

Recommendation 65: Increase the acquisition thresholds of the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and the Services Contract Act to \$2 million.

Problem

The Davis–Bacon Act, the Walsh–Healey Act, and the Service Contract Act negatively affect defense acquisitions in several ways. They impose often-artificially high costs of labor on federal contracts. Their duplicative and outdated provisions – namely, their acquisition thresholds – impose heavy administrative burdens on DoD and on industry. Because public funding does not dominate total U.S. expenditures for the labor categories covered by these laws, a smaller percentage of U.S. workers are covered by them than in the 1930s. Because of this, these labor laws also serve as a barrier to entry to working for the federal government. Private companies with both commercial and federal clients often wish to avoid maintaining two sets of standards for their workforces. Competition for defense contracts is thus reduced.

Background

The Davis–Bacon Act

The Davis–Bacon Act¹ was originally passed in 1931. As amended, the Davis–Bacon Act requires contractors to pay no less than the prevailing wages to various classes of labor employed under construction contracts in excess of \$2,000. All contracts covering the construction, alteration, and/or repair – including painting and decorating – of public buildings or public works in the United States are included.² The Department of Labor (DOL) determines prevailing wages by surveying interested third parties. The federal minimum wage is not the same as the prevailing wage. The DOL prevailing wage determinations related to the Davis–Bacon Act have been written into 58 other federal program statutes.³ Although DOL’s administration of the act has changed over the years, the statute itself has remained largely unchanged since 1935.

The Davis–Bacon Act is implemented through FAR Subpart 22.4 and DFARS Subpart 222.4. In addition to the wage rate requirements, FAR Subpart 22.406 requires contractors to maintain detailed payroll records for all laborers on federally funded construction projects for 3 years. Contractors and subcontractors must submit certified payroll data on a weekly basis, and make payroll records and employees available for DOL inspections.⁴

¹ Wage Rate Requirements, 41 U.S.C. 31-IV.

² Rate of Wages for Laborers and Mechanics, 40 U.S.C. § 3142.

³ See, Statutes Related to the Davis–Bacon Act Requiring Payment of Wages at Rates Predetermined by the Secretary of Labor, 29 CFR Part 1, Appendix A.

⁴ Davis–Bacon and Related Acts Provisions and Procedures, 29 CFR 5.5(a)(3).

The Walsh–Healey Act

The Walsh–Healey Act was enacted in 1936 to extend the protection of the federal government to employees of contractors that furnish materials, supplies, articles, and equipment in any amount exceeding \$15,000 (the original threshold was \$3,000).⁵ The Walsh–Healey Act requires the following:

- The contractor must pay its employees not less than the prevailing minimum wages as determined by the Secretary of Labor.
- No employee of the contractor will be permitted to work more than 40 hours per week, unless the contractor has otherwise agreed with its employees in accordance with the Fair Labor Standards Act.
- The contractor will not employ males younger than 16, females younger than 18, or convict labor.
- The work will not be performed under conditions that are unsanitary, hazardous, or dangerous to the health and safety of the employees.⁶

In January 2011, the Walsh–Healey Act was recodified as the Public Contracts Act, and its provisions were restated as chapter 65 of U.S. Code Title 41.⁷ For DoD acquisition, the Walsh–Healey Act is implemented through FAR Subpart 22.6 and DFARS Subpart 222.6.

The Walsh–Healey Act delineates several exemptions established by DOL. Most notably, the exemptions apply to contracts for items usually purchased on the *open market*, (i.e., generally available commercial items and for contracts for the purchase of perishables, including dairy, livestock, and nursery products).⁸ In addition, DOL’s regulations grant full exemptions from the Walsh–Healey Act to the following contract categories: public utility services; materials or supplies manufactured outside the United States; purchases against the account of a defaulting contractor where the stipulations of the statute were not included in the defaulted contract; and contracts to sales agents or publisher representatives for the delivery of newspapers, magazines, or periodicals.⁹

The Walsh–Healey Act does not apply to personal services or subcontractors. It does apply to the work of a *substitute manufacturer*. If the regular practice in the industry for manufacturers of the final product to manufacture subcomponents rather than to purchase them from other firms or to perform certain services rather than to have other firms perform these services, the other firms are substitute manufacturers and subject to the Walsh–Healey Act.

⁵ The Walsh–Healey Public Contracts Act, 41 U.S.C. 35.

⁶ *Ibid.*

⁷ An Act to Enact Certain Laws Relating to Public Contracts as Title 41, United States Code, “Public Contracts,” Pub. L. No. 111-350, 124 Stat. 3677.

⁸ Walsh–Healey Public Contracts Act, Statutory Exemptions, FAR 22.604-1.

⁹ Walsh–Healey Public Contracts Act, Regulatory Exemptions, FAR 22.604-2.

The Service Contract Act

The McNamara–O’Hara Service Contract Act¹⁰ (SCA) was enacted in 1966 and amended in 1976. SCA generally applies to all federal government contracts for service employees with a contract value over \$2,500 performed in the United States. Examples of covered service contracts include contracts for cafeteria or food services, security guard services, washing laundry, custodial and janitorial services, dry cleaning services, and computer services. DOL provides locality-based wage determinations on a contract-by-contract basis. SCA also has requirements such as recordkeeping and notification requirements, as implemented in FAR Subpart 22.10.¹¹ The provisions of SCA apply to contractors and subcontractors at all tiers.

Exemptions from SCA include contracts that are covered by the Davis–Bacon Act or the Public Contracts Act; communications services; public utilities; and postal services.¹² Additionally, DOL is authorized to establish administrative exemptions to SCA for any of the following services: automobile maintenance, financial services, conference hosting, transportation, and real estate or relocation.¹³

Discussion

The Davis–Bacon Act, the Walsh–Healey Act, and the Service Contract Act affect defense acquisition in two significant ways, both of which have been documented for decades. The three labor laws levy high wage rates and costs across many labor sectors. They also create an additional layer of administrative burden through their recordkeeping requirements, which is often compounded by duplicative provisions found in FLSA and the Occupational Safety and Health Act¹⁴ (OSHA). Because the acquisition thresholds are so low for the application of all three laws to federal contracts, nearly all related DoD contracts are subject to these cost and administrative burdens. These thresholds are relics that do not reflect current labor market dynamics and the additional labor protections that have been enacted.

Cost Inflation

Increased labor costs associated with the Davis–Bacon Act have been documented in a series of noted studies in the past ten years. A 2008 Beacon Hill Institute paper argues that on average, Davis–Bacon Act prevailing wages were found to be 22 percent higher than construction wages reported through the Bureau of Labor Statistics for the same general area.¹⁵ The increase in labor costs translated to a 9.9 percent average increase in overall project costs, but in some areas project costs were increased by almost 20 percent.¹⁶ In 2010, the U.S. Chamber of Commerce recommended repealing the Davis–Bacon Act because it inflates federally funded construction costs by as much as 15 percent, costing the tax payers more than \$1 billion annually, in addition to a \$100 million a year in government administrative costs. The Chamber argued that repealing the Davis–Bacon Act would create an estimated 31,000 new

¹⁰ Required Contract Provisions, Minimum Wages, 41 U.S.C. 351.

¹¹ Labor Standards Clauses for Federal Service Contracts, 29 CFR 4.6(e), (g).

¹² Service Contract Labor Standards, 41 U.S.C. § 6702.

¹³ Administrative Limitations, Variances, Tolerances, and Exemptions, 29 CFR 4.123.

¹⁴ Fair Labor Standards Act, 29 U.S.C. § 203. Occupational Safety and Health Act of 1970, 29 U.S.C. 15.

¹⁵ Sarah Glassman, Michael Head, David Tuerck, and Paul Bachman, *The Federal Davis–Bacon Act: The Prevailing Mismeasure of Wages*, The Beacon Hill Institute, February 2008, 32, accessed October 25, 2018, <http://www.beaconhill.org/BHISTudies/PrevWage08/DavisBaconPrevWage080207Final.pdf>.

¹⁶ *Ibid*, 33.

construction jobs and remove a barrier that keeps many small and minority-owned firms from competing for federal or federally funded contracts.¹⁷ Finally, a 1983 Congressional Budget Office (CBO) report concluded that compliance with the Davis–Bacon Act increases federal construction costs by 3.7 percent.¹⁸ Adding to its older estimates in 2013, CBO determined that repeal of the Davis–Bacon Act would save \$13 billion in discretionary federal government outlays.¹⁹

SCA also increases the direct costs of services provided to the federal government. In a 1990 testimony before Congress, the General Services Administration (GSA) provided examples of 10 cases where the prevailing rates established by DOL were higher than the rates GSA found to be prevailing in the area. GSA found that DOL's prevailing rate exceeded the rates in the area by 28 percent to 82 percent.²⁰

The Walsh–Healey Act does not impose the same potentially inflationary wage rates that are observed in the Davis–Bacon Act or the Service Contract Act. Instead, it uses the federal minimum wage established by the FLSA.

Outdated and Burdensome Management

DoD acquisition is also affected by the three labor laws through the additional burden caused by duplicative labor standards requirements and the confusion around their applicability. For example, GAO argued that the provisions of the Davis–Bacon Act were rendered moot with the passing of the Fair Labor Standards Act of 1961 (FLSA).²¹ GAO also suggested that Congress should consider repealing SCA for a number of similar administrative and financial reasons:

- Inherent problems exist in its administration.
- Wage rates and fringe benefits set under it are generally inflationary to the government.
- Accurate determinations of prevailing wage rates and fringe benefits cannot be made using existing data sources.
- The data needed to accurately determine prevailing wage rates and fringe benefits would be very costly to develop.
- The FLSA and administrative procedures implemented through the federal procurement process could provide a measure of wage and benefit protection for employees the act now covers.²²

¹⁷ “Davis–Bacon Act,” U.S. Chamber of Commerce, August 4, 2010, accessed October 25, 2018, <https://www.uschamber.com/Davis-Bacon-act>.

¹⁸ Congressional Budget Office, *Modifying the Davis–Bacon Act: Implications for the Labor Market and the Federal Budget*, July 1983, accessed October 25, 2018, https://www.cbo.gov/sites/default/files/98th-congress-1983-1984/reports/doc12-entire_0.pdf.

¹⁹ “Options for Reducing the Deficit: Repeal the David-Bacon Act,” Congressional Budget Office, November 13, 2013, accessed October 25, 2018, <https://www.cbo.gov/budget-options/2013/44791>.

²⁰ See, Paul R. Shlemon, “The Service Contract Act—A Critical Review,” *Federal Bar Journal*, Vol. 34, No. 3 (Summer 1975), 240–48.

²¹ GAO, *The Davis–Bacon Act Should Be Repealed*, HDR-79-18, April 27, 1979, 24, accessed October 25, 2018, <https://www.gao.gov/assets/130/126529.pdf>.

²² GAO, *The Congress Should Consider Repeal of the Service Contract Act*, GAO/HRD-83-4, January 31, 1983, i, accessed October 25, 2018, <https://www.gao.gov/assets/140/139434.pdf>.

FLSA and OSHA provisions have subsumed the provisions of the Walsh–Healey Act.²³ In addition to these duplications, there is a great deal of confusion around the applicability of the act in certain cases. An important example of this administrative confusion involves Section 8(a) contractors under the Small Business Administration (SBA). Because SBA negotiates these contracts, the Section 8(a) companies generally believe themselves to be subcontractors that do not fall under the eligibility of the Walsh–Healey Act. A 1981 decision by the U.S. Comptroller General, however, established that Section 8(a) companies were, in fact, prime contractors in terms of labor type and that the Public Contracts Act did apply to this SBA program.²⁴ In establishing this precedent, the Walsh–Healey Act burdens companies of all sizes, disproportionately so for very small businesses.

Outdated Acquisition Thresholds

Previous efforts have been made to increase the acquisition thresholds for the three labor laws, which are decades old—two are original to their 1930s founding. In 1993, the Section 800 Panel recommended raising the threshold for the Davis–Bacon Act to the SAT. This recommendation was primarily motivated by a desire to eliminate contracting agency oversight required to ensure contractor compliance with the act on small dollar contracts.²⁵ Because the acquisition thresholds for the Walsh–Healey Act and SCA are similarly low, the Section 809 Panel recommends substantially raising all three thresholds. The motivation remains the same: to reduce the administrative burden for small contracts, calculated at modern threshold amounts.

In conducting analysis for updating the acquisition thresholds for the three labor laws, the Section 809 Panel sought to balance the total dollar amount obligated by DoD related to these laws with the number of low dollar contract actions required to comply. Calculations made using data from the Federal Procurement Data System (FPDS) indicate the vast majority of contract actions related to these labor provisions fell below the \$2 million threshold in FY 2017 (see Figure 6-1).²⁶ In terms of total funding, the majority of dollars spent during this time were on contract actions exceeding of \$2 million (see Figure 6-1). For example, in FY 2017, 94 percent of contract actions related to the Davis–Bacon Act were for contracts below the \$2 million threshold; yet, only 18 percent of the total dollars spent were for contracts less than \$2 million. The same is true for the Walsh–Healey Act and SCA. Ninety-nine percent of contract actions related to the Walsh–Healey Act fell below the \$2 million threshold, but only 12 percent of the total dollars spent were on contracts below \$2 million. Ninety-four percent of contract actions related to SCA fell below the \$2 million threshold, but only 12 percent of the total dollars spent were on contracts below \$2 million. Thus, raising the acquisition thresholds would reduce the administrative burden on smaller contracts while still covering most of the DoD expenditure in this area.

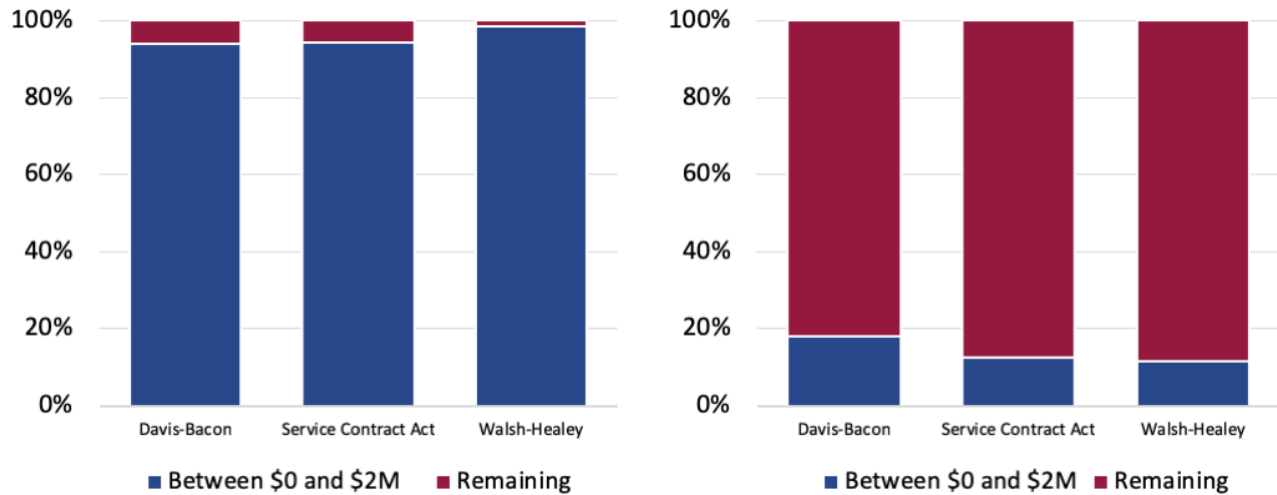
²³ For discussion, see, “Walsh–Healey Public Contracts Act,” The Wifcon Forums and Blogs, August 22, 2017, accessed October 25, 2018, <http://www.wifcon.com/discussion/index.php?/topic/4080-Walsh-Healey-public-contracts-act/>.

²⁴ Comptroller General of the United States, *Small Business Administration – Request for Advance Decision, File: B-195118*, May 22, 1981, 5, accessed October 25, 2018, <https://www.gao.gov/assets/440/432959.pdf>.

²⁵ The Acquisition Law Advisory Panel to the United States Congress, *Streamlining Defense Acquisition Laws*, Jan. 1993, pp. 4-25 and 4-26.

²⁶ FDPS data extracted on September 17, 2018.

Figure 6-1. DoD Contract Actions for FY 2017 (left) and Dollar Total of DoD Contract Actions for FY 2017 (right)



Conclusions

Despite the well-documented cost inflation and administrative burden imposed on defense acquisitions by the Davis–Bacon Act, the Walsh–Healey Public Contracts Act, and the Service Contract Act, it is not necessary to repeal these laws or to waive their applications to all DoD acquisitions. However, raising their acquisition thresholds to \$2 million will strike balance between achieving less burdensome contract actions and continuing to uphold the intent of these laws for most of DoD’s related expenditures.

Implementation

Legislative Branch

- Establish a socioeconomic labor threshold of \$2 million for DoD at 10 U.S.C. § 2338a.
- Apply the socioeconomic labor threshold to the Davis–Bacon Act at 10 U.S.C. § 2338a.
- Apply the socioeconomic labor threshold to the Walsh–Healey Public Contracts Act at 10 U.S.C. § 2338a.
- Apply the socioeconomic labor threshold to the Service Contract Act at 10 U.S.C. § 2338a.

Executive Branch

- There are no Executive Branch changes required for this recommendation.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.