 42 U.S.C. § 3222; Domestic Volunteer Service Act of 1973, 42 U.S.C. § 5046; Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5196(j)(8); Housing and Community Development Act of 1974, 42 U.S.C. §§ 1440(g), 5310; Federal Nonnuclear Energy Research and Development Act, 42 U.S.C. § 5919(x)(2); National Energy Conservation Policy Act, 42 U.S.C. § 6371j; (continued...)

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, includes a prevailing wage provision.<sup>10</sup>

Section 611(j)(8) of the Stafford Act references the Davis-Bacon Act to require the payment of locally prevailing wages to laborers and mechanics employed on construction projects related to emergency preparedness.<sup>11</sup> 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.<sup>12</sup> These projects are funded by other sections of the Stafford Act, which are not affected by the prevailing wage requirements of section 611(j)(8). In 2002, one proposal for the establishment of a homeland security agency included a provision that would have arguably required the payment of prevailing wages for workers on these kinds of projects.<sup>13</sup> However, the prevailing wage language in this proposal was not included in the final version of the homeland security measure.

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<sup>9</sup> (...continued)

Public Works Employment Act of 1976, 42 U.S.C. §§ 6708, 6728; Energy Conservation and Production Act, 42 U.S.C. § 6881(h); Solid Waste Disposal Act, 42 U.S.C. § 6979; Clean Air Act, 42 U.S.C. § 7614; Head Start Act, 42 U.S.C. § 9839(g)(3); Urban Mass Transportation Act, 49 U.S.C. § 5333(a); Rail Passenger Service Act, 49 U.S.C. § 24312; Airport and Airway Improvement Act, 49 U.S.C. § 47112(b); Model Secondary School for the Deaf Act, Pub. L. No. 89-694, § 4, 80 Stat. 694; Delaware River Basin Compact, Pub. L. No. 87-328, § 15.1, 75 Stat. 714.

<sup>10</sup> 42 U.S.C. § 5121 *et seq.*

<sup>11</sup> 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.).

<sup>12</sup> *See* 42 U.S.C. §§ 5172(a)(1) (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 expenses 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)(i) (The President may provide financial assistance for the repair of owner-occupied private residences, utilities, and residential infrastructure damaged by a major disaster to a safe and sanitary living or functioning condition).

<sup>13</sup> S. 2452, 107<sup>th</sup> Cong. § 194 (2002) (Lieberman substitute).

## Effect of Proclamation

Shortly after the issuance of the President's September 8, 2005 Proclamation, questions concerning the validity and effect of the Proclamation were raised. Some argued that the National Emergencies Act ("NEA") requires the President to declare a national emergency before he may suspend the prevailing wage requirements of the Davis-Bacon Act.<sup>14</sup> Enacted in 1976, the NEA identifies a procedure for declarations of national emergency by the President, prescribes accountability and reporting requirements for the President, and provides for the termination of national emergencies.<sup>15</sup> The NEA was enacted, in part, "to provide for [the] orderly implementation and termination of future national emergencies."<sup>16</sup> Because the Proclamation was seemingly issued without regard to the NEA, critics maintained that it could be invalid.<sup>17</sup>

Section 201 of the NEA provides for the declaration of national emergency by the President and discusses the effect of such a declaration on other laws. Section 201(a) states:

With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.<sup>18</sup>

In the Senate report accompanying the NEA, the Senate Committee on Government Operations indicated that section 201(a) was not intended to grant additional authority to the President: "The President can only exercise those powers delegated to him in other statutes . . . The purpose of this statute is to prescribe the procedures to be followed in the event that the President proclaims a national emergency, as authorized by some other statute."<sup>19</sup>

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<sup>14</sup> See *Rep. Miller: In Rush to Cut Wages, President Forgets to First Declare National Emergency*, US Federal News, Sept. 16, 2005, 2005 WLNR 14735421 ("President Bush was in such a hurry to cut workers' wages that he did it even before declaring a national emergency. This may mean that the President's wage proclamation was done illegally.").

<sup>15</sup> 50 U.S.C. § 1601 *et seq.* For additional information about the National Emergencies Act, see CRS Report 98-505, *National Emergency Powers*, by Harold C. Relyea.

<sup>16</sup> S. Rep. No. 94-1168, at 1(1976), *reprinted in* 1976 U.S.C.C.A.N. 2288.

<sup>17</sup> See note 14.

<sup>18</sup> 50 U.S.C. § 1621(a). See S. Rep. No. 93-549, at 314 (1973) (identifying section 6 of the Davis-Bacon Act as authorizing the exercise of special or extraordinary power during a period of a national emergency).

<sup>19</sup> S. Rep. No. 94-1168, *supra* note 16 at 4. The House Committee on the Judiciary, which also reviewed the National Emergencies Act, reached a similar conclusion. See H.R. Rep. No. 94-238, at 5 ("This language of section 201(a) is not intended to grant any additional authority to the President. Rather it indicates the general nature of the circumstances in which a declaration might be issued. The proclamation would be immediately transmitted

(continued...)

Section 201(b) of the NEA further provides, in relevant part:

Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter.<sup>20</sup>

The Senate Committee on Government Operations maintained that section 201(b) establishes that the statutes granting powers to the President during a national emergency shall have effect “only during times the President has declared a national emergency and then only if he has acted in accordance with the provisions of the act.”<sup>21</sup> The Committee also observed that the stipulation in section 201(b) “has particular reference to the provisions of section 301 which require that the President specify the laws he or other officers will utilize.”<sup>22</sup>

Both the language of section 201(b) and the legislative history of the NEA appear to support the position that a declaration of national emergency must be issued in accordance with the NEA to be effective. Section 201(a) of the NEA requires a declaration to be transmitted immediately to the Congress and published in the Federal Register. Section 301 requires the President to “specify the provisions of law under which he proposes that he, or other officers will act.”<sup>23</sup> Section 301 also states that such specification may be made either in the declaration of national emergency or in subsequent executive orders.<sup>24</sup>

Although the President’s September 8, 2005 Proclamation did not mention the NEA and was not identified as a “declaration,” it seems possible to have argued that the Proclamation did comply with the NEA’s requirements.<sup>25</sup> The Proclamation stated that “conditions caused by Hurricane Katrina constitute a ‘national emergency’

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<sup>19</sup> (...continued)  
to the Congress and published in the Federal Register.”).

<sup>20</sup> 50 U.S.C. § 1621(b).

<sup>21</sup> S. Rep. No. 94-1168, *supra* note 16 at 5.

<sup>22</sup> *Id.* The House Committee on the Judiciary again reached a similar conclusion. See H.R. Rep. No. 94-238, at 5-6 (“Subsection (b) limits the effectiveness of provisions of law to be exercised during a national emergency to periods when a President’s declaration of national emergency is in effect and then only in accordance with the balance of the provisions of the bill. This latter provision has particular reference to the provisions of section 301 which requires that the President specify the provisions of law he will utilize or under which other officers of the Government will act.”).

<sup>23</sup> 50 U.S.C. § 1631.

<sup>24</sup> *Id.*

<sup>25</sup> Compare Proclamation 7924, *supra* note 1, with Proclamation 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (titled “Declaration of National Emergency by Reason of Certain Terrorist Attacks”).

...<sup>26</sup> The Proclamation was transmitted immediately to Congress and published in the Federal Register.<sup>27</sup> Finally, the Proclamation identified 40 U.S.C. § 3147 as the provision of law under which the President proposed to act.<sup>28</sup> Thus, while the Proclamation did not follow identically the language or structure of other declarations of national emergency under the NEA, it appeared to satisfy generally the act's substantive and procedural requirements.<sup>29</sup>

If the Proclamation was found to comply with the NEA's requirements, it seems likely that the statute's other provisions would have become applicable. For example, section 202(b) of the NEA requires that each house of Congress meet to consider a vote on a joint resolution to terminate the emergency no later than six months after the emergency is declared, and within each six-month period thereafter during the course of the emergency.<sup>30</sup> In addition, section 202(d) provides for the termination of a national emergency

on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary.<sup>31</sup>

Thus, although section 6 of the Davis-Bacon Act does not identify a time period or expiration date for suspensions brought under that section, the NEA would have likely prompted the automatic termination of the suspension if the President did not provide for the extension of the national emergency.

Questions about the termination of the suspension and the relationship between the Proclamation and the NEA, however, seemed to disappear following the issuance of a second Proclamation on November 3, 2005.<sup>32</sup> This second Proclamation revoked the September 8, 2005 Proclamation and reimposed the prevailing wage requirements of the Davis-Bacon Act and the related acts. Although the September 8, 2005 Proclamation did not reference the NEA, the statute was identified in the November

<sup>26</sup> Proclamation 7924, *supra* note 1.

<sup>27</sup> See H.R. Doc. 109-55 (2005); 151 Cong. Rec. S9831 (daily ed. Sept. 8, 2005) (Report on the Suspension of Subchapter IV of Chapter 31 of Title 40, United States Code, Within a Limited Geographic Area in Response to the National Emergency Caused by Hurricane Katrina); 70 Fed. Reg. 54,227 (Sept. 8, 2005).

<sup>28</sup> See Proclamation No. 7924, *supra* note 1.

<sup>29</sup> See, e.g., Proclamation No. 7463, *supra* note 25 (“... I hereby declare that the national emergency has existed since September 11, 2001, and, pursuant to the National Emergencies Act ... I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c), 12006, and 12302 of title 10, United States Code, and sections 331, 359, and 367 of title 14, United States Code.”). The National Emergencies Act does not appear to require a proclamation to specifically reference the NEA in its text.

<sup>30</sup> 50 U.S.C. § 1622(b).

<sup>31</sup> 50 U.S.C. § 1622(d).

<sup>32</sup> Proclamation 7959, 70 Fed. Reg. 67,899 (Nov. 3, 2005), *available at* [<http://www.whitehouse.gov/news/releases/2005/11/20051103-9.html>].

3, 2005 Proclamation as a source for the President's authority.<sup>33</sup> By revoking the suspension so soon after the September 8, 2005 Proclamation, the second proclamation left unresolved the question of whether the September 8, 2005 Proclamation not only suspended the Davis-Bacon Act, but also served as a declaration of national emergency under the NEA.

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<sup>33</sup> *Id* (“NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States, including section 202 of the National Emergencies Act, 50 U.S.C. 1622, do by this Proclamation revoke . . . Proclamation 7924 as to all contracts for which bids are opened or negotiations concluded on or after November 8, 2005.”).