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Department of Labor's "Novel" Reading of the Davis-Bacon Act Fails Again.

On April 5, 2016, the U.S. Court of Appeals for the District of Columbia held that the Davis-Bacon Act and its higher wage requirements do not apply to the development of the CityCenterDC project in Washington, D.C. Assuming there are no further appeals, the Court's decision brings to an end an eight-year battle by the Mid-Atlantic Regional Council of Carpenters and U.S. Department of Labor (DOL) to broaden the reach of the Davis-Bacon Act. The Court's decision left open questions that impact how private-public partnerships are structured to take advantage of the Government's vast property holdings and need for development and infrastructure upgrades.

Davis-Bacon Act. The 1931 Davis-Bacon Act ("DBA") was originally intended to prevent non local contractors from moving into an area and winning federal construction contracts by using cheaper itinerant labor. The DBA, as amended, requires that each contract over $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, and/or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. These minimum wages are to be no less than the locally prevailing wages and fringe benefits paid on similar projects. In addition, Congress has added prevailing wage provisions to approximately 60 statutes that assist construction projects through grants, loans, loan guarantees and insurance. These "related Acts" involve construction in such areas as transportation, housing, air and water pollution reduction, and health. This application of prevailing wages to so many statutes and construction projects makes the CityCenterDC case very important as prevailing wages have historically made construction projects more costly. In the case of CityCenterDC, estimates are that the project would have cost approximately $20 million more were the DBA to have applied.

CityCenterDC. CityCenterDC is a mixed-use development that includes 325,000 square feet of retail space (including luxury stores such as Gucci, Hermès, Dior, and Louis Vuitton), 520,000 square feet of office space, approximately 450 apartments, 216 condominiums, and a luxury hotel. The District of Columbia (the City) owns the land on which CityCenterDC sits, and leased it to a private developer on a series of 99-year ground leases. The developers and the City also entered into development agreements that required the developers, not the City, to contract with general contractors to develop the property at the developers' cost.

The Decision. The Court was unwilling to broaden application of the DBA to cover projects that had never previously been subject to the DBA, that is, projects that are privately funded, privately owned, and privately operated. In coming to its decision, the Court strictly interpreted the language of the DBA in holding that CityCenterDC was not subject to the DBA because the City was not a party to the actual construction contract, and the project is not a public work. The Court noted that for a project to be considered a public work, either or both of the following must apply: (i) public funding for the construction, or (ii) government ownership or operation of the completed facility. In the case of CityCenterDC, neither applied. In one of the most quoted portions of the Court's opinion, the Court stated that it was "unwilling to green-light such a massive, atextual, and ahistorical expansion of the Davis-Bacon Act. The concept of a public work may well be elastic. But it cannot

reasonably be stretched to cover a Louis Vuitton. CityCenterDC is not a public work."

Unanswered Questions and Practice Tips

In a pair of very important footnotes, the Court expressly left open two very important questions, with others being implied.

(1) Footnotes 2 and 5 – Does a project have to meet both elements of the public work test, or just one?

> TIP – While the Court's discussion of this point suggests that there could be an argument in favor of both elements having to be met, plan for the worst (that only one element must be met). Avoid project structures that involve the City (i) paying rent for the property or providing funding for the construction, or (ii) providing more than standard zoning oversight, or controlling or operating the project post-completion.

(2) Footnote 4 – What about situations where the project is structured with an intermediary so that the Government is not in a direct contract with the general contractor?

> TIP – Make sure there is a legitimate business purpose for the deal structure. Ensure files are sufficiently documented to mitigate against allegations that the structure is a sham arrangement to avoid application of the DBA to the project.

(3) At what point are zoning oversight, as well as tax and other development incentives, deemed Government funding of the project and/or control of the project?

> TIP – Avoid management control of the project by the Government. Try to structure tax incentives so they are tied to the developer and not the project itself.

The Court's decision should come as a welcome relief to a large number of contractors that have their eye on the trillions of dollars of infrastructure projects, but fear that the application of the DBA to those projects will drive up costs, making some projects not worth pursuing.

Those interested in reading the opinion can do so here.

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