

THE DAVIS-BACON ACT AND THE WALSH-HEALEY PUBLIC CONTRACTS ACT: A COMPARISON OF COVERAGE AND MINIMUM WAGE PROVISIONS

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INTRODUCTION

Some thirty years ago the national conscience was aroused by the destructive effect of widespread unemployment on wages of workers. It was a time of depression. Competition for limited markets forced employers to cut labor costs. Wages and prices spiraled downward.

One bold way chosen to stop this trend was the National Industrial Recovery Act,¹ providing for codes of fair competition for both prices and wages. Another, confined to the construction industry, was the Davis-Bacon Act, passed in 1931 and strengthened in 1935,² requiring the payment of prevailing wages to laborers and mechanics performing contracts for the construction, alteration, and repair of public works of the United States.

A third, and also limited effort, was the Walsh-Healey Public Contracts Act, passed in 1936,³ after the National Industrial Recovery Act had been declared unconstitutional. This act became law at a time when regulation of labor standards and the use of the commerce powers for this purpose were considered beyond the reach of congressional action.⁴ It was clearly within the reach of Congress, however, to prevent the purchasing power of the federal government from being used to permit bidders on federal supply contracts to profit by depressing wages and working conditions.

The Walsh-Healey Act established the eight-hour day and the forty-hour week, prohibited child labor, set safety standards, and authorized the Secretary of Labor to determine prevailing minimum wages for contract performance. It is, in a general sense, a counterpart of the Davis-Bacon Act, setting labor standards for supply contracts, as does the Davis-Bacon Act for construction contracts.

These basic statutes on labor standards for government contracts—the Walsh-Healey Act and the Davis-Bacon Act—are the concern of this article: their usefulness, their need, their operation, and their shortcomings. Each aspect of both statutes will be separately examined.

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¹ Act of June 16, 1933, 48 Stat. 195.

² 46 Stat. 1494 (1931) as amended, 40 U.S.C. § 276a (1958).

³ 49 Stat. 2036 (1936) as amended, 41 U.S.C. §§ 35-45 (1958).

⁴ *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

I

COVERAGE PROVISIONS

A. Walsh-Healey Public Contracts Act

The Walsh-Healey Public Contracts Act applies to all government contracts (*i.e.*, those entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States) which exceed \$10,000, and which are for the manufacture or furnishing of materials, supplies, articles, or equipment.⁵

The description of agencies whose contracts are subject to the act is expansive, but it has been interpreted not to include: (1) contracts by the Commonwealth of Puerto Rico and the Virgin Islands; (2) contracts by the American Red Cross and the Salvation Army; and (3) those of any state or political subdivision thereof or any agency of a state or political subdivision, even though federal funds are used in payment for materials, supplies, articles, or equipment.⁶ The act has been held to apply, however, to contracts of post exchanges and to contracts financed with non-appropriated funds generally.⁷

Concerning the application of the \$10,000 limitation, there has been some judicial and an abundance of administrative precedent.⁸ Section three of the Department of Labor Rulings and Interpretations No. 3 effectively describes the interpretations that have been made. They may be summarized as follows: (1) contracts which are indefinite in amount and which may exceed \$10,000 are considered subject to the act, unless the contracting officer knows in advance that the total amount will not exceed \$10,000; (2) the act should be applied to a contract when its amount exceeds \$10,000, even though prompt payment may reduce the actual expenditure to a figure not exceeding \$10,000; (3) contracts calling for the delivery of material in installments are considered subject to the act where the contract exceeds or may exceed \$10,000; (4) when an invitation for bids on several items totalling more than \$10,000 permits bidding on any one or more of the items not amounting to more than \$10,000, awards made to different bidders for \$10,000 or less are not subject to the act; (5) if one contract is awarded containing several schedules for separate items and if the total contract price exceeds \$10,000, the contract is subject to the act; (6) a contract is not subject to the act when a person bids on several items of equipment of an aggregate value exceeding \$10,000 and he is low bidder on only a few items of an

⁵ Sec. 1, 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1958). The act also applies to construction, alteration, furnishing, or equipping of naval vessels, § 12, 52 Stat. 403 (1938), 10 U.S.C. § 7299 (1958).

⁶ U.S. Department of Labor Rulings and Interpretations No. 3 § 2.

⁷ *In re* Park Sherman Co., Dep't of Labor Hearing Examiner's Dec. PC-424, Feb. 23, 1954 (10 WH Cases 141); see also *In re* United Biscuit Co., Administrator's Dec. PC-770, April 25, 1963; *United Biscuit Company v. Wirtz*, 48 CCH Labor Cases ¶131,517 (D.D.C. 1963).

⁸ *E.g.*, *United States v. Ozmer*, 9 WH Cases (5th Cir. 1950); *George v. Mitchell*, 282 F.2d 486, 496 (D.C. Cir. 1960).

aggregate value of \$10,000 or less; and (7) a contract is subject to the act if it is for an amount exceeding \$10,000, even though the amount paid by the contractor for freight charges reduces to a figure less than \$10,000 the amount actually received by him for the goods.

The act has been liberally applied to contracts "for the manufacture or furnishing of materials, supplies, articles, and equipment." For example, the act has been held to apply to contracts for "services" which consist of essentially manufacturing operations, such as furnishing labor to assemble tents supplied by the government,⁹ or contracts for managing industrial plants.¹⁰ It also has been held to apply to contracts for sand, gravel, and rock.¹¹ In the recent case of *United States v. Stocks Lincoln-Mercury*,¹² the act was held to apply to a contract for furnishing both materials and services. In the contract involved, the services were regarded as incidental or as an integral part of the manufacture or furnishing of material, supplies, or equipment.

The Walsh-Healey Public Contracts Act has been interpreted not to apply to contracts which are exclusively for personal services,¹³ and those which are for the rental of real estate or personal property.¹⁴ There are exemptions in section nine of the act for the following:

[P]urchases of such materials, supplies, articles, or equipment as may usually be bought in the open market . . . perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers . . . contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof . . . carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.¹⁵

These exemptions are narrowly construed. For example, the so-called "open market" exemption has been held to apply only to purchases which the government itself can make on the "open market."¹⁶ Some commentators contended that the apparent intent of the exemption warrants a broader construction.¹⁷ However, it is readily apparent that the present construction is proper. A broader interpretation would render meaningless some of the other statutory exemptions, such as those for "perishable" and "agricultural" products.¹⁸ Also, it would whittle away a substantial portion of the act's protection. This is an appropriate place to note that a

⁹ *In re* Old Dominion Mfg. Co., Inc., Secretary of Labor's Dec. PC-157, April 1, 1946 (6 WH Cases 1223).

¹⁰ *In re* Reynolds Research Corp., Dep't of Labor Hearing Examiner's Dec. PC-39, May 15, 1950 (9 WH Cases 456), and cases cited therein.

¹¹ *In re* Ready-Mix Concrete Co., Dep't of Labor Hearing Examiner's Dec. PC-401, May 11, 1951 (10 WH Cases 246), and cases cited therein. The act itself used the word "production" in section 1(d).

¹² 307 F.2d 266 (10th Cir. 1963).

¹³ Walsh-Healey Public Contract Act, Rulings and Interpretations, No. 3, § 16.

¹⁴ *Id.* § 17.

¹⁵ 49 Stat. 2039 (1936), 41 U.S.C. § 43 (1958).

¹⁶ *Ruth Elkhorn Coals, Inc. v. Mitchell*, 248 F.2d 635 (D.C. Cir. 1957).

¹⁷ *Modley, Patton & Reilly, Problem Child Among Labor Laws—The Walsh-Healey Act*, *DUKE L.J.* 205, 219 (Spring, 1963).

¹⁸ Walsh-Healey Public Contracts Act, Rulings and Interpretations No. 3, §§ 9-18.

question of the applicability of the "open market" exemption may properly be raised in judicial review of prevailing minimum wage determinations.¹⁹

I do not propose to take up here all problems dealing with the application of the Walsh-Healey Act, because the emphasis of this paper is upon the wage determination process. There are other problems, and I shall merely direct attention to some of them. The act requires that every contractor be "a manufacturer of or a regular dealer" in the material, supplies, articles, or equipment to be manufactured or used in the performance of the contract.²⁰ This requirement was placed in the act in order to do away with the undesirable effects of brokerage and bid peddling on labor standards.²¹

One seeking familiarity with the act should also be aware of the so-called "substitute manufacturer" question. "Substitute manufacturers" are subject to the requirements of the act, whereas, "subcontractors" are not so subject. The general rule is that an employer producing the materials, supplies, articles, or equipment or performing the services that are required for the performance of a government contract is considered a "substitute manufacturer" if it is the regular practice in the industry engaged in the manufacture of the commodities called for by the government contract for members of that industry to do such work themselves rather than to have it done by others. On the other hand, if it is the regular practice in the industry manufacturing the commodities called for by the contract for the manufacturer to purchase rather than to make particular components of the contract commodities in question, the one who supplies such components to him is not considered covered by the act. He is regarded as a "subcontractor."²² But if it is not the regular practice in such industry for such performance to be carried out by others, but rather that the prime contractor actually perform the work in question, then anyone contracting with the prime contractor for such performance is considered a "substitute manufacturer," and is covered by the act.²³

B. Davis-Bacon Act

The Davis-Bacon Act applies to:²⁴

[E]very 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

¹⁹ *Ruth Elkhorn Coals, Inc. v. Mitchell*, *supra* note 16. *Contra*, *Consolidated Electric Lamp Co. v. Mitchell*, 13 WH Cases 288 (D.D.C. 1957).

²⁰ Sec. 1(a), 49 Stat. (1936), 41 U.S.C. § 35 (1958). See the application of these terms in 41 C.F.R. § 201.101. (Rev. 1963.)

²¹ H.R. REP. NO. 2946, 74th Cong., 2d Sess. 4 (1936). See also *Perkins v. Lukens Steel*, 310 U.S. 113, 118 (1940).

²² Walsh-Healey Public Contracts Act, Rulings and Interpretations No. 3 § 30.

²³ *Id.* § 31.

²⁴ Sec. 1, 46 Stat. 1494 (1931), as amended, 40 U.S.C. § 276a (1958). The Davis-Bacon or prevailing wage concept has also been applied in the indicated sections of the following laws: the Federal-Aid Highway Act of 1956 [§ 108(b), 70 Stat. 378 (1956), recodified at 72 Stat. 895 (1958), 23 U.S.C. § 113(a) (1958)]; National Housing Act [§ 212 added to c. 874, 48 Stat. 1246 (1934), by § 14, 53 Stat. 807 (1939)], as amended §§ 110(j), 201(b), 704(c), 73 Stat. 661, 667, 686 (1959); § 612(c), 75

The term "contracts to which the United States . . . is a party" has been generally interpreted as covering the contracts of agencies of the type listed in section one of the Walsh-Healey Public Contracts Act. Note the similarity between this section and the definition of the term "federal agency" in Department of Labor Regulations, Part 5.²⁵ Consequently, section two of the Department of Labor Rulings and Interpretations No. 3 interpreting the Walsh-Healey Public Contracts Act also serves as a general guide to the application of the Davis-Bacon Act. For example, the Davis-Bacon Act has been held not to apply to the contracts of any state or political subdivision thereof or any agency of a state or political subdivision.

Also, as in the case of the Walsh-Healey Public Contracts Act, the Davis-Bacon Act has been interpreted as applying to contracts of nonappropriated fund instrumentalities, such as Army and Air Force exchanges, officers' open messes, and enlisted men's open messes.²⁶

Because of textual differences between the two acts, however, the coverage question with regard to nonappropriated funds is close with respect to the Davis-Bacon Act. The Davis-Bacon Act expressly refers to contracts to which the United States is a party, and there is a line of judicial decisions holding that there is no right of action under the Court of Claims Act against the United States for a breach of contract by a post exchange.²⁷ Also, the recent Supreme Court case of *Paul v. United States*²⁸ drew a distinction between contracts with appropriated funds and those with nonappropriated funds in holding that state milk price controls would not affect contracts made with appropriated funds because of conflict with federal procurement regulations, but would affect those made with nonappropriated funds. The Court expressly mentioned the inclusion of Davis-Bacon standards provisions in contracts with appropriated funds in suggesting the possible effectuating of state

Stat. 181 (1961), 12 U.S.C. § 1715c (Supp. IV, 1962)]; the Housing Act of 1959 [§ 202, 73 Stat. 667 (1959), 12 U.S.C. § 1701q (Supp. IV, 1962)]; the College Housing Act of 1950 [as added, § 602, 73 Stat. 681 (1959), 12 U.S.C. § 1749a (Supp. IV, 1962)]; the Federal Water Pollution Control Act [§ 5, 75 Stat. 206 (1961), 33 U.S.C. § 466e (Supp. IV, 1962)]; the Hospital Survey and Construction Act [§ 625 as added to c. 373 (1944), by § 2, 60 Stat. 1041 (1940), as amended, 42 U.S.C. § 291h (1958)]; the Federal Airport Act [§ 15, 60 Stat. 178 (1946), 49 U.S.C. § 1114 (1958)]; the Housing Act of 1949 [§ 109, 63 Stat. 419 (1949), as amended, 42 U.S.C. § 1459 (1958)]; School Survey and Construction Act of 1950 [§ 1011, 72 Stat. 551 (1958), 20 U.S.C. § 636 (1958) prior similar provisions at § 205, 64 Stat. 972 (1950)]; Defense Housing and Community Facilities and Services Act of 1951 [§ 310, 65 Stat. 307 (1951), 42 U.S.C. § 1592i (1958)], the United States Housing Act of 1937 [§ 16, 50 Stat. 896 (1937), as amended, 42 U.S.C. § 1416 (1958)]; Federal Civil Defense Act of 1950 [§ 3(c), 72 Stat. 533 (1958), 50 U.S.C. App. § 2281 (1958)]; Area Redevelopment Act [§ 21, 75 Stat. 61 (1961), 42 U.S.C. § 2518 (Supp. IV, 1962)]; Delaware River Basin Compact, [§ 15, 75 Stat. 714 (1961)]; Health Professions Educational Assistance Act of 1963 [§ 721, 77 Stat. 167 (1963)], and the Community Mental Health Centers Act [§ 205, 77 Stat. 292 (1963)]; Higher Education Facilities Act of 1963 [§ 403, 77 Stat. 328 (1963)]; Vocational Education Act of 1963 [§ 7, 77 Stat. 408 (1963)].

²⁵ 29 C.F.R. § 512(j); 29 Fed. Reg. 100 (1964). The regulations were promulgated under Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 3176 (1951), 63 Stat. 1267 (1951), 5 U.S.C. § 1332-15 (1958).

²⁶ Letter to the Department of the Army, dated March 23, 1955, from Assistant Solicitor.

²⁷ See *Bailey v. United States*, 201 F. Supp. 605 (D. Alas. 1962); *Pulaski Cab Company v. United States*, 157 F. Supp. 955 (Ct. Cl. 1958); *Borden v. United States*, 116 F. Supp. 873 (Ct. Cl. 1953); and *Edelstein v. South Post Officers' Club*, 118 F. Supp. 40 (E.D. Va. 1951).

²⁸ 371 U.S. 245 (1963).

milk pricing controls by similar means.²⁹ But the Court was silent concerning the application of such standards to contracts with nonappropriated funds.

On the other hand, there was no question concerning the application of labor standards before the Court in the *Paul* decision. Also, there would seem to be no question about the fact that nonappropriated funds agencies are instrumentalities of the United States.³⁰ Their activities are either established and created through the use of appropriated funds, or are maintained from profits indirectly derived from the use of appropriated moneys.³¹ The United States is liable under the Federal Tort Claims Act for the negligence of employees of nonappropriated funds instrumentalities.³² Their employees are federal employees, even though by express congressional direction they are not considered employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act.³³ But more importantly, construction by nonappropriated funds instrumentalities is covered by the Miller Act,³⁴ the federal construction bond statute. This has particular significance because the Miller Act is virtually co-extensive with the Davis-Bacon Act in its application,³⁵ and was enacted by the same Congress.³⁶ Further, it seems obvious that the Contract Work Hours Standards Act³⁷ would apply to construction by nonappropriated funds instrumentalities, because it applies to, among other things, contracts involving the employment of laborers and mechanics on federal public works.

The starting point in considering the application of the Davis-Bacon Act to "mixed" contracts is section 6(b) of the Department of Labor's publication, *Walsh-*

²⁹ *Id.* at 255.

³⁰ *Standard Oil Company of California v. Johnson*, 316 U.S. 481 (1942), holding that non-appropriated funds are protected from state taxing powers. See also the decision of the Comptroller General at 38 DECS. COMP. GEN. 470 (1959) holding that sales to a ship's store or similar organizations were sales to an agency of the Department of Defense and the Department of the Navy within the meaning of statutes restricting the selling activities of retired officers [§ 1309, 67 Stat. 437 (1953), 5 U.S.C. § 59c (1958), c. 1041, 70A Stat. 381 (1956), 10 U.S.C. § 6112(b) (1958)].

³¹ 38 DECS. COMP. GEN. 470, 475 (1959).

³² *United States v. Holcombe*, 272 F.2d 143 (4th Cir. 1960).

³³ *Ibid.* See also, § 1, 66 Stat. 138 (1952), 5 U.S.C. § 150h (1958).

³⁴ *United States v. Phoenix Assurance Company of New York*, 163 F. Supp. 713 (N.D. Cal. 1958). This was a suit brought under the Miller Act for supplying labor and materials for the construction of a post library, with the cost of construction being paid by and from a non-appropriated fund. Standard government contract forms were used, but the name of the particular fund was inserted in lieu of that of the United States. The court held that the Miller Act applied, concluding that the post library was a public building or public work of the United States. In so doing, the court observed that it was not necessary to find a formal contract with the United States. The court stated (at p. 715) that: "the test is not whether there was a formal contract in the name of the United States, but whether there was a contract 'for the construction . . . of any public building or public work of the United States.' *If the person or agency making the contract for the public building or public work, on behalf of the United States had the authority to so contract, it is immaterial whether the contract is made in the name of the United States or such person or agency.*" (Emphasis added.)

³⁵ The Miller Act applies to: "any contract, exceeding \$2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States. . . ." Sec. 1, 49 Stat. 793 (1935), 40 U.S.C. § 270a (1958). The absence of the words "contract to which the United States . . . is a party" should be noted.

³⁶ 74th Cong., 1st Sess. (1935).

³⁷ Secs. 101-106, 76 Stat. 357-359 (1962), 40 U.S.C. §§ 327-332 (Supp. IV, 1963).

Healey Public Contracts Act, Rulings and Interpretations, No. 3. Section 6(b) reads as follows:

Contracts . . . for the manufacture or furnishing of articles of equipment . . . are subject to the Public Contracts Act even though such contracts call for the erection or installation of the articles or equipment after delivery. *If such a contract involves more than an incidental amount of erection or installation work it may be subject to the Davis-Bacon Act with respect to such work if the site of the work is known at the time the invitation to bid is issued.* Examples of such contracts are those for manufacture or furnishing and installation of elevators or generators requiring prepared foundations or housing. (Emphasis added.)

The section assumes necessarily that such installation work would have to be "construction, alteration, and/or repair" under the Davis-Bacon Act in order to be covered thereby. Contracts which entail "more than an incidental amount of" such activity, that is to say a substantial amount, are covered by the act. Recent applications of this test indicate that it has both quantitative and qualitative aspects. A quantitative application based solely upon the act's \$2,000 monetary requirement has been rejected.³⁸ This seems sound. It is clear from the act and its legislative history that the cost of construction must at least exceed \$2,000 in order to be covered thereby. But it is by no means clear that all construction is covered which exceeds \$2,000 in cost when it is combined with other types of work.

What is a "substantial" amount of construction has to be gleaned necessarily from all the facts and circumstances. Both quantitative and qualitative considerations are involved. In the case of common types of construction activity, quantitative considerations appear to merit greater weight. For example, in a recent letter, it was assumed that construction under a "mixed" contract, consisting mainly of trenching, backfilling, and building manholes, and amounting to thirteen per cent of the total contract cost, was covered by the Davis-Bacon Act.³⁹ On the other hand, the

³⁸ In a memorandum of law attached to a letter from the Acting Solicitor of Labor to Leonard S. Janofsky, February 11, 1960, regarding work at Vandenberg Air Force Base, the following was stated:

"It is our conclusion that installation work constituting construction activity is of a substantial rather than incidental nature where it exceeds the jurisdictional requirements of the Davis-Bacon Act [*i.e.*, \$2,000] in dollar value."

A letter from the Acting Solicitor of Labor to Headquarters, United States Air Force, March 17, 1960, concerning work performed by the Hawaiian Telephone Company is to the same effect.

However, recent letters reject this purely quantitative approach.

In a letter to the Bureau of Ships, November 6, 1961 (DB-13), I stated the following:

". . . [T]he \$2,000 monetary requirement of the Davis-Bacon Act is not regarded as the only test of coverage in the case of supply and installation contracts. In the case of the instant contracts, however, the cost of the construction activity not only exceeded the monetary standard of the Davis-Bacon Act, but, in fact, constituted the major cost of the contract, as shown by the breakdown of estimated labor and material cost which you submitted."

To the same effect are letters of the Solicitor to the Office of the Assistant Secretary of the Army for Logistics, November 30, 1961, concerning work at Camp Roberts, California, and to the Directorate of Procurement Management, Dep't of the Air Force, April 16, 1962, regarding work at Malstrom Air Force Base, Montana (DB-23).

³⁹ Letter of Solicitor to the Directorate of Procurement Policy, Dep't of the Air Force, dated July 9, 1963, concerning work at Vandenberg Air Force Base, Calif. (DB-37). The Comptroller General has also employed a test of substantiality. Cf. 40 DECS. COMP. GEN. 565 (1961). On the same facts con-

act has not been applied to installation operations which are simple in character, involving no structural or engineering operations and taking individually a minimum of time and which are categorized as incidental to manufacturing and furnishing articles.⁴⁰ Such operations are not substantial in a "mixed contract" setting, even if it is assumed that they constitute "construction."

The testimony before the Roosevelt Subcommittee in connection with its investigation of the administration of the Davis-Bacon Act and proposed fringe benefits amendments has demonstrated the extreme difficulty of prescribing general interpretative rules concerning the term "construction."⁴¹ The report of the Missile Site Public Contracts Advisory Committee to the Secretary of Labor (the so-called "Holland Report") well illustrates this.⁴² Contractor associations and trade unions were vehement in their hostility to the report, whereas manufacturer groups and industrial unions endorsed it.⁴³

The definitions contained in the Department's Regulations, Part 5,⁴⁴ appear adequate to cope at least with conventional problems.⁴⁵ Section 5.2(g) defines "construction" as "all types of work done on a particular building or work at the site thereof." Section 5.2(f) defines the term "work" as including "construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work," and enumerates common examples of such activity. Other problems are dealt with pragmatically. For example, in the case of contracts of the Atomic Energy Commission, a number of guides have been developed for solving particular coverage problems of that agency.⁴⁶ Many questions are referred to us

considered in the Solicitor's letter of July 9, 1963, the Comptroller General expressed the opinion that 13% of the work under a contract is not a substantial part, and therefore, the Davis-Bacon Act would not apply. See Comptroller General's Letter B-150318, dated June 6, 1963. See also Cox, *The Davis-Bacon Act and Defense Construction*, in NEW YORK UNIVERSITY, 15TH ANNUAL CONFERENCE ON LABOR 151, 173 (1962).

⁴⁰ Letter of Solicitor to Directorate of Procurement Management, Dep't of the Air Force, April 16, 1962, regarding work at Malstrom Air Force Base, Montana (DB-37).

⁴¹ *Hearings Before the Special Subcommittee on Labor of the House Committee on Education and Labor on H.R. 9656 and 9657, the Administration of the Davis-Bacon Act*, 87th Cong., 2d Sess. (1962).

⁴² The Committee recommended the following:

"A. Work performed at missile sites shall be construed to be 'construction, alteration, and/or repair, including painting and decorating' within the meaning of this act only if such work is performed for or is incidental to the purpose of

1. providing housing, shelter, protection access to, or permanent foundation for a missile or space vehicle, its associated and supported systems (including components thereof), and for site personnel, or
2. providing such basic services and facilities (*e.g.*, primary power, heat, illumination, plumbing, air conditioning, etc.) as are necessary to fully equip and fit out a building or structure (surface or subsurface) in order to meet the requirements for which such building or structure is designed.

"B. Work performed at missile sites shall not be construed as 'construction, alteration and/or repair, including painting and decorating' within the meaning of the act if such work is performed for or is incidental to the purpose of providing a fully operable missile or space vehicle, together with its associated and supporting systems (including components thereof)." 200 BNA DAILY LABOR REP. E-1 (1961).

⁴³ 51 BNA DAILY LABOR REP. A-7-10 (1962).

⁴⁴ 29 C.F.R. Part 5; 29 Fed. Reg. 99 (1964).

⁴⁵ See Cox, *supra* note 39.

⁴⁶ 41 C.F.R. §§ 9-12.5000, 9-12.5005-2 (Rev. 1963).

under section 5.12 of Regulations, Part 5, which provides that: "All questions arising in any agency relating to the application and interpretation . . . of the Davis-Bacon Act . . . shall be referred to the Secretary of Labor for appropriate ruling or interpretation."⁴⁷

The word "works" in the term "public works" generally refers to improvements, such as buildings, roads, canals, rather than to progress or activity. For example, the isolated act of drilling or digging would not be within the term because it is an activity as distinguished from an improvement.⁴⁸ As a general rule, the work is "public" and federal when it is a work in which the United States is interested, regardless of whether title therein is in the federal government, and which is carried out with federal funds to serve the interest of the general public.⁴⁹ The exclusive expenditure of federal funds is a good rule of thumb for ascertaining whether a federal public work is involved. But it cannot be categorically applied because the words of the statute have their commonly accepted meaning. Recently, we had an instance where state highway facilities were being relocated under a state construction contract in connection with a Corps of Engineers project for river channel improvement. The work was carried out exclusively with federal funds, but all the facts and circumstances indicated that the project could only be fairly characterized as a non-federal public work,⁵⁰ simply because the only federal aspect of the work was the use of federal funds.

The prevailing wage protection of the act is provided to "laborers" and "mechanics" who are employed by the contractor and any of his "subcontractors" and who are "employed directly upon the site of the [contract] work."⁵¹ Whether particular workers are "laborers" or "mechanics" presents largely a question of fact. The general rule is that a "laborer" is one who performs manual work at a toilsome occupation requiring physical strength as distinguished from mental training, whereas a "mechanic" is a skilled workman who has learned a trade.⁵² A "subcontractor" is generally one who undertakes the performance of a specific part of the government construction contract, except where the undertaking is that of an ordinary materialman or manufacturer.⁵³ Employment "directly upon the site of the [contract] work" usually means the physical location of the public building or work involved. But the phrase may also include the location of contract work which is functionally and proximately connected with contract performance. Work has been regarded as functionally and proximately connected with contract performance when it is carried out at a temporary facility established almost exclusively to meet the

⁴⁷ 29 C.F.R. § 5.12; 29 Fed. Reg. 103 (1964).

⁴⁸ Letter from Solicitor to Deputy General Counsel, Corps of Engineers, dated June 25, 1963, relating to exploratory drilling.

⁴⁹ See 29 C.F.R. § 5.2(h); 29 Fed. Reg. 100 (1964). Cf. *United States to the Use of Noland v. Irwin*, 316 U.S. 23 (1942), and *Peterson v. United States*, 119 F.2d 145 (6th Cir. 1941).

⁵⁰ Letter from Solicitor to Deputy General Counsel, Corps of Engineers, dated June 21, 1963.

⁵¹ *Supra* note 24.

⁵² *Hearings, supra* note 41, at 823.

⁵³ *Id.* at 830.

needs of the contract rather than to serve the public; such facility is located within the general area of construction; and the facility is integrated with construction needs.⁵⁴

II

WAGE DETERMINATIONS

A. Walsh-Healey Public Contracts Act

1. *The Determinations procedure.*

All wage determinations under the Walsh-Healey Public Contracts Act must be on the record after an opportunity for a hearing.⁵⁵ Such determinations are subject to the requirements of sections seven and eight of the Administrative Procedure Act.⁵⁶ The rules of practice governing minimum wage determination proceedings⁵⁷ comply with those requirements.

The Rules of Practice provide that "proceedings may be initiated by the Secretary [of Labor] upon his own motion or upon the request of any party showing a proper interest in the industry."⁵⁸ After such initiation, the first step in the wage determination process is usually the holding of an industry panel meeting.⁵⁹ Attending the panel meeting are generally representatives of the Wage and Hour and Public Contracts Division, which has the responsibility of administering the statute,⁶⁰ counsel from the Office of the Solicitor, representatives of various trade associations interested in the industry, and representatives of the AFL-CIO and the labor unions which are prominent in the industry.

Several important matters are taken up at the panel meeting. The definition of the industry which will be the subject of the wage determination, and any branches which should be considered for wage determination purposes, is considered. The other matters generally relate to a wage survey which is conducted by the Department for each proceeding. In recent years, the survey has been conducted by the Bureau of Labor Statistics (BLS).⁶¹ There is discussion of such things as the form of the

⁵⁴ In the phrase "employed directly upon the site of the work," the word "work" does not appear to refer to the public building or public work which is the subject of construction, alteration, or repair. This would require the word to refer back to words "public buildings or public works." If Congress intended such a reference it is reasonable to infer that it would have made it. A similar phrase in section 2 of the act is followed by the phrase "covered by the contract." It seems then that the latter phrase fills an ellipsis following the word "work" in the limitation in question. As to the word "directly," the legislative history of the limitation indicates only a congressional intent not to cover work which is only indirectly or remotely connected with contract performance, such as mill work on materials which are to be used in federal construction. Cf. Comptroller General's letter B-148076, July 26, 1963.

⁵⁵ Sec. 10, c. 881 (1936), as added § 301, 66 Stat. 308 (1952), 41 U.S.C. § 43a (1958).

⁵⁶ Secs. 7, 8, 60 Stat. 241, 242 (1946), 5 U.S.C. §§ 1006, 1007 (1958).

⁵⁷ 41 C.F.R. §§ 50-203.15-50-203.22 (Rev. 1963).

⁵⁸ 41 C.F.R. § 50-203.15 (Rev. 1963). Provisions of the act requiring the inclusion of representations with respect to minimum wages apply only to contracts which have been the subject of a determination by the Secretary, § 12, formerly § 11, 49 Stat. 2039 (1936), renumbered § 301, 66 Stat. 308 (1952), 41 U.S.C. § 45 (1958).

⁵⁹ 41 C.F.R. § 50-203.16 (Rev. 1963).

⁶⁰ U.S. Gov. ORG. MANUAL 324 (1963).

⁶¹ See Tentative Labor Dep't Dec., 26 Fed. Reg. 5898 (1961) (manifold business forms industry).

wage questionnaire to be used in the making of a survey of the industry, the payroll period for this survey, the size of establishments to be surveyed, and lists of establishments to be included in the survey. The present use of the industry panel has its critics.⁶² On the whole, however, it has met with substantial approval.

Upon completion of the BLS survey, which is discussed at the panel meeting, the Department is ready to commence the formal proceedings. It is begun by publication of a notice of hearing in the *Federal Register*.⁶³ Generally, the notice is published at least thirty days before the hearings.⁶⁴ The notice contains a tentative definition of the industry, sets forth the subjects and issues of the hearing such as the adequacy of the definition, whether there should be branch or regional determinations, the prevailing minimum wages in the industry or branches thereof, in some instances whether there should be a separate provision for beginners, and the date of effectiveness of any wage determination.⁶⁵ Interested persons are informed in the notice that they may obtain upon request the tabulated wage and employment data of the BLS survey. By means of this offer, those attending the hearing have an opportunity to acquaint themselves with the data in advance of any presentation they may wish to make. Neither the Department's rules nor the terms of the notice require that the interested persons file any prehearing statements indicating the general nature of their presentations. It is important to note that the notice sets forth subjects and issues for the hearing. It sets forth no proposed rules, because the Department is not a proponent of any given minimum wage as being that which should be determined to be the prevailing minimum wage in the industry, or any branch thereof.

The hearing is presided over by a hearing examiner appointed under section eleven of the Administrative Procedure Act.⁶⁶ The hearing examiner rules upon the admissibility of evidence, rules upon procedural requests, and otherwise regulates the course of the proceeding.⁶⁷

The Department of Labor usually proceeds first at the hearing presenting evidence helpful to a prevailing minimum wage determination. An economist from the BLS testifies concerning the conduct and compilation of the wage survey, which is offered in evidence. Upon cross-examination he is often questioned about the quality of any sampling and the accuracy of what the tabulations purport to show. The witness is sometimes asked upon cross-examination to disclose data underlying the survey, and related requests for compulsory process in order to obtain such data are often made. However, the replies to the BLS survey questionnaire are obtained

⁶² Modley, Patton & Reilly, *supra* note 17, at 222. Note the discussion of the recommendations of the Advisory Council Committee Report which would substantially formalize the meeting.

⁶³ 41 C.F.R. § 50-202.17(b). A press release is also issued.

⁶⁴ This has been found to be sufficient notice. *E.g.*, Tentative Labor Dep't Dec., 20 Fed. Reg. 5690 (1955) (bituminous coal industry).

⁶⁵ *E.g.*, 28 Fed. Reg. 3784 (1963) (notice of hearing: construction machinery and equipment industry); 27 Fed. Reg. 9656 (1962) (battery industry).

⁶⁶ 60 Stat. 244 (1946), 5 U.S.C. § 1010 (1958).

⁶⁷ 41 C.F.R. §§ 50-203.18, .19, and .20 (Rev. 1963).

under a pledge of confidence, and are seen only by sworn employees of the Bureau. No information from the respondent is released by the BLS. In the past, the Secretary has consistently held that, on balance, the need for this information for cross-examination purposes is outweighed by the burden which it would place upon the government.⁶⁸

Typically, the BLS witness is cross-examined rigorously concerning the preparation of the tabulations, the techniques employed in their preparation, and the possibilities of upward or downward bias because of these techniques. It is not unusual to find a close correspondence between the critical statistics shown on the bureau survey and those on surveys conducted by participating trade associations.⁶⁹ Under these circumstances, particularly when the subject matter and evidence in rule-making proceedings are broadly economic or statistical in character and the parties are numerous, extensive cross-examination rarely contributes substantially to the record, and is often not necessary for a full and true disclosure of the facts.⁷⁰ Also, the production of the voluntary responses to the Bureau survey would breach a pledge of confidence given to obtain the information. This breach could jeopardize the effectiveness of the work of the Bureau, not only with respect to wage surveys for the Walsh-Healey program, but also its other important programs, such as its production of monthly figures on employment, hours, and earnings of workers in the non-agricultural economy.

An economist from the Wage and Hour and Public Contract Divisions usually testifies at the hearing concerning information relating to the competition for government contracts in the industry establishments located in various geographic regions throughout the country. The testimony runs to the issue of whether regional determinations should be made for the industry. The purpose is only to present evidence with respect to this issue. As indicated earlier, the Department sets forth no proposed rules in the notice of hearing, and it does not seek to support any position when it puts into evidence data relating to the competition for government contracts.

At this point, the hearing examiner seeks to ascertain the preference of those participating as to the order of presentations. Commonly, the trade associations make their presentations following that of the Department. The presentations of organized labor then follow.

Following the hearing and the expiration of the time for filing proposed findings and conclusions, with accompanying briefs,⁷¹ the hearing examiner certifies the

⁶⁸ See tentative Labor Dep't Dec., 22 Fed. Reg. 3729 (1957) (scientific, industrial, and laboratory instruments industry); final Labor Dep't Dec., 23 Fed. Reg. 1986 (1958) (scientific, industrial, and laboratory instruments industry); tentative Labor Dep't Dec., 24 Fed. Reg. 8741 (1959) (tires and related products industry); tentative Labor Dep't Dec., 27 Fed. Reg. 1913 (1962) (motors and generators industry); tentative Labor Dep't Dec., 27 Fed. Reg. 11282 (1962) (electronic equipment industry). But see *Wirtz v. Baldor Electric Co.*, 48 CCH L.C. ¶ 31,518 (D.C. Cir. 1963), which discusses this problem.

⁶⁹ *E.g.*, tentative Labor Dep't Dec., 27 Fed. Reg. 11282 (1962) (electronic equipment industry).

⁷⁰ Attorney General's Manual on the Administrative Procedure Act (APA), p. 78, and legislative history cited therein.

⁷¹ Sec. 8, 60 Stat. 242 (1948), 5 U.S.C. § 1007 (1958).

record to the Secretary of Labor for his consideration. The hearing examiner issues no decision, and makes no recommendations to the Secretary of Labor. The next step is the issuance of a tentative decision by the Secretary, as provided in the rules of practice⁷² and in accordance with the Administrative Procedure Act.⁷³ The tentative decisions are fully reasoned, and reflect a careful study of the proposed findings and conclusions presented by interested persons. Following the tentative decision, interested persons may file exceptions thereto. The Secretary then issues a final decision after consideration of any exceptions, and discusses fully any matters which are not subsumed in the narrative of the tentative decision.

In addition to the evidence relating to the proposed rule-making, the evidence is received at the hearing in relation to the discretionary exception provided in section 4(c) of the Administrative Procedure Act⁷⁴ and reflected in the rules of practice⁷⁵ for shortening the delay in effective date of final decisions resulting in wage determinations. In recent decisions, good cause has been found to shorten the delay in effective date to seven days.⁷⁶ Generally, objection to diminution of the delay in effective date is based on an allegation of inadequate time to adjust to any new wage determination. However, because minimum wages prescribed under the act apply only to contracts for which bids are solicited or negotiations otherwise commenced on or after the effective date of a particular determination,⁷⁷ and there are intervals of time between invitation for bids and their opening⁷⁸ the time allowed for adjusting to any new determination seems likely in most cases to equal or exceed thirty days when seven days is prescribed. Thus, it would seem that further delay in most cases would not be in the public interest.

2. *Application of statutory terms.*

(a) *Types of determination.* Under section 1(b) of the Walsh-Healey Public Contracts Act,⁷⁹ the Secretary of Labor determines "the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contracts." The text has been interpreted as permitting the Secretary of Labor to determine prevailing minimum wages in accordance with three distinct standards, namely, the prevailing minimum wages for persons employed: (1) on "similar work," (2) in the "particular or similar industries," or (3) in "groups of industries

⁷² 41 C.F.R. § 50-203.21 (Rev. 1963).

⁷³ Sec. 8, 60 Stat. 242 (1946), 5 U.S.C. § 1007 (1958).

⁷⁴ 60 Stat. 238 (1946), 5 U.S.C. § 1003(c) (1958).

⁷⁵ 41 C.F.R. § 50-203.22 (Rev. 1963).

⁷⁶ *E.g.*, final Labor Dep't Dec., 26 Fed. Reg. 2698 (1961) (manifold business forms industry), final Labor Dep't Dec., 26 Fed. 7699 (1961) (paper and pulp industry), tentative Labor Dep't Dec., 27 Fed. Reg. 11282 (1962) (electronic equipment industry), tentative Labor Dep't Dec., 28 Fed. Reg. 6989 (1963) (engines and turbines industry).

⁷⁷ 41 C.F.R. § 50-202.1 (Rev. 1963).

⁷⁸ See tentative Labor Dep't Dec., 27 Fed. Reg. 11282 (1962) (electronic equipment industry).

⁷⁹ 49 Stat. 2036 (1936), 5 U.S.C. § 35 (1958).

currently operating in the locality" in which the contract is to be performed.⁸⁰ In the vast majority of cases, the Secretary has made determinations for "particular" industries. None of the terms involved are defined in the act.

(b) "*Prevailing minimum wages . . . for persons employed.*" Concerning the meaning of the term "wages," it should be noted that no determination decision under the act has included payments for welfare and pension plans or any other fringe benefits.⁸¹ Although one decision left open the question of the relevance of fringe benefits,⁸² other decisions have indicated that such benefits are not within the term "wages."⁸³ The AFL-CIO Economic Policy Committee has urged the inclusion of fringe benefits in wage determinations under the act.⁸⁴

With regard to the term "minimum wages," trade associations often urge the Secretary to use in his determination the lowest established rates of various establishments instead of the lowest wage rates actually paid during a representative payroll period, contending that such lowest established rates are a better measure of the minimum wages. The Secretary has consistently rejected this contention.⁸⁵ The lowest wage rates actually paid seem more representative of the particular industry at any one time,⁸⁶ and seem to serve more adequately the "persons employed" standard of the act.⁸⁷ Also, at least in some cases, lowest established wage rates have not been shown to have been paid with sufficient recency to give reasonable assurance that they will be used with respect to future employment.⁸⁸

In applying the term "prevailing," the Secretary seeks first to find out whether there is a predominant minimum wage, and in the event there is none, he next seeks the most representative minimum wage.⁸⁹ Typically, it is necessary to ascertain the most representative minimum wage, because in most industries there is no minimum wage which may be regarded as "prevailing" in the usual sense of the term.⁹⁰ This brings us to consideration of the median method of arriving at the most representative minimum wage, a method which has been the subject of some

⁸⁰ *E.g.*, tentative Labor Dep't Dec., 17 Fed. Reg. 11197 (1952) (textile industry); tentative Labor Dep't Dec., 20 Fed. Reg. 5690 (1955) (bituminous coal industry).

⁸¹ Tentative Labor Dep't Dec., 17 Fed. Reg. 11197 (1952) (textile industry). See also tentative Labor Dep't Dec., 27 Fed. Reg. 898 (1962) (machine tools industry).

⁸² Tentative Labor Dep't Dec., 23 Fed. Reg. 5129 (1958) (flour and related products industry).

⁸³ Tentative Labor Dep't Dec., 19 Fed. Reg. 535 (1954) (woolen and worsted industry) and tentative Labor Dep't Dec., 27 Fed. Reg. 898 (1962) (machine tools industry).

⁸⁴ See statement of Walter P. Reuther before the Joint Economic Committee of Congress. 33 BNA DAILY LAB. REP. A-9 (1963).

⁸⁵ Tentative Labor Dep't Dec., 26 Fed. Reg. 10518 (1961) (office, computing, and accounting machines industry).

⁸⁶ In tentative Labor Dep't Dec., 25 Fed. Reg. 7801 (1960) (electron tubes and related products industry) it was noted that the lowest established rates table would present minimum wages at a level lower than those which would be paid in the industry at any one time.

⁸⁷ Tentative Labor Dep't Dec., 25 Fed. Reg. 12363 (1960) (metal business furniture and storage equipment industry).

⁸⁸ Tentative Labor Dep't Dec., 25 Fed. Reg. 7801 (1960) (electron tubes and related products industry).

⁸⁹ *E.g.*, Tentative Labor Dep't Dec., 26 Fed. Reg. 4173 (1961) (electronic component parts industry), Tentative Labor Dep't Dec., 27 Fed. Reg. 315 (1962) (drugs and medicine industry).

⁹⁰ Modley, Patton & Reilly, *supra* note 17, at 218.

comment.⁹¹ With some variations because of facts and circumstances peculiar to particular industries, the most representative minimum wage is found to be that paid by about one-half of the establishments employing approximately one-half of the employees covered by the act in a frequency distribution table containing the lowest wage rates actually paid in such establishments.⁹²

Trade associations have advanced from time to time proposed alternatives to the median method. Perhaps the most significant of these is the so-called "interquartile" method. Under the "interquartile" method, the dispersions from the median are measured in both directions, both upward and downward, to the upper and lower quartiles. The lowest point in the range, that is the lower quartile, would be the point of determination.⁹³ Thus, the method permits the ascertainment of a prevailing *range* of minimum wages, but would ultimately prescribe a minimum wage at the lower quartile, which would seem less representative of the lowest wages actually paid than the median. The "interquartile" method has been carefully considered in a number of proceedings, and it has been consistently rejected.⁹⁴ Other methods have also been suggested,⁹⁵ but time does not permit their examination here.

(c) *Locality*. From the first wage determination under the act to the present, the Secretary of Labor has prescribed industry-wide application of wage determinations whenever the industry as a whole was found to constitute one competitive area for the manufacturing or furnishing of the products of an industry under the government contracts.⁹⁶ Industry-wide application of wage determinations has been validated upon judicial review.⁹⁷ In *Mitchell v. Covington Mills*,⁹⁸ the Court of Appeals for the District of Columbia stated concerning an industry-wide wage determination for the textile industry:⁹⁹

. . . [U]nlike some industries, only an industry-wide minimum will serve this purpose (*i.e.*, to outlaw low wages as an element in the competition for Government contracts and to use the leverage of the Government's purchasing power to raise labor standards), because the competition is industry-wide. The District Court's construction of the Act would make it necessary for the Secretary to fix separate minima according to the wages that

⁹¹ *Id.* at 215. See also Backman & Levine, *The Prevailing Minimum Wage Under the Walsh-Healey Act*, NEW YORK UNIVERSITY, 14th ANNUAL CONFERENCE ON LABOR 393, 417-19 (1961).

⁹² *E.g.*, tentative Labor Dep't Dec., 23 Fed. Reg. 5334 (1958) (soaps and related products industry).

⁹³ Tentative Labor Dep't Dec., 25 Fed. Reg. 12363 (1960) (metal business furniture and storage equipment industry).

⁹⁴ *E.g.*, *ibid.*; also, tentative Labor Dep't Dec., 26 Fed. Reg. 7352 (1961) (miscellaneous chemical products and preparations industry).

⁹⁵ See, for example, tentative Labor Dep't Dec., 25 Fed. Reg. 9903 (1960) (paper and paperboard containers and packaging products industry). Tentative Labor Dep't Dec., 26 Fed. Reg. 5626 (1961) (paper and pulp industry).

⁹⁶ Labor Dep't Dec., 2 Fed. Reg. 233 (1937) (men's clothing industry), tentative Labor Dep't Dec., 28 Fed. Reg. 9318 (1963) (battery industry).

⁹⁷ *Mitchell v. Covington Mills*, 229 F.2d 506 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1002 (1956); *Consolidated Electric Lamp Company v. Mitchell*, 259 F.2d 189 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 908 (1959).

⁹⁸ *Supra* note 97.

⁹⁹ 229 F.2d at 508.

prevail in each separate textile community. This would freeze the competitive advantage of concerns that operate in low-wage communities and would in effect offer a reward for moving into such communities. Obviously this would defeat the purpose of the Act.

However, it is unclear from *Covington Mills* or the subsequent decision in *Consolidated Electric Lamp Co.*¹⁰⁰ whether the validity of industry-wide determinations rests upon an interpretation that the locality standard of the act applies to wage determinations for groups of industries, or simply on a broad construction of the term "locality" in the light of the legislative purposes involved.

The foregoing should not be read as suggesting that geographic differentials in minimum wages are not prescribed. They are,¹⁰¹ and the issue of whether or not such differentials should be made is present in every proceeding.

(d) *Particular or similar industries, similar work, groups of industries.* With few exceptions, wage determinations under the act are for "particular or similar industries." The term "industries" or its singular form is not defined or restricted by the act. Nor is it a term of precise content in general usage. The definitions of particular industries are often drawn from industry groupings in the Standard Industrial Classification (SIC) Manual.¹⁰² These groupings conform with the structure of American industry, and have been found to furnish authoritative guides.¹⁰³ However, it has been noted in wage determinations that there is substantial flexibility as to industrial scope authorized under the act. The act has been held to authorize determinations applicable to branches of an industry,¹⁰⁴ or so-called product divisions.

While it has been recently held that the "similar work" standard may not be used to prescribe minimum wages for various industrial occupations,¹⁰⁵ this decision is pending on appeal, with the Secretary of Labor contending it is in error. In an early determination under the act for the *men's hat and cap industry*,¹⁰⁶ the Secretary of Labor had declined a request for separate occupational minimum wages. This position was later abandoned when the determination was amended to provide two minimum wage rates; one for employees whose tasks were "subservient and supplementary to the basic productive processes of the industry" and the other for the remaining minimum wage workers.¹⁰⁷ Separate occupational minimum wages have

¹⁰⁰ *Supra* note 97.

¹⁰¹ *E.g.*, Labor Dep't Dec., 4 Fed. Reg. 265 (1939) (iron and steel industry), tentative Labor Dep't Dec., 20 Fed. Reg. 5690 (1955) (bituminous coal industry).

¹⁰² Bureau of the Budget, Standard Industrial Classification Manual (1957).

¹⁰³ Tentative Labor Dep't Dec., 19 Fed. Reg. 535 (1954) (woolen and worsted industry).

¹⁰⁴ Tentative Labor Dep't Dec., 24 Fed. Reg. 8741 (1959) (tires and related products industry) and authority cited therein. For some illustrative determinations involving product divisions of branches, see tentative Labor Dep't Dec., 21 Fed. Reg. 6142 (1956) (battery industry), tentative and final Labor Dep't Decs., 25 Fed. Reg. 9903 (1960), 26 Fed. Reg. 7 (1961) (paper and paperboard containers and packaging products industry), tentative Labor Dep't Dec., 28 Fed. Reg. 6989 (1963) (engines and turbines industry).

¹⁰⁵ See *Barber-Coleman Co. v. Wirtz*, 16 WH Cases 267 (D.D.C. 1963).

¹⁰⁶ Labor Dep't Dec., 2 Fed. Reg. 1335 (1937).

¹⁰⁷ 3 Fed. Reg. 224 (1937), 13 Fed. Reg. 6081 (1948).

been established by tolerances under section six of the act¹⁰⁸ more often than they have been under the "similar work" standard.

The "groups of industries" standard has been used to establish under the act a minimum wage for all industries which is equal to that payable under section 6(a) (1) of the Fair Labor Standards Act, except in those particular or similar industries for which higher minimum wages have been prescribed.¹⁰⁹

B. Davis-Bacon Act

1. *Wage determination process.*

Contracts subject to the Davis-Bacon Act must contain a wage determination made by the Secretary of Labor. There is no provision in the act comparable to section twelve of the Walsh-Healey Public Contracts Act,¹¹⁰ permitting the making of construction contracts without wage standard requirements in the absence of wage determinations by the Secretary of Labor. In most cases, separate wage determinations are made for individual contracts.¹¹¹ In the remainder of cases, wage determinations of more general application are made for the contracts of an agency in a particular area where the volume of construction is high; wage patterns are well established; and the evidence indicates clearly that the statutory standards are met regardless of the type of any individual procurement.¹¹²

At present, about 50,000 wage determinations are made yearly by the Wage-Determinations Division of the Office of the Solicitor.¹¹³ Moreover, under the Walsh-Healey Public Contracts Act, only single wage rates for given industries are generally the subject of wage determinations. Under the Davis-Bacon Act separate wage rates are determined in all cases for each classification of laborers and mechanics. The Department's general form for requesting wage determinations¹¹⁴ for most covered construction contains space for at least fifty-four separate classifications and wage rates, while that for Interstate Highway¹¹⁵ construction contains space for at least sixty-two classifications and wage rates.

The wage determination procedure is initiated by the procurement agency which submits its request for a finding of wage-rates prevailing in the locality of the proposed project for the various classes of laborers and mechanics whose employment will be required. The request is usually made at least thirty days before any advertisement of specifications or the beginning of negotiations, as the case may be.

The finding of the wage rates prevailing in the locality of the proposed project for

¹⁰⁸ Sec. 6, 49 Stat. 2038 (1936), 41 U.S.C. § 40 (1958). See 41 C.F.R. Part 50-203 (Rev. 1963).

¹⁰⁹ See 41 C.F.R. § 50-202.2 (Rev. 1963); 28 Fed. Reg. 7513 (1964), 28 Fed. Reg. 1265 (1964).

¹¹⁰ Formerly § 11, 49 Stat. 2039 (1936), renumbered, § 301, 66 Stat. 308 (1952), 41 U.S.C. § 45 (1958).

¹¹¹ 29 C.F.R. § 5.3, 29 Fed. Reg. 100 (1964).

¹¹² *Ibid.* Formerly such similar wage determinations were issued under regulatory variances, and were often referred to as "54A-type" decisions. *E.g.*, 32 C.F.R. § 1012.4040-2(a) (Rev. 1963).

¹¹³ *Hearings, supra* note 41, at 64. The Office of the Solicitor performs the wage determination functions of the Secretary of Labor under the Davis-Bacon Act and its related statutes. *Id.* at 63.

¹¹⁴ Form DB-11, *Hearings, supra* note 41, at 83.

¹¹⁵ Form DB-11(a), *id.* at 84.

the various classes of laborers and mechanics that will be required is an investigative or appraising process.¹¹⁶ The Department must have or obtain relevant wage rate information in order to make its finding. To this end, the Department conducts a continuing program for the obtaining and compiling of such information. The Department encourages the voluntary submission of such information by contractors, trade associations, labor organizations, public officers, and other interested persons.¹¹⁷ The Department also subscribes to a commercial reporting service which keeps it advised on a daily basis on new construction projects in almost every state.¹¹⁸ The names and addresses of the general contractors and their subcontractors are furnished to us by the reporting service. We send letters to the contractors asking them to furnish pertinent wage rate information.

Sometimes, the information which we have is insufficient for making a finding. In such situations, a field survey can be made in the area of the proposed project for the purpose of obtaining the necessary information.¹¹⁹ In the course of such a survey, local labor organizations, contractors, contractors' groups, and public agencies are contacted. Upon occasion, hearings may also be held in order to amplify further the record upon which the finding is to be based.¹²⁰

When the finding is made, and the wage determination is issued to the requesting agency, copies of the wage determination are promptly sent to labor organizations and contractor associations with the understanding that such copies will be distributed to any local affiliates that may have an interest in the wage determination. This is done in order to afford interested persons an opportunity to present timely requests for changes in the wage determination upon the basis of any evidence that they may have.¹²¹ In this connection, interested persons have access to the information upon which the wage determination is based, although respect is given to any underlying data submitted in confidence in order not to discourage the voluntary submission of such data. The entire program depends in large measure upon the voluntary submission of such data.

The act confers no litigable rights on bidders for government construction contracts to challenge judicially the wage determinations of the Secretary of Labor.¹²² However, the successful bidder (*i.e.*, the contractor) has several avenues of review with respect to the matter of labor costs.¹²³

Interested persons may, however, appeal to the Department's Wage Appeals Board for review in its discretion of wage determinations by the Office of the Solicitor.¹²⁴

¹¹⁶ Gillioz v. Webb, 99 F.2d 585 (5th Cir. 1938).

¹¹⁷ 29 C.F.R. § 1.3, 29 Fed. Reg. 96 (1964).

¹¹⁸ Hearings, *supra* note 41, at 67.

¹¹⁹ 29 C.F.R. § 1.7, 29 Fed. Reg. 96 (1964).

¹²⁰ 29 C.F.R. § 1.8, 29 Fed. Reg. 96 (1964).

¹²¹ Hearings, *supra* note 41, at 70.

¹²² United States v. Binghamton Construction Co., 347 U.S. 171 (1954).

¹²³ For a discussion of these, see Speck, *Liability of the United States Upon Wage Schedules in Construction Contracts*, 23 GEO. WASH. L. REV. 249 (1955).

¹²⁴ 29 C.F.R. § 1.14; 29 Fed. Reg. 97 (1964).

The Wage Appeals Board is empowered to pass upon all questions of fact and law.¹²⁵

In the predetermination of wage rates under the Davis-Bacon Act, it is not always possible for the procurement agency and the Department of Labor to foresee in all cases what classes of laborers and mechanics will be needed in the course of construction, and there is some question as to whether the act permits the determination of prevailing wage rates after the award of contract for classes of laborers or mechanics not listed in the contract wage schedule. It is permissible, however, to provide by contract that any class of laborers and mechanics not listed in contract wage schedule shall be classified or reclassified conformably with that schedule, and in the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers or mechanics, to refer the matter to the Secretary of Labor for final determination.¹²⁶ The Department's regulations provide for such a procedure.¹²⁷

2. *Application of statutory terms.*

Under section one of the Davis-Bacon Act¹²⁸ the Secretary of Labor predetermines the minimum wages to be paid various classes of laborers and mechanics to be employed under contracts covered thereby which are "based upon the wages . . . determined . . . 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."

(a) *Wages.* There is no definition of the term "wages" in the act, nor in the Department's rules. However, the term has been interpreted as meaning cash or its equivalent. Unconditional vacation payments in cash are considered "wages" under the act.¹²⁹

There is a need for a change in the act permitting the general inclusion of fringe benefits in prevailing wage determinations. It is necessary in order to safeguard substantial local practices under which such benefits are paid from outside practices under which such benefits are not paid. This need has been generally recognized, and requires no elaboration here.¹³⁰

The term "wages" when used in connection with the making of wage determinations means, to the extent practicable, current wages. Wages paid more than a year previous to the request for the wage determination need not be considered.¹³¹

(b) *Prevailing wage rate.* The Department's rules concerning the making of

¹²⁵ Secretary of Labor's Order No. 32-63, 29 Fed. Reg. 118 (1964).

¹²⁶ 19 DECS. COMP. GEN. 568 (1939).

¹²⁷ 29 C.F.R. § 5.5(a)(1)(ii); 29 Fed. Reg. 101 (1964).

¹²⁸ 46 Stat. 1494 (1931), as amended, 49 Stat. 1011 (1935), 40 U.S.C. § 276a (1958).

¹²⁹ Statement of Secretary of Labor Goldberg, in *Hearings Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, on H.R. 9656 and H.R. 9657, 87th Cong., 2d Sess. 13 (1962).

¹³⁰ Report of House Committee on Education and Labor, H.R. REP. No. 308, 88th Cong., 1st Sess. 2 (1963). A bill to include fringe benefits in wage determinations under the act was recently passed by the House of Representatives. 110 CONG. REC. 1171 (daily ed. Jan. 28, 1964).

¹³¹ 29 C.F.R. § 1.6; 29 Fed. Reg. 96 (1964).

wage determinations do not define the term "prevailing" as such. Rather, they use the term "prevailing wage rate," which is defined as follows for each classification of laborers and mechanics in the particular area involved:¹³²

- (1) The rate of wages paid in the area in which the work is to be performed, to the majority of those employed in that classification in construction in the area similar to the proposed undertaking;
- (2) In the event that there is not a majority paid at the same rate, then the rate paid to the greater number: *Provided*, such greater number constitutes 30 per cent of those employed:
or
- (3) In the event that less than 30 per cent of those so employed receive the same rate, then the average rate.

The bulk of the criticism the Department's use of the term centers upon the so-called "thirty per cent" rule, which is employed when there is no majority of laborers or mechanics employed in a classification and before any resort is made to finding an average wage rate as the "prevailing wage rate."¹³³ In commenting upon this rule in its report concerning the recent investigation of the administration of the Davis-Bacon Act, the House General Subcommittee on Labor considered it preferable to the use of an average.¹³⁴ The conclusion of the committee apparently takes into consideration the fact that the percentage of workmen involved in an application of the rule may range from thirty per cent to forty-nine per cent. Further, such legislative history as there is on the point indicates that by "prevailing" Congress meant the most predominant wage.¹³⁵ The use of an average discloses a representative but not a predominant wage.

A number of states have similarly construed the term "prevailing" under analogous legislation. The Hawaii and Kentucky statutes define the term to mean the rate paid to a majority receiving a single rate, then the rate paid to the greater number, provided this greater number constitutes at least thirty per cent. The New York statute also has a similar provision. It looks first to the rate paid to the majority of workers. However, if such a rate does not exist, the prevailing rate is considered that which is paid to the greater number, provided that this greater number constitutes at least forty per cent of the workers. If forty per cent does not receive a single rate, then the average rate is controlling. The Wisconsin statute also defines this term. Under its provisions, the prevailing wage rate is the rate paid to the majority, and if there is no majority, then the rate paid to the greater number without further limitation.¹³⁶

(c) *Classes and corresponding classes of laborers and mechanics.* The Secretary of Labor predetermines the minimum wages to be paid various "classes" of laborers and mechanics to be employed under a proposed contract from the wages found to

¹³² 29 C.F.R. § 1.2(a); 29 Fed. Reg. 96 (1964).

¹³³ E.g., see *Hearings, supra* note 41, at 16, 190, 239, 248, 737.

¹³⁴ Report of House General Subcommittee, *infra* note 152, at 7, 8.

¹³⁵ E.g., *Hearings Before the House Committee on Labor on H.R. 12, 122, 7005, 7254, and H.J. Res. 38, 72d Cong., 1st Sess. 103, 189 (1932).*

¹³⁶ *Hearings, supra* note 41, at 825.

be locally prevailing "for the corresponding classes of laborers and mechanics" employed on projects of a character similar to the contract work. In so doing, the Secretary generally takes the local corresponding classes of laborers and mechanics as he finds them, although he may not use criteria which detract from the term "classes," as used in the act. If the local practice is to distinguish crafts upon the basis of end products, tools, and the like, it would seem that the statute does not permit the Secretary of Labor to disregard such methods of distinction.¹³⁷ To do otherwise would destroy craft lines which the statute seeks to preserve. In distinguishing craft lines for the purposes of wage determination, the Secretary uses the test of locally prevailing practice. A different test is clearly unreasonable for wage determination purposes, because it would permit the possibility of more than one applicable minimum wage rate for the same work. Serious enforcement problems would arise if anything but a prevailing practice test were used. For example, if a "substantial" practice test were used as an alternative, the contractor would have a choice of minimum wages to pay in any situation where the "substantial" practice was not the "prevailing" practice.¹³⁸ Moreover, it would not lend the certainty to minimum labor costs prior to contract award which was sought by the 1935 amendments.¹³⁹

The terms considered under this heading were not included in the original Davis-Bacon Act of March 3, 1931,¹⁴⁰ which simply provided that "the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor . . . shall be not less than the prevailing rate of wages for *work of a similar nature*. . . ." The investigation of the Walsh Committee, which contributed to the enactment of the act in its present form, disclosed that under the original act, there had been a failure to retain strict lines of demarcation between skilled and unskilled labor. As a consequence, the tendency had been for wages of the skilled group to descend toward the level of the unskilled group. As a result, the "work of a similar nature" standard was deleted, and in lieu thereof provision was made for wage determinations for "classes" of laborers and mechanics from the locally prevailing wages paid "*corresponding classes of laborers and mechanics* employed on projects of a character similar to the contract work."¹⁴¹

(d) *Projects of a character similar to the contract work*. As indicated in the preceding paragraph, the phrase "projects of a character similar to the contract work" was not included in the original Davis-Bacon Act, but was added in 1935 as part of a new standard replacing the original "work of a similar nature" standard. The legislative history suggests that the phrase was intended to assure that workmen, such as carpenters, plumbers, and electricians, receive wages while working on

¹³⁷ Cf. Comptroller General's letter B-147602, Jan. 23, 1963.

¹³⁸ *Ibid.*

¹³⁹ See Gillioz v. Webb, *supra* note 116.

¹⁴⁰ Secs. 1-2, 46 Stat. 1494 (1931). (Emphasis added.)

¹⁴¹ Report of Senate Committee on Education and Labor, S. REP. No. 332, 74th Cong., 1st Sess. 17 (1935). (Emphasis added.)

government projects which at least equal those they would receive when employed on similar projects being constructed in the locality.¹⁴² Thus, in comparing the term "contract work" with "project," the Department does not narrowly construe "contract work" so as to refer only to the specified work in the contract, because this would defeat the purpose of the phrase in situations where such work is only a part of a larger planned undertaking. By "contract work" is meant, therefore, the overall planned undertaking or project without regard to the mechanics of procurement—*i.e.*, whether the work is to be accomplished under one or several contracts.¹⁴³ Otherwise, the application of the act would be dependent upon the mechanics of procurement; and we do not believe this was intended.

In most wage determinations, the question of similarity of projects poses no problem. We have found that it has been the general practice in the construction industry to distinguish between heavy and highway construction on the one hand, and building construction on the other, with one schedule of wage rates for the heavy and highway construction and another schedule for the building construction.¹⁴⁴ In some areas and under some circumstances, a distinction is made between heavy and highway construction.

Occasionally, however, situations do arise when it is necessary to pass upon close questions involving the similarity of projects because of the presence of wage differentials which are based upon construction more narrowly classified than building, heavy, or highway, or because of difficulty in classifying a project as requiring building, heavy, or highway construction. In such situations, the projects considered for wage determination purposes should closely correspond to the proposed project.¹⁴⁵

(e) *City, town, village, or other civil subdivision of the state in which the work is to be performed.* The Department's rules governing the making of wage determinations provide that if there has been no similar construction within the city,

¹⁴² For a discussion of the legislative history, see *Hearings, supra* note 41, at 825.

¹⁴³ *E.g.*, *Re the Determination of Prevailing Wage Rates for Construction Work at Pantex Ordnance Works, Carson County, Texas*; Report of Hearing Examiner, August 23, 1951, United States Department of Labor; *Re Prevailing Wage Rates for the Construction of Roads and Streets, Railroads, Utilities, including Underground Fuel Storage Tanks, Water Mains, Gas Lines and Sewer Lines; Grading; Paving of Airstrips, Runways, and Taxiways at Bergstrom Air Force Base and San Marcos Air Force Bases, in the Austin, Texas area.* Report of Hearing Examiner, March 12, 1953; *Re the Determination of Prevailing Wage Rates for the Construction of Roads and Streets; Railroads; Utilities, Including Underground Fuel Storage Tanks, Water Mains, Gas Lines, and Sewer Lines; Grading; Paving of Airstrips, Runways and Taxiways; Ellington AFB, Houston ORC Armory, San Jacinto Depot and Harris Co. A.C.W., in Houston, Texas area.* Report of Hearing Examiner, January 27, 1953. *Predetermination of wage rates to be paid for construction of site facilities for Houston Manned Spacecraft Center, Report of Solicitor, March 26, 1962.*

¹⁴⁴ *Hearings, supra* note 41, at 840.

¹⁴⁵ *E.g.*, the construction of runways, aprons, and taxiways, and at a municipal airport have been considered "similar" to the same type of construction at an Air Force installation. *Re: Determination of Prevailing Wage Rates for Construction Work at Tye Air Force Base, Taylor County, Texas, with Particular Reference to Taxiways, Runways, Operational Aprons, and Related Work*, Report of Hearing Examiner, August 6, 1953. The construction of one dam has been compared to that of another. *Re: Determination of Wage Rates to be Paid Laborers and Mechanics on Building and Heavy Construction At Gavins Point Reservoir, in Knot and Cedar Counties, Nebraska, and Yankton County, South Dakota*, Report of Hearing Examiner, January 30, 1953. In the case of residential housing projects, it may not be inappropriate to consider similar housing projects. *Hearings, supra* note 41, at 873.

town, village, or other civil subdivision of the state wherein the proposed project is located, then the wage rates paid on the nearest similar construction may be considered.¹⁴⁶ Such legislative history as there is¹⁴⁷ fully supports the Department's position that this so-called "locality" standard was not intended to be given a narrow, technical meaning. Congress apparently recognized that the Secretary must consider an area sufficiently large so that there will be sufficient projects "of a character similar" on which to base the wage determination, but with the limitation that it be small enough to reflect local wages and not the wages of a different area.

The findings of the House General Subcommittee on Labor following an investigation of the administration of the Davis-Bacon Act support the Department's interpretation of this provision. The report of the Committee notes that in gathering wage data on a project similar to Boulder Dam, the Secretary might have to go to all adjoining states.¹⁴⁸ Administrative experience has borne out this observation. For example, about nine years ago, the Oahe Reservoir was being constructed in Stanley and Hughes counties, South Dakota. The reservoir was to be located about six miles northwest of Pierre, South Dakota, and was to be completed at an estimated cost of \$300 million. It was to be 9,300 feet long and 242 feet high. The embankment was to contain some 78,000,000 cubic yards of earth, and 1,065,000 cubic yards of concrete were to be required for the spillway. The area was rural in character, and thinly populated. The labor force for the project obviously had to be drawn from the entire state and beyond. Since there were no projects of a character similar in the civil subdivisions involved, it was necessary to go beyond in search of such projects, although in the particular case it was not necessary to cross state lines.¹⁴⁹

CONCLUSION

In concluding, it may be well to summarize the points of similarity and difference in the coverage and wage determination provisions of the Walsh-Healey Public Contracts Act and the Davis-Bacon Act.

The Walsh-Healey Public Contracts Act applies to government contracts in excess of \$10,000 for the manufacturing or furnishing of materials and equipment. The Davis-Bacon Act applies to government contracts in excess of \$2,000 for the construction, alteration, and/or repair of public buildings or public works of the United States. Both statutes are liberally construed in affording minimum wage protection in federal procurement.

Under the Walsh-Healey Public Contracts Act, the requirement for the inclusion of representations with respect to the payment of minimum wages applies only to purchases or contracts relating to industries which have been the subject of

¹⁴⁶ 29 C.F.R. § 1.2(a), 1.5(b) (Rev. 1963).

¹⁴⁷ For further discussion of the legislative history, see *Hearings, supra* note 41, at 828.

¹⁴⁸ Report of House General Subcommittee on Labor, *infra* note 152, at 4, 5.

¹⁴⁹ *Re: Predeterminations of wage rates to be paid laborers and mechanics on construction work at Oahe Reservoir, near Pierre, South Dakota, in Stanley and Hughes Counties, South Dakota*, Report of Hearing Examiner.

wage determinations by the Secretary of Labor. Because of the enormity of statistical problems and compliance with the formalities requisite to proceedings subject to sections seven and eight of the Administrative Procedure Act, comparatively few wage determinations are made under the act which have application in particular or similar industries. In contrast, the inclusion of wage determinations by the Secretary of Labor under the Davis-Bacon Act is mandatory in the case of federal construction contracts. About 50,000 wage determinations are issued each year. Under the Walsh-Healey Act, in most instances only a single minimum rate is prescribed as a result of a wage determination for an entire industry, while under the Davis-Bacon Act separate minimum wages are prescribed for numerous classifications of laborers and mechanics.

The wage determination provisions under the two statutes differ somewhat. The Walsh-Healey Public Contracts Act calls for the determination of "prevailing minimum wages," whereas the Davis-Bacon Act requires that "prevailing wages" for various classifications of laborers and mechanics be found.

The Walsh-Healey Public Contracts Act contains essentially three distinct wage determination standards. The Secretary may determine the prevailing minimum wages for persons employed: (1) on "similar work," (2) in "particular or similar industries," or (3) in "groups of industries currently operating in the locality" in which the contract is to be performed. Most wage determinations under the act are made for particular industries, and contain no regional differentials because of the existence of industry-wide competition for government contracts. When industry-wide competition exists, only a co-extensive wage determination will serve the purposes of the legislation. If plants in Community A are paying substantially lower wages than plants in Community B, and all plants compete for government contracts, the recognition of Community A and Community B as separate localities under the act would mean that the plants in Community A might underbid plants in Community B upon the basis of lower wages. Even if the "locality" limitation is read as limiting the entire wage determination function, it is not necessary to attach a narrow geographic connotation to it where to do so would frustrate the legislative purpose.

Under the Davis-Bacon Act, the prescribed minimum wages for various classes of laborers and mechanics are those found 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. The wage determinations under the act reflect the prevailing wages paid in a civil subdivision of the state wherein the proposed construction project is located. The Secretary considers evidence beyond the civil subdivision only when there is not sufficient evidence therein of wages paid on projects of similar character.

Some critics of the Davis-Bacon Act and the Walsh-Healey Public Contracts Act have asserted that the statutes have outlived their usefulness, and that, therefore,

they should be repealed.¹⁵⁰ The core of their contention is that this legislation is no longer justifiable, because the Fair Labor Standards Act affords sufficient minimum wage protection.

Without the Davis-Bacon Act and the Walsh-Healey Public Contracts Act, it would not be unrealistic to expect the price of labor to become once more an element in the competition for government construction and supply contracts. This legislation still constitutes an important part of our national labor policy, and retains its usefulness.¹⁵¹ The findings of the House General Subcommittee on Labor following an investigation of the administration of the Davis-Bacon Act fully support this conclusion. The Committee noted that the fundamental principle of the Davis-Bacon Act is to avoid the depression of local wage conditions as the results of federal construction programs. The Committee found that this principle is as valid today as it was when the act was first enacted in 1931.¹⁵²

Such legislation is not a unique federal phenomenon. The Davis-Bacon principle has been given broad recognition in state legislation relating to public works construction. There are thirty-four states which have statutes more or less similar to the Davis-Bacon Act, providing for the prescription of minimum wages payable upon such construction.¹⁵³

The Walsh-Healey Public Contracts Act merely represents an extension of the Davis-Bacon principle to supply contracts. It was so regarded by its proponents.¹⁵⁴

¹⁵⁰ *Hearings, supra* note 41, at 730, 737-38 (Statements of Robert T. Borth, Chamber of Commerce of the United States; Frank W. Cantrell of Little Rock, Ark., on behalf of State Manufacturers Association; James L. McIlvaine, President, Northern Virginia Builders Association; Albert H. Small, Chairman, Labor Committee, The House Builders Association of Metropolitan Washington). See also Chamber of Commerce pamphlets: DAVIS-BACON—THE SHOTGUN LAW; WALSH-HEALEY ACT—THE HORSE AND BUGGY LAW; and INFLATION'S HELPMATE: THE DAVIS-BACON AND WALSH-HEALEY ACTS.

¹⁵¹ This conclusion is shared by others. For example, in the recent hearings held by the House Special Subcommittee on Labor on the administration of the Davis-Bacon Act, Leon B. Kromer, Jr., Executive Vice President, Mechanical Contractors Association, testified as follows:

"The basic purpose of the act is no less valid today than it was 31 years ago when first enacted. To eliminate this act, would, on federal and federally assisted construction, place laborers and mechanics in the jungle of fierce competition that is the industry. Labor would again become a barter item in the bidding to get work. In many areas of this country, with excess manpower available, the end result with respect to wages and earnings would be all too apparent.

"Employees, therefore, need its protection as much today as at any time since enactment. The association that I represent is unequivocally opposed to repeal of the act."

In a similar statement, James E. Swan, Director of Labor Relations, National Electrical Contractors Association, testified as follows:

"Contrary to certain opinions . . . the Davis-Bacon Act was not an 'emergency' measure temporarily enacted because of the depression of the 1930's. The Davis-Bacon Act concept was first proposed in 1926 by a Congressman Robert Bacon, Republican, New York. Hearings were held on legislative proposals in 1927, and recurred until 1931. . . . In fact, President Herbert Hoover had repeatedly recommended Davis-Bacon legislation, and issued an Executive Order substantially similar to the act. Legal problems as to suitable legislative language . . . appeared to be a primary factor in the delay of enactment." *Hearings, supra* note 41, at 657, 671, 672.

¹⁵² STAFF OF HOUSE GENERAL SUBCOMMITTEE ON LABOR, 88TH CONG., 1ST SESS., ADMINISTRATION OF THE DAVIS-BACON ACT I (Comm. Print 1963).

¹⁵³ Alaska, Arizona, Calif., Colorado, Conn., Dela., Fla., Hawaii, Idaho, Ill., Ind., Kan., Kentucky, Maine, Md., Mass., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., Ohio, Oregon, Pa., R.I., Tenn., Texas, Utah, Wash., W.Va., and Wis., H.R. REP. No. 308, 88th Cong., 1st Sess. 2 (1963).

¹⁵⁴ Report of House Committee on the Judiciary, H.R. REP. No. 2946, 74th Cong., 1st Sess. 5 (1936). See also, for example, the remarks of Congressmen Citron and Hancock, 80 CONG. REC. 10004 (1962).

One of its primary objectives is to prevent the payment of wages lower than the prevailing minimum wages from being a competitive factor in the procurement of government supply contracts,¹⁵⁵ and to have the government's immense purchasing power sustain labor standards rather than lower them.¹⁵⁶

It should be recognized that federal minimum wage legislation, of which the Davis-Bacon Act and the Walsh-Healey Public Contracts form a part, is integrally related to other facets of our national policy.¹⁵⁷

Critics have alleged from time to time that the Davis-Bacon Act and the Walsh-Healey Public Contracts contribute to inflation.¹⁵⁸ The allegation was examined in the recent investigation by the House Special Subcommittee on Labor on the administration of the Davis-Bacon Act. The report concerning this investigation concluded:¹⁵⁹

Appropriate administration of the act would preclude any inflationary effects. What is required under the act is that the Secretary of Labor find the wages that are prevailing in a community. If this is done properly, what is reflected by a prevailing wage will be merely the actual wage paid in a community. This would have neither an inflationary nor deflationary result.

Contentions of inflationary effect have also been examined in several wage determination proceedings under the Walsh-Healey Public Contracts Act, and they have failed to withstand close scrutiny.¹⁶⁰ In the proceeding for the *Evaporated Milk Industry*, it was stated that the record furnished no justification for assuming that price increases to the public would result from discharging the statutory mandate by making applicable to all firms who sell to the government the prevailing minimum wages already in effect in the industry as a whole.¹⁶¹

The Walsh-Healey Public Contracts Act and the Davis-Bacon Act are still an important part of our national labor policy. Without this legislation, it would not be unrealistic to expect that the price of labor once more would become an element in the competition for government contracts. Following a recent investigation of the administration of the Davis-Bacon Act, the House General Subcommittee on Labor found that the fundamental principle of the Davis-Bacon Act is as valid today as when originally enacted; that is, that federal procurement should not be a means for depressing local wage conditions. The Walsh-Healey Public Contracts Act, which is an extension of the Davis-Bacon principle, has similar current validity.

¹⁵⁵ U.S. DEP'T OF LABOR 50TH ANN. REP. 233 (1962).

¹⁵⁶ *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943).

¹⁵⁷ *Hearings Before Senate Committee on Labor and Public Welfare on Taft-Hartley Revision*, 83d Cong., 1st Sess. 581-84 (1953) (colloquy between Senator Taft and Arthur J. Goldberg).

¹⁵⁸ E.g., see Chamber of Commerce pamphlet "Inflation's Helpmate: The Davis-Bacon and Walsh-Healey Acts."

¹⁵⁹ See *supra* note 152.

¹⁶⁰ Final Labor Dep't Dec., 24 Fed. Reg. 1986 (1958) (evaporated milk industry); final Labor Dep't Dec., 22 Fed. Reg. 1986 (1958) (scientific, industrial, and laboratory instruments industry); tentative Labor Dep't Dec., 24 Fed. Reg. 8741 (1959) (tires and related products industry).

¹⁶¹ *Ibid.*