

## **INDOT'S Reversal of its Davis-Bacon Position**

In late 2015, ICI became involved in a contentious issue with INDOT on behalf of E&B Paving because ICI was concerned INDOT's assertion that the Davis-Bacon Act applied to drivers delivering asphalt was misguided. E&B had a contract for a project in southern Indiana where it was purchasing asphalt from a commercial plant not dedicated to the construction site and contracted for the asphalt delivery. INDOT claimed the delivery drivers were spending more than a de minimis amount of time on the site of construction and were therefore covered by the Davis-Bacon Act. ICI/E&B, through legal counsel, disagreed with INDOT's position citing substantial authority holding that if drivers are on a construction site only for the purpose of delivering materials, their delivery work is not covered by Davis-Bacon's prevailing wage law regardless of the amount of time the delivery takes. As ICI/E&B asserted, the delivery of materials was not "construction, prosecution, completion or repair" of the project for the purposes of coverage under the Davis-Bacon Act.

We are pleased to report INDOT has agreed to reverse its position that those drivers making the deliveries were covered by the wage provisions of the Davis-Bacon Act. However, even though in E&B's circumstance INDOT has agreed to reverse its position, its recent ruling is unclear as to what position it might take in a circumstance where a driver delivering materials is required to wait for substantial periods of time on the site. Counsel's position was and remains that so long as a driver is not doing site construction work, the amount of time the driver is on the site should not matter to coverage. However, INDOT, in its letter to counsel, stated it is closing its investigation on this "specific matter and will enforce the minimum wage provision as set forth" in the regulations. Accordingly, this caveat from INDOT causes counsel some concern. As one might expect from the state, even though it was willing to concede the battle and retreat, it has reserved the right to wage war on another front. Accordingly, another contractor may come under attack by INDOT on another day over a similar Davis-Bacon issue. Of course, if anyone reading this summary subsequently suffers such a challenge, be sure to contact ICI to discuss the matter. Until then, ICI is happy with its success of the ICI/E&B appeal of INDOT's misapplication of the Davis-Bacon Act to the E&B project.