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DAVIS-BACON

HOUSE REPUBLICANS AND OPEN SHOP CONTRACTORS ONCE AGAIN NIX PREVAILING WAGES—in an ongoing battle, mainly fueled by open-shop contractors, some House Republicans urged the House Education and Labor Committee not to add Davis-Bacon Act prevailing wage mandates to federal funding for school infrastructure modernization bills.

HOUSE APPROVES ENERGY TAX BILL WITH DAVIS-BACON LANGUAGE—the House approved H.R.5351: Renewable Energy and Energy Conservation Tax Act of 2008, despite the Administration's veto threat. It includes Section 411, which for the first time, applies Davis-Bacon Act prevailing wage requirements to projects financed with proceeds of any tax credit bond.

SENATE APPROVES INDIAN HEALTH CARE BILL AMENDMENTS WITH DAVIS-BACON LANGUAGE—the Senate approved S.1200: Indian Health Care Improvement Act Amendments of 2007 with prevailing wage requirements for construction or renovation projects, despite the Administration's veto threat. It includes Section 303, which proposes applying Davis-Bacon wage rates for the construction or renovation projects of certain health care facilities on Native American tribal lands.

PRESIDENT SIGNS ECONOMIC STIMULUS PACKAGE

President Bush signed into law (P.L.110-185) a \$152 billion package of tax rebates and business investment incentives (H.R.5140) in an attempt to bolster our sagging economy. Unfortunately, this legislation fell short because it was passed without any infrastructure spending provisions or energy tax incentives—despite the construction industry's push to include them.

Such infrastructure investments are good for the economy because contractors would have to purchase more materials and employees would spend their newly acquired wages.

Several governors, labor organizations, and contractor associations have indicated they will continue to work with the Senate and House committees to try and pass a second stimulus package in the \$12 billion range that would include infrastructure provisions and tax incentives. President Bush does not favor a second package.

IMMIGRATION REFORM REVISITED

HOUSE LEADERSHIP PONDS PASSING IMMIGRATION BILL—as a result of Rep. Heath Shuler's circulating a discharge petition to move his bill (H.R.4088: Secure America through Verification and Enforcement [SAVE] Act of 2007) directly to the House floor for a vote, the House leadership is once again debating passage of such legislation in 2008.

The House leadership spurred by the Republicans and the so called "Blue Dog" Democrats (who sometimes vote Republican) being lead by Rep. Shuler, is working to determine whether it can offer immigration reform legislation this year. Already claiming 136 signatures for the discharge petition, Rep. Shuler needs only 82 more signatures for the discharge petition to reach the required 218.

EMPLOYERS FACE STIFF NEW PENALTIES FOR IMMIGRATION VIOLATIONS—in an attempt to take action, the federal government is raising civil penalties on employers who violate immigration law.

MANDATORY THREE PERCENT WITHHOLDING TAX

H.R.3033 HEARING HELD—On February 27, the House Oversight and Government Reform Committee’s Subcommittee on Government Management, Organization, and Procurement held an H.R.3033 hearing, and the Campaign for Quality Construction (CQC) Alliance submitted a written statement in support of the legislation.

FCA’S TOP REGULATORY ISSUES

OSHA’S FY 09 BUDGET EYES INCREASE IN ENFORCEMENT AND COMPLIANCE ASSISTANCE—the President’s FY09 OSHA budget allocation has increased \$11.3 million over FY08’s. Most of this increase would be spent on Federal enforcement efforts. The total enforcement budget would be \$194 million with 47 new employees, half of them added to OSHA’s enforcement team to become part of OSHA’s site-specific targeting program. The second largest increase in the budget is \$5 million for federal compliance assistance efforts (raising the total compliance assistance budget to \$76.6 million).

OSHA’S PROPOSED CONFINED SPACE RULE: COMMENTS

FCA Contractor Comments—in response to OSHA’s request for contractor comments to the proposed confined space ruling, the following nine comments were submitted by Redwood Painting Co., Inc., in Pittsburg, CA.

DOL’S 2008 APPRENTICESHIP MODERNIZATION

In 2008, the DOL plans to address employment training programs for young adults, along with apprenticeship program registration, safety and health, and pension protection.

FURTHER INFORMATION

MORE ON DAVIS-BACON

During a recent House Education and Labor Committee hearing, Rep. Charles Boustany, Rep. Howard McKeon, and some open-shop contractors alleged the same age-old erroneous arguments: “That prevailing wages make already expensive public construction projects even more expensive” and that there are numerous problems with the current Davis-Bacon wage determination method. Labor and management, on the other hand, continue to argue that the Davis-Bacon law forces contractors to compete on a level playing field: on the basis of who can best train, best equip, and best manage a construction crew.

MORE ON IMMIGRATION

U.S. Attorney General Michael Mukasey and Department of Homeland Security Secretary Michael Chertoff announced a new program that will increase penalties for violations of Federal immigration laws by as much as 25 percent on average and will apply to violations such as non-compliance with Federal I-9 employment eligibility verification requirements. This program stipulates that the maximum penalty for a first offense of knowingly employing an unauthorized worker will increase \$100 per violation (from \$275 to \$375), and the maximum penalty for multiple violations will rise \$5,000 (from \$11,000 to \$16,000). They also announced that they would expand the prosecutions/removals of criminal aliens, streamline existing guest-worker programs, and establish a new Southwest Border Enforcement Initiative. Designed to fortify law enforcement and prosecution efforts, this new program would be financed by a \$100 million FY09 budget request by the Department of Justice.

In addition, Mr. Chertoff said that the DHS will soon be publishing an updated proposed “no-match” rule. This action is in response to the stay proceedings in the lawsuit filed last year that prevented the government from implementing the no-match letters program in August 2007.

MORE ON MANDATORY Three Percent WITHHOLDING

At that hearing, the CQC Alliance, of which FCA is a member, submitted a lengthy written statement for the record which can be summarized as follows: “The CQC vigorously supports Congressional efforts to better enforce the

requirement that all Federal contractors be responsible contractors....We urge the Congress to enact H.R.3033 to assure that taxpayer dollars are only being spent with law-abiding and taxpaying firms.”

At that same hearing, Mr. Paul Denett, Office of the Federal Procurement Policy Administrator, commented on the three contractor accountability bills pending in the House: **H.R.3033**: the Contractors and Federal Spending Accountability Act; **H.R.3928**: the Government Contractor Accountability Act of 2007; and **H.R.4881**: the Contracting and Tax Accountability Act of 2007. He also stated that amendments to the Federal Acquisition Regulation (FAR) are expected this month that will authorize appropriate Federal officials to use tax delinquency as sufficient grounds for debarment or suspension. In addition, he agreed there is a need for Federal departments and agencies to share information regarding improper conduct or questionable activities by contractors.

MORE ON APPRENTICESHIP MODERNIZATION

PROPOSED RULE: MODERNIZATION OF APPRENTICESHIP PROGRAM SYSTEM—the DOL has issued a proposed rule that would update regulatory provisions under the National Apprenticeship Act—providing more clarification and flexibility, as well as strengthening oversight procedures for measuring apprenticeship program performance. The rule would also revise the process for determining an apprenticeship program’s eligibility for being registered by either the DOL or a state agency. In addition, the rule would provide three methods that apprentices could use to meet an industry standard: (1) a **time-based approach** that requires completion of 2,000 hours of on-the-job training; (2) a **competency-based approach** where a program sponsor verifies that an apprentice has successfully demonstrated that he/she has acquired a certain level of skills and knowledge; and (3) a **hybrid approach** that combines the above two. Also, the rule would allow training to be conducted through classroom instruction, an occupational or industry course, electronic media, or other approved instruction. Finally, the rule would clarify provisions established for stripping an apprenticeship program of its registration and for de-recognizing state apprenticeship agencies.

In the area of safety and health, look for these items to be addressed: a peer review on the health effects and risk assessment for silica, as well as reports on beryllium, methylene chloride, and diacetyl. The Employment Standards Administration plans to revise the LM-2 form for labor unions to file their annual financial reports for trusts in which they have an interest, along with implementing the provisions of the Pension Protection Act of 2006.

MORE ON CONFINED SPACE RULE

- 1) **1926.1203** – The definition of Hazardous Atmosphere is vague when it says “(4) an airborne concentration of a substance that exceeds the dose or exposure limit specified by an OSHA requirement.” Is this simply referring to PEL’s, TLV’s, IDLH values, etc? If so, specify which one. While we are on this subject, could we get a reality check on just what constitutes a hazardous atmosphere regarding “toxic exposures”? For example, dust has a PEL, and so does hydrogen sulfide. However, an atmosphere that exceeds the PEL for dust is not in the same category as an atmosphere that exceeds the PEL for hydrogen sulfide. Can’t we use IDLH values?
- 2) **1926.1204 – Part (b)(3)** requires atmospheric testing “without using mechanical ventilation or altering the natural ventilation in the space.” I know what OSHA is trying to accomplish, but we perform abrasive blasting on tank interiors regularly. I don’t think it is a good idea to start abrasive blasting a tank interior with the dust collector turned off just to get a base reading which will make our work on tank interiors more dangerous.
- 3) **1926.1205 – Part (a)(4)** requires the use of direct-reading instruments for monitoring atmospheric hazards. I don’t think anything is available to monitor airborne lead dust directly. This is the hazard we face the most. Also, I am not aware of direct reading instruments for paint that have a multitude of solvents in the formula. Draeger tubes can be used for one solvent at a time, but many coatings contain 3 or 4 different solvents.
- 4) **1926.1208 – Part (b)(2)** requires that monitoring procedures will detect an increase in atmospheric hazard levels in the event the ventilation system fails....” This would require a direct reading instrument which leads to the same problem identified in Comment #3.

- 5) **1926.1210 – Part (j)(1)** requires the use of communications equipment for entrant-to-attendant communication. Does this mean that “line-of-sight” is no longer adequate for working in confined spaces?
- 6) **1926.1213** – Rescue criteria should be different for atmospheres that are hazardous due to dust compared to atmospheres that are hazardous due to hydrogen sulfide, carbon monoxide, chlorine gas, etc.
- 7) **1926.1219 – Part (a)** is unclear. Does the 1st sentence refer to *all* confined spaces or just to the types regulated by this new regulation? Also, the 2nd sentence confuses me.
- 8) **Overall: Separate Sewer Systems Rule**—it appears that sewer systems should get their own regulation, because other more innocuous permit-required confined spaces are getting caught up in the dragnet of regulating sewer system work. Just write this regulation for sewer system work, and refer to 8CCR5158 for other construction permit-required confined space work. OSHA may need to tweak 8CCR5158, but that would be a lot better than having to reconcile this new procedure to the confined spaces in which we are used to working.
- 9) **Overall: Rule’s Length**—this procedure is way too long. Reading this new regulation exhausted me. If OSHA is hoping that employers will read it and actually understand all of its requirements, they’re going to have to shorten it, because I don’t think employers will survive reading such a lengthy rule.

(NOTE: It appears that the overall contractors’ response so far agrees with Redwood’s assessment that the rule is simply “too complex.” As a result, many in the construction industry have called for a “public hearing” before the rule is finalized. Many comments have indicated that the general industry standard, with its two classifications, is sufficient. Some even objected to the use of a “controlling contractor,” which in their opinion doesn’t always exist, since many prime contractors work directly for the owners who are not always physically present at the worksite. OSHA has targeted early 2009 as the date to implement their revised ruling.)