

# LOAN DOCUMENT

PHOTOGRAPH THIS SHEET

①

LEVEL


INVENTORY

DTIC ACCESSION NUMBER

The Davis-Bacon and Service Contract Act...  
DOCUMENT IDENTIFICATION  
Apr 94

DISTRIBUTION STATEMENT A  
Approved for Public Release  
Distribution Unlimited

DISTRIBUTION STATEMENT

ACCESSION FOR	
NTIS	GRAM
DTIC	TRAC
UNANNOUNCED	
JUSTIFICATION	
BY	
DISTRIBUTION/	
AVAILABILITY CODES	
DISTRIBUTION	AVAILABILITY AND/OR SPECIAL
	

DISTRIBUTION STAMP

20061026089

DATE RECEIVED IN DTIC

DATE ACCESSIONED

DATE RETURNED

REGISTERED OR CERTIFIED NUMBER

PHOTOGRAPH THIS SHEET AND RETURN TO DTIC-FDAC

H  
A  
N  
D  
L  
E  
  
W  
I  
T  
H  
  
C  
A  
R  
E

**THE DAVIS-BACON AND SERVICE CONTRACT ACTS:  
LAWS WHOSE TIME HAS PASSED?**

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other government agency.

by Timothy J. Pendolino  
Major, U.S. Army  
Judge Advocate General's Corps

42ND JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1994

**THE DAVIS-BACON AND SERVICE CONTRACT ACTS:  
LAWS WHOSE TIME HAS PASSED?**

Timothy J. Pendolino  
Major, U.S. Army  
Judge Advocate General's Corps

**ABSTRACT:** In the Davis-Bacon and Service Contract Acts, Congress attempted to protect the wages of workers in the construction and service industries by establishing a sort of minimum wage for Government contracts. Unfortunately, Congress failed to provide either the key definitions or a workable system with which to implement this intent. As a result, a burdensome and unwieldy system has sprung out of the implementation of both Acts. This thesis reviews the intent and implementation of both Acts, identifies some of their major shortcomings, and recommends their repeal.

## Table of Contents

I.	INTRODUCTION . . . . .	1
II.	BACKGROUND/HISTORY . . . . .	5
	A. <i>The Davis-Bacon Act.</i> . . . .	5
	B. <i>The Service Contract Act</i> . . . . .	10
III.	Regulatory Provisions. . . . .	16
	A. <i>The Davis-Bacon Act.</i> . . . .	17
	1. <i>Definitions</i> . . . . .	17
	2. <i>Wage Determinations</i> . . . . .	19
	3. <i>Record-keeping Requirements</i> . . . . .	22
	4. <i>Enforcing the DBA</i> . . . . .	23
	5. <i>Penalties for Noncompliance</i> . . . . .	24
	B. <i>The Service Contract Act.</i> . . . .	25
	1. <i>Definitions</i> . . . . .	25
	2. <i>Contracts Exempted from Coverage of the SCA</i> . . . . .	27
	3. <i>General SCA Requirements</i> . . . . .	28
	4. <i>Successor Contractors</i> . . . . .	28
	5. <i>SCA Wage Determinations</i> . . . . .	30
	6. <i>Requesting Wage Determinations</i> . . . . .	31
	7. <i>Receipt of Wage Determinations</i> . . . . .	33
	8. <i>Conformance Procedures</i> . . . . .	33
	9. <i>Option Exercises</i> . . . . .	34

10.	<i>Recordkeeping Requirements . . . . .</i>	34
11.	<i>SCA Violations . . . . .</i>	35
C.	<i>Relationship Between the SCA and DBA . . . . .</i>	37
IV.	<i>CURRENT PROPOSALS FOR REPEAL OR REFORM. . . . .</i>	39
A.	<i>Proposals for Repeal . . . . .</i>	39
B.	<i>Unrelated Bills Amending the DBA and/or the SCA . . . . .</i>	40
1.	<i>Section 311(e) of the Department of Defense Acquisition Management Reform Act of 1993. . . . .</i>	40
2.	<i>Section 9003 of the Government Reform and Savings Act of 1993 . . . . .</i>	41
3.	<i>The Crime Control Act of 1993 . . . . .</i>	41
4.	<i>The Health Security Act . . . . .</i>	42
C.	<i>Bills Amending the DBA . . . . .</i>	42
1.	<i>The Davis-Bacon Reform Act . . . . .</i>	43
2.	<i>The Davis-Bacon Act . . . . .</i>	46
D.	<i>Other Proposals for Change . . . . .</i>	51
1.	<i>The "Section 800 Committee." . . . .</i>	52
2.	<i>The National Performance Review . . . . .</i>	53
V.	<i>THE DAVIS-BACON AND SERVICE CONTRACT ACTS SHOULD BE REPEALED. . . . .</i>	55
A.	<i>The Prevailing Wage Concept is Inherently Flawed. . . . .</i>	56
B.	<i>The Davis-Bacon Act . . . . .</i>	60
1.	<i>Direct Costs . . . . .</i>	60
2.	<i>Administrative Costs . . . . .</i>	64

3. Social impact . . . . .	65
4. Continued Need for the DBA's Protections . . .	69
C. The Service Contract Act . . . . .	70
1. Direct Costs . . . . .	70
2. Administrative costs . . . . .	71
3. Continued need for the SCA's protection . . . .	72
D. DOL Administrative Costs . . . . .	74
VI. CONCLUSION. . . . .	75
Results of Survey of DA Activities . . . . .	A-1

THE DAVIS-BACON AND SERVICE CONTRACT ACTS:  
LAWS WHOSE TIME HAS PASSED?

Timothy J. Pendolino  
Major, U.S. Army

I. INTRODUCTION

*"Mr. Speaker, if this bill were not demanded by organized labor, it would not have a chance of passage in this House under suspension of the rules. This is the most ridiculous proposition I have ever seen brought before a legislative body."*<sup>1</sup>

In the sixty-three years since Rep. Blanton made the above statement on the floor of the House of Representatives, the Davis-Bacon Act<sup>2</sup>, along with its much younger relative, the Service Contract Act<sup>3</sup>, continues to be the subject of periodic debate. These debates generally pit those who believe that Government must act to protect workers from competitive pressures and unscrupulous employers against those who believe in free market forces. The result has been that a Democratically-controlled Congress amends the Acts to broaden their coverage and strengthen their controls<sup>4</sup> while a Republican Administration makes regulatory changes which have the opposite effect.<sup>5</sup>

What are these Acts and what do they do? In very simple terms, Congress provided in both Acts that those working on Government contracts for construction or services could not be paid less than the wage determined by the Secretary of Labor to be "prevailing" in the locality where the work is to be performed.<sup>6</sup>

The Davis Bacon Act (DBA) applies to "every contract in excess of \$2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings and public works."<sup>7</sup> The DBA requires that each such contract "contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which work is to be performed . . ."<sup>8</sup>

The Service Contract Act (SCA) applies to "every contract entered into by the United States or District of Columbia in excess of \$2,500 . . . the principal purpose of which is to furnish services in the United States through the use of service employees."<sup>9</sup> The SCA requires that each such contract contain a "provision specifying the monetary wages to be paid the various



classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary [of Labor] . . . in accordance with prevailing rates for such employees in the locality."<sup>10</sup> In the case of service employees covered by a collective bargaining agreement, the SCA mandates the payment of wages no less than "the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations."<sup>11</sup>

Both the DBA and the SCA provide for withholding of funds due a contractor in order to pay employees who have been paid less than the prescribed prevailing wage.<sup>12</sup> Both Acts also provide that a contractor may be debarred (i.e., made ineligible for receipt of Government contracts) for a period of up to three years if the Secretary of Labor finds that the contractor failed to comply with the Acts' requirements.<sup>13</sup>

Unfortunately, Congress failed to define, or explain precisely what it meant, by key terms such as "prevailing" and "locality." This left it to the Secretary of Labor to work out the details which would form the very heart of the coverage of both Acts.

Proponents of these Acts believe that the Acts are necessary to prevent the wages of those working on Government contracts

from falling to minimum wage levels due to the competitive nature of Government procurement which favors the lowest bidder. These proponents believe that this protection is worth any additional costs the Acts may impose on the taxpayers. Critics, on the other hand, generally dismiss the argument that wages need protection and claim that the Acts are simply too expensive, both in terms of direct and administrative costs, to justify their continued existence in these days of budget tightening.

In the past, critics of the Davis-Bacon and Service Contract Acts have introduced bills in Congress which would repeal one or both of the Acts, or which would raise the dollar threshold at which the Acts apply.<sup>14</sup> To date, however, supporters of the Acts have carried the day, and Congress has not enacted any of these bills.

This thesis will take an objective look at whether there is a continued need for both Acts. To begin, Section II discusses the background and history of both Acts. Section III then provides an overview of the regulations that the Department of Labor has issued to implement and administer the Acts. It also discusses the procurement regulations which the other executive agencies have issued to guide their contracting personnel in the administration of the Acts. Next, Section IV looks at the bills currently pending before Congress which would repeal or reform the Acts. Finally, Section V discusses the impact of the Acts,

attempts to quantify some of the costs associated with the Acts, and recommends that Congress repeal both Acts. It also recommends that, to protect the wages of lower-paid service workers, Congress consider mandating certain changes to procurement regulations.

## II. BACKGROUND/HISTORY

### A. *The Davis-Bacon Act.*

The Davis-Bacon Act ("DBA") was enacted in 1931, a precursor to the New Deal legislation. The DBA was the first federal wage law to apply to nongovernment workers.<sup>15</sup> At the time the DBA was enacted, the Country was in the throes of the Great Depression and work of any kind was scarce. This was especially true in the construction industry. Under these circumstances, nonlocal contractors could import work crews to a job site for \$2.00 a day, much less than the \$3.50 to \$4.00 a day then prevailing. These lower wages put even more downward pressure on local wage rates than the Depression. During this period, federal construction was especially important because post offices and Veterans Administration hospitals were just about the only things being built.<sup>16</sup>

One of the DBA's original sponsors, Rep. Bacon, specifically referred to this situation during the 1931 hearings on his bill:

A practice has been growing up in carrying out the building program where certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, have been going around throughout the country 'picking' off a contract here and a contract there and local labor and the local contractors have been standing on the sidelines looking in. Bitterness has been caused in many communities because of this situation.

This bill, my friends, is simply to give local labor and the local contractor a fair opportunity to participate in this building program.<sup>17</sup>

However, there was some evidence to suggest that this problem was not as serious as the bill's supporters made it out to be. A January 10, 1931 opinion from the Comptroller General of the United States, submitted for the record during consideration of the bill before Congress, stated that the practice of importing cheap labor did not appear to be widespread.<sup>18</sup> The Comptroller General's study surveyed 26 Treasury Department projects employing 1,724 workers.<sup>19</sup> The study found that 368 of these were from outside the area of the

project.<sup>20</sup> Outside workers were usually employed in cities such as Boise, Idaho and Juneau, Alaska where large supplies of construction workers were not available.<sup>21</sup>

In addition to this most often stated concern, another, less noble, purpose also may have played a part in the passage of the DBA. Rep. Allgood put it most clearly in his remarks on the House floor:

Reference has been made to a contractor from Alabama who went to New York with bootleg labor. That is a fact. That contractor has cheap colored labor that he transports, and puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country.<sup>22</sup>

It appears from statements such as these that racial bigotry also may have played a part in the perceived need for legislation such as the DBA. In fact, the argument continues to be made that the DBA has a disproportionately adverse affect on minorities and women.<sup>23</sup>

Whatever the reason behind its enactment, the DBA became law in 1931. The original text of the Act was deceptively simple. The entire substantive portion of the DBA, as originally enacted, read:

every contract in excess of \$5,000 in amount, to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall contain a provision to the effect that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located, or in the District of Columbia if the public buildings are located there, and a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract: *Provided*, That in case of national emergency, the President is authorized to suspend the provisions of this Act.<sup>24</sup>

Shortly after the DBA's enactment, several serious problems became apparent. The DBA did not contain any enforcement mechanism, key terms were not defined, and the prevailing rates were not conclusively determined until after contract award. This latter point caused contractors concern since the Secretary of Labor could determine the prevailing rate to be higher than that in their bid, with no right to adjustment of the bid price.<sup>25</sup>

Because of these problems, Congress amended the DBA in 1935.<sup>26</sup> These amendments provided for:

a. Predetermination of prevailing wage rates by the Department of Labor ("DOL");<sup>27</sup>

b. Weekly payment of wages conforming to the wage rate determination;<sup>28</sup>

c. A Government right to terminate the contract and charge completion costs to the terminated contractor for violations of the DBA;<sup>29</sup>

d. A lowering of the DBA threshold from \$5,000 to \$2,000;<sup>30</sup> and

e. The following sanctions:

(1) withholding payments due a contractor who was violating the DBA;

(2) disbursement of the amount withheld to workers with wage claims; and

(3) a three-year debarment.<sup>31</sup>

In 1941, Congress again amended the DBA to extend the Act's coverage to contracts awarded through other than sealed bidding procedures.<sup>32</sup> Congress amended the DBA a final time in 1965. These amendments expanded the meaning of the term "wage" to include the basic hourly rate of pay plus a number of allowable fringe benefits.<sup>33</sup>

B. *The Service Contract Act.*

Congress enacted the Service Contract Act (SCA) in 1965 to protect the last major group of employees working on Government contracts who were not covered by some kind of prevailing or minimum wage standard -- service employees.<sup>34</sup> The Congressional purpose behind the SCA was much the same as that behind the DBA. The following remarks by Rep. Austin J. Murphy<sup>35</sup> from 1990 oversight hearings provide some insight into this purpose:



The federal government used its enormous procurement power to depress prevailing wage scales which was often the result of religious adherence to a policy of low cost procurement.

. . . .

The Service Contract Act was a bipartisan response to an intolerable situation in which shoddy contractors worked hand in hand with procurement agencies to exploit the most underpaid members of the labor force.<sup>36</sup>

Also instructive are the statements of Mr. Charles Donahue, then the Solicitor of Labor, regarding the bill which ultimately became the SCA:

The principle basic to the Service Contract Act is neither novel nor unique. Its rationale is simply that funds of the Federal Government shall not be used to finance contracts which undercut and depress the wage rate prevailing in a locality or upon which undesirable working conditions obtain. The Government now insists in prevailing wage standards in construction and supply contracts . . .<sup>37</sup>

With regard to the coverage of the SCA, Mr. Donahue stated: "[g]enerally speaking, this bill applies to what are ordinarily known as service or blue-collar employees, to janitorial services, to various kinds of maintenance services under Government service contracts . . . guards are also covered under this proposal."<sup>38</sup>

The Department of Labor (DOL) began to experience problems in administering the SCA almost immediately. These problems were primarily due to difficulties in defining the locality on which prevailing rates would be based and in determining the types of employees to whom those rates would apply.<sup>39</sup>

As a result of oversight hearings held in 1971, the Special Subcommittee on Labor of the House Committee on Education and Labor identified five major problems with the administration of the SCA:

a. DOL was not issuing wage determinations for all service contracts covered by the SCA. The Subcommittee found that in Fiscal Year 1971, DOL had issued wage determinations for only 35% of covered contracts;<sup>40</sup>

b. Because of DOL's failure to issue wage determinations, the gap between Wage Board rates (which applied to Government blue-collar service employees) and Service Contract rates was growing;<sup>41</sup>

c. DOL was failing to use the "blacklisting" (i.e., debarment) provisions of the SCA;<sup>42</sup>

d. DOL's refusal to recognize prospective wage increases in collective bargaining agreements was resulting in a virtual wage freeze for service employees. According to the Subcommittee, incumbent contractors who were bound to pay their employees wage increases as a result of collective bargaining were consistently underbid by new contractors when the contract was recompeted. This meant that the employees might never receive a wage increase;<sup>43</sup> and

e. As an offshoot of the above finding, the Subcommittee found that incumbent contractors were being "turned out" every year with the new contractors refusing to recognize collective bargaining agreements. The current employees were forced to take pay cuts to keep their jobs. According to the Subcommittee, "[t]he collective bargaining process was becoming a mockery."<sup>44</sup>

During 1986 hearings, former Rep. James G. O'Hara highlighted the situation at Laredo Air Force Base, Texas which the Subcommittee considered during 1971 oversight hearings:

there emerged a practice by which the Air Force re-opened contract bidding annually and timed its request for bids so that the perfectly proper arms-length labor negotiations between the workers and one service contractor, resulting in prospective wage increases for the employees, were persistently disregarded in the bidding conditions under which the next contractor got the job. By juggling contractors, and playing games with the 'prevailing wage' language of the Service Contract Act, the Air Force was able to freeze the wages of employees at levels at or near the minimum wage, even where those workers were able, through proper collective bargaining, to secure agreements which seemed to raise their wages and improve working conditions.<sup>45</sup>

As a result of the 1971 oversight hearings, Congress amended the SCA in 1972.<sup>46</sup> These amendments contained six major provisions:

a. Successor contractors may not reduce the wages or fringe benefits of existing employees;<sup>47</sup>

b. The Secretary of Labor must give "due consideration" to wages and fringe benefits received by Federal Wage Board employees performing similar tasks when making wage determinations;<sup>48</sup>

c. The Secretary of Labor could relieve violators of the SCA from the debarment provisions only in unusual circumstances;<sup>49</sup>

d. Prospective increases in wages and fringe benefits contained in collective bargaining agreements were required to be reflected in wage and fringe benefit determinations;<sup>50</sup>

e. The Secretary of Labor could permit service contracts to be awarded for a period of up to five years;<sup>51</sup> and

f. All service contracts involving five or more employees were to be covered by wage and fringe benefit determinations by the end of Fiscal Year (FY) 1977.<sup>52</sup>

Following the 1972 amendments, the focus of controversy over the SCA turned to the scope of the definition of the term "service employee."<sup>53</sup> In 1974, a Federal District Court in Delaware held that the SCA applied only to employees whose counterparts in Federal service would be classified as "wage board" employees.<sup>54</sup> The court drew a distinction between these

employees as "blue-collar" employees and Federal "general schedule" employees as "white-collar" employees and found that the SCA only applied to those classified as "blue collar."<sup>55</sup> Based on this distinction, the court held that the keypunch operators working on the contract at issue were equivalent to "white-collar" employees and, therefore, were not covered by the SCA.<sup>56</sup> In 1976, the Federal District Court for the Middle District of Florida similarly held that Congress had intended the SCA to apply only to "blue-collar" workers performing work similar to Federal "wage-board" employees.<sup>57</sup>

Primarily as a result of these two decisions, Congress enacted the final amendments to the SCA in 1976.<sup>58</sup> These amendments made it clear that all service employees were covered by the Act. Only those employees who fall within the Fair Labor Standards Act's<sup>59</sup> exemption for persons "employed in a bonafide executive, administrative, or professional capacity" are excluded from coverage.<sup>60</sup>

### III. Regulatory Provisions.

As stated above, Congress failed to define key terms it used in both Acts. In addition, neither Act contained guidance concerning Congress's intent as to implementation. Instead, these matters were left to the broad discretion of the Secretary of Labor. To carry out the tasks assigned by Congress, the

Secretary has issued regulations related to both Acts which, as of this writing, take up over 140 pages in the Code of Federal Regulations. These regulations apply to Department of Labor (DOL) personnel, the personnel in executive agencies responsible for awarding and administering the contracts covered by the Acts, and to the contractors awarded these contracts. To help guide executive agency personnel in their dealings with the Acts, there are another 30 pages of regulations in the Federal Acquisition Regulation<sup>61</sup> which deal with implementation of the Acts. Based on sheer volume alone, it should be clear that the regulatory system which has grown up around these Acts is extremely complex and burdensome. This section will provide a detailed description of portions of these regulations to give the reader some idea of what DOL, executive agencies, and contractors must deal with. In addition, this discussion will set the stage for some of the points to be discussed in later sections. For clarity, each Act will be addressed separately.

A. *The Davis-Bacon Act.*

1. *Definitions.* --As noted in the introduction to this Section, the DBA does not define the key terms necessary to its implementation. Therefore, this discussion of the regulations implementing the DBA will begin with the definitions established by the Department of Labor (DOL), as supplemented by the procurement regulations.

(a) *Prevailing Wage.* --"the wage paid to the majority (more than 50 percent) of the laborers and mechanics in the classification on similar projects in the area during the period in question."<sup>62</sup> If no one wage is paid to a majority, then a weighted average of the wages paid to all workers in a classification is used.<sup>63</sup>

(b) *Area.* --"the city, town, village, county or other civil subdivision of the State in which the work is to be performed."<sup>64</sup> The regulations go on to state, however, that the area for wage determination purposes will normally be the county unless "sufficient current wage data" (defined as data on current projects or, if necessary, on those projects begun within a year of the beginning of the wage rate survey) is not available.<sup>65</sup> If there has not been enough similar construction in the county within the past year to make a wage rate determination, data from surrounding counties may be used.<sup>66</sup> However, data from metropolitan counties may not be used as the basis for wage determinations in rural counties and vice versa.<sup>67</sup> The regulations do not define "rural" or "metropolitan."

(c) *Building or work.* --"construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work."<sup>68</sup>



(d) *Construction, prosecution, completion, or repair.* --includes altering, remodeling, painting, and decorating.<sup>69</sup> The manufacturing of "materials, articles, supplies, or equipment" is also included if done on the site of the building or work by "persons employed at the site by the contractor or subcontractor."<sup>70</sup>

(e) *Laborers or mechanics.* --"Those workers, utilized by a contractor or subcontractor at any tier, whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade) as distinguished from mental or managerial. . ."<sup>71</sup>

(f) *Public building or public work.* --a "building or work, the construction, prosecution, completion, or repair of which . . . is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency."<sup>72</sup>

(g) *Wages.* --the "basic hourly rate of pay" plus bona fide fringe benefits.<sup>73</sup>

2. *Wage Determinations.* --The DBA requires that contractors on Government construction contracts pay their employees not less than the prevailing wage as determined by DOL. Contractors are

informed of these prevailing wages through the incorporation of wage determinations into their contracts.

(a) *Types and availability of wage determinations.*

--There are two types of DBA wage determinations -- general and project. General wage determinations cover a specified geographic area and apply to all DBA-covered projects in that area.<sup>74</sup> General wage determinations should be used by the contracting agency whenever possible.<sup>75</sup> Once a general wage determination is incorporated into a contract, it is normally effective for the duration of that contract.<sup>76</sup>

Project wage determinations are used only when no general wage determination is available and are issued by DOL at the specific request of the contracting agency.<sup>77</sup> Once it is incorporated into a contract, a project wage determination is normally effective for the duration of that contract.<sup>78</sup>

(b) *Requesting wage determinations.* --If a general wage determination applicable to the project is available, the contracting agency simply incorporates that wage determination into its contract without notifying DOL.<sup>79</sup> If a general wage determination is not available, the contracting agency uses a Standard Form (SF) 308 to request a project wage determination from DOL.<sup>80</sup> Because DOL takes at least 30 days to process a request for a project wage determination,<sup>81</sup> the contracting

agency should submit its request at least 45 days before it plans to issue a solicitation.<sup>82</sup>

(c) *Sources of information for wage determinations.*

--Where does DOL obtain the prevailing wage information it incorporates into wage determinations? DOL's regulations state that it "will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties."<sup>83</sup>

DOL may not use data from Federal projects subject to the DBA to determine prevailing rates in the area for building and residential construction.<sup>84</sup> However, such data may be used if DOL determines that it cannot determine the prevailing rate without using data from Federal projects.<sup>85</sup> Data from Federal projects is used for heavy and highway construction wage determinations.<sup>86</sup>

(d) *Contesting wage determinations.* --Any interested person<sup>87</sup> who feels that a wage determination is in error may request reconsideration of the determination by DOL.<sup>88</sup> If not happy with the results of this reconsideration, an interested party may file an appeal with the Wage Appeals Board.<sup>89</sup> The Board is an independent arm of the DOL and has the authority to make final decisions regarding wage determinations.<sup>90</sup> These procedures add to the already overblown bureaucracy surrounding

the DBA and result in the expenditure of additional funds on the administration of the Act.

3. *Recordkeeping Requirements.* --Section 2 of the Copeland Anti-Kickback Act<sup>91</sup> requires that contractors working on DBA-covered contracts submit weekly payroll reports.<sup>92</sup> Every contractor and subcontractor working on a DBA-covered contract must submit a copy of weekly payrolls and weekly payroll statements of compliance (with the requirements of the DBA) to the contracting agency.<sup>93</sup> The contractor must submit this information within seven calendar days after the regular payment date of the payroll week covered.<sup>94</sup> Upon receipt of the payroll records and statements, the contracting agency is to examine them "to ensure compliance with the contract and any statutory or regulatory requirement."<sup>95</sup>

The contracting agency must keep the payroll records and statements for three years after completion of the contract and must make them available to DOL on request.<sup>96</sup> The regulations also require a contractor to maintain its weekly payroll records for a period of three years after the completion of the contract.<sup>97</sup> Estimates of the cost to contractors of these recordkeeping requirements range from \$94 million to \$235 million.<sup>98</sup> These costs are passed on to the Government, increasing the cost burden associated with the DBA.

4. *Enforcing the DBA.* --Contracting agencies are primarily responsible for DBA enforcement.<sup>99</sup> These agencies are to maintain an enforcement program that is to include:<sup>100</sup>

a. "Ensuring that contractors and subcontractors are informed, before commencement of work, of their obligations under the labor standards clauses of the contract;"<sup>101</sup>

b. "Adequate payroll reviews, on-site inspections, and employee interviews to determine compliance by the contractor and subcontractors, and prompt initiation of corrective action when required;"<sup>102</sup>

c. "Prompt investigation and disposition of complaints;"<sup>103</sup> and

d. "Prompt submission of all [required] reports  
... "<sup>104</sup>

As part of this enforcement program, contracting agencies are to conduct compliance checks "as may be necessary to ensure compliance with the labor standards requirements of the contract."<sup>105</sup>

If a compliance check indicates that violations may have occurred "that are substantial in amount, willful, or not

corrected", the contracting agency is required to conduct a labor standards investigation.<sup>106</sup> If the contracting agency concludes that the contractor has underpaid its employees, it is to request that the contractor make restitution.<sup>107</sup> The cost of compliance with these requirements is a major contributor to the cost contracting agencies incur in administering the DBA.<sup>108</sup>

5. *Penalties for Noncompliance.* --DOL and the contracting agencies have a wide range of options available for dealing with a contractor that is not complying with DBA requirements. First, if, as a result of a compliance check or investigation, the contracting agency believes a violation exists, it must withhold from payments due the contractor an amount equal to the estimated wage underpayment.<sup>109</sup> If the contractor fails or refuses to comply with the DBA, the contracting agency must suspend any payment, advance, or guarantee of funds until it withholds sufficient funds to compensate employees for the underpayments.<sup>110</sup> In addition, a contract may be terminated for default for violations of the DBA.<sup>111</sup> Finally, if the Secretary of Labor determines that the violations were aggravated or willful, he can debar the contractor for a period of up to three years.<sup>112</sup>

The DBA is implemented through the inclusion of labor standards provisions in a covered contract. The FAR sets out a list of all of the provisions which are to be included in a contract to which the DBA applies.<sup>113</sup>

B. *The Service Contract Act.*

1. *Definitions.* --As with the DBA, when Congress enacted the SCA, it failed to define many of the key terms necessary to implementation of the Act. In order to better understand the discussion which follows, this section will begin with the definitions provided in the DOL and procurement regulations.

(a) *Service Contract.* --"any Government contract, the principal purpose of which is to furnish services in the United States through the use of service employees . . . or any subcontract at any tier thereunder."<sup>114</sup> The DOL regulations provide examples of 55 types of contracts which DOL considers to be "service contracts."<sup>115</sup>

(b) *Principal Purpose.* --The DOL regulations state that "[i]f the principal purpose [of a contract] is to provide something other than services . . . the Act does not apply."<sup>116</sup> The regulations go on to state:

no hard and fast rule can be laid down as to the precise meaning of the term *principal purpose*. This remedial Act is intended to be applied to a wide variety of contracts, and the Act does not define or

limit the types of services which may be contracted for under a contract the principal purpose of which is to furnish services. . . . Whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case.<sup>117</sup>

(c) *Service Employee.* --"any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity . . . ." <sup>118</sup>

(d) *Locality.* --The DOL regulations state that "[l]ocality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area." <sup>119</sup> However, the regulations also allow plenty of room for other interpretations:

Locality may also be defined as, for example, a city, a State, or, under rare circumstances, a region, depending on the actual place or places of contract performance, the geographical scope of the data on which the determination was based, the nature of the services being contracted for, and the procurement method used.



. . . . .

Although the term *locality* has reference to a geographical area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts.<sup>120</sup>

## 2. *Contracts Exempted from Coverage of the SCA.*

(a) *Statutory exemptions.* --The SCA specifically exempts seven types of contracts and work from its coverage.<sup>121</sup> In addition, the Act<sup>122</sup> gives the Secretary of Labor the authority to grant administrative exemptions to the Act.<sup>123</sup> The Secretary has used this authority to exempt several types of contracts from the requirements of the SCA.<sup>124</sup> The most important of these exempts "[c]ontracts principally for the maintenance, calibration and/or repair of . . . [a]utomated data processing equipment and office information/word processing systems."<sup>125</sup> However, this exemption may be used only if four specific criteria are met.<sup>126</sup>

(b) *Professional employees.* --As noted in the definition section, *supra*, the term *service employee* does not include "any person employed in a bona fide executive, administrative, or professional capacity . . ."<sup>127</sup> Therefore, the services performed on a Government contract by these employees

are not covered by the SCA. However, the DOL definition of this exemption is very narrow.<sup>128</sup> DOL's interpretation of this exemption could lead to situations where highly paid professionals such as engineers and scientists would be covered by the Act. These are not the kinds of workers that Congress intended to protect when it enacted the SCA.<sup>129</sup>

3. *General SCA Requirements.* --The SCA contains two general requirements which apply to all service contracts performed using service employees, regardless of the dollar amount of the contract. The first is that a service contract may not run for more than five years.<sup>130</sup> The second general requirement is that no contractor or subcontractor may pay its employees less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act.<sup>131</sup>

4. *Successor Contractors.* --Section 4(c) of the SCA<sup>132</sup> applies to any contractor and subcontractor awarded a contract "which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished in the same locality."<sup>133</sup> Under these circumstances, the successor contractor or subcontractor must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) to service employees at least equal to those agreed upon by a predecessor contractor.<sup>134</sup>

Section 4(c) does not apply if the incumbent contractor enters into a collective bargaining agreement (CBA) for the first time which does not become effective until after the expiration of its current contract.<sup>135</sup> Otherwise, the terms of a new or revised CBA will establish the minimums which a successor contractor can pay.<sup>136</sup>

The terms of a predecessor contractor's CBA will be inapplicable if the Secretary of Labor determines, after a hearing, that:

a. The terms of the CBA are "substantially at variance" with those which prevail in the area;<sup>137</sup> or

b. The terms of the CBA were not reached "as a result of arm's-length negotiations."<sup>138</sup>

DOL's regulations provide detailed guidance on the grounds for, and conduct of, such a hearing.<sup>139</sup> The FAR states that contracting agencies may request a hearing if they believe that either of these two conditions exists.<sup>140</sup>

It should be noted that, under DOL's regulations, it makes no difference whether the successor contractor has its own CBA with its employees.<sup>141</sup> Thus, a successor contractor's CBA is valid, at least as far as wages and fringe benefits are

concerned, only if it provides for payments in excess of those provided for in the predecessor contractor's CBA.<sup>142</sup>

5. *SCA Wage Determinations.* --As with the DBA, the minimum wages and fringe benefits which must be paid under a SCA-covered contract will be set forth in a wage determination incorporated into the contract.<sup>143</sup> DOL will issue these wage determinations "for all contracts entered into under which more than 5 service employees are to be employed."<sup>144</sup> There are two types of SCA wage determinations: "prevailing in the locality" determinations and "collective bargaining agreement (successorship)" determinations.<sup>145</sup>

(a) *Prevailing in the locality determinations.*

--These wage determinations "are based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made."<sup>146</sup> DOL determines the prevailing rate for the locality by using the "single rate which is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality."<sup>147</sup> If there is no single rate paid to a majority DOL uses the statistical mean (average) or median rate.<sup>148</sup>

In addition to these sources of information, DOL is also required, by the terms of the SCA itself, to give "due

consideration" to the rates that would be paid by the contracting agency to the service employees if they were employed under the Civil Service system.<sup>149</sup> Unfortunately, the term *due consideration* is not defined in the statute.<sup>150</sup>

b. *Collective bargaining agreement (successorship) determinations.* --Section 4(c) of the SCA specifically dictates the wages to be paid in cases where there is a predecessor contractor that has a collective bargaining agreement (CBA) with its employees.<sup>151</sup> In such a case, therefore, DOL's wage determination simply sets forth the wages and fringe benefits contained in the CBA.<sup>152</sup> Accrued wages and fringe benefits, and any prospective increases, are also included in the wage determination.<sup>153</sup>

6. *Requesting Wage Determinations.* --For every service contract expected to exceed \$2,500, contracting agencies are required to file a "notice of intention to make a service contract" with DOL.<sup>154</sup> This notice is submitted on a Standard Form (SF) 98, Notice of Intention to Make a Service Contract, with its Attachment A (SF 98a) (hereinafter referred to together as the "notice").<sup>155</sup>

If the procurement is for a "known or recurring requirement", the contracting agency must submit the notice not less than 60, nor more than 120, days before the earliest of

(1) issuance of any invitation for bids, (2) issuance of any request for proposals, (3) commencement of negotiations, (4) issuance of a modification for [the] exercise of [an] option, contract extension, or change in scope, (5) annual anniversary date of a contract for more than 1 year subject to annual appropriations, (6) each biennial anniversary date of a contract for more than 2 years not subject to annual appropriations . .

.<sup>156</sup>

The FAR provides for shorter time frames for unplanned or emergency requirements.<sup>157</sup>

One of the items of information contracting agencies must include on the notice is the place where the services are to be performed. Obviously, DOL requires this information to determine the rates prevailing in the locality. Where the services are to be performed at a Government facility, or some other known location, this is not a problem. However, in some cases, such as for services to be performed at the contractor's location, the place of performance will not be known until the contract is awarded. In this situation, the contracting agency must first determine all possible places of performance using information such as prior procurements, mailing lists, and responses to presolicitation notices.<sup>158</sup> Once it has done this, the agency is

to request wage determinations for each of the possible places of performance identified.<sup>159</sup> If the contracting agency learns of additional places of performance, it is to submit requests for additional wage determinations to cover those places.<sup>160</sup> The FAR also contains detailed procedures for the contracting agency to follow if it cannot identify all possible places of performance.<sup>161</sup>

7. *Receipt of Wage Determinations.* --The FAR contains several provisions concerning late receipt of wage determinations.<sup>162</sup> First, it should be noted that a contracting agency may not award a covered contract which does not include a wage determination.<sup>163</sup> Therefore, if the contracting agency does not possess a previously-issued wage determination (or CBA) that it can use on the procurement, it would appear that it has no choice but to delay the award of a contract until DOL issues a wage determination. The procedures for late receipt of wage determinations will only apply in cases where the contracting agency fails to receive a revised wage determination within the prescribed time.

8. *Conformance Procedures.* --In some cases, contract performance will require classes of service employees not included in the wage determination. Before a contractor can use the unlisted class(es) of employees on the contract, it must initiate "conformance procedures."<sup>164</sup> The contractor must provide

"an appropriate level of skill comparison" between the unlisted classification(s) and the classifications contained in the wage determination.<sup>165</sup> The contractor provides this information to the contracting agency using a SF 1444, Request for Authorization of Additional Classification and Rate.<sup>166</sup> The contracting agency is to review the form and forward it to DOL with recommendations.<sup>167</sup> DOL will approve, disapprove, or modify the request within 30 days.<sup>168</sup>

9. *Option Exercises.* --Under DOL regulations, the extension of a contract pursuant to an option clause is considered a new contract for SCA purposes.<sup>169</sup> Therefore, each option exercise requires the incorporation of a new or revised wage determination into the contract.<sup>170</sup> This means that contracting agencies must go through the entire wage determination process, as described above, each time they exercise an option under a contract.

10. *Recordkeeping Requirements.* --Each contract in excess of \$2,500 subject to the SCA is required to contain a clause which, among other things, requires the contractor to keep extensive records.<sup>171</sup> These records are to include:

a. The name, address, and social security number of each employee;<sup>172</sup>



b. The correct work classification and rate of pay for each employee;<sup>173</sup> and

c. The number of daily and weekly hours worked by each employee.<sup>174</sup>

The contractor is required to keep these records for three years from the completion of the work.<sup>175</sup> The records must be kept on a weekly basis.<sup>176</sup> A contractor's failure to maintain such records could subject it to withholding of funds due it under the contract.<sup>177</sup>

11. *SCA Violations.* --DOL regulations provide that "[a]ny employer, employee, labor or trade organization, contracting agency, or other interested person or organization" may report a violation, or apparent violation, of the SCA to DOL.<sup>178</sup> Unlike cases involving the DBA, the primary responsibility for investigating these complaints rests with DOL, not the contracting agency.<sup>179</sup> The contracting agencies are required to cooperate with DOL during its conduct of these investigations.<sup>180</sup>

If DOL determines that a contractor has underpaid its employees, it can request that the contracting agency withhold funds due the contractor in an amount sufficient to reimburse the employees for the underpayment.<sup>181</sup> The contracting agency must comply with a DOL request to withhold funds.<sup>182</sup> When DOL requests

withholding, the contracting agency is to transfer the funds, to the extent available, to DOL for payment to the employees.<sup>183</sup> The contracting agency may also withhold and transfer funds to DOL on its own initiative.<sup>184</sup>

Contractor violations of the SCA may result in the termination for default of the contract.<sup>185</sup> Violation of the SCA will also lead to a three-year debarment of the contractor. The Secretary of Labor is required to debar a contractor found to have violated the SCA unless he recommends otherwise due to "unusual circumstances."<sup>186</sup> The debarment is for a mandatory three-year period.<sup>187</sup>

DOL regulations provide that a prime contractor is "jointly and severally liable" with a subcontractor for the subcontractor's violation(s) of the SCA.<sup>188</sup> This means that the prime contractor could be required to repay amounts underpaid to a subcontractor's employees.<sup>189</sup> The prime contractor could also be subject to termination for default, or even debarment, for a subcontractor's violation(s).<sup>190</sup> The regulations also provide for personal liability.<sup>191</sup> Therefore, "[a]n officer of a corporation who actively directs and supervises contract performance, including employment policies and practices and the work of the employees working on the contract, is . . . liable for the violations, individually and jointly with the company."<sup>192</sup>

C. *Relationship Between the SCA and DBA.*

As noted earlier, the SCA does not apply to a contract covered by the DBA. However, the distinction between the two is not always clear.

1. *Contracts for Clearing Land.* --Contracts for clearing timber or brush, or for the demolition or dismantling of buildings or other structures are subject to the DBA if it appears that the clearing of the site is to be followed by the construction of a public building or work at the same site.<sup>193</sup> However, if there will be no further construction work at the site, the clearing work is considered to be services subject to the SCA.<sup>194</sup>

2. *Construction Work Performed as Part of Nonconstruction Contracts.* --In some cases, contracts will contain specifications for both construction and service work. The construction work under such a contract will be subject to the DBA if:

- a. It is to be performed on a public work or building;
- b. The contract contains specific requirements for a substantial amount of construction work exceeding the \$2,000 DBA threshold; and

c. The construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required under the contract.<sup>195</sup>

3. *Installation Support Contracts.* --The problem of SCA/DBA overlap can be especially troublesome when dealing with contracts for installation support. This is because these contracts typically call for a wide range of activities, such as replacing broken windows, spot painting, or minor patching of a wall which could be covered under either Act. To help in dealing with this problem, the DOD procurement regulations contain the following guidelines:<sup>196</sup>

a. Individual service calls or orders which require thirty-two or more work hours to perform are considered repair work subject to the DBA.<sup>197</sup>

b. Individual service calls or orders which require less than thirty-two work hours to perform are considered maintenance subject to the SCA.<sup>198</sup>

c. Individual service calls or orders requiring painting work of 200 square feet or more are subject to the DBA regardless of the number of work-hours involved.<sup>199</sup>

This section has provided an overview of the regulations promulgated to implement the DBA and SCA. Hopefully, this overview has given the reader some idea of the tremendous complexity involved in the oversight of two seemingly simple statutes. This complexity is a major cause of the frustration experienced by Government and contractor personnel who must deal with these Acts.<sup>200</sup> The problems and costs associated with administration of the DBA and SCA will be discussed in Section V, *infra*.

#### IV. CURRENT PROPOSALS FOR REPEAL OR REFORM.

Over the years, numerous bills have been introduced in Congress seeking to repeal or significantly restrict the coverage of both the DBA and the SCA.<sup>201</sup> The 103rd Congress has also seen its share of proposals seeking to somehow modify either the DBA, the SCA, or both. This section will identify all of the bills which would repeal either Act and discuss those bills which would amend either Act in some way. Also included is a discussion of two reports which include recommendations for changes to both Acts.

##### A. *Proposals for Repeal.*

There are four bills and one resolution before Congress which call for the repeal of the DBA<sup>202</sup> and two which would repeal

the SCA.<sup>203</sup> As of the date of this writing, none of these bills has made it out of the responsible Congressional Committee and none are given much chance of being enacted.<sup>204</sup>

B. *Unrelated Bills Amending the DBA and/or the SCA.*

There are five bills before Congress which, while not focused on either of the Acts, contain provisions which would modify either the coverage or the current implementation of one or both. The following addresses and comments on the merits of each of these bills in turn.

1. *Section 311(e) of the Department of Defense Acquisition Management Reform Act of 1993.*<sup>205</sup> --This bill would raise the threshold for DBA coverage from its current \$2,000 to an amount equal to the "simplified acquisition threshold." Section 311(f) of the bill does the same for the SCA.<sup>206</sup> Section 311(b) sets the "simplified acquisition threshold" at \$100,000.<sup>207</sup> If this bill is enacted as written, the DBA and SCA would no longer apply to contracts of less than \$100,000. Other sources have estimated that such an increase would eliminate 52.5% of Department of Defense (DOD) contract actions from DBA coverage but only 7.0% of the dollars.<sup>208</sup> This would result in savings on administrative costs associated with the DBA.<sup>209</sup> However, because the amount of contract dollars covered by the DBA would be reduced only slightly, the direct costs associated with the Act, which make up

the Act's major cost impact,<sup>210</sup> would not be reduced significantly. For this reason, this proposal does not go far enough.

2. *Section 9003 of the Government Reform and Savings Act of 1993.*<sup>211</sup> --This bill would add the following language to both Acts: "To more effectively implement wage determination procedures, the Secretary of Labor is authorized to develop and implement an electronic data interchange system to request and obtain wage determinations required under the Act."<sup>212</sup> Except for the time saved in mailing forms back and forth, it does not appear that this measure would have a significant impact on the length of time it takes to obtain a wage determination. Therefore, this proposal would have very little, if any, effect on the administrative costs associated with the DBA.<sup>213</sup>

3. *The Crime Control Act of 1993.*<sup>214</sup> --This bill would remove federal prison construction from under the coverage of the DBA. Section 603 of this bill would amend the DBA by adding the following language: "The requirements of this section shall not apply to contracts for construction, alteration, and/or repair of institutions used to incarcerate persons held under the authority of any enactment of Congress."<sup>215</sup> If one accepts the proposition that the DBA adds to the cost of federal construction,<sup>216</sup> it is apparent that the intent of this provision is to save on the cost of constructing prisons.

4. *The Health Security Act.* --Even President Clinton's proposed legislation to reform the nation's health care system contains a technical amendment to both Acts. This legislation was introduced as identical bills in both the House<sup>217</sup> and the Senate<sup>218</sup> under the short title of "The Health Security Act." Both the DBA and the SCA currently contain a provision which exempts fringe benefits required by other Federal, State, or local law from the fringe benefits specified in a wage determination.<sup>219</sup> This means that the cost of a fringe benefit otherwise required by law cannot be used by a contractor to offset the costs of fringe benefits required under a wage determination. Section 10401 of the Health Security Act would amend both the DBA and SCA to allow the cost of health insurance employers are required to pay to be included in the costs of fringe benefits included in a wage determination.<sup>220</sup> This change would remove any confusion concerning the treatment of health insurance costs as a fringe benefit under the DBA and SCA.

C. *Bills Amending the DBA.*

Congress is considering four bills which would make major changes to the DBA.<sup>221</sup> Actually, these four bills represent two sets of identical legislation introduced in both the House and the Senate. One set of bills was introduced by Republicans and would restrict the application of the DBA.<sup>222</sup> These bills were introduced under the short title "The Davis-Bacon Reform Act."<sup>223</sup>



The other set of bills, although raising the threshold for DBA coverage, would otherwise expand the DBA's application.<sup>224</sup> These bills were introduced under the short title "The Davis-Bacon Act."<sup>225</sup> Each set of bills will be discussed separately. (For ease of reference, each set of bills will be referred to collectively as the "bill".)

1. *The Davis-Bacon Reform Act.* --The bill would make the following changes to the DBA.

a. The bill would raise the threshold for DBA coverage from \$2,000 to \$500,000.<sup>226</sup> Such a threshold would exclude the majority of DOD contract actions from DBA coverage.<sup>227</sup> However, it would exclude less than 50% of the contract dollars from coverage.<sup>228</sup> Therefore, although significantly reduced, the direct costs associated with the DBA would not be eliminated.<sup>229</sup> Since the added costs of DBA coverage provide no benefit to the Government, simply raising the DBA threshold is not an adequate solution.

b. The DBA currently refers to "the city, town, village, or other civil subdivision of the State in which the work is to be performed" as the area to be used in determining the prevailing wage.<sup>230</sup> The bill would insert in lieu of this language: "the particular urban or rural subdivision (of the State) in which work is to be performed."<sup>231</sup> While this language

allows DOL some flexibility in determining which areas to survey in determining the prevailing wage, it makes it clear that urban rates are not to be imported into rural areas. This importation of rates from urban to rural areas has often drawn criticism from detractors of the DBA. Since urban wage rates tend to be higher than those in rural areas, using urban rates to set the prevailing rate for rural areas tends to drive up the wage rates in those rural areas.<sup>232</sup>

c. Currently, DOL uses the majority wage rate paid to a class of workers, or if there is no majority, the weighted average rate, as the prevailing wage rate.<sup>233</sup> The bill would drastically change this practice by requiring DOL to use the entire range of wages paid to workers in the area as the prevailing wage rate.<sup>234</sup> This would allow contractors to establish the minimum wage for their employees anywhere within this range.

It would appear that, if this provision is enacted, it would eliminate most of the problems associated with the DBA. This change would allow the market to establish the high and low ends of the wage scale and allow employers to pay anything within this range.<sup>235</sup> It would also be easier for DOL to establish the high and low wages paid in a particular area than it is to try to establish the prevailing wage.<sup>236</sup> However, unless one believes that there are still construction companies with gangs of cheap,

itinerant labor roaming the country,<sup>237</sup> it is difficult to see why a DBA which includes this type of provision is required at all.<sup>238</sup>

d. The bill would prohibit the use of wage data from federal projects covered by the DBA in the determination of the prevailing wage for all types of construction.<sup>239</sup> An exception is allowed for cases where DOL, because of insufficient data, cannot establish a prevailing wage without the use of data from the federal projects.<sup>240</sup> This change would prevent the inflation of the prevailing wage in a locality because of the effect of previously-applied DBA rates which were already based on an average in that locality.<sup>241</sup>

e. The bill would allow the use of helpers<sup>242</sup> paid at the prevailing wage for helpers in the area working on similar projects.<sup>243</sup>

f. There are currently 58 statutes in force which require the payment of wages at rates predetermined by the Secretary of Labor in accordance with the DBA.<sup>244</sup> The bill makes it clear that these statutes will not apply to contracts of \$500,000 or less.<sup>245</sup> The bill also provides that the DBA (and the 58 related statutes) will not apply to any federally-assisted project unless "at least 25 percent of the costs of that project are paid by [a] Federal grant or instrument."<sup>246</sup>

g. Under the bill, the DBA would not apply to persons who volunteer their services and who do not receive compensation or who receive only their "expenses, reasonable benefits, or a nominal fee" for those services.<sup>247</sup> This change would allow the use of volunteer labor on projects such as a town library, partially financed with federal funds, without raising concerns over DBA coverage.<sup>248</sup>

h. Finally, the bill would change the reporting requirements imposed under the Copeland Anti-Kickback Act.<sup>249</sup> Rather than the weekly reports currently required, the bill would require the submission of reports at "the beginning, midpoint, and conclusion of the period covered by the contract" but no less often than every three months.<sup>250</sup> This change would significantly reduce the estimated \$94 million to \$235 million spent by contractors in complying with the DBA's reporting requirements.<sup>251</sup>

There has been no action in either the House or the Senate on the "Davis-Bacon Reform Act." The bills have not been acted on by the responsible committees in either chamber. Neither bill is given much chance of being enacted.<sup>252</sup>

2. *The Davis-Bacon Act.* --Companion bills proposing to amend the DBA were also introduced in the House and Senate by the Democratic side.<sup>253</sup> The bill would make the following changes to the DBA.

a. The bill would raise the threshold for DBA coverage to \$100,000.<sup>254</sup>

b. The DBA would no longer preempt the coverage of state or local prevailing wage laws to federal projects.<sup>255</sup> Therefore, if a state or local prevailing wage law requires higher rates than the DBA wage determination, or if the contract is below the \$100,000 threshold, the state or local law will control.<sup>256</sup>

c. The bill contains a provision which requires contracting agencies to add the costs of multiple contracts for the same or related work at a project site and to treat the sum as the cost of a single contract.<sup>257</sup> This means that if the aggregate costs of the individual contracts is more than \$100,000, the DBA will apply to all of the contracts. This change would bring many smaller contracts, not currently covered by the DBA, under the Act's coverage. This would further undermine the positive effects of increasing the DBA threshold to \$100,000.

The bill also creates a private right of action to enforce this provision. An action may be brought by any interested person against the Secretary of Labor, the head of the contracting agency, or "the contracting authority" which entered into the contract.<sup>258</sup> The suit may be brought in the U.S. District Court

in which the violation is alleged to have occurred or in the District Court for the District of Columbia.<sup>259</sup>

If the court finds that the Government failed to properly aggregate the contracts and, therefore, that the DBA should have applied, it may award the employees the difference between the DBA wage rates and the wage rates actually paid.<sup>260</sup> The court may also award interest on this amount beginning from the date construction began.<sup>261</sup> It may also award attorney's fees and court costs.<sup>262</sup> The bill defines an "interested person" as "any contractor likely to seek or to work under a contract to which [the prevailing wage provisions of the Act] applies, any association representing such a contractor, any laborer or mechanic likely to be employed or to seek employment under such a contract, or any labor organization which represents such a laborer or mechanic."<sup>263</sup>

d. The bill provides that helpers may be used only if the practice of using helpers prevails in the area.<sup>264</sup> Such a restriction on the use of helpers adds significantly to the cost of DBA-covered construction.<sup>265</sup>

e. The bill would require DOL to consider wages paid on other DBA-covered projects in the area when determining the prevailing wage for all types of construction.<sup>266</sup>

f. The bill also would require DOL, in any situation where it does not have sufficient data to determine the prevailing wage for any area, to use as the prevailing wage the "highest prevailing wage determined . . . to be prevailing in an area in the State which is comparable to the area in which the contract is to be performed."<sup>267</sup> This apparently means that DOL will have to use the highest prevailing wage it can find in an urban or rural area of the State depending on the nature of the area in which the project is to be located. Such a change in practice would further increase already inflated prevailing rate determinations.<sup>268</sup>

g. The bill provides for another private right of action which would allow any "interested person" to challenge a determination that the DBA does not apply to a project.<sup>269</sup> Following an administrative review at DOL, a party may bring suit in any United States Circuit Court of Appeals for the circuit in which the person is located or in the Court of Appeals for the District of Columbia Circuit.<sup>270</sup>

h. The bill states that an employer who pays less than the prevailing wage prescribed by the Act will be liable for the amount of the underpayment.<sup>271</sup> If the violation is willful, the employer is also liable for liquidated damages in an amount equal to the amount of the underpayment.<sup>272</sup> The bill provides for yet another private right of action allowing an "interested party"

(this term is not defined) or a laborer or mechanic to sue the employer to recover such underpayments.<sup>273</sup> The suit may be brought in "any Federal or State court of competent jurisdiction."<sup>274</sup> A successful plaintiff may also recover costs and attorney's fees.<sup>275</sup> The three new rights of action created under this bill would spawn an increase in litigation which would add to the large administrative costs already associated with the DBA.

i. The bill would expand the coverage of the DBA by expanding the definition of the term "construction". The expanded definition would include:

the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or its subcontractors, including independent hauling contractors, and the manufacturing or furnishing of materials, articles, supplies or equipment for the project from facilities dedicated exclusively, or nearly so, to the prosecution of the [DBA-covered] building or work . . .<sup>276</sup>

This change would increase the number of persons covered by the DBA and, therefore, would further increase the direct and administrative costs associated with the Act.



j. The bill would change the reporting requirements under the Copeland Anti-kickback Act from a weekly requirement to a monthly requirement.<sup>277</sup> As noted earlier, any lessening of the Act's reporting requirements would result in administrative cost savings.<sup>278</sup>

k. Finally, the bill directs the Secretary of Labor to study the feasibility of employers using electronic methods to comply with the reporting requirements.<sup>279</sup>

To summarize, the increase in the DBA's threshold and decrease in its reporting requirements called for under this bill would result in cost savings. However the bill's expansion of the Act's coverage and creation of new private rights of action would probably more than offset any cost savings. Taken as a whole, this bill increases the burden imposed by the DBA. Unlike its Republican counterpart, this bill has cleared the House Subcommittee on Labor Standards, Occupational Safety and Health.<sup>280</sup> However, the bill is still not given much chance of passage in either the House or the Senate.<sup>281</sup>

#### *D. Other Proposals for Change.*

In addition to the legislative proposals discussed above, two reports were issued in 1993 which included recommendations for changes to the SCA and DBA.

1. *The "Section 800 Committee."* --In Section 800 of the Defense Authorization Act for Fiscal Year 1991,<sup>282</sup> Congress directed DOD to establish a DOD advisory panel on streamlining and codifying acquisition laws.<sup>283</sup> The DOD Acquisition Law Advisory Panel issued its report to Congress in January, 1993.<sup>284</sup> Chapter 4 of the Panel's report deals, in part, with the DBA and SCA. The Panel recommended the establishment of a "simplified acquisition threshold" at \$100,000.<sup>285</sup> The Panel then recommended an increase of the "statutory floors" for several statutes, including the DBA and SCA, to match this new threshold.<sup>286</sup> In other words, if the Panel's recommendations are adopted, neither the DBA nor the SCA would apply to contracts of less than \$100,000. The Panel stated that this change would, in the case of the DBA, "streamline" 52.5% of DOD contract actions above \$25,000 while affecting only 7.0% of the dollars.<sup>287</sup> For the SCA, this increase in the threshold would "streamline" 57.3% of the contract actions while affecting only 7.8% of the dollars.<sup>288</sup> As noted previously, this change in the DBA's threshold would result in some administrative cost savings by reducing the number of contract actions covered by the Act. However, the DBA's direct cost impact would not be reduced significantly.<sup>289</sup>

The Panel also recommended two additional changes to the DBA. First, the panel recommended that the reporting

requirements be changed to require reports only at the beginning, midpoint, and end of the contract period, but no less than quarterly.<sup>290</sup>

Second, the Panel recommended that DOL change the way it issues wage determinations.<sup>291</sup> Rather than the general and project wage determination system DOL currently uses, the Panel recommended the use of annual wage determinations which cover all of the labor classifications in a given area for a one-year period.<sup>292</sup> This change would lessen the burden of wage determination preparation on DOL.<sup>293</sup>

2. *The National Performance Review.* --On March 3, 1993, President Clinton announced the formation of a "National Performance Review" ("NPR") to be directed by Vice President Gore. The purpose of this Review was "to redesign, to reinvent, [and] to reinvigorate the entire national government."<sup>294</sup> On September 7, 1993, the President released the NPR report.<sup>295</sup> Chapter 1 of the report deals, in part, with the "four federal labor laws implemented through the federal procurement process."<sup>296</sup> Addressing these statutes generally, the report states that

[e]ach was passed because of valid and well founded concerns about the welfare of working Americans. But as part of our effort to make the government's

procurement process work more efficiently, we must consider whether those laws are still necessary -- and whether the burdens they impose on the procurement system are reasonable ones.<sup>297</sup>

Those who conducted the review apparently answered these questions in the affirmative, since the report recommends the repeal of only the Walsh-Healey Public Contracts Act.<sup>298</sup>

With regard to the DBA, the report points out that the \$2,000 threshold for DBA coverage was set more than 60 years ago and recommends an increase in this threshold to \$100,000.<sup>299</sup> As for the SCA, the report finds that the Act's "five-year limit [on the length of service contracts] is inconsistent with the government's interest in entering into long range contracts."<sup>300</sup> The report recommends that Congress increase the limit to 10 years.<sup>301</sup> The report does not recommend an increase in the SCA threshold or any other changes to the SCA.

The report also recommends a relaxation of the reporting requirements imposed by the Copeland Anti-Kickback Act.<sup>302</sup> If the report's recommendation were adopted, the requirement for weekly payroll submissions would be eliminated.<sup>303</sup> Instead, contractors would certify their compliance with the law "with each

payment."<sup>304</sup> Contractors would still be required to keep their payroll records for three years in order to prove compliance if necessary.<sup>305</sup>

Obviously, there has been a great deal of activity regarding the DBA and SCA this past year. As one reads the descriptions of these various proposals, the two schools of thought regarding the Acts become readily apparent. On the one side, a call for outright repeal of both Acts. On the other, further expansion of the Acts' coverage (at least with regard to the DBA). At this time, it appears that the status quo will prevail since, as was pointed out above, it does not appear that Congress will enact any of the legislative proposals currently before it.

#### V. THE DAVIS-BACON AND SERVICE CONTRACT ACTS SHOULD BE REPEALED.

To this point, we have looked at the purpose and history of the Acts, the regulations promulgated to implement them, and the current proposals for changing them. It is now time to turn to two questions. First, are the benefits derived from these Acts worth the direct and administrative costs associated with their application? Second, are the Acts still necessary? This section discusses the issues associated with these questions and concludes that the answer to both is "no".

A. *The Prevailing Wage Concept is Inherently Flawed.*

Before discussing the specifics of each Act, some general comments related to the concept of prevailing wages, applicable to both Acts, are required. As noted several times previously,<sup>306</sup> neither Act defines the term "prevailing wage". This lack of definition has forced DOL to try to establish a workable method for determining the wages that are prevailing in a locality.<sup>307</sup> There are several problems with DOL's chosen methods and with the concept of "prevailing" in general.

"Prevailing" is not in itself a statistical parameter. In addition, the application of statistical parameters, such as the mean (average) or median, produces results which are sometimes contrary to common sense. Two examples used by Dr. Armand J. Thieblot in his study of the Acts illustrate this point.<sup>308</sup> First, consider the following series of digits representing wage rates: 2, 2, 5, 8, 8. In this case, there is no majority rate. The mean rate (used for SCA purposes)<sup>309</sup> is 5. The average rate (used for DBA purposes)<sup>310</sup> is also 5. However, this is the wage paid to only one of the five workers involved. This result does not appear to comport with the common understanding of the term "prevailing".

Next, consider a different distribution of digits representing wages: 1, 1, 1, 7, 7, 8, 8, 9, 9. In this case,

there again is no majority rate. The median rate is 7; this rate would be applied for SCA purposes. The weighted average of these rates is 5.67; this is the rate which would be applied for DBA purposes. Intuitively, one would think that the "prevailing" rate in this case would be somewhere over 7. However, neither statistical parameter applied by DOL reaches this result.

The application of the prevailing rate concept is also inherently inflationary. Again, an example from Dr. Thieblot illustrates this point.<sup>311</sup> In a labor force of four individuals whose wage rates are represented by the digits 1, 2, 3, and 4, the application of a prevailing wage law would result in a rate of 2.5, the average rate. This rate would become the minimum which employers could pay the workers. Therefore, the wages paid in this locality would now be 2.5, 2.5, 3, and 4. The next time prevailing rates are calculated, the new rate would be 3. The next average would be based on rates of 3, 3, 3, and 4, resulting in a prevailing rate of 3.25. In two iterations, the prevailing rate would have increased from 2.5 to 3.25. As Dr. Thieblot himself points out, this example is highly contrived<sup>312</sup> (primarily because it assumes that only rates covered by the prevailing wage law will be included in the calculations). However, it is a simple example which illustrates the concept. This example also illustrates the inflationary effect of using wage rates from DBA-covered projects in the prevailing rate calculation. The General Accounting Office discussed this concept in a report on the SCA:

Such prevailing rates, by their nature, do not recognize the limited skills and experience of newly hired or entry-level workers and assume that all workers in a job classification are entitled to the same wage rate. Moreover, once a 'prevailing' rate is established in a wage determination as the minimum which can be paid, it becomes the floor for adjusting the wage differentials for higher skilled and more experienced workers in the same job class and for later revising that rate in future determinations. This can quickly escalate wages paid service workers on Federal contracts and can create or widen a gap between the federally mandated rates on SCA-covered contracts and those being paid private sector workers in the same job classifications in the local labor market.<sup>313</sup>

Since the principles are identical, the same problems apply to the application of the prevailing rate concept under the DBA.

Finally, DOL's application of the prevailing rate concept causes further problems. The following example, based on an example contained in a Congressional Budget Office (CBO) study of the DBA<sup>314</sup> illustrates the point. Consider three cases involving hypothetical distributions of workers and wage rates:



<u>Case 1</u>		<u>Case 2</u>		<u>Case 3</u>	
<u>Percent of Workers</u>	<u>Hourly Wage</u>	<u>Percent of Workers</u>	<u>Hourly Wage</u>	<u>Percent of Workers</u>	<u>Hourly Wage</u>
75	\$8.00	25	\$8.00	48	\$8.00
25	10.00	25	8.01	27	9.00
		25	8.02	25	10.00
		25	10.00		

For Case 1, there is a clear majority of workers earning \$8.00. Therefore, under both the SCA and DBA, the prevailing rate would be \$8.00. In Case 2, the same 75% majority earns between \$8.00 and \$8.02. However, because DOL bases all of its calculation on a to-the-penny rate, the small differences between the three rates mean that there is no majority rate.<sup>315</sup> Therefore, the average rate of \$8.51 would become the prevailing rate. This method of calculation results in a minimum rate that is at least \$.49 per hour higher than the rate paid to 75% of the workers in the workforce. The results in Case 3 differ depending on which Act is applied. Even though 48% of the workers are paid \$8.00, this rate would not be the prevailing rate under either Act since it is not paid to a majority (more than 50%) of the workers. Under the SCA, the median rate of \$9.00 would be considered prevailing. Under the DBA, the average rate of \$8.77 would be used. This example shows that only in cases where there is a single wage rate (to the penny) paid to a clear majority of workers does the prevailing rate, as determined under DOL procedures, come close to the rate one would intuitively consider to be prevailing.

## B. *The Davis-Bacon Act.*

This discussion will focus on four issues associated with the DBA: direct costs of the Act, administrative cost of the Act, the Act's social impact, and the continued need for the Act's protections. The following discusses each issue in turn.

1. *Direct Costs.* --Before attempting to quantify the direct costs associated with application of the DBA, we must first define what is meant by "direct cost" and discuss some of the reasons the administration of the Act results in such costs. The direct cost of the DBA is usually discussed in terms of the amount the Government would pay for labor costs but for the requirements of the Act. In other words, the direct cost is the difference between the prevailing rate determined by DOL and the rate the Government would have to pay in the open market. For the Government to incur extra costs as a result of the DBA, the prevailing rates established by DOL must be higher than the rates available on the open market.<sup>316</sup> Part of the reason for this phenomenon are the failings of the prevailing wage concept discussed above.<sup>317</sup> There are also several reasons related to DOL wage determination procedures which help explain why this may be the case. First, DOL collects wage rate data on a project basis rather than on individual workers.<sup>318</sup> This data overstates the number of workers in the area and can bias the survey results.<sup>319</sup> In a 1979 report on the DBA, the General Accounting Office (GAO)

used the following example to illustrate the problem.<sup>320</sup> Assume the county being surveyed has only two contractors, A and B, which employ 15 and 5 carpenters, respectively. Contractor A worked on a large project for a full year and reported that it paid a rate of \$7.00 per hour to its carpenters. Contractor B worked on 10 smaller projects during the year and reported that it paid a rate of \$10.00 per hour to its carpenters on each project. DOL would compile this data as follows:

A -- 15 carpenters at \$ 7.00

B -- 50 carpenters at \$10.00

Based on the majority rule, DOL would establish the prevailing rate at \$10.00 per hour. However, this rate was actually paid to only 25% of the carpenters in the area.

Another contributing problem is the fact that DOL relies primarily on the voluntary submission of wage data for use in establishing the prevailing rate.<sup>321</sup> This could result in the use of data which is biased towards the rates paid by a particular group of contractors, such as those with unionized employees. In 1989, DOL published a 109-page reference/training manual to aid its employees in preparing DBA wage surveys.<sup>322</sup> This guide discusses bias in wage data surveys, stating that non-respondents are more likely to be open shop (i.e., non union) contractors than union contractors for two reasons.<sup>323</sup> First, it is easier

for union contractors to collect the wage data since the rates are in the collective bargaining agreement (CBA). Second, open shop contractors consider wages proprietary information and are reluctant to report it. On the other hand, union wage rates are already published in the CBA. The manual states that steps should be taken to eliminate this bias but notes: "These steps will not always be successful and will have to be balanced against the need for efficiency."<sup>324</sup> Since union rates generally run higher than open shop rates, any bias toward union rates will increase DOL's prevailing wage rate.<sup>325</sup>

Numerous studies have attempted to quantify the additional costs imposed on the Government by the DBA. The following discusses several of these studies in order to give the reader an idea of the magnitude of the costs involved.

a. Dr. Thieblot, in his study on the DBA, estimated the Act's impact by using a comparison of contract bids during the period that President Nixon suspended the DBA.<sup>326</sup> Dr. Thieblot compared the original bids on contracts subject to the DBA with the rebids for the same contracts during the time the Act was suspended. Based on this comparison, he estimated that the DBA cost the Government \$620 million to \$1 billion annually (in 1972 dollars).<sup>327</sup>

b. In 1974, Dr. Thieblot conducted a more detailed study of the Act's impact.<sup>328</sup> This study was based on survey responses from 1,402 contractors representing over 180,000 employees in every major construction trade. The respondents reported that the average DBA labor cost was 31.1% of total job costs. The average rate increases (the difference between the DBA rates and the rates the respondents paid on non-DBA work) was 36%. This results in a total job cost increase of 5.6%. On total federal construction of \$47 billion in FY 1992,<sup>329</sup> this is direct impact of \$2.6 billion of annual excess costs.

c. In 1992 testimony before a House Subcommittee, the Director of the CBO noted that estimates of the DBA's cost effect ranged from 0.1% in a study by North Carolina State University to 11% in a study by President Carter's Council of Economic Advisors.<sup>330</sup> He then referred to a 1983 study the CBO had conducted<sup>331</sup> and stated that since little had been written about the impact of the DBA since, the CBO continued to use the 1983 study as the basis for its cost estimates.<sup>332</sup> The 1983 study determined that the use of average rate calculations to determine the prevailing wage for DBA purposes increased the costs to the Government by 1.5%.<sup>333</sup> The study also estimated that the prohibition on the use of helpers added an additional 1.6% to the costs.<sup>334</sup> The result is a total cost impact of 3.1%. Using the \$47 billion figure for federal construction in FY 1992, the annual direct cost impact of the DBA is \$1.46 billion.

2. *Administrative Costs.* --The DBA imposes administrative costs on both contractors and the Government. Administrative costs to the contractors are caused by the DBA's reporting and recordkeeping requirements.<sup>335</sup> The 1983 CBO study referred to in the previous paragraph estimated that the reporting requirements of the Act added 0.2% to the cost of federal construction.<sup>336</sup> This results in an annual cost of \$94 million. A 1972 study by the Associated General Contractors of America estimated that the reporting requirements added 0.5% to construction costs.<sup>337</sup> Applying this figure to the \$47 billion in construction for FY 1992 results in an annual cost of \$235 million.

The DBA also imposes administrative costs on the contracting agencies who must incorporate its requirements into their contracts and who have the primary responsibility for its enforcement.<sup>338</sup> In an effort to try to quantify a part of these costs, the author mailed surveys to 60 activities throughout the Department of the Army (including U.S. Army Corps of Engineers activities). The survey asked the recipients to estimate the amount of time the activity's contracting personnel spent on DBA-related matters, both before and after contract award. Using a weighted average of the responses, the author determined that these activities spent 1.5 hours on pre-award DBA matters<sup>339</sup> and 15 hours on post-award DBA matters.<sup>340</sup> This is a total of 16.5 work-hours for every DBA-covered contract.<sup>341</sup> In FY 1993, the Department of the Army awarded 5,785 contracts subject to the

DBA.<sup>342</sup> Therefore, it can be estimated that a total of 95,453 work-hours are expended on DBA-related matters by Department of the Army personnel on an annual basis.<sup>343</sup> The average grade of contracting personnel who would work on DBA-related matters is GS-12<sup>344</sup>. Therefore, the Department of the Army's cost (in terms of labor costs alone) of administering the DBA can be estimated to be over \$2.5 million per year.<sup>345</sup>

3. *Social impact.* --The previous discussion has focused on the direct and administrative costs associated with the DBA. It should be pointed out, however, that some commentators have noted that the DBA also has adverse social consequences such as restricting the opportunities for minorities and youth in construction because of the rules regarding apprentices, helpers, and trainees.<sup>346</sup>

In addition to these impacts, it appears that the current administration of the DBA may make it more difficult for local contractors and their workers to obtain DBA-covered work. For example, local open shop contractors have to change their labor supply, organization, and methods of using and compensating employees to comply with DOL's union-oriented job classifications.<sup>347</sup> The GAO has also commented on the DBA's effect in this regard:

The inflated wage costs may have had the most adverse effect on the local contractors and their workers -- those the act was intended to protect -- by promoting the use of nonlocal contractors on Federal projects. Nonlocal contractors worked on the majority of these projects, indicating that the higher rates may have discouraged local contractors from bidding.<sup>348</sup>

In addition to higher rates, the paperwork requirements associated with the DBA may also discourage, or even prohibit, the entry of new firms into the DBA construction market. As part of the research for this thesis, the author interviewed a construction foreman for a general contractor working in the Charlottesville, Virginia area.<sup>349</sup> This individual stated that his company does not bid on DBA work because of the paperwork burdens. These burdens impact the company's ability to bid on DBA work in two ways. First, they would have to hire a new person full time to keep up with the paperwork. The second impact is a learning curve which causes their initial costs for DBA compliance to be higher than a firm that has experience in DBA work. This fact, combined with the extremely competitive bidding for DBA work makes it impossible for his company to win a DBA project and still make a profit.

The impact of the DBA on small local contractors was also discussed in recent Congressional testimony.<sup>350</sup> Ms. Sara Jean



Lindholm, the head of a Chicago community redevelopment firm, explained the impact of the DBA in her area:

a major intent of the Davis-Bacon Act was to ensure that federal contracts reflect the local labor market, which should not be disrupted by the importation of outside labor. However, from the vantage point of the inner city, implementation of the act today leads to exactly the reverse outcome and denies neighborhood residents the opportunity to work on projects that are designed to redevelop their own communities.<sup>351</sup>

Ms. Lindholm went on to compare the wages paid by a well-established inner-city contractor to the DBA rates for the area and noted that the DBA rates "run from 23% to nearly 70% higher."<sup>352</sup> She then described the consequences of using this firm on several DBA-covered projects:

the efficacy of the firm's crews was almost irreparably damaged in the process. Work crews which had effectively partnered the highest skilled workmen with those who were less experienced had to be split up. Most of the crews found it incomprehensible that some individuals would be paid dramatically more for doing comparable work at a different site. Payroll procedures became unbearably complex. A laborer might

be paid \$10.00/hour for half a day at one site and then over \$19.00 [/hour] for the rest of the day at the Davis Bacon site. Over-all, the process created confusion, suspicion, animosity, and competition among members of the crews with consequent discipline issues and high staff turnover.<sup>353</sup>

As a result, this local contractor will no longer work on DBA projects. Ms. Lindholm's firm now uses only large city-wide contracting firms (and one out of state firm) for its DBA-covered rehabilitation projects.<sup>354</sup>

There is one last example which not only illustrates the social consequences of the DBA, but also demonstrates its direct cost impacts. When introducing S. 1228,<sup>355</sup> which calls for the repeal of the DBA, on the Senate floor, Senator Hank Brown referred to the town of Philomath, Oregon. According to Senator Brown, the residents of this town raised over \$600,000 to build a community library which they planned to construct partly with volunteer labor. However, because the project was to be financed in part with federal funds, the DBA applied and prevailing wages had to be paid to all workers on the project. The town had to abandon the library because of the increased cost attributed to DBA coverage.<sup>356</sup> It is unlikely that the original supporters of the DBA in Congress would have envisioned, much less supported, such a result.

4. *Continued Need for the DBA's Protections.* --It can be argued that in 1931, when the DBA was enacted, the conditions fostered by the Great Depression required some sort of protection for the wages of construction workers. However, it does not appear that any such protection is needed in current times. In his study of the DBA, Dr. Thieblot noted that in 1975, DBA-covered construction accounted for approximately 40% of the construction activity in the United States.<sup>357</sup> Therefore, 60% of the construction is built purely on competitive bidding with the contract being awarded to the lowest bidder.<sup>358</sup> In the private sector, union and open shop firms compete effectively against each other.<sup>359</sup> There is no evidence that out of town contractors bringing in cheap itinerant labor drive down local labor rates.<sup>360</sup> The GAO echoed these findings in its study of the DBA: "We found no indications, and [DOL] did not present any evidence, of an adverse effect on or exploitation by contractors of the estimated 3.0 million workers employed on construction projects not covered by the act."<sup>361</sup>

In fact, Bureau of Labor Statistics figures for November 1992 show that the average hourly wage for construction workers was \$14.17, average weekly wages were \$531.38.<sup>362</sup> These were the second highest rates (behind mining) in the 8 industrial sectors of the economy surveyed.<sup>363</sup> Based on these figures, it does not appear that the wages of construction workers need any protection.

To summarize, the DBA is expensive in terms of direct and administrative costs. In addition, it appears to be hurting the very workers it was designed to protect. Finally, these workers no longer need the protection the DBA was originally intended to provide.

C. *The Service Contract Act.*

Much less information is available on the impacts of the SCA. The information that is available, however, clearly leads to the conclusion that the SCA is expensive and difficult to administer and increases the direct costs of services provided to the Government. The following will discuss the direct and administrative costs associated with the SCA. Also discussed is the continued need for the protections the SCA provides.

1. *Direct Costs.* --As with the DBA, the direct costs associated with the SCA are measured in terms of difference between the prevailing rate established by DOL and the rates available in the open market. In 1990 testimony before Congress, the General Services Administration provided examples of 10 cases where the prevailing rates established by DOL were higher than the rates GSA found prevailing in the area.<sup>364</sup> GSA found that DOL's prevailing rate exceeded the rates in the area by 28 to 82%.

In its study of the SCA, the GAO compared DOL's prevailing rates to rates it determined based on its own surveys of localities.<sup>365</sup> Using several different methods of calculation, the GAO determined that DOL's rates exceeded the rates in the area by 24.5 to 31.5%.<sup>366</sup> The GAO stated that DOL's "inflated rates could be adding hundreds of millions of dollars annually to Federal service contract costs."<sup>367</sup>

2. *Administrative costs.* --Apparently, there has not been any attempt to quantify the administrative costs associated with contractors' compliance with the SCA. However, the SCA does not incorporate the Copeland Anti-Kickback Act's requirements for the submission of weekly payroll reports. Therefore, the cost to contractors of complying with the SCA should be substantially less than that for complying with the DBA.<sup>368</sup>

There is a similar lack of information on the SCA's administrative cost to the contracting agencies. The author's survey, discussed above, also included questions concerning time spent on SCA matters in an attempt to estimate SCA costs incurred by the Department of the Army.<sup>369</sup> Using weighted averages of the responses, the survey shows that the responding activities spent 3 hours on pre-award SCA matters and 13.5 hours on post-award SCA matters. This results in a total of 16.5 work-hours per covered contract. The Department of the Army forwards approximately 5,000 requests for SCA wage determinations (SF 98) to DOL every

year.<sup>370</sup> Since it can be assumed that each of these requests represents a SCA-covered contract,<sup>371</sup> it can be estimated that approximately 82,500 work hours per year are spent on SCA-related matters by Department of the Army contracting personnel.<sup>372</sup> The average grade of contracting personnel who would deal with SCA matters is GS-12,<sup>373</sup> so the labor costs associated with SCA compliance for DA can be estimated at \$2.2 million.<sup>374</sup> In response to a Freedom of Information Act request from the author, DOL stated that it issued 53,401 SCA wage determinations in FY 1993.<sup>375</sup> Applying the work-hour and salary figures stated above to this number results in a Government-wide labor cost of \$23.6 million per year associated with SCA administration.

3. *Continued need for the SCA's protection.* --Unlike the construction workers covered by the DBA, the service workers covered by the SCA are a very diverse group. Classifications of covered service employees may range from janitors and sanitation workers to doctors and lawyers.<sup>376</sup> On the one hand, a very good argument can be made that the service employees on the higher end of this spectrum (in terms of pay) do not need the protection of the SCA.<sup>377</sup> On the other hand, with respect to the lower end of the wage spectrum, the same arguments that led to the passage of the SCA in 1965 would appear to be just as applicable today.<sup>378</sup> Lower paid classes of employees such as janitors and gate guards, who also work at scattered locations and at odd hours, making it difficult for them to obtain the leverage of union

representation, could still be at the mercy of unscrupulous employers willing to cut wages to the bare minimum in order to win a Government contract.

There is, however, one significant difference in Government contracting procedures today versus those procedures in place at the time of the enactment of the SCA. In 1965, the statutory preference for sealed bid procurements was still in place.<sup>379</sup> This meant that almost all service contracts were awarded to the lowest bidder who, all other things being equal, most likely achieved that low bid by cutting wages paid to his employees.<sup>380</sup> With the passage of the Competition in Contracting Act,<sup>381</sup> however, this statutory preference for sealed bids was eliminated.<sup>382</sup> Under current law, sealed bidding is to be used only when four factors are met, in all other cases, negotiated procedures must be used.<sup>383</sup> Contracting agencies have the discretion to structure their procurements so that negotiated procedures can be used.<sup>384</sup> While contracting agencies must consider price in their award decisions,<sup>385</sup> price need not be the determinative factor.<sup>386</sup> Therefore, contracting agencies could structure their procurements so that the wages a contractor proposes to pay its employees, and the experience level of its proposed work force are factors to be considered in making the award of the contract.<sup>387</sup> This concept is similar to that used to protect the wages of professional employees who are exempt from SCA coverage.<sup>388</sup> Such an approach would result in added costs as

a result of the requirement for additional work on the part of contracting personnel.<sup>389</sup> However, these additional costs would be more than offset by the cost savings achieved by eliminating the requirements associated with the SCA. If the SCA were repealed, Congress could require changes to the applicable procurement regulations which would require contracting agencies to evaluate contractor proposals to ensure that the wages the contractor proposes to pay its employees are reasonable. Contractors proposing unreasonably low compensation for their employees could be eliminated from consideration for award of the contract.<sup>390</sup>

In summary, the SCA is also expensive and difficult to enforce and administer. Those who support retention of the Act may argue that service workers at the bottom end of the pay scale need the continued protection of the Act. However, these workers could be adequately protected by the changes to the procurement regulations described above.

#### *D. DOL Administrative Costs.*

Another significant cost impact of the DBA and SCA is related to the costs DOL incurs in carrying out its responsibilities under both Acts. In response to the author's Freedom of Information Act request, DOL stated that its Wage and Hour Division<sup>391</sup> employed 1,333 full-time employees during Fiscal



Year 1993.<sup>392</sup> The average grade of employees in the Wage and Hour Division is GS-11.<sup>393</sup> While the costs associated with this staff could not be totally eliminated by repeal of both Acts, significant cost savings could be achieved.<sup>394</sup>

## VI. CONCLUSION.

During the Great Depression, Congress saw the need for some kind of legislation to protect the wages of workers. The Davis-Bacon Act was the means Congress chose to protect those in the construction industry. While the merits of the approach Congress chose are debatable, it would be difficult to argue that the circumstances of the Depression did not warrant some kind of action. However, with the end of the Depression the need for legislation such as the Davis-Bacon Act also ended. In the sixty-three years since its enactment, the failings of the prevailing wage concept have become abundantly clear. Because of these failings, it is nearly impossible for the Department of Labor to accurately determine what wages prevail in a given locality. Numerous studies have shown that the Department of Labor's prevailing wages often exceed, sometimes significantly, the wages actually paid in the locality. This inflation in wage rates adds billions of dollars annually to the cost of Federal construction. In addition to these costs are the costs incurred by contractors in complying with the reporting and recordkeeping requirements of the Act. These costs are on the order of several

hundred million dollars per year. Since these costs are almost always passed on to the Government, they also add to the cost of Federal construction. Finally, the cost to the Government of its own administration of the Act must be added on. In total, the Government spends several billion dollars per year as a result of Davis-Bacon Act requirements. This is money for which the Government receives no direct benefit and which could otherwise be spent for additional construction projects.

In addition to its cost, the Davis-Bacon Act may also create barriers to the entry of youth and minorities into construction fields because of its stringent rules regarding the use of helpers, trainees, and apprentices. The recordkeeping and reporting requirements of the Act may also provide a barrier to the entry of small local firms into the market for Federal construction. It appears that the Davis-Bacon Act is actually harming the very people it was intended to protect. Finally, statistics showing the wages paid in the construction industry as a whole lead to the conclusion that construction workers do not need the protection of laws such as the Davis-Bacon Act.

The proposals to raise the threshold at which the Davis-Bacon Act would apply would help to alleviate these problems. However, these proposals do not go far enough. It is clear that

the Davis-Bacon Act has long outlived any benefit it may have provided. It has become an anachronism we can no longer afford. Congress should repeal the Act immediately.

By the time Congress enacted the Service Contract Act in 1965, it should have been clear that the prevailing wage concept simply does not work. Congress, however, believing that those working on Government service contracts needed wage protection, chose to apply the concept once again. As with the Davis-Bacon Act, it is nearly impossible to determine with any accuracy the wages which prevail in a given area. This causes the Government to pay millions of dollars in additional costs every year on its service contracts. The Government does not receive any direct benefit for this money.

Congress should also repeal the Service Contract Act immediately. However, some workers at the lower end of the service industry pay scale may fall victim to unscrupulous employers attempting to pay substandard wages in an attempt to win Government contracts. To avoid this possibility, Congress should consider a revision to the procurement regulations which would require contracting personnel to evaluate the contractors' proposed wages. If contracting personnel determine the wages are not reasonable, the contractor would be eliminated from

consideration for award of the contract. This approach would provide protection for service workers while eliminating the burdensome and costly requirements of the Service Contract Act.

Congress enacted both the Davis-Bacon and Service Contract Acts with a noble purpose in mind. However, the Davis-Bacon Act has outlived its usefulness and the Service Contract Act was probably never needed at all. In these times of budget tightening, it is difficult to justify the retention of two Acts which cost the Government billions of dollars annually and provide no benefits in return.

## APPENDIX

### RESULTS OF SURVEY OF DA ACTIVITIES

The author mailed survey questionnaires to sixty DA activities that deal with DBA and/or SCA-covered contracts. The primary purpose of the survey was to obtain an estimate of the amount of time DA contracting personnel spend on pre-award and post-award DBA and SCA matters.

To this end, the survey included questions asking recipients to estimate the amount of time contracting officers and/or contract specialists spend on pre-award DBA and/or SCA matters and on post-award DBA and/or SCA matters. Pre-award matters would include obtaining wage determinations and incorporating them into solicitations. For the SCA, pre-award matters also include determining the proper job classification and its corresponding Government counterpart. Post-award matters would include issues related to enforcement of both Acts, conformance procedures, and, for the SCA, obtaining new or revised wage determinations for each option exercise.

The amount of time respondents supplied was converted into minutes where necessary. The frequency (number of times each

response occurred) was then noted. This data was used to obtain a weighted average of the amount of time respondents estimated their activities spend on pre-award and post-award DBA/SCA matters. The following is a tabulation of the survey responses.

#### Pre-award Davis-Bacon Act Matters

<u>Time Spent Per Covered Contract (in minutes)</u>	<u>Frequency of Response*</u>
5	1
10	1
15	4
20	2
30	7
45	1
60	6
90	1
120	7
180	1
195	1
330	1
840	1

The weighted average of these figures is 89.25 minutes or approximately 1.5 hours.

\* These figures do not total 60 responses because some recipients did not respond to the survey and/or failed to answer specific questions. In addition, some activities do not deal with contracts covered by one or the other of the Acts.

Post-award Davis-Bacon Act Matters

<u>Time Spent Per Covered Contract (in minutes)</u>	<u>Frequency of Response</u>
45	2
60	3
120	3
180	2
240	1
300	3
600	1
720	1
960	2
1200	1
1440	2
1560	1
1800	1
2400	2
2700	1
3120	1

The weighted average of these figures is 901 minutes or approximately 15 hours. Adding this figure to the 1.5 hour average for pre-award matters results in a total estimate of 16.5 work-hours spent on DBA-related matters per covered contract.

### Pre-award SCA Matters

<u>Time Spent Per Covered Contract (in minutes)</u>	<u>Frequency of Response</u>
20	1
25	1
30	4
45	2
60	6
90	1
120	6
180	7
195	1
240	2
480	1
540	1
600	1
960	1

The weighted average of these figures is 170 minutes or approximately 3.0 hours.



# Post-Award SCA Matters

<u>Time Spent Per Covered Contract (in minutes)</u>	<u>Frequency of Response</u>
15	1
30	3
60	4
120	2
180	4
195	1
240	2
300	2
420	1
480	1
720	2
900	1
960	1
1800	1
2400	1
3120	1
9600	1

The weighted average of these figures is 817 minutes or approximately 13.5 hours. Adding this figure to the 3.0 hour average for pre-award matters results in a total estimate of 16.5 work-hours spent on SCA-related matters per covered contract.

#### ENDNOTES

1. 74 CONG. REC. 6508 (1931) (remarks by Rep. Blanton).
2. Public L. No. 71-798, 46 Stat. 1494 (codified as amended at 40 U.S.C. § 276a (1988)).
3. Public. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 351-357 (1988)).
4. The Davis-Bacon Act has been amended 4 times since its passage; the Service Contract Act 3 times. Each of these amendments has had the effect of broadening or strengthening the relevant Act's coverage.
5. See, e.g., 50 Fed. Reg. 4506 (1985) where the Reagan Administration's Department of Labor published a final rule making two changes to its regulations implementing the DBA. The first changed 29 C.F.R. § 1.3(d) to prohibit the use of data from DBA-covered projects for certain types of wage determinations (see the text accompanying notes 84-86, *infra*). The second changed 29 C.F.R. § 1.7(b) to preclude the use of data from metropolitan areas in wage determinations for rural areas (see note 232, *infra*).
6. See 40 U.S.C. § 276a(a) (1988) and 41 U.S.C. § 351(a)(1) (1988). The term "prevailing" is defined at 29 C.F.R. § 1.2 (1993) for the DBA and at 29 C.F.R. § 4.51(b) (1993) for the SCA.
7. 40 U.S.C. § 276a(a) (1988).

8. *Id.*

9. 41 U.S.C. § 351(a) (1988).

10. *Id.*

11. *Id.*

12. 40 U.S.C. §§ 276a(a), 276a-2 (1988); 41 U.S.C. § 352(a) (1988).

13. 40 U.S.C. § 276a-2(a) (1988); 41 U.S.C. § 354 (1988).

14. For example, the Senate version of the National Defense Authorization Act for FY 1987, P.L. No. 99-661, included a provision which would have raised the SCA threshold for Department of Defense contracts to \$1 million. See, S. Rep. No. 99-331, 99th Cong., 2nd Sess. (1986). In the 102nd Congress, opponents of the Acts introduced two bills calling for repeal of the DBA (S. 2868, 102nd Cong., 1st Sess. (1991); H.R. 1755, 102nd Cong., 1st Sess. (1991) and one calling for repeal of the SCA (H.R. 5787, 102nd Cong., 1st Sess. (1991)). For a discussion of the proposals currently before Congress, see Section IV, *infra*.

15. ARMAND J. THIEBLOT, JR., THE DAVIS-BACON ACT 6 (Labor Relations and Public Policy Series Report No. 10, 1975) [hereinafter THIEBLOT, THE DAVIS-BACON ACT].

16. *Id.* at 7.

17. 74 CONG. REC. 6510 (1931).

18. JOHN P. GOULD AND GEORGE BITTLINGMAYER, THE ECONOMICS OF THE DAVIS-BACON ACT 7-8 (1980) [hereinafter GOULD & BITTLINGMAYER].

19. *Id.*

20. *Id.*

21. *Id.*

22. 74 CONG. REC. 6513 (1931).

23. *See, e.g.*, ARMAND J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION: THE DAVIS-BACON ACT, STATE "LITTLE DAVIS-BACON" ACTS, THE WALSH-HEALEY ACT, AND THE SERVICE CONTRACT ACT 127-128 (Labor Relations and Public Policy Series No. 27, 1986) [hereinafter THIEBLOT, PREVAILING WAGE LEGISLATION].

24. Davis-Bacon Act, Pub. L. No. 71-798, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. § 276a (1988)).

25. THIEBLOT, THE DAVIS-BACON ACT, *supra*, note 15, at 11.

26. Act of Aug. 30, 1935, Pub. L. No. 74-403, 49 Stat. 1011 (1935).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Act of Mar. 23, 1941, Pub. L. No. 77-22, 55 Stat. 53; Act of Aug. 21, 1941, Pub. L. No. 77-241, 55 Stat. 658 (1941) (codified as amended at 40 U.S.C. § 276a-7 (1988)).

33. Pub. L. No. 88-349, 78 Stat. 238 (1965).

34. The Davis-Bacon Act covers employees working on construction contracts. The Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988), covers employees working on Government supply contracts. Basically, the Walsh-Healey Act makes the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(a) (Supp. IV 1992) and 29 U.S.C. § 207 (1988), respectively, applicable to supply contracts.

35. At this time, Rep. Murphy was the Chairman of the Subcommittee on Labor Standards of the House Committee on Education and Labor.

36. *Oversight Hearing on the Federal Service Contract Act Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 101st Cong., 2nd Sess., 4-5 (1990) (statement of Rep. Murphy). Rep. James G. O'Hara, the principal author of the SCA, made the following remarks during 1986

oversight hearings on the SCA:

The movement toward enactment of the Service Contract Act of 1965 began about twenty years ago, when a number of members, including myself, Senator Pat McNamara, and a bipartisan group of other Members had our attention called to the role played by the Government of the United States, and particularly the procurement offices of the various armed services, in actively depressing wages and working conditions among workers who were already at the bottom of the economic totem pole -- workers who largely were performing unskilled or semi-skilled -- or at least underpaid -- chores for government agencies who had decided, for budgetary reasons to contract out such work, so it would not be covered by Wage Board rate procedures. The technique which the Government used to depress wages and working conditions was to frequently put out for rebidding the contracts some agencies had made for the performance of such services as laundering, contract mail hauling, janitor, porter, and building maintenance services, food services, etc. The repeated reopening of these contracts for new bids had the effect of encouraging contractors to cut wages and depress working conditions, in order to undercut existing contract holders and to give prospective new contractors a

competitive edge.

*Oversight Hearings on the Service Contract Act Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 99th Cong., 2nd Sess., 7-8 (1986) (statement of James G. O'Hara, former member of Congress) [hereinafter 1986 Hearings].*

37. *Service Contract Act of 1965: Hearings on H.R. 10238 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess., 5 (1965) (statement of Mr. Charles Donahue, Solicitor of Labor). Mr. Donahue also stated:*

contracting agencies must, in the absence of statutory authority, award contracts to the lowest bidder who can satisfactorily complete the work. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it difficult -- if not impossible -- to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level.

There is the possibility also that under the pressure

of bid competition an ordinarily fair contractor may reduce the wages of employees in order to improve the chances that his bid will be accepted. This action, of course, would further depress wage rates. When, as at present, a low bid award policy on service contracts is coupled with a policy of no labor standards protection, the trend may well be in certain areas for wage rates to spiral downward.

38. *Id.* at 9.

39. THIEBLOT, PREVAILING WAGE LEGISLATION, *supra* note 23, at 237.

40. SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMM. ON EDUCATION AND LABOR, 94th Cong., 1st Sess., CONGRESSIONAL OVERSIGHT HEARINGS: THE PLIGHT OF THE SERVICE WORKER REVISITED 3 (Comm. Print 1975).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 4.



45. 1986 Hearings, *supra* note 36, at 13.

46. Act of Oct. 9, 1972, Pub. L. No. 92-473, §§ 1,2, 86 Stat. 789.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. The SCA only applies to contracts "the principal purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. § 351 (1988).

54. *Descomp v. Sampson*, 377 F.Supp. 254 (D. Del. 1974).

55. *Id.* at 263. The Court relied heavily on the testimony of the Solicitor of Labor before Congress regarding the intent of the SCA. See note 37, *supra*, and its accompanying text, for the relevant portion of that testimony.

56. *Id.*

57. *Federal Elec. Corp. v. Dunlop*, 419 F.Supp. 221 (M.D.

Fla. 1976).

58. Act of Oct. 13, 1976, Pub. L. No. 94-489, §§ 1, 2, 90 Stat. 2358 (codified at 41 U.S.C. § 357(b) (1988)).

59. *See*, 29 U.S.C. §213(a)(1) (1988).

60. These terms are defined at 29 C.F.R. § 541 (1993).

61. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (1 Apr. 1984) [hereinafter FAR].

62. 29 C.F.R. § 1.2(a)(1) (1993).

63. *Id.*

64. 29 C.F.R. § 1.2(b) (1993).

65. 29 C.F.R. § 1.7(a) (1993).

66. 29 C.F.R. § 1.7(b) (1993).

67. *Id.*

68. 29 C.F.R. § 3.2(a) (1993); FAR 22.401.

69. 29 C.F.R. § 3.2(b) (1993); FAR 22.401.

70. 29 C.F.R. § 3.2(b) (1993).

71. FAR 22.401.

72. *Id.*

73. *Id.*

74. FAR 22.404-1. These wage determinations have no expiration date and remain effective until modified, superceded, or canceled by a notice in the *Federal Register*.

75. FAR 22.404-1(a)(1). Contracting agencies, and other interested parties, can find general wage determinations in a Government Printing Office (GPO) document entitled *General Wage Determinations Issued Under the Davis-Bacon and Related Acts*. This document is published weekly.

76. *Id.*

77. FAR 22.404-1(b). A project wage determination is effective for 180 calendar days from the date of the determination.

78. *Id.*

79. FAR 22.404-3.

80. FAR 22.404-3(b). This form must include the following information: the location of the proposed project; the name of the project and a sufficiently detailed description of the work to allow a determination of the type of construction involved; any available pertinent wage payment information; the estimated cost of the project; and all of the classifications of laborers and mechanics likely to be employed.

81. 29 C.F.R. § 1.5(c) (1993); FAR 22.404-3(c).

82. FAR 22.404-3(c).

83. 29 C.F.R. § 1.3(a) (1993).

84. 29 C.F.R. § 1.3(d) (1993).

85. *Id.*

86. *Id.*

87. DOL regulations define an "interested person" to include contractors; laborers and mechanics; and Federal, State, or local agencies. 29 C.F.R. § 7.2(b) (1993).

88. 29 C.F.R. § 1.8 (1993).

89. 29 C.F.R. § 1.9 (1993).

90. The Wage Appeals Board also has the authority to decide cases involving debarment under the DBA, controversies concerning the payment of prevailing wages or classification of employees, and liquidated damages assessed under the Contract Work Hours and Safety Standards Act 40 U.S.C. § 328 (1988). See, 29 C.F.R. § 7.1(b) (1993).

91. Act of June 13, 1934, Pub. L. No. 73-324, 48 Stat. 948 (1949) (codified as amended at 40 U.S.C. § 276 (1988)).

92. The Copeland Anti-Kickback Act was enacted to aid in

the enforcement of the DBA. THIEBLOT, THE DAVIS-BACON ACT, *supra* note 15, at 32-33. To the extent these records are reviewed and/or used at all, it is to enforce the DBA. See, 29 C.F.R. § 3.1 (1993).

93. 29 C.F.R. § 3.3(b) (1993); FAR 22.406-6(a).

94. *Id.*

95. FAR 22.406-6(c)(1). The contracting agency is to pay particular attention to:

- a. "The correctness of classifications and rates";
- b. "Fringe benefits payments";
- c. "Hours worked";
- d. "Deductions", and
- e. "Disproportionate employment ratios of laborers, apprentices, or trainees, to journeymen."

96. FAR 22.406-6(d).

97. 29 C.F.R. § 3.4(b) (1993). These payroll records must "set out accurately and completely the name and address of each laborer and mechanic, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and

actual wages paid." *Id.* The contractor must make the records available to representatives of the contracting agency or DOL upon request. *Id.*

98. See the text accompanying notes 335-337, *infra*, for further discussion concerning these costs.

99. 29 C.F.R. § 5.6(a)(3) (1993); FAR 22.406-1(a).

100. FAR 22.406-1(a).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. FAR 22.406-7(a). "Regular compliance checks" are to include the following: employee interviews, on-site inspections, payroll reviews, and comparison of the information obtained with other available data such as inspector's reports and construction logs to ensure consistency. FAR 22.406-7(b).

106. FAR 22.406-8. This investigation is to be made "by personnel familiar with labor laws and their application to contracts." *Id.* The Defense Federal Acquisition Regulation

Supplement contains an additional 3 pages of regulatory guidance and procedures for the conduct of these investigations. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 222.406-8 (1 Apr. 1984) (hereinafter DFARS).

107. *Id.*

108. See the text accompanying notes 338-345, *infra*, for further discussion concerning these costs.

109. FAR 22.406-9(a). In *Bailey v. Dep't of Labor*, 810 F.Supp. 261 (D. Alaska 1993), the court held that such a withholding, without first providing the contractor a hearing, violated the contractor's due process rights. It is still uncertain what effect, if any, this decision will have.

110. 29 C.F.R. § 5.9 (1993); FAR 22.406-9(b).

111. See, FAR 22.406-11.

112. 29 C.F.R. § 5.12 (1993). This section contains detailed procedures for implementation of the debarment process.

113. FAR 22.407.

114. FAR 22.1001.

115. 29 C.F.R. § 4.130 (1993).

116. 29 C.F.R. § 4.111 (1993).

117. *Id.*

118. FAR 22.1001; *see, also*, 29 C.F.R. § 4.113(b) (1993).

119. 29 C.F.R. § 4.53 (1993).

120. *Id.*

121. 41 U.S.C. § 356 (1988). These exemptions are:

1. Any contract covered by the Davis-Bacon Act.  
(The overlap between the SCA and the DBA is discussed in the text accompanying notes 194-199, *infra*.)

2. Any work covered by the Walsh-Healey Public Contracts Act.

3. Any contract for the carriage of freight and personnel for which published tariff rates are in effect.

4. Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934.

5. Any contract for public utility services.

6. Any employment contract calling for direct services to a Federal agency by an individual.



7. Any contract with the United States Postal Service the principal purpose of which is the operation of postal contract stations.

122. 41 U.S.C. § 353(b) (1988).

123. The statute grants the Secretary the authority to:

provide such reasonable limitations and [to] make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions [of the Act] . . . but only in special circumstances where he determines that such limitation, variance, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of [the Act] to protect prevailing labor standards.

41 U.S.C. § 353(b) (1988).

124. 29 C.F.R. § 4.123 (1993); FAR 22.1003-4.

125. 29 C.F.R. § 4.123(e)(1)(i) (1993); FAR 22.1003-4(b)(4)(i).

126. 29 C.F.R. § 4.123(e)(1)(ii) (1993); FAR 22.1003-

4(b)(4)(ii). The four criteria are:

1. The items of equipment are commercial items sold in "substantial quantities" to the general public;
2. The services are furnished at prices which are, or are based on, established catalog or market prices;
3. The contractor pays the same wages and fringe benefits on the Government contract as it does on commercial contracts for the same services; and
4. The contractor certifies that it complies with the above criteria.

127. 41 U.S.C. § 356 (1988).

128. See, 29 C.F.R. part 541. The DOL regulations point out that the fact that an employee is highly paid is not determinative of whether he or she is excluded from the Act's coverage and go on to state:

Thus, such employees as laboratory technicians, draftsmen, and air ambulance pilots, though they require a high level of skill to perform their duties and may meet the salary requirements of the regulations

. . . are ordinarily covered by the Act's provisions because they do not typically meet the other requirements of those regulations.

29 C.F.R. § 4.156 (1993).

129. See the text accompanying notes 35-38, *supra*, for a discussion of the Congressional intent behind the SCA.

130. 41 U.S.C. § 353(d) (1988); FAR 22.1002-1.

131. 29 U.S.C. § 6(a)(1) (1988). See, 41 U.S.C. § 351(b)(1) (1988); FAR 22.1002-4.

132. Act of Oct. 22, 1965, Pub. L. 89-286, § 4, 86 Stat. 789, *amended by* Act of Oct. 9, 1972, Pub. L. 92-473, § 3, 86 Stat. 789 (codified as amended at 41 U.S.C. § 353(c) (1988)).

133. 29 C.F.R. § 4.1b(a) (1993).

134. FAR 22.1008-3(b). These requirements apply under the following conditions:

(1) The services to be furnished under the proposed contract will be substantially the same as services being furnished by an incumbent contractor whose contract the proposed contract will succeed.

(2) The services will be performed in the same locality.

(3) The incumbent prime contractor or subcontractor is furnishing such services through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements.

135. FAR 22.1008-3(c)(1).

136. The terms of the new or revised CBA will control unless the contracting agency does not receive notice of the terms of the agreement in time to incorporate them into the new contract. DOL's regulations (29 C.F.R. § 4.1(b) (1993)) and FAR 22.1008-3(c) provide detailed guidance on these time limits. However, these time limitations apply only if the contracting agency has given both the incumbent contractor and the employee's collective bargaining agent written notification at least 30 days in advance of all applicable acquisition dates. 29 C.F.R. § 4.1(b)(3) (1993); FAR 22.1008-3(c)(2)(ii). FAR 22.1010 provides detailed guidance for the contracting agencies on complying with these requirements.

137. 29 C.F.R. § 4.1b(a) (1993).

138. 29 C.F.R. § 4.11(a) (1993).

139. 29 C.F.R. §§ 4.10-4.11, 29 C.F.R. Parts 6 and 8 (1993).

140. FAR 22.1013(a).

141. 29 C.F.R. § 4.163(d) (1993). The regulations state:

The fact that a successor contractor may have its own collective bargaining agreement does not negate the clear mandate of the statute that the wages and fringe benefits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract nor does it negate the application of a prevailing wage determination issued pursuant to section 2(a) where there was no applicable predecessor collective bargaining agreement.

142. *Id.*

143. 29 C.F.R. §4.3(a) (1993).

144. *Id.*

145. 29 C.F.R. § 4.50 (1993).

146. 29 C.F.R. § 4.51(a) (1993). DOL most frequently uses information "derived from area surveys made by the Bureau of

Labor Statistics, U.S. Department of Labor, or other Labor Department personnel." DOL will also use the wages and fringe benefits found in collective bargaining agreements "where they have been determined to prevail in a locality for specified occupational class(es) of employees."

147. 29 C.F.R. § 4.51(b) (1993).

148. *Id.* This section provides details on when the mean, vice the median, rate is to be used.

149. 41 U.S.C. § 351(a)(5) (1988); 29 C.F.R. 4.51(d) (1993). The statute refers to the rates which would be paid "to the various classes of service employees if § 5341 [covering "blue-collar" employees] or § 5332 [covering "white-collar" employees] of Title 5 were applicable to them."

150. The DOL regulations state:

The term *due consideration* implies the exercise of discretion on the basis of the facts and circumstances surrounding each determination, recognizing the legislative objective of narrowing the gap between the wage rates and fringe benefits prevailing for service employees and those established for the Federal employees. Each wage determination is based on a survey or other information on the wage rates and fringe benefits being paid in a particular locality and

also takes into account those wage rates and fringe benefits which would be paid under Federal pay systems.

29 C.F.R. § 4.51(d) (1993).

151. See the text accompanying notes 132-142, *supra*, for a discussion of the requirements of § 4(c) of the SCA.

152. 29 C.F.R. § 4.52 (1993).

153. *Id.*

154. 29 C.F.R. § 4.4(a)(1) (1993); FAR 22.1007.

155. *Id.* The SF 98a is to include the following information:

a. "All classes of service employees to be utilized" on the contract. FAR 22.1008-2(a)(1). If section 4(c) of the SCA applies, the exact title of each classification in the collective bargaining agreement (CBA) should be used. *Id.* In addition, the contracting agency is to obtain a copy of the CBA and attach it to the SF 98. 29 C.F.R. § 4.4(c) (1993); FAR 22.1008-3(d). If section 4(c) does not apply, the classification titles from DOL's *Service Contract Act Directory of Occupations* should be used. *Id.*

b. "The estimated number of service employees in each

class." *Id.*

c. "The wage rate that would be paid each class if employed by the agency" as Civil Service employees. The FAR sets out specific procedures for computing these "equivalent rates." *Id.*

156. FAR 22.1008-7.

157. *Id.*

158. FAR 22.1009-2.

159. FAR 22.1009-3.

160. *Id.*

161. *See*, FAR 22.1009-4.

162. *See, generally*, FAR Subpart 22.1012.

163. 41 U.S.C. § 358 (1988); 29 C.F.R. § 4.4(f) (1993).

164. FAR 22.1019.

165. *Id.*

166. *Id.*

167. *Id.*



168. *Id.*

169. 29 C.F.R. § 4.143 (1993).

170. *Id.*

171. 29 C.F.R. § 4.6 (1993). The clause itself is set out in this section and at FAR 52.222-41.

172. *Id.*

173. *Id.*

174. *Id.*

175. 29 C.F.R. §§ 4.6, 4.185 (1993).

176. *Id.*

177. 29 C.F.R. § 4.6 (1993).

178. 29 C.F.R. § 4.191 (1993).

179. *Id.*

180. FAR 22.1024.

181. 29 C.F.R. § 4.187 (1993).

182. *Id.*

183. *Id.*

184. FAR 22.1022.

185. FAR 22.1023.
186. 29 C.F.R. § 4.188 (1993).
187. *Id.*
188. 29 C.F.R. § 4.114 (1993).
189. *Id.*
190. *Id.*
191. 29 C.F.R. § 4.187(e) (1993).
192. *Id.*
193. 29 C.F.R. § 4.116 (1993).
194. *Id.*
195. 29 C.F.R. § 4.116(c) (1993); FAR 22.402(b).
196. DFARS 222.402-70.
197. *Id.*
198. *Id.*
199. *Id.*

200. To illustrate, as part of the research for this thesis, the author mailed surveys to 60 Department of the Army activities which deal with contracts covered by the DBA and SCA.

One of the survey questions asked whether these activities ever experienced any delays in obtaining timely SCA wage determinations from DOL. Of the 45 who responded to this question, 33 (or 73%) answered "often." Respondents included the following comments on this subject:

" . . . to the point where it is rare to get one timely [sic] without follow-up action with Wage and Hour Division."

"Delays of several months are common, particularly with any new requirements."

"Always!"

These comments reveal part of the frustration the SCA causes Government personnel -- it delays their procurements. This is not due to any particular failing on the part of DOL but reflects the difficulty involved in trying to make SCA wage determinations. See the appendix for more information regarding the survey.

201. See, e.g., note 14 *supra*.

202. The bills are: S. 1228, 103rd Cong., 1st Sess.

(1993); H.R. 1785, 103rd Cong., 1st Sess. (1993); H.R. 2393, 103rd Cong., 1st Sess. (1993); and H.R. 3774, 103rd Cong., 2nd Sess. (1994). The resolution is: H. Res. 105, 103rd Cong., 1st Sess. (1993).

203. These two bills are: S. 1229, 103rd Cong., 1st Sess. (1993); and H.R. 1518, 103rd Cong., 1st Sess. (1993).

204. For example, a service published by Information for Public Affairs, Inc., gives H.R. 2393 a 1% chance of clearing the House Committee on Education and Labor and a 0% chance of clearing the Senate Committee on Labor and Human Resources. The bill is given the same odds of passing the full House and Senate. This service forecasts similar odds for the other repeal measures now pending before Congress. INFORMATION FOR PUBLIC AFFAIRS, INC., available in LEXIS, Legis Library, BLCAST File (hereinafter INFORMATION FOR PUBLIC AFFAIRS, INC.).

205. S. 1598, 103rd Cong., 1st Sess., § 311(e) (1993).

206. *Id.* § 311(f).

207. *Id.* § 311(b).

208. DEPARTMENT OF DEFENSE, ACQUISITION LAW ADVISORY PANEL, STREAMLINING DEFENSE ACQUISITION LAWS 4-26 (1993) [hereinafter DOD ACQUISITION PANEL].

209. See the text accompanying notes 335-345, *infra*, for a discussion of these costs.

210. See the text accompanying notes 316-334, *infra*, for a discussion of the direct costs associated with the DBA.

211. H.R. 3400, 103rd Cong., 1st Sess., § 1003 (1993).

212. *Id.*

213. Administrative costs associated with the Act can be reduced only by reducing the amount of time personnel are required to spend dealing with DBA-related matters. This proposal does not appear to have a significant impact on this time requirement.

214. H.R. 2872, 103rd Cong., 1st Sess. (1993).

215. *Id.* § 603(a).

216. For a discussion of the merits of this proposition, see the text accompanying notes 316-345, *infra*.

217. H.R. 3600, 103rd Cong., 2nd Sess. (1994).

218. S. 1779, 103rd Cong., 2nd Sess. (1994).

219. 40 U.S.C. § 276a(b)(2) (1988); 41 U.S.C. § 351(a)(2) (1988).

220. H.R. 3600, 103rd Cong., 2nd Sess., § 10401 (1994); S.

1779, 103rd Cong., 2nd Sess., § 10401 (1994).

221. The four bills are: S. 916, 103rd Cong., 1st Sess. (1993); H.R. 2042, 103rd Cong., 1st Sess. (1993); S. 627, 103rd Cong., 1st Sess. (1993); and H.R. 1231, 103rd Cong., 1st Sess. (1993).

222. S. 916; H.R. 2042, *supra*, note 221.

223. *Id.*

224. S. 627; H.R. 1231, *supra* note 221.

225. *Id.*

226. S. 916; H.R. 2042, *supra* note 221.

227. DOD ACQUISITION PANEL, *supra* note 208 at 4-52.

228. *Id.*

229. See the text accompanying notes 316-334, *infra*, for a discussion of these costs and how they are calculated.

230. 40 U.S.C. § 276a(a) (1988).

231. S. 916; H.R. 2042, *supra* note 221, § 3.

232. See, e.g., THIEBLOT, THE DAVIS-BACON ACT, *supra* note 15, at 47. Current DOL regulations (29 C.F.R. § 1.7(b) (1993)) prohibit the use of data from metropolitan counties for wage determinations for rural counties. It is not clear whether the

language in the bill is intended only to codify this regulatory prohibition or whether it is intended to expand it. For example, if the "urban or rural subdivision" language of the bill refers to cities, as opposed to counties, DOL would not be able to use wage rates from a city in a rural portion of the same county -- something the current regulations would allow it to do.

233. See 29 C.F.R. §1.2(a)(1) (1993) and the text accompanying notes 62-63, *supra*, for further discussion of the method used by DOL to calculate the prevailing wage rate.

234. S. 916; H.R. 2042, *supra* note 221, § 4.

235. Subject, of course, to the minimum wage provided for in the Fair Labor Standards Act, 29 U.S.C. §206(a) (Supp. IV 1992).

236. For a discussion of the difficulties involved in determining an accurate prevailing wage, see the text accompanying notes 306-315, *infra*.

237. See the text accompanying notes 17-18, *supra*.

238. There does not appear to be any reason to incur the administrative costs that the DBA would continue to generate, if wage rates to be paid construction employees are set by market forces.

239. S. 916; H.R. 2042, *supra* note 221, § 5.

240. *Id.* Currently, DOL prohibits the use of data from other federal projects only for building and residential construction unless the insufficient data exception applies. Data from federal projects is used for heavy and highway construction wage determinations. See 29 C.F.R. § 1.3(d) (1993) and the text accompanying notes 84-86, *supra*, for further discussion of this matter.

241. See the text accompanying notes 311-313, *infra*, for an explanation of how the use of DBA rates from other projects can inflate the prevailing wage determination.

242. A "helper" is a semi-skilled worker who works under the supervision of a journeyman. A helper may perform a variety of duties such as preparing tools and materials, cleaning, and positioning items for the journeyman. See 29 C.F.R. § 5.2(n)(4) (1993) for further discussion of the definition of the term "helper." It should be noted, however, that DOL has been prohibited from implementing these regulations. See note 334, *infra*.

243. S. 916; H.R. 2042, *supra*, note 221, § 6.

244. See, 29 C.F.R. § 1.1 (1993) and Appendix A thereto.

245. S. 916; H.R. 2042, *supra* note 221, § 8.

246. *Id.* § 9.



247. *Id.* § 10.

248. See the text accompanying note 356, *infra*, for an example of how such problems can arise.

249. 40 U.S.C. § 276c (1988). This statute requires weekly payroll reports by contractors. See the text accompanying notes 92-94, *supra*, for a more detailed discussion of these requirements.

250. S. 916; H.R. 2042, *supra* note 221, § 12.

251. See the text accompanying notes 335-337, *infra*, for a discussion of these administrative costs.

252. INFORMATION FOR PUBLIC AFFAIRS, INC., *supra* note 204.

253. S. 627, 103rd Cong., 1st Sess. (1993), was introduced by Sen. Edward Kennedy. H.R. 1231, 103rd Cong., 1st Sess. (1993), was introduced by Rep. Austin J. Murphy, Chairman of the House Subcommittee on Labor Standards, Occupational Health and Safety. This Subcommittee has jurisdiction over most DBA-related matters.

254. S. 627; H.R. 1231, *supra* note 253, § 2. See the text accompanying notes 207-210, *supra*, for a discussion of the impact of this change.

255. *Id.* § 2(b)(2).

256. In states where the threshold for coverage and the method(s) for determining the prevailing wage are similar to that in the DBA, this change would eliminate the effects of the increase in the DBA threshold.

257. S. 627; H.R. 1231, *supra* note 253, § 2(b)(3).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* § 9. If this bill is enacted, it will be interesting to see how a court determines whether a person is a "laborer or mechanic likely to be employed or to seek employment under the contract.

264. *Id.* § 2(c)(4).

265. See the text accompanying note 334, *infra*, for an estimate of these costs.

266. S. 627; H.R. 1231, *supra* note 253, § 3(b)(1). See the text accompanying notes 84-86, *supra*, for a discussion of the use of DBA rates in determining the prevailing rate.

"an appropriate level of skill comparison" between the unlisted classification(s) and the classifications contained in the wage determination.<sup>165</sup> The contractor provides this information to the contracting agency using a SF 1444, Request for Authorization of Additional Classification and Rate.<sup>166</sup> The contracting agency is to review the form and forward it to DOL with recommendations.<sup>167</sup> DOL will approve, disapprove, or modify the request within 30 days.<sup>168</sup>

9. *Option Exercises.* --Under DOL regulations, the extension of a contract pursuant to an option clause is considered a new contract for SCA purposes.<sup>169</sup> Therefore, each option exercise requires the incorporation of a new or revised wage determination into the contract.<sup>170</sup> This means that contracting agencies must go through the entire wage determination process, as described above, each time they exercise an option under a contract.

10. *Recordkeeping Requirements.* --Each contract in excess of \$2,500 subject to the SCA is required to contain a clause which, among other things, requires the contractor to keep extensive records.<sup>171</sup> These records are to include:

a. The name, address, and social security number of each employee;<sup>172</sup>

considered construction and, therefore, is not covered by the DBA. See, 29 C.F.R. § 5.2(j)(2) (1993). It appears from its wording that this section of the bill would require DBA coverage in both cases.

277. *Id.* § 2. See the text accompanying notes 91-94, *supra*, for further discussion of these reporting requirements.

278. See the text accompanying notes 250-251, *supra*.

279. S. 627; H.R. 1231, *supra* note 253, § 2.

280. The Subcommittee approved the bill for full Committee action on November 16, 1993. This is not surprising since the chairman of the Subcommittee is the author of the bill.

281. The bill is given only a 31% chance of passage in the House and 2% in the Senate. INFORMATION FOR PUBLIC AFFAIRS, INC., *supra* note 204.

282. Public L. No. 101-510 (1990).

283. *Id.*

284. DOD ACQUISITION PANEL, *supra* note 208.

285. *Id.* at 4-10.

286. *Id.* at 4-12.

287. *Id.* at 4-26.

288. *Id.*

289. See the text accompanying note 210, *supra*.

290. DOD ACQUISITION PANEL, *supra* note 208 at 4-53. This is the same change included in S. 916, *supra* note 221. See the text accompanying that note for a discussion of the impact of such a change.

291. *Id.*

292. *Id.*

293. *Id.*

294. 35 Gov't Cont. (Fed. Pub.) ¶ 167 (1993).

295. NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1993).

296. *Id.* The report identifies these laws as: The Davis-Bacon Act, the Service Contract Act, the Copeland Anti-Kickback Act, and the Walsh-Healey Public Contracts Act.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* Presumably, this means with each payment request submitted to the Government rather than requiring a certification with each payment to an employee.

305. *Id.*

306. *See, e.g.,* the text following note 13 and note 60.

307. *See* the text accompanying note 62, *supra*, regarding the DBA and the text accompanying note 147, *supra*, regarding the SCA for a discussion of how DOL has defined "prevailing".

308. THIEBLOT, PREVAILING WAGE LEGISLATION, *supra*, note 23 at 17-18.

309. *See* the text accompanying notes 147-148, *supra*.

310. *See* the text accompanying notes 62-63, *supra*.

311. THIEBLOT, PREVAILING WAGE LEGISLATION, *supra* note 23 at 19.

312. *Id.*

313. U.S. GENERAL ACCOUNTING OFFICE, THE CONGRESS SHOULD CONSIDER REPEAL OF THE SERVICE CONTRACT ACT 11 (1983).

314. THE CONGRESS OF THE U.S., CONGRESSIONAL BUDGET OFFICE,  
MODIFYING THE DAVIS-BACON ACT: IMPLICATIONS FOR THE LABOR MARKET AND THE  
FEDERAL BUDGET 21 (1983) [hereinafter CBO STUDY].

315. *See, generally*, U.S. DEP'T OF LABOR, WAGE AND HOUR DIV.,  
CONDUCTING SURVEYS FOR DAVIS-BACON CONSTRUCTION WAGE DETERMINATIONS:  
RESOURCE BOOK 64-65 (1989). [hereinafter DOL MANUAL]

316. *See* the discussion accompanying notes 326-334, *infra*.

317. *See* the text accompanying notes 308-315, *supra*.

318. U.S. GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE  
REPEALED 51 (1979). *See, also*, DOL MANUAL, *supra* note 315.

319. *Id.*

320. *Id.*

321. *See* the discussion accompanying note 83, *supra*.

322. DOL MANUAL, *supra* note 315.

323. *Id.* at 30.

324. *Id.*

325. *See, generally*, THIEBLT, THE DAVIS-BACON ACT, *supra* note  
15 at 57.

326. *Id.* at 89-94. President Nixon suspended the DBA for

34 days beginning February 23, 1971 because of rapid inflation in the cost of construction, caused primarily by the rapid escalation of construction wages.

327. *Id.*

328. *Id.* at 157.

329. *Hearings on H.R. 1231, The Davis-Bacon Reform Bill of 1993, Before the Subcomm. on Labor Standards, Occupational Health and Safety of the House Comm. on Education and Labor, 103rd Cong., 1st Sess. (1993).* (statement of Robert D. Reischauer, Director, CBO) [hereinafter Reischauer statement].

330. *Id.*

331. CBO STUDY, *supra* note 314.

332. Reischauer statement, *supra* note 329.

333. *Id.*

334. *Id.* Section 104 of the DOL Appropriation Act for Fiscal Year 1994 (Pub. L. No. 103-112) prohibits DOL from expending funds to implement the new regulations expanding the use of helpers. These regulations were first published in the *Federal Register* on January 27, 1989. Since helpers cannot be used, the estimated 1.6% increase cost must be factored into the total cost impact of the DBA.



335. See the text accompanying notes 92-94, *supra*, for a discussion of these requirements. It should be noted that these costs are usually included by contractors as part of their bid for a project. Therefore, these costs could also be considered a direct cost of the DBA.

336. *Id.*

337. THIEBLOT, THE DAVIS-BACON ACT, *supra* note 15 at 80.

338. See the text accompanying notes 99-108, *supra*.

339. It is not surprising that this number is so low since most activities rely on the area wage determinations issued by DOL. (See the text accompanying note 75, *supra*.) Therefore, pre-award DBA actions generally consist only of incorporating the correct wage determination(s) and contract clauses into the solicitation.

340. It should be noted that this figure, for the most part, includes only the time spent by contracting personnel on the DBA's post-award requirements. It does not include the time spent by inspectors and others engaged in enforcement activities.

341. Because of the limited survey size and the method of estimation used, this figure is only an estimate. However, it should at least provide an order of magnitude estimate of the costs involved. A complete breakdown of the survey results is at the appendix.

342. This information is from the Army's semi-annual enforcement reports for Fiscal Year 1993. The author obtained a copy of these reports from the Army Labor Advisor, LTC G. Alan Sirmans, Office of the Judge Advocate General of the Army.

343. This figure is the result of multiplying the 16.5 work-hours estimated from the survey results by the 5,785 DBA-covered contracts the Army awarded in FY 1993.

344. Telephone interview with Mike Cummins, Career Management Directorate, U.S. Army Personnel Command (Mar. 25, 1994).

345. A GS-12, step 7, employee is paid \$26.78 per hour, including fringe benefits. Telephone interview with Richard Potter, Budget Analyst, TRADOC Contracting Activity (Mar. 22, 1994). Multiplying this figure by the 95,453 work-hours estimated to be expended on DBA-related matters results in the total cost estimate.

346. See, THIEBLOT, THE DAVIS-BACON ACT, *supra* note 15 at 47 and GOULD & BITTLINGMAYER, *supra* note 18 at 62.

347. THIEBLOT, THE DAVIS-BACON ACT, *supra* note 15 at 46.

348. U.S. GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE REPEALED iv (1979).

349. Interview with David Wheatley, Anderson-Nichols

Construction Co., in Charlottesville, VA (Feb. 15, 1994).

350. *Hearing on H.R. 1231, the Davis-Bacon Reform Bill of 1993, Before the Subcomm. on Labor Standards, Occupational Health and Safety of the House Comm. on Education and Labor, 103rd Cong., 1st Sess. (1993) (statement of Sarah Jean Lindholm).*

351. *Id.* at 57.

352. *Id.* at 59.

353. *Id.* at 60.

354. *Id.*

355. 103rd Cong., 1st Sess., (1993).

356. *See, 139 CONG. REC. S8718 (daily ed. July 14, 1993) (statement of Sen. Brown).*

357. THIEBLOT, THE DAVIS-BACON ACT, *supra* note 15 at 151-152.

358. *Id.*

359. *Id.*

360. *Id.*

361. U.S. GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE REPEALED 17 (1979).

362. *Hearings on H.R. 1231, The Davis-Bacon Reform Bill of*

1993, *Before the Subcomm. on Labor Standards, Occupational Health and Safety of the House Comm. on Education and Labor*, 103rd Cong., 1st Sess. 33 (1993) (statement of the Associated General Contractors of America).

363. *Id.*

364. *Oversight Hearing on the Federal Service Contract Act Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 101st Cong., 2nd Sess., 184; 207-211. The GSA based its determination of the prevailing rate primarily on Bureau of Labor Statistics data.

365. U.S. GENERAL ACCOUNTING OFFICE, *THE CONGRESS SHOULD CONSIDER REPEAL OF THE SERVICE CONTRACT ACT 33-40* (1983).

366. *Id.*

367. *Id.* at iii.

368. See the text accompanying notes 335-337, *supra* for a discussion of the cost of compliance with these requirements.

369. See the text accompanying note 339, *supra*, for a discussion of the survey methodology. Details of the survey results are in the appendix.

370. Telephone interview with LTC G. Alan Sirmans, Department of the Army Labor Advisor, Office of the Judge Advocate General of the Army (Feb. 25, 1994).

371. *Id.*

372. This figure is the product of multiplying 16.5 work hours per contract by 5,000 contracts. It should be obvious that this figure is only an approximation of the amount of time spent on SCA-related matters. A lengthy, and costly, research effort would be required to obtain a more accurate estimate of the amount of time actually spent. However, this figure probably represents an order of magnitude approximation.

373. See note 344, *supra*.

374. This figure is the product of multiplying \$26.78, the hourly salary, including fringes, for GS-12 employees by 82,500 work-hours. See the text accompanying note 344, *supra*, regarding the use of the GS-12 grade. Again, this figure is only an approximation of the actual costs. See note 372, *supra*.

375. Letter from Maria Echaveste, Administrator, Employment Standards Administration, Wage and Hour Division, U.S. Department of Labor, to the author. (Feb. 23, 1994) (on file with author) [hereinafter DOL letter].

376. Professionals such as doctors and lawyers, when under contract to the Government, are usually exempt from the Act's coverage. However, under some circumstances, the Act may even apply to these persons. See notes 127-129, *supra*, and their accompanying text, for reference to the procedures for making

this determination.

377. *See, generally*, U.S. GENERAL ACCOUNTING OFFICE, SERVICE CONTRACT ACT SHOULD NOT APPLY TO SERVICE EMPLOYEES OF ADP AND HIGH TECHNOLOGY COMPANIES (1980).

378. See the text accompanying notes 35-38, *supra*, for examples of these arguments.

379. JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 387 (1986) [hereinafter Cibinic & Nash].

380. See note 37, *supra*.

381. Public L. 98-386, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 10 and 41 U.S.C.).

382. CIBINIC & NASH, *supra* note 430 at 387.

383. *Id.*

384. THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, CONTRACT LAW DESKBOOK, VOLUME I 7-3 (Aug. 1993).

385. 10 U.S.C. § 2305(a) (1988); FAR 15.605(b).

386. *See, e.g.*, DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 15.605(d) (Dec. 1, 1984).

387. Prior to the passage of the SCA, some contractors

would achieve lower bids by hiring only inexperienced employees to whom they could pay entry-level wages. This often resulted in a complete turnover of personnel every time a new contract was awarded. This practice was often highlighted as one of the factors supporting the need for protections such as those included in the SCA. See the discussion accompanying note 44, *supra*.

388. See notes 127-129, *supra*, and their accompanying text, for a discussion of professional employee compensation.

389. Additional clauses would have to be added to solicitations for service contracts. Furthermore, evaluation of the contractors' proposed compensation would require additional time and effort on the part of contracting personnel.

390. As noted above, this approach does require additional effort on the part of contracting personnel. However, it does have offsetting advantages. First, it allows the Government to assure itself that it is getting quality service employees by requiring the contractors to pay adequate wages. Second, it eliminates all of the requirements associated with the SCA, saving both the contractors and the Government time and money.

391. This is the division of DOL responsible for issuing DBA and SCA wage determinations and for enforcing both Acts.

392. DOL Letter, *supra* note 375.

393. *Id.*

394. Of course, salaries are not the only costs associated with the operation of the Wage and Hour Division.