

PREVAILING WAGE LAW: The State Highway Commission cannot
STATE HIGHWAY COMMISSION: include in contracts for highway con-
 struction involving federal aid a
provision as to wage determination by the Missouri Department of
Labor and Industrial Relations during the period of the suspension
of the Davis-Bacon Act and related federal acts pursuant to the
presidential proclamation of February 23, 1971.

OPINION NO. 218

March 22, 1971



Mr. Robert L. Hyder
General Counsel
State Highway Commission
Jefferson City, Missouri 65101

Dear Mr. Hyder:

This is in answer to your recent request for an opinion from this office in which you ask whether contracts entered into by the State Highway Commission on which bids are opened after March 5, 1971, involving federal aid can contain the state statutory requirements that the contractor awarded the contract shall pay not less than the prevailing hourly rate of wages to all workmen performing work under the contract as determined by the Missouri Department of Labor and Industrial Relations.

Sections 290.210 to 290.340, RSMo 1969, constitute what is commonly referred to as the Prevailing Wage Law of Missouri.

Section 290.210(6), RSMo 1969, provides as follows:

"'Public body' means the state of Missouri or any officer, official, authority, board or commission of the state, or other political subdivision thereof, or any institution supported in whole or in part by public funds."

Section 290.210(7), RSMo 1969, provides in part as follows:

"'Public works' means all fixed works constructed for public use or benefit or paid for wholly or in part out of public funds.
. . ."

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Section 290.230, RSMo 1969, provides in part as follows:

"1. Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, and not less than the prevailing hourly rate of wages for legal holiday and overtime work, shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance work. . . ."

Section 290.250, RSMo 1969, provides in part as follows:

"Every public body authorized to contract for or construct public works, before advertising for bids or undertaking such construction shall request the department to determine the prevailing rates of wages for workmen for the class or type of work called for by the public works, in the locality where the work is to be performed. The department shall determine the prevailing hourly rate of wages in the locality in which the work is to be performed for each type of workman required to execute the contemplated contract and such determination or schedule of the prevailing hourly rate of wages shall be attached to and made a part of the specifications for the work. The public body shall then specify in the resolution or ordinance and in the call for bids for the contract, what is the prevailing hourly rate of wages in the locality for each type of workman needed to execute the contract and also the general prevailing rate for legal holiday and overtime work. It shall be mandatory upon the contractor to whom the contract is awarded and upon any subcontractor under him, to pay not less than the specified rates to all workmen employed by them in the execution of the contract. The public body awarding the contract shall cause to be inserted in the contract a stipulation to the effect that not less than the prevailing hourly rate of wages shall be paid to all workmen performing work under the contract. . . ."

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From the above statutory provisions it is clear that all contracts for construction of highways by the State Highway Commission must contain a provision that not less than the prevailing wages as determined by the State Department of Labor and Industrial Relations shall be paid to workmen by the contractors unless such requirement is abrogated or suspended by some other state or federal requirement.

On February 23, 1971, the President of the United States issued a proclamation suspending the provisions of the Davis-Bacon Act and other federal statutes requiring the payment of wages determined in accordance with the Davis-Bacon Act. Such proclamation provides in part as follows:

"Section 1 of the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494, as amended, 40 U.S.C. 276a), provides:

' . . . every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there. . . .';

Various other acts provide for the payment of wages, with these provisions dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act.

* * *

-- The Davis-Bacon Act and other acts dependent upon it frequently require contractors working on federally involved projects to pay

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the high negotiated wage settlements to mechanics and laborers, thereby sanctioning and spreading the high rates and thus inducing further acceleration contributing to the threat to the Nation's economy.

Section 6 of the Davis-Bacon Act provides:

'In the event of a national emergency the President is authorized to suspend the provisions of this Act.'

WHEREAS I find that a national emergency exists within the meaning of section 6 of the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494, as amended, 40 U.S.C. 276a).

NOW THEREFORE, I, RICHARD NIXON, President of the United States of America, do by this proclamation suspend, as to all contracts entered into on or subsequent to the date of this proclamation and until otherwise provided the provisions of the Davis-Bacon Act of March 3, 1931, as amended, and the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act;

And I do hereby suspend until otherwise provided the provisions of any Executive Order, proclamation, rule, regulation or other directive providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act;

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of February in the year of our Lord nineteen hundred seventy-one, and of the Independence of the United States of America the one hundred ninety-fifth.

RICHARD NIXON."

On March 1, 1971, the Solicitor of the United States Department of Labor issued a memorandum to all states' Attorneys General as to the effect of the suspension of the Davis-Bacon and related Acts by the presidential proclamation. Such memorandum stated in part:

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"The effect of that action was to remove from all federally involved construction contracts entered into on or after February 23, 1971, all otherwise applicable Federal requirements that laborers and mechanics be paid at least the wage rate determined by the Secretary to be prevailing for their crafts.

In addition, and as indicated in the attached memorandum, it is our judgment that all State-required wage standards provisions have been rendered inapplicable for the duration of such suspension to federally involved construction contracts on which the wage payment requirements of the Federal statutes and regulations have been suspended. . . ."

On March 1, 1971, William H. Rehnquist, an Assistant Attorney General of the United States issued a memorandum to the Solicitor of the United States Department of Labor concerning the effect of the suspension of the Davis-Bacon Act and related acts on state statutes providing for the inclusion in construction contracts of provisions as to payment of not less than prevailing wages. The memorandum stated in part:

"While the Davis-Bacon Act is not a preemptive statute in the broad sense of the word, it is our view that the suspension provision (40 U.S.C. 276a-5) does preclude a State from imposing its 'Davis-Bacon' requirements on construction otherwise subject to the Davis-Bacon Act or a Davis-Bacon extension statute. Any other conclusion would subvert the whole purpose of the suspension provision. If the States had the power locally to undo what the President has found necessary in the national interest, then the suspension provision would be rendered impotent. Such a result, in our opinion, would be illogical. If suspension has any meaning at all with respect to the construction contracts covered, it must mean that there will be no wage floor, federal or State, for the duration of the suspension."

It is clear that both the Solicitor of the United States Department of Labor and the office of the United States Attorney General have determined that the suspension of the provisions of the Davis-Bacon Act and other federal acts to which the Davis-Bacon Act applies have preempted the field of prevailing wages

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and, therefore, that during the period of suspension under the presidential proclamation, the State Prevailing Wage Laws have no validity or effect and cannot be followed or enforced by state agencies.

However, we deem it unnecessary for this office to determine whether the presidential proclamation has the effect of nullifying or suspending the State Prevailing Wage Law of Missouri because of action taken by the Federal Highway Administration of the United States Department of Transportation. The State Highway Commission of Missouri received March 5, 1971, a telegram from the Federal Highway Administration which stated:

"In addition to the deletions of the Davis-Bacon provisions as discussed in Swicks wire of 2/26 proposals for federal aid projects on which bids are opened after 3-5 must contain no wage determination made under the provisions of state statutes or other determination processes."

It is clear that no federal grants for highway construction will be made by the Federal Highway Administration if the contracts for such construction provide for payment in accordance with the Prevailing Wage Law as determined by a state agency when bids for such construction are opened after March 5, 1971.

The provisions of the Davis-Bacon Act are applicable to all federally assisted contracts for highway construction entered into by the Missouri Highway Commission under the provisions of Section 113 of Title 23 of the United States Code which provides in part as follows:

"(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the initial construction work performed on highway projects on the Federal-aid systems, the primary and secondary, as well as their extensions in urban areas, and the Interstate System, authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of August 30, 1935, known as the Davis-Bacon Act (40 U.S.C. 267a)."

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Section 226.150, RSMo 1969, provides as follows:

"The [state highway] commission is hereby directed to comply with the provisions of any act of congress providing for the distribution and expenditure of funds of the United States appropriated by congress for highway construction, and to comply with any of the rules or conditions made by the bureau of public roads of the Department of Agriculture, or other branch of the United States government, acting under the provisions of federal law in order to secure to the state of Missouri funds allotted to this state by the United States government for highway construction"

We believe that such provision authorizes and compels the State Highway Commission to eliminate from its contracts for highway construction, which are federally assisted, any requirement that no less than the prevailing wage as determined by the Department of Labor and Industrial Relations be paid the workmen by the contractors on such highway projects.

The Supreme Court of Missouri in the case of Logan v. Matthew, 52 S.W.2d 989, 330 Mo. 1213, ruled specifically as to the meaning of this provision. In that case, the Federal Bureau of Public Roads refused to approve the contribution of any federal highway construction funds toward the locating and construction of Missouri Route 65 through Livingston and Carroll counties if the route were constructed so as to go through the towns of Avalon and Tina. Section 8120, RSMo 1929, (now Section 227.020, RSMo 1969) contained the provision that Avalon and Tina were points through which such state highway must pass.

Section 8106, RSMo 1929, (now Section 226.150, RSMo 1969) provided that the State Highway Commission was directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States for highway construction, and to comply with any of the rules and conditions made with the Bureau of Public Roads or other branch of the United States government acting under the provisions of federal law, in order to secure to the State of Missouri funds allotted to this state by the United States government for highway construction.

Since Section 8120 provided that the state highway must go through two specific towns, and the federal authorities refused to grant highway construction aid unless the highway followed a route which did not go through the two towns, the Supreme Court

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was required to determine whether Section 8106 or 8120 prevailed. The Supreme Court held that the provisions of Section 8120, RSMo 1929, (now Section 226.150) prevailed. The Court said (l.c. 992):

"It appears clear from the provisions of this statute that the purpose of the Legislature was to secure all of the funds allotted to the state by the federal government for road construction, and in order to accomplish that result it directed the state highway commission to comply with any of the rules or conditions made by the federal government."

The dissenting opinion by two judges is also significant because such dissenting opinion recognized the fact that the majority opinion clearly held that the State Highway Commission was and is directed and obligated by Section 226.150 to comply with the requirements of any future federal laws and regulations applicable to federal aid for state highway construction. The dissenting opinion stated (l.c. 994):

"Furthermore, the direction is to comply with the provisions of any act of Congress governing the distribution and expenditure of federal road funds, and any rules and regulations of the bureau. This deprives the state highway commission of any discretion in the matter, and mandatorily obligates it to follow not only the present but any future federal laws and regulations on the subject."

In view of the fact that the Federal Highway Administration has officially informed the State Highway Commission of Missouri that the Federal Highway Administration will not make any payments on contracts for any highway construction projects of Missouri on which bids are opened after March 5, 1971, which contain any wage determination under state statutes, it is clear that the State Highway Commission is required by the provisions of Section 226.150 not to include in its contracts involving federal aid for highway construction any wage determination made by the Labor and Industrial Relations Commission until such time as the suspension of the Davis-Bacon Act and related acts by the presidential proclamation has ended.

CONCLUSION

It is the opinion of this office that the State Highway Commission cannot include in contracts for highway construction in-

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volving federal aid a provision as to wage determination by the Missouri Department of Labor and Industrial Relations during the period of the suspension of the Davis-Bacon Act and related federal acts pursuant to the presidential proclamation of February 23, 1971.

Very truly yours,

A handwritten signature in cursive script that reads "John C. Danforth". The signature is written in black ink and is positioned above the typed name.

JOHN C. DANFORTH
Attorney General