



LORI ANN LANGE



SUSAN ELLIOTT

D.C. Circuit Affirms that Prevailing Wage Law Does Not Apply to a Privately Developed Project on Public Land

CityCenterDC is a mixed-use development project in the District of Columbia that is located on land owned by the District but leased to private developers. The private developers are funding the construction of CityCenterDC and have entered into construction contracts to build the Project. Those contracts did not contain a requirement for contractors to pay prevailing wages to all workers on the Project. The Department of Labor asserted that the contractors were responsible for paying Davis-Bacon Act rates. On April 5, 2016, the United States Court of Appeals for the District of Columbia Circuit in *District of Columbia v. Department of Labor*¹ affirmed that the Davis-Bacon Act² is not applicable to this privately funded, owned, and operated project. The court rejected what it characterized as a novel Department of Labor argument that the CityCenterDC project is a public work.

The Davis-Bacon Act (now known as the Wage Rate Requirements (Construction) statute) requires contractors and subcontractors to pay prevailing wages on certain public projects. Specifically, the Act applies when the Federal Government or the District of Columbia enters into (or provides funding for) a contract in excess of \$2,000 for the construction, alteration, or repair of a public building or public work of the Federal Government or the District of Columbia. When applicable, the Act requires that contractors and subcontractors pay all mechanics and laborers directly employed on the project site prevailing wages as determined by the U.S. Department of Labor.

Although the District of Columbia only leased the land to the developer— it was not a party to the construction contracts for the building of CityCenterDC and provided no funding for the construction—the Department of Labor argued that the lease agreements between the District of Columbia and the developers were contracts for construction that triggered application of the Davis-Bacon Act. The Court rejected the Department of Labor’s arguments finding that the Davis-Bacon Act did not “stretch” to cover a three-party relationship in which a government agency rents property to a private developer and the private developer, in turn, enters into a construction contract with a construction contractor. The Court stated that “no court had previously sanctioned such a significant expansion of the Davis-Bacon Act,” and it declined to be the first.

The Court further held that, even if the District of Columbia were a party to the construction contracts, the Davis-Bacon Act still would not be applicable because the CityCenterDC project is not a public work. According to the Court, to qualify as a public work, a project must have at least one of the following

Please Contact

Lori Ann Lange
llange@pecklaw.com
202.293.8815

or

Susan Elliott
sellott@pecklaw.com
202.293.8815

characteristics: (1) public funding for the construction; or (2) government ownership or operation of the completed facility. CityCenterDC has neither. The District of Columbia did not expend any funds for the construction of CityCenterDC and does not own or operate the Project. The Court specifically noted that the District does not occupy any space at CityCenterDC, does not own or operate any of the businesses located there, and does not offer any government services there. Accordingly, the Court found that CityCenterDC is an enclave of private facilities and does not qualify as a public work.

In reaching this conclusion, the Court rejected the Department of Labor's argument that CityCenterDC should be considered a public work because the District of Columbia helped plan the project and the project will produce benefits for the public. As the Court stated, "The concept of a public work may well be elastic. But it cannot reasonably be stretched to cover a Louis Vuitton."

The Court's decision is a victory for developers who lease property from the Federal Government or the District of Columbia. Had the Department of Labor's interpretation of the Davis-Bacon Act stood, future privately funded, owned, and operated projects could have been subject to prevailing wage requirements if the Federal Government or the District of Columbia had some role in the planning of the project.

¹ No. 14-5132, 2016 WL 1319453 (D.C. Cir. Apr. 5, 2016).

² 40 U.S.C. § 3142.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.