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# **Davis Bacon and Federal Contracting Requirements Bidding 101**

**Plus some other stuff: School District competitive bidding requirements and their exceptions.**

Michigan School Business Officials  
2022 Conference

# Davis Bacon Act

- Codified at 40 USC sec. 3141 *et seq.*
- Requires payment of prevailing wages for every contract in excess of \$2,000 for construction, alteration, or repair, including painting and decorating, of public buildings and public works which requires or involves the employment of mechanics or laborers
  - Specifically requires advertisements to include certain information related to the minimum wages that must be paid to various classes of laborers and mechanics
- Applies to both wages and fringe benefits
- Contracting agencies are responsible for insuring that the appropriate wage determinations are incorporated in bid solicitations and for designating specifically the work to which such wage determinations will apply. 29 CFR 1.6(b)

# Davis Bacon: The Framework

- Uniform Guidance (2 CFR Part 200) (Applicable per 2 CFR Part 3474)
  - Federal Regulations- procurement methods when non-federal entities use federal ESSER Funds
  - When a project receives any funding that requires payment of the DB prevailing wage, construction work at the site for the entire project is generally subject to DB
  - Elementary and Secondary School Education Relief (ESSER) I/II/III
    - CARES Act, CRRSA Act and ARPA
- Davis Bacon Regs (29 CFR Parts 1,3, 5, 6, 7)
- All procurements must comply with State law
- Cooperative purchasing programs allowed
  - Underlying contract between the cooperative purchasing program and the contractor must comply with the Uniform Guidance
- Specific contractual provisions must be included in the contract between the school district and the contractor

# Wage Determinations

- Determine which schedule of prevailing wages applies (Building, Heavy, Highway, or Residential)
  - All Agency Memoranda No. 130 (March 17, 1978) and 131 (July 14, 1978)
  - All Agency Memorandum No. 236 (December 14, 2020) – Updates AAM 131
  - Building
    - Construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade.
    - Includes incidental other work (generally, 20%). Multiple schedules may be necessary if the cost of those items is substantial in relation to project cost.
- Wage Determinations must be updated to the date of contract award
  - Assuming wage determinations were properly included in the contract (including a proper description of the project), Wage determinations do not need to be updated after commencement of construction unless the scope of the contract/construction changes substantially
- The wage determination and a Davis Bacon poster (WH-1321) must be posted at all times by the contractor and its subcontractors at the site of work in a prominent and accessible place.

# Davis Bacon: Required Provisions (Contracts)

- Minimum Wage, Withholding, Payroll and Basic Records, Apprentices and Trainees, Copeland Act, Subcontracts, Contract Termination and Debarment, Compliance with Davis Bacon and related Act, Disputes concerning labor standards, and Certification of Eligibility (29 CFR 5.5)
- Ex:
  - (1) the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics;
  - (2) the contractor will post the scale of wages to be paid in a prominent and easily accessible place at the site of the work; and
  - (3) there may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.
  - If the contracting officer finds that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid, the Federal Government by written notice to the contractor may terminate the contractor's right to proceed with the work or the part of the work as to which there has been a failure to pay the required wages. The Government may have the work completed, by contract or otherwise, and the contractor and the contractor's sureties shall be liable to the Government for any excess costs the Government incurs.

# Davis Bacon: Required Provisions (Contracts)(Cont.)

- Uniform Guidance Required Provisions 2 CFR Part 200
  - Applies to all Federal agencies that make Federal awards to non-Federal entities
- Appendix II Contract Provisions
- > simplified acquisition threshold, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for sanctions and penalties where appropriate
- > \$10,000, must address termination for cause and for convenience
- EEOC provisions
- > \$100,000 involving mechanics and laborers, must include a provision for compliance with the Contract Work Hours and Safety Standards Act
- > \$150,000, Clean Air Act compliance
- Byrd Anti-Lobbying Amendment

# Reporting Requirements

- Covered workers must be actually paid weekly and certified payrolls must be submitted weekly. 29 CFR 3.4
- Each Contractor/Subcontractor must deliver the weekly statement (with a signed Statement of Compliance), within 7 days after the regular payment date of the payroll period, to a representative of a federal or state agency in charge at the site of the work.
- Contractors must maintain a record of worker's payroll and hours worked including the name, address, and social security number of each such worker, their correct labor classification(s), hourly rates of wages paid, including rates of contributions or costs anticipated for bona fide fringe benefits and how those rates were computed, daily and weekly number of hours worked, deductions made, and actual wages paid. Contractors employing apprentices under approved apprenticeship programs must also maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates required by the applicable programs. The contractor must make these records available to the Department of Labor or the funding recipient upon their request. 29 CFR 5.5(a)(3).

# Application

- Contractors and subcontractors are required to pay Davis-Bacon prevailing wage rates to laborers and mechanics who perform work on DBRA covered projects, including bona fide apprentices and trainees. Laborers and mechanics include workers who perform primarily manual or physical work, including those who use the tools of a trade.
- Workers such as timekeepers, inspectors, architects or engineers, or anyone exempt under the part 541 regulations under the Fair Labor Standards Act, are generally not considered laborers or mechanics and, therefore, are not required to be paid prevailing wages because they do not generally perform primarily physical or manual work or use the tools of a trade.
- In addition, prevailing wages generally are only required to be paid to laborers and mechanics when they are employed on the site of the work, as defined in 29 CFR 5.2(l).



# Non-Compliance - Penalties

- If a district fails to include the proper notice language in the contract documents, contractors who bid on the project or perform work on the project without paying the prevailing wage rates could make a claim against a district for failure to provide the notice if they paid their employees less than the required prevailing wage for the work performed. Essentially, a district could end up owing a contractor the difference between what the contractor paid its employees for performing the work and what it should have paid its employees for performing the work.
- Penalties for contractors
  - Debarment
- Must report actual or suspected violations

# Davis Bacon: Typical Problems

- Misclassification of laborers and mechanics
- Failure to pay full prevailing wage for all hours worked, including overtime
- Inadequate recordkeeping
- Failure to maintain a copy of bona fide apprenticeship programs and individual registration documents for apprentices
- Failure to submit certified payrolls weekly
- Failure to post the Davis Bacon poster and applicable wage determination

# State Law Competitive Procurement: Applicable Procurements

- Construction, renovation and repair of school buildings. (Includes additions)
- Procurement of supplies, materials and equipment.
- Procurement of energy conservation improvements.

# Sources of Law

## ■ Michigan Revised School Code

- General contracting authority
  - MCL 380.11a (General Powers School Districts)
  - MCL 380.601a (Intermediate School Districts)
- School buildings
  - MCL 380.1267
  - MCL 380.1274a
- Supplies, materials and equipment
  - MCL 380.623a (Intermediate School Districts)
  - MCL 380.1274 (K-12)
- Violations of competitive requirements
  - MCL 380.1815

## ■ Miscellaneous

- Performance and Payment Bonds - 1963 Public Act 213
- Iran-Linked Contractors – 2012 PA 517
- Case Law and Attorney General Opinions
- Federal Statutes and Regulations (Not Covered In this Presentation)

# School Buildings

- Construction, additions, renovation, and repair. MCL 380.1267.
  - Before commencing construction of a new school building, or addition to or repair or renovation of an existing school building, except repair in emergency situations, the board of a school district ... shall obtain competitive bids on all the material and labor required for the complete construction of a proposed new building or addition to or repair or renovation of an existing school building.
- Includes contracts entered into for energy conservation improvements under MCL 380.1274a.

# School Buildings – Energy Conservation Improvements and Operational Improvements

- Sources of financing
  - Operating funds of the school district
  - Proceeds of bonds or notes
  - Installment contract or lease-purchase agreement
  - Energy saving performance contracts (“ESPC”)
- "Qualified provider" means an individual or a business entity that is experienced in performing design, analysis, and installation of energy conservation improvements or operational improvements and facility energy management measures and that will provide these services under the contract with a guarantee or on a performance basis.
- Energy conservation improvements
  - Adding square footage to existing school facilities; building envelope improvements; heating, ventilating, and cooling upgrades; lighting retrofits; installing or upgrading an energy management system; motor, pump, or fan replacements; domestic water use reductions; information technology improvements associated with an energy conservation improvement to school facilities; municipal utility improvements associated with an energy conservation improvement to school facilities; and upgrading other energy consuming equipment or appliances
- Operational Improvements
  - Adding square footage to existing school facilities, or installing equipment or providing services that result in decreased, eliminated, or avoided operating or maintenance costs
  - Operational improvements do not have to be energy conservation related

# School Buildings – Energy Saving Performance Contracts

- Bids for an ESPC must include:
- A detailed breakdown of the energy performance savings or operational savings to be derived each year and for the duration of the energy saving performance contract, including at least all of the following:
  - A description of the guaranteed energy use savings or operational savings, and tasks to be performed under the energy saving performance contract.
  - The combined total net cost of all of the energy conservation measures or operational improvements in the project.
  - The projected energy savings and operating and maintenance cost savings resulting from the project.
  - The useful life of each energy conservation measure or operational improvement.
  - The simple payback period.
- A certification by the qualified provider that measurement and verification techniques for determining cost savings will be performed in accordance with the protocols promulgated by the Efficiency Valuation Organization.
- School board may require that the qualified provider furnish a bond that guarantees the energy cost savings or operational savings for a period of time.

# School Buildings: Procedures

- Publication: At least two weeks before bid opening, all requests for bids must be
  - published in a newspaper in general circulation in the area where the construction, renovation or repair will take place, and
  - posted for at least 2 weeks on the MI Dept. of Management and Budget website.



## School Buildings: Publication

- Publication must:

1. State date/time bids must be received
2. State that late bids will not be considered or accepted
3. Identify the time, date and location of the public opening of bids
4. State that the bid shall be accompanied by a sworn and notarized statement disclosing any familial relationship between the bidder (owner and employees) and the superintendent and board of the school district

## School Buildings: Bids

- Each bid must contain a bid bond in an amount not less than 1/20 of the amount of the bid
- The board may reject any or all bids. If all are rejected, the district shall re-advertise in the same manner as the original notice
- Michigan-based business preferences are acceptable if adopted by the board. (policy must be consistent with federal statutes and regulations and shall not be applied to projects using federal funds)

# School Buildings – Bid Openings

- At a public meeting identified in the advertisement for bids, the board ... or its designee shall open and read aloud each bid that the board ... received at or before the time and date for bid submission specified in the advertisement for bids.
- Virtual Bid Openings Post March 30, 2021
  - What takes place at the bid opening
    - Open bids
    - Read name of bidder
    - Other information
  - Designee – Virtual ok
  - Board – Virtual *might be ok...*
    - Has a local state of emergency or disaster been declared by municipality or county
    - No rendering of a decision or deliberation towards a decision
    - Best practice would be either have designee open bids or OMA compliant board opening

# Delegation of competitive bidding duties

- A board may delegate certain functions to a construction manager, but must retain and exercise its statutory authority to:
  1. Set bid specifications
  2. Advertise for bids
  3. Accept or reject bids
  4. Require and receive the statutorily mandated security amount
- A construction manager may: (1) make recommendations as to which bid a board should accept, and (2) prepare bid specifications
- 1992 Mich. O.A.G. 6734

# School Buildings: Exceptions

- Construction, renovations or repairs costing less than \$25,288. (for the 2020-21 school year)(adjusted annually by CPI)
  - Project may not be artificially subdivided to avoid the dollar limits
- Repair work normally performed by district employees
- **Emergencies**
  - This exception is carefully scrutinized by courts
  - Examples: fixing a leaking roof or broken windows; repairing a boiler to prevent dangerous condition
  - General standard is for protection of health, safety and welfare of students or other occupants of the School Building
- No sole source exception

## Note: Performance and Payment Bonds

- Before any contract exceeding \$50,000 for the “construction, alteration or repair of any public building or public work, or improvement of a ... school district [or] public education institution” is awarded, the primary contractor must furnish both a performance and a payment bond, each in an amount not less than 25% of the contract amount, for the protection of the district. Act 213 (1963), MCL 129.201 *et seq.*
- Must be at no cost to district.

## Note: School Building Security Requirements

- A school district... shall not commence the construction of a new school building or the major renovation of an existing school building unless the school district ... consults on the plans for the construction or major renovation regarding school safety issues with the law enforcement agency that is or will be the first responder for that school building.
- As used in this section, "school building" means either of the following:  
(a) A building intended to be used to provide instruction for pupils; (b) A recreational or athletic structure or field intended to be used by pupils.

# Supplies, materials and equipment

- The board of an intermediate/school district must adopt written policies governing the procurement of supplies, materials, and equipment. MCL 380.623a and MCL 380.1274
- A district shall not purchase an item or group of items in a single transaction costing \$25,288 or more unless competitive bids are obtained for those items and the purchase is approved by the board. (amount is adjusted annually by CPI)
  - Food purchase limit is \$100,000 in a single transaction
- Michigan-based business preference policies are acceptable if adopted by the board (policy must be consistent with federal statutes and regulations and shall not be applied to projects using federal funds)
  - Can be based on status of the primary contractor or subcontractors
  - See MCL 18.1268 for definition of “Michigan-based business”
- No formal procedural requirements are contained in statute
  - Subject to board policies which may impose more stringent requirements
  - Absent policy to the contrary, can be phone quotes or faxes (but the process should be documented)



## Supplies, materials and equipment: Exceptions

- Items purchased through a cooperative bulk purchasing program operated by the MI Dept. of Management and Budget.
- Items purchased through a cooperative purchasing program organized under section 11a of the revised school code (which permits districts to exercise powers jointly) if the bidding requirement was satisfied at that level.
- Food purchased in a single transaction costing less than \$100,000
- No emergency or sole source exception

# Bid Withdrawals and Modifications

- Withdrawal of Bid after Opening
  - “[A]n honest mistake without negligence” is a valid cause to rescind a contract, provided that the bidder was not grossly negligent, that no intervening rights had accrued, and that the parties could each be returned to their pre-bid, status quo position. *Kutsche v. Ford*, 222 Mich 442, 449 (1923).
  - Clerical errors may be basis to withdraw a bid prior to the award of the contract. *Fraser Public Schools v. Kolon*, 35 Mich App 441 (1971).
- Modifications to bids between bid opening and award, no matter how attractive, is essentially a new bid and is prohibited absent a new bidding process. Only solution: reject all bids and re-do bidding process.
- District may enforce bid after award of contract.

## Disappointed Bidders

- Bid awards; Disappointed bidders
  - No statutory requirement that contracts be awarded to lowest bidder. Bid specifications and board policies dictate the criteria for awards.
  - Lowest bidder has no valid business expectancy and no legal standing to sue in order to challenge the award of a contract (*Cedroni Assoc., Inc. v. Tomblinson, Harburn, Assoc., Architects & Planners, Inc.* 492 Mich. 40 (2012))

# Change Orders

- Change orders
  - A change order may need to be competitively bid, but is fact specific.
  - Ex: a change in the scope of the project which was not handled as a bid alternate which increases the price by more than the bidding threshold.
  - Ex: A change in price that is disproportionate to the original contract amount.
  - Initial contract documents should contain procedures for handling and pricing changes arising from unforeseen circumstances

## Miscellaneous Issues

- Iran Economic Sanctions Act (2012 PA 517): A district must require persons submitting bids to certify that the bidder is not an “Iran-linked business”
  - Iran-linked business is not eligible to submit a bid on an RFP with a public entity
- Criminal sanctions
  - A person who “knowingly or intentionally” violates or who “knowingly or intentionally permits or consents to a violation” of competitive bid requirements of Section 1267 is guilty of a misdemeanor punishable by up to 1 year in prison and a fine equal to not more than 10% of the cost of the project. MCL 380.1815

# Competitive Procurement Cheat Sheet

<u>Formal Bidding Required</u> (MCL 380.1267)	<u>No Bidding Required</u>	<u>Bidding Required</u> (Formal or Informal) (MCL 380.1274)
Building/Site Improvements Labor and/or Materials	Pure Services (no construction labor or repair or installation)	Supplies and Equipment
Construction	Architects/tech designers/engineers	Buses
Remodeling	Construction managers	Computers, copiers, software, phones, cameras
Repairs (except emergencies)	Lawyers	Other vehicles
Site work (paving, demolition, landscaping, drainage)	Auditors	Furnishings
Infrastructure installation (e.g. wiring for tech, security connection)	Maintenance or repairs (other than initial wholesale outsourcing) which do not involve more than incidental supplies or parts (as opposed to remodeling)	Instruments
Fixtures (built in/hardwired; treated as construction or remodeling)		Uniforms
Energy conservation improvements (remodeling)	Energy conservation management (operational)	Paper, pens, ink, and the like
	Consultants, Surveyors	Lightbulbs
	Installation of equipment purchased from vendor other than equipment seller	Purchase price includes the labor associated with installation of the purchased equipment
	Cooperative purchase of equipment where 3rd party took bids	
	Land purchases, sales and leases	

## Questions?

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