U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

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ALL AGENCY MEMORANDUM NUMBER 222

TO: All Contracting Agencies of the Federal Government and the District of Columbia

FROM: Dr. David Weil, Administrator

SUBJECT: Scope of Davis-Bacon Act Coverage in Light of the D.C. Circuit's Opinion in *CityCenterDC*

The Davis-Bacon Act ("DBA" or "Act"), 40 U.S.C. § 3141 *et seq.*, generally requires the payment of prevailing wages to laborers and mechanics working on contracts with the Federal Government or the District of Columbia for the construction of public buildings and public works. 40 U.S.C. § 3142(a). On April 5, 2016, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") held that the DBA did not apply to a contract between the District of Columbia and private developers regarding a project called CityCenterDC. *Dist. of Columbia v. Dep't of Labor*, 819 F.3d 444 (D.C. Cir. 2016) ("*CityCenterDC*"). The Wage and Hour Division ("WHD") of the U.S. Department of Labor ("Department") has received questions from contracting agencies and other stakeholders regarding the implications of the court's decision for other projects to which the DBA might apply. In order to assist contracting agencies in making proper DBA coverage determinations—thereby fulfilling the Department's mandate to promote consistency in administration of the DBA, *see* Reorganization Plan No. 14 of 1950, 5 U.S.C. app. 1 at 126—this memorandum provides background and context regarding the DBA and its coverage provisions, summarizes the *CityCenterDC* opinion, and provides guidance regarding the opinion's significance.

Background

The DBA serves "to protect [contractors'] employees from substandard earnings by fixing a floor under wages on Government projects." *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177 (1954); *see also Drivers Local Union No. 695 v. Nat'l Labor Relations Bd.*, 361 F.2d 547, 553 n.23 (D.C. Cir. 1966) (explaining that the DBA is "a remedial act for the benefit of construction workers" (citing *Binghamton Constr. Co.*, 347 U.S. at 176-78)). The Act provides that "every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics." 40 U.S.C. § 3142(a).

Contracting agencies "ha[ve] the initial responsibility for determining whether a particular contract is subject to the Davis-Bacon Act," but disputes about such coverage are subject to administrative review by the Department. *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 760 (1981); 29 CFR § 5.13; *see also Paper Allied Indus. Chem. & Energy Workers Int'l Union v.*

U.S. Dep't of Energy, No. CV-04-194, 2006 WL 2524120, at *1-3 (D. Idaho Aug. 30, 2006) (affirming the Department's "authority to make final and binding coverage determinations under the [DBA]").

Legal Context

Pursuant to the DBA's text and as relevant here, the Act applies to contracts of the Federal Government or the District of Columbia that are "for construction"[1] of "public buildings and public works." 40 U.S.C. § 3142(a).[2]

Contract for construction

Under the Department's longstanding interpretation, a contract is "for construction" if "more than an incidental amount of construction-type activity is involved in the performance of a government contract." *See, e.g.*, *In re Military Hous., Fort Drum, N.Y.*, WAB No. 85-16, 1985 WL 167239, at *4 (Dep't of Labor Wage App. Bd. Aug. 23, 1985) ("*Fort Drum*") (referring to this definition as the "traditional position of the Department of Labor" and citing Sec'y of Labor Op. No. DB-24 (May 8, 1962)); *see also Building & Construction Trades Dep't, AFL-CIO v. Turnage*, 705 F. Supp. 5, 6 (D.D.C. 1988) (affirming the Department's position by holding that "there is nothing in the Act itself which indicates that Congress intended to restrict its application to contracts where 'construction' is the only element of the contract" and finding

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[1] Although this memorandum specifically addresses "construction," the principles described apply equally to contracts for the other activities named in the DBA: "alteration[] or repair, including painting and decorating." 40 U.S.C. § 3142(a); *see also* 29 CFR § 5.2(j) (defining "construction, prosecution, completion, or repair").

[2] Congress has included DBA prevailing wage provisions in numerous statutes—referred to as "Davis-Bacon Related Acts" ("DBRAs")—under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other methods. (DBRAs include those statutes listed in 29 CFR part 1, Appendix A and 29 CFR § 5.1.) Notably, the two DBA coverage requirements addressed in this memorandum are not prerequisites to coverage under those laws. First, DBRA-covered construction work involves Federal financial assistance rather than contracting for construction by Federal agencies or the District of Columbia. *See Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110, 1111 (D.C. Cir. 1996) ("Although the Davis-Bacon Act by its terms applies only to contracts to which the United States is a party, there are more than 50 other statutes which require contractors to pay Davis-Bacon wages under contracts to which the United States is not a party, but which are financed in whole or in part with federal funds." (citing 29 CFR part 1, App. A)). Second, the "public buildings and public works" requirement for DBA coverage need not be met in the context of DBRAs. *See, e.g.*, 29 CFR § 5.5(a) (providing that DBA prevailing wage provisions are required in the context of construction "of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated)").

reasonable the Department's conclusion that "the nature of the contract is not controlling so long as construction work is part of it"). The Department has, accordingly, understood the term "contract ... for construction" to include contracts that contemplate construction projects even though they may not be agreements exclusively for construction or made directly with the entity that will perform the construction activities. In particular, a series of authorities make clear that the DBA applies to leases by the government of structures that the lease agreements contemplate will be built.

- In 1985, in *Fort Drum*, the Department determined that contracts to lease housing units for military families that were to be built on private land to the specifications of the Department of the Army were contracts for construction for purposes of the DBA. *Fort Drum*, 1985 WL 167239, at *4-5 ("[W]hile the principal purpose of [the relevant] contracts to lease may be to rent military housing, construction of these units is more than an incidental element.").

- In a 1994 memorandum, the Office of Legal Counsel within the Department of Justice ("OLC") opined that "the applicability of the Davis-Bacon Act to any specific lease contract can be determined only by considering the facts of the particular contract." *Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, 18 Op. O.L.C. 109, 109, 1994 WL 810699 (1994) ("OLC Opinion").[3] OLC based its reasoning primarily on the language of the Act, explaining that "[t]he words 'contract ... for construction ... of public buildings or public works' do not plainly and precisely indicate that a contract must include provisions dealing only with construction. Rather, the plain language would seem to require only that there be a contract, and that one of the things required by that contract be construction of a public work." *Id.* at 111. OLC also explained that its determination was supported "by the legislative history, by reference to the goals of the Act, by judicial and executive interpretation of the Act, and by the interpretation of similar language in related Acts." *Id.* at 111. Furthermore, OLC noted that reaching a different conclusion "would leave substantial room for agencies to evade the requirements of the Act by contracting for

[3] The 1994 OLC Opinion explicitly repudiated the reasoning of a 1988 OLC memorandum concluding that the DBA did not apply to a contract between the Veterans Administration ("VA") and a developer under which the agency leased an outpatient clinic to be built as contemplated in the agreement. OLC Opinion at 109 (citing *Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities*, 12 Op. O.L.C. 89, 1988 WL 391005 (1988)). The 1988 memorandum addressed the Department's prior conclusion that the DBA applied to the lease, *see In re Crown Point, Ind. Outpatient Clinic*, WAB No. 86-33, 1987 WL 247049, at *2-3 (Dep't of Labor Wage App. Bd. June 26, 1987) ("*Crown Point*") (describing provisions in the contract regarding the construction of the building, such as requirements that the developer submit to the agency plans for the building and construction process, and concluding that "[a]ny reasonable person who studies the aforementioned requirements ... certainly must conclude that the VA is entering into ... a 'contract for construction' as well as a lease"), which was affirmed by the U.S. District Court for the District of Columbia, *see Turnage*, 705 F. Supp. 5.

long-term lease rather than outright ownership of public buildings and public works." *Id.* at 112.

- Subsequently, in *In re Phoenix Field Office, Bureau of Land Management*, ARB No. 01-010, 2001 WL 767573 (Dep't of Labor Admin. Rev. Bd. June 29, 2001) ("*Phoenix Field Office*"), the Department described the reasoning of *Fort Drum* and the 1994 OLC Opinion in concluding that the DBA applied to a lease by the Bureau of Land Management ("BLM") of a building and storage facility to be built for BLM's use. *Id.* at *7-8. The Department noted that the lease "contemplates substantial new construction activity" and was a contract for construction even though BLM did not "exercis[e] complete authority over the building that will be leased." *Id.*.[4]

Public building or public work

Under the Department's regulations, a "public work" is a project "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." 29 CFR § 5.2(k). The Department has determined that a variety of projects fit within this definition. For example, in *Fort Drum*, the Department concluded that construction of military family housing to be leased by a Federal agency, which occurred at the request of and with the involvement of that agency, was "carried on directly by the authority of the Department of the Army." *Fort Drum*, 1985 WL 167239, at *7; *see also id.* at *7 n.8 (noting that it was not necessary to assess whether the project was also "'carried on directly ... with the funds of a Federal agency,'" though it was significant that under the lease, the Department of Defense had the option of purchasing the housing at the conclusion of the contract and that the government's "financial backing" made the project feasible). The Department further explained that housing built for use by military families "serves the public

[4] It is also the longstanding position of the Comptroller General of the United States that the DBA applies to leases of public buildings or public works by the government. *See, e.g.*, *Comptroller General Campbell to the Postmaster General*, 34 Comp. Gen. 697, 701, B-122382, 1955 WL 1089 (June 27, 1955) ("Under the proposed agreement to build, lease and convey, a bidder agrees to execute a ground lease as lessee of government-owned land, erect certain buildings on the land for the use of the Post Office Department and, upon completion of the buildings, execute a lease-purchase agreement which will provide for the vesting of title in the government at or before the expiration of the leasehold term. Considering these agreements together, it reasonably may be assumed that the contracts are agreements for construction of buildings to which the United States is a party and that the leasing of the buildings is only incidental to the construction."); *The Honorable George M. White Architect of the Capitol Washington, D.C. 20515*, B-234896, 1989 WL 240971, at *2 (July 19, 1989) ("Three separate contracts are involved here: the development agreement between the United States and a developer; the contract between the developer and a builder for the construction of the building; and the lease of the completed building from the developer by the United States. The United States is not a party to the contract for construction of the building. The United States is, however, a party to both the development agreement and the lease, and together these two contracts provide the basis for the construction contract.").

interest in providing decent, cost efficient housing for our enlisted military personnel" even though the DBA-covered contracts called only for 20-year leases of the buildings. *Id.* at *7 (further noting that the fact that the buildings could be converted to private use after 20 years "does not diminish the 'public' nature of these structures"). In *Phoenix Field Office*, the Department concluded that "occupancy" of the relevant building by BLM "for an extended period," in this case 10 to 15 years, was "for the public's benefit." *Phoenix Field Office*, 2001 WL 767573, at *7.

In its 1994 memorandum, OLC advised that whether a lease is a contract for construction of a public building or public work depends on "such factors as the length of the lease, the extent of government involvement in the construction project, the extent to which the construction will be used for private rather than public purposes, the extent to which the costs of construction will be fully paid for by the lease payments, and whether the contract is written as a lease solely to evade the requirements of the Davis-Bacon Act." OLC Opinion at 119 n.10; *see also* All Agency Memorandum No. 176 (June 22, 1994) at 2, *available at* http://www.wdol.gov/aam/AAM176.pdf (reiterating that the WHD considers these factors significant to a determination of DBA coverage); WHD Field Operations Handbook (FOH) ¶ 15b07, *available at* https://www.dol.gov/whd/FOH/FOH_Ch15.pdf (instructing WHD investigators to consider these factors in assessing DBA coverage).

***CityCenterDC* Opinion**

On April 5, 2016, the D.C. Circuit issued an opinion addressing the DBA's application to CityCenterDC, a development built by private developers pursuant to a lease of public property from the District of Columbia. *CityCenterDC*, 819 F.3d 444. The case raised the question of whether the relevant requirements for DBA coverage—that there be a contract to which the District was a party for construction of a public building or public work—were met in circumstances in which private developers paid the District (rather than the District making any payments to the developers) to lease land on which they would build a development, in accordance with specifications negotiated with the District, that would be privately owned and operated. *Id.* at 444, 454. The Department had held in its administrative review of the matter that the Act did apply to this novel situation because of the District's involvement in planning and overseeing the construction project as well as the public benefits the District sought to receive from turning the site into a publicly accessible and economically productive development. *See In re Application of the Davis-Bacon Act to Construction of the CityCenterDC Project in the District of Columbia*, ARB Case Nos. 11-074, 11-078, 11-082, 2013 WL 1874818 (Dep't of Labor Admin. Rev. Bd. Apr. 30, 2013).

The D.C. Circuit rejected the Department's decision, basing its conclusion on two determinations. *See CityCenterDC*, 819 F.3d at 446.[5] First, the court held that the District's

[5] In reaching this result, the D.C. Circuit affirmed the decision of the U.S. District Court for the District of Columbia that had first addressed a challenge to the Department's conclusion; the district court had granted summary judgment to the District and the developers on the ground

contract with the developers that would build, own, and operate CityCenterDC was not a "contract for construction" to which the District was a party. *Id.* at 449-50. The court described the arrangement, in which the District had not entered a contract with the entity that would perform construction: the District leased to the developers the land on which CityCenterDC was to be built; in exchange for use of the land, the developers would pay the District each year for 99 years; and the developers would arrange for construction of the project, a development of stores, restaurants, private offices, and private residences, in accordance with certain specifications set out by the District. *Id.* at 445, 447. The D.C. Circuit opined that to treat the District's lease of land to the developers as a contract for construction "would significantly enlarge the scope of the Davis-Bacon Act," further explaining that the situation before the court was different than those in *Fort Drum*, *Crown Point*, or *Phoenix Field Office*—in which, as described above, the DBA did apply to leases—because "in those cases, unlike here, the Government was the lessee not the lessor, and the leases required construction for which the Government would pay de facto through its rental payments." *Id.* at 450 & n.3. The court further noted that there was no allegation in the case of "a sham arrangement that a federal agency or D.C. enter[ed] into with an intermediary just to avoid contracting directly with a construction contractor, all for the purpose of avoiding the Davis-Bacon Act"; for that reason, the court did "not consider whether … a sham exception exists, and if so, what its contours might be." *Id.* at 451 n.4.

Second, the court held that CityCenterDC was not a public work. *Id.* at 451-54..[6] The court considered dictionary definitions of "public work" as well as the Department's regulatory definition of "public building or public work," 29 CFR § 5.2(k), in concluding that a project "must possess at least one (if not both) of the following two characteristics … in order to qualify as a public work under the Davis-Bacon Act: (i) public funding for the construction or (ii) government ownership or operation of the completed facility." *CityCenterDC*, 819 F.3d at 452-53 (footnote omitted)..[7] In this case, the court reasoned, the District "did not expend funds for the construction of CityCenterDC"—rather, the project developers made rental payments to the District while the District made no financial contributions to the project at all—so CityCenterDC was not a public work on the basis of public funding. *Id.* at 447, 453. As to the second characteristic, the court found that "D.C. does not own or operate CityCenterDC," emphasizing that CityCenterDC is "'an enclave of private facilities,'" *id.* at 453 (quoting *Dist. of Columbia v. Dep't of Labor*, 34 F. Supp. 3d at 175); the finished development is home exclusively to "upscale retail stores," "high-end restaurants," "[a] large private law firm," and "luxury residences," *id.* at 445; and the District "does not occupy any space at CityCenterDC,"

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that CityCenterDC was a "private construction project" rather than a public work. *See Dist. of Columbia v. Dep't of Labor*, 34 F. Supp. 3d 172, 182-86 (D.D.C. 2014).

[6] The Department had not asserted that the project was a public building. *See CityCenterDC*, 819 F.3d at 451.

[7] The court noted that "[a]t least one of the two characteristics is *necessary* for a project to qualify as a public work; we need not and do not decide whether either characteristic alone is *sufficient* for a project to qualify as a public work." *CityCenterDC*, 819 F.3d at 452 n.5.

"does not own or operate any of the businesses located there," and "does not offer any government services there," *id.* at 447.

Scope of DBA Coverage

Because the WHD has received questions about the meaning of *CityCenterDC*—which addressed certain aspects of the DBA coverage provisions and left open questions about others—this section of this memorandum addresses the concepts of "contract … for construction" and "public buildings and public works" in light of the D.C. Circuit's opinion.

Contract for construction

The D.C. Circuit's opinion emphasized one fact about the CityCenterDC contract: that the District itself had not entered into a contract with the entity that would perform the construction of the project. *See CityCenterDC*, 819 F.3d at 449. But importantly, the court's holding was also based on additional facts that made the case unique such that the court believed application of the DBA to the project would constitute a "sudden[] exten[sion]" of the Act that the court refused to sanction. *Id.* at 450. Most significantly to the court, the CityCenterDC project included no payment by the government as a lessee in exchange for construction. *See id.* at 450 (explaining that the District entered into contracts that "refer[red] to the èventual construction that *the Developers would pay for*" (emphasis added)); *id.* at 453 ("D.C. did not expend funds for the construction of CityCenterDC. Quite the opposite. The Developers make substantial rental payment *to D.C.*" (emphasis in original)); *id.* at 450 n.3 (distinguishing and declining to disagree with *Fort Drum*, *Crown Point*, and *Phoenix Field Office*, in which the DBA applied where Federal agencies had entered into leases with developers rather than contracts with entities performing construction because "there, unlike here, the Government did in effect pay the costs of construction, albeit indirectly, through the rental payments it made as a lessee").

Furthermore, although the opinion rejected the notion that the DBA applied to CityCenterDC, it did not express disagreement with the Department's longstanding interpretation that a contract is for construction if "more than an incidental amount of construction-type activity is involved in the performance of a government contract." *Fort Drum*, 1985 WL 167239, at *4; *see also CityCenterDC*, 819 F.3d at 450 & n.3 (expressing the view that application of the DBA to CityCenterDC would mean that the Act applies to "*any* lease, land-sale, or development contract between the Federal Government or D.C. and another party, so long as the agreements required the counterparty in turn to undertake more than an incidental amount of construction," thereby acknowledging the Department's longstanding definition and indicating, in part by distinguishing the prior cases regarding leases, that the DBA can apply to *some* leases, land-sales, or development contracts (emphasis added)). Under this standard and in keeping with *CityCenterDC*, contracts involving an agreement that particular construction will occur as well as government funding of that construction will, assuming other relevant coverage requirements are met, be DBA-covered. The variety of methods through which the government might provide funding to a project is addressed below, in the discussion of what constitutes public funding for purposes of assessing whether a project is a public work. The reason for broadly construing public funding in that context—that creative mechanisms for public financial support should not

affect DBA coverage—applies equally to an assessment of whether a contract is "for construction."

In addition, the D.C. Circuit noted that there was no indication the contracts underlying the CityCenterDC development were intended to avoid DBA requirements. *CityCenterDC*, 819 F.3d at 451 n.4. Any evidence of such intent in other cases would weigh in favor of a finding of DBA coverage. *See* OLC Opinion at 119 n.10 (noting that "whether the contract is written as a lease solely to evade the requirements of the Davis-Bacon Act" is a factor relevant to a coverage determination). The applicability of the DBA does not depend upon the sophistication or obfuscatory nature of contracting structure or financing techniques, and in particular, the use of an intermediary to enter into a contract with the entity that will perform the construction called for by a Federal agency or the District is not determinative of whether the Act applies.

Public building or public work

In assessing whether CityCenterDC is a "public work," the D.C. Circuit's opinion discussed certain aspects of that term's meaning while leaving unaddressed other issues not relevant to the matter before the court.

As a preliminary matter, under the Department's regulation defining "public building or public work," only the first of the two characteristics the D.C. Circuit considered relevant to whether a project is a public work—that is, public funding—may be considered necessary under *CityCenterDC* to satisfy this requirement for DBA coverage. *See CityCenterDC*, 819 F.3d at 452 n.5, 453 n.6 (suggesting that 29 CFR § 5.2(k) requires public funding for construction but not government ownership or operation but explicitly noting that the court was not resolving the question of whether either one of the two characteristics was alone sufficient for a project to be a public work). The regulation provides that a public work includes a project that "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." 29 CFR § 5.2(k). The first part of this provision ("is carried on directly by authority of or with funds of a Federal agency"), means, as the D.C. Circuit observed, that the involvement of public funding in a project indicates that the project may be a public work. The second part of the regulation ("to serve the interest of the general public regardless of whether title thereof is in a Federal agency") plainly indicates that government ownership is not a prerequisite to meeting the definition. The regulation's reference to the "interest of the general public" includes government ownership or operation but does not require it because government funding alone also strongly indicates that the project fulfills a significant need or goal of the relevant Federal agency (or the District). *Cf. United States ex rel. Noland Co. v. Irwin*, 216 U.S. 23, 28 (1942) (holding that a library building at Howard University was a public work for purposes of the Miller Act, relying on the definition of "public works" in the National Industrial Recovery Act, Pub. L. No. 73-90, 48 Stat. 201 (June 16, 1933)—from which the Department's regulatory definition is derived—because Federal funds were appropriated to pay for the library's construction and "education of youth in the liberal arts and sciences" fulfills a public interest, and rejecting the notion that a public work must be owned by the United States, noting that "Howard University is a private institution"); *see also CityCenterDC*, 819 F.3d at 453 (citing *Irwin*, 316 U.S. at 27).

CityCenterDC did not present the question of what circumstances can constitute "public funding" for purposes of assessing whether a project is a public work. Public funding can, of course, include direct payments to a construction contractor, *see CityCenterDC*, 819 F.3d at 445 ("[S]uppose the District of Columbia contracted with a construction contractor to build a new public park. That would be a classic example of a construction project covered by the Davis-Bacon Act."), and it can also include payments that are formally in exchange for something other than construction (for example, for the lease of a building) as part of a contract that contemplates construction (for example, of the building to be leased), *see, e.g.*, *Phoenix Field Office*, 2001 WL 767573, at *8 (noting that "the stream of lease payments from the Federal government on the Phoenix field office will substantially pay for the cost of the facility"). Because like the structure of contracts, the structure of payments should not determine DBA coverage, the WHD will consider any expenditure or transfer of funds or an asset of financial value directly or indirectly in exchange for construction to also satisfy this DBA coverage prerequisite. Public funding can therefore include, for example, financial support of construction through means such as grants, awards, subsidies (whether through direct payments or targeted tax reductions), or the conveyance or other transfer of real property or other assets directly or indirectly in exchange for construction. *See Fort Drum*, 1985 WL 167239, at *7 n.8 (noting in discussing whether the project was publicly funded that it had the "financial backing" of the Federal agency); *cf. Ober United Travel Agency, Inc. v. U.S. Dep't of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998) (explaining that for purposes of coverage determinations under the Service Contract Act, 41 U.S.C. § 6701 *et seq.*, "it does not matter whether the contractor is paid directly by the government or indirectly").[8] In other words, if a Federal agency or the District of Columbia is providing something of value directly or indirectly in exchange for construction as part of a contractual arrangement that includes more than an incidental amount of construction, the project is almost certainly a public work, even if the arrangement is structured such that money does not flow directly from the agency or District to the party performing the construction.

As noted in *CityCenterDC*, "government ownership or operation" is an indicator that a project is a public work. Government ownership plainly includes when the government holds title to real property or another asset. Government operation can take a variety of forms depending upon the nature of the building or work being constructed. It includes occupancy by the employees of a Federal agency or the District or relatives of such employees. *See Phoenix Field Office*, 2001 WL 767573 (concluding that the DBA applies to the lease of a building constructed for use in part as office space for BLM employees); *Fort Drum*, 1985 WL 167239 (concluding that the DBA applies to the lease of housing constructed for use by military families); *see also CityCenterDC*, 819 F.3d at 447 (finding relevant to a DBA coverage determination that "D.C. does not occupy any space at CityCenterDC"). It also includes circumstances in which the

[8] Although *CityCenterDC* involved the transfer of property from the District to developers, the D.C. Circuit opined that the public funding requirement was not met because the District received annual payments from the developers in exchange for use of the land. *See CityCenterDC*, 819 F.3d at 447, 449 (explaining that the developers paid for the construction of CityCenterDC while "D.C. provided no public funding for construction of CityCenterDC"). These circumstances are distinguishable from any in which the government exchanges property or use of property as consideration in exchange for construction.

building or work is used to serve a governmental function or purpose. *See Crown Point*, 1987 WL 247049 (concluding that the DBA applied to a building constructed to be an outpatient clinic and leased by the VA to provide health services to veterans); *Phoenix Field Office*, 2001 WL 767573 (concluding that the DBA applied to a building constructed for use in part as storage space for BLM); *see also CityCenterDC*, 819 F.3d at 447 (finding relevant to a DBA coverage determination that "D.C. does not offer any government services" at the CityCenterDC development).

Examples

Although final DBA coverage determinations can only be made on the basis of a full consideration of the relevant facts in a particular circumstance, to provide additional clarity to the contracting community, the WHD notes examples of DBA coverage determinations.

- *Leases contemplating publicly funded construction.* As explained above, the DBA applies when a Federal agency or the District of Columbia leases a building or work and the lease agreement contemplates construction of the structure to be rented. *CityCenterDC* explicitly did *not* overturn *Fort Drum*, *Crown Point*, or *Phoenix Field Office*. *See CityCenterDC*, 819 F.3d at 450 n.3. Instead, it distinguished the facts of those cases, in each of which a Federal agency made rental payments to a developer that in turn arranged for construction in accordance with government specifications of the building or work the agency wished to lease. *See Fort Drum*, 1985 WL 167239, at *4-5; *Crown Point*, 1987 WL 247049, at *2-3, *agreed with by* 1994 OLC Opinion; *Phoenix Field Office*, 2001 WL 767573, at *7-9. Similar future projects will also be DBA-covered: if a lease expends public funds for construction and contemplates more than an incidental amount of construction, it will be a contract for construction; and if a project is publicly funded (by lease payments) and will be operated by the agency (because it will be occupied or used by the agency as contemplated by a lease), the project is certainly a public work.

- *Privatization of government functions*. Federal agencies are in some circumstances permitted to "privatize" systems or functions that were previously performed directly by the government and still serve a public purpose; such privatization does not mean there is no DBA coverage of the relevant construction projects.

  For example, the Military Housing Privatization Initiative ("MHPI"), 10 U.S.C. § 2871 *et seq.*, permits the Department of Defense ("DOD") to enter into agreements with developers who will operate and maintain housing units for rent by military families. DOD facilitates these arrangements through several financial tools, including direct loans to developers, loan guarantees for developers, conveying or leasing property to generate funds for financing the projects, leasing housing units to guarantee developers' rental incomes, and/or making "differential lease payments" to supplement families' rental payments to developers, *id.* §§ 2873-74, 2876-77, and DOD may make financial investments in the entity with which it enters an agreement, *id.* § 2875. Moreover, military members pay for the privatized housing with their "Basic Allowance for Housing," and DOD uses appropriated funds to provide such allowances. *See* MHPI

FAQs, *available at* http://www.acq.osd.mil/housing/faqs.htm; 10 U.S.C. § 2883a. Prior to *CityCenterDC*, the WHD took the position, with which DOD agreed, that the DBA applied to construction of a privatized military housing facility through the MHPI. *See* FOH ¶ 15d07 (Oct. 25, 2010) (noting that the Army, Navy, and Air Force "have agreed to include [DBA] provisions and applicable wage determinations in all MHPI contracts and have agreed that all developers will be required to comply with the [DBA] labor standards provisions"); *see also* MHPI FAQs, *available at* http://www.acq.osd.mil/housing/faqs.htm ("*Does the Davis-Bacon Act apply to privatized developers?* Yes. It is the developer's responsibility to work out the application of the Davis-Bacon Act to the specific MHPI project."). Based on the factual circumstances contemplated by statute, the DBA will continue to apply to MHPI contracts after *CityCenterDC*. The contracts will be for construction because they contemplate more than an incidental amount of construction and because they involve public funding in exchange for that construction. In addition, the projects will be public works because of the public funding (indirectly through rental payments as well as directly or indirectly through any means of financial support DOD has selected for a given project), because the housing is occupied by federal employees and their families, and in some cases because DOD is an owner of the developer that manages the project.

As another example, DOD is permitted to privatize utility systems (such as systems that generate and supply electric power or treat or supply water), by conveying such systems to a private entity. 10 U.S.C. § 2688. Such arrangements may include both the government's receipt of the utility system's services, *see id.* § 2688(c)(1)(B), (c)(2), and "a contribution toward the cost of construction, repair, or replacement of the utility system by the entity to which the utility system is being conveyed," *id.* § 2688(h). If an arrangement conveying a utility system does indeed contemplate construction and involve public funding for the construction (whether the payments are made directly in exchange for construction or indirectly through, for example, payments for utility services that exceed the cost of the services unrelated to construction), the requirements for DBA coverage will be met.

- *Exchanges of property for construction.* The General Services Administration ("GSA") has authority to enter into agreements conveying government-owned property in exchange for construction of new government facilities. GSA is considering, for example, exchanging ownership of the Federal Bureau of Investigation headquarters and (separately) the Department of Labor headquarters for the construction of new buildings to accommodate the needs of those agencies. *See* GSA News Release, "GSA Issues Phase II of the Request for Proposals (RFP) for the FBI Headquarters Consolidation Project" (Jan. 22, 2016), available at https://www.gsa.gov/portal/content/122554; GSA News Release, "GSA announces shortlist of sites for the new Department of Labor (DOL) headquarters, continues to explore options for exchange" (Nov. 29, 2016), available at https://www.gsa.gov/portal/content/152638. If a future contract provided for the conveyance of government property to a private party in exchange for the construction of a replacement facility for governmental use, the DBA would cover that contract, even if an intermediary exists between the agency and the entity performing the construction. Such a contract would plainly be for construction and would involve both public funding

for construction (albeit through the transfer of an asset rather than direct payment of money) and government occupancy (and perhaps government ownership) of the completed project.

Conclusion

The WHD intends this memorandum to provide helpful guidance to the contracting community. It acknowledges, however, that no document of general applicability can address the myriad specific scenarios that can arise in government contracting. Questions regarding the interpretation of the DBA, the Department's regulations in 29 CFR part 5, or the application of the Act to a particular contract may be submitted in accordance with 29 CFR § 5.13 or directed to the Branch of Government Contracts Enforcement, Office of Government Contracts, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210; telephone number (202) 693-0064.