AMERICANS FOR PROSPERITY FOUNDATION

INSTITUTE FOR THE AMERICAN WORKER

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Submitted Via Regulations.gov

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor,
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments on Notice of Proposed Rulemaking, Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15,698 (Mar. 18, 2022), RIN 1235-AA40.

Dear Ms. DeBisschop:

We write on behalf of Americans for Prosperity Foundation and the Institute for the American Worker.[1] We appreciate this opportunity to comment on the Notice of Proposed Rulemaking regarding Updating the Davis-Bacon and Related Acts Regulations (RIN 1235-AA40), as published at 87 Fed. Reg. 15,698 (the "NPRM").

I. Introductory comments.

The NPRM proposes "to amend regulations issued under the Davis-Bacon and Related Acts that set forth rules for the administration and enforcement of the Davis-Bacon labor standards that apply to Federal and federally assisted construction projects." 87 Fed. Reg. at 15,698.

We support efforts to bring greater clarity and transparency to the government contracting process but have concerns over a number of the proposed amendments to the Department's Davis-Bacon Act regulations. *First*, as set forth below, the proposed amendment of the test to determine the applicable prevailing wage rates for a given contract is arbitrary and will unjustifiably privilege higher union wages in a given locality, leading to higher costs and a greater burden on the taxpayers who ultimately fund government contracting. *Second*, the NPRM's proposal to use wage escalation data from the Bureau of Labor Statistics ("BLS") will improperly inflate Davis-Bacon Act wage determinations because no changes to the Department's underlying wage survey process is contemplated. *Third*, the proposal to eliminate the distinction between urban and rural work areas when making prevailing wage determinations is unjustified by the text of the Davis-Bacon Act and will result in unnecessary inflation of construction costs. *Fourth*, the proposal to treat

[1] *See* AMERICANS FOR PROSPERITY FOUNDATION, https://americansforprosperityfoundation.org/; INSTITUTE FOR THE AMERICAN WORKER, https://i4aw.org.

certain different wage rates as functionally the same also will unjustifiably inflate construction costs by improperly privileging union wages. And *finally*, the Department's proposal to effect prevailing wage requirements by operation of law rather than through incorporation of appropriate clauses in covered contracts exceeds the Department's authority and violates the express provisions of the Davis-Bacon Act.

II. The proposed amendment to the "prevailing wages" test is arbitrary and unjustified and will only add to the current inflationary economic conditions.

The Davis-Bacon Act requires payment of locally prevailing wages and fringe benefits on specific Federal construction contracts, 40 U.S.C. § 3142,[2] and Congress has incorporated the "prevailing wages rate" requirement into a large number of additional related acts. The purpose of this provision, according to a 1981 Memorandum from the Office of Legal Counsel, which the Department itself relies on, is "to prevent the exploitation of imported labor and the concomitant depression of local wage rates."[3]

The 1981 OLC memorandum notes, however, the Act neither defines what it means by "prevailing" nor the procedure by which the Department is to determine the applicable prevailing wage rate.[4] The OLC therefore looked to "the common meaning of the word, and to the legislative history and purpose of the two Acts" to come to the conclusion that "prevailing" means the "most current" or "predominant" wage in the relevant locality.[5] Just as important, the OLC further concluded that "if no single wage can fairly be said to be 'prevailing,' and no single rate 'most current,' an average may represent the closest approximation of the statute's requirement."[6]

Building on this memorandum, the Department's current regulations, implemented during a 1981–82 rulemaking, define the prevailing wage rate as "the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question." 29 C.F.R. § 1.2. Where there is no majority, "the *prevailing wage* shall be the average of the wages paid, weighted by the total employed in the classification." *Id.*

This makes sense, is non-arbitrary, and gives full effect to the language of the Davis-Bacon Act. It has been in use for more than 40 years, almost half the entire life of the Act, and should be retained as the best and most accurate means of implementing the intent of Congress. As the Department itself concluded in the 1981–82 rulemaking, "the term 'prevailing wage' contemplates the most widely paid rate as a definition of first choice. The Department has accordingly

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[2] 40 U.S.C.§ 3142(b): "The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there."

[3] Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts, 5 Op. O.L.C. 174, 176 (1981), https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf.

[4] *Id.* at 175.

[5] *Id.* at 175-76.

[6] *Id.* at 177.

determined that the revision which defines prevailing wage as the majority, or weighted average where there is no majority, is the most proper interpretation of the statue." 47 Fed. Reg. 23,645.

The Department's current proposal is to return to the rule in place before the 1981–82 rulemaking, which would add to the current definition an additional test, the so-called 30 percent rule, whereby "in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers." 87 Fed. Reg. 15,700.

This would be an arbitrary change. What is sacrosanct about the figure of 30 percent? Why not 32.5 percent or 43.1 percent or any of the infinite percentages that might be chosen between 0 and 50 percent? In other words, there is nothing in the Davis-Bacon Act to motivate or justify the choice of 30 percent. Moreover, in the 1981–82 rulemaking, the Department agreed with commentators who demonstrated "a rate based on 30 percent does not comport with the definition of 'prevailing', and that the 30 percent rule gives undue weight to collectively bargained rates." 47 Fed. Reg. 23644. Nothing in the NPRM contradicts that conclusion.

Indeed, contrary to any provision in the Davis-Bacon Act, the 30 percent rule appears motivated solely to give precedence to union wages since, under a collective bargaining agreement, wage earners in a particular classification generally earn uniform rates. In addition, union contractors historically have participated in the Department's wage surveys at a higher rate than non-union contractors.[7] As such, the 30 percent rule will cause the Department's wage determinations to reflect union rates, which in almost all instances are higher than the norm.

Implementation of the 30 percent rule also would unjustifiably ignore the rates applicable to 70 percent of workers. That is, where there is no majority, there is by definition no *actual* prevailing rate and a resort to the 30 percent rule would serve to inflate the wage determination by relying only on the highest wage earners in the locality. Where there is no majority, the only proper way to approximate the prevailing wage within the meaning of the Davis-Bacon Act is to include 100 percent of workers and take the weighted average of their wage rates. Any other approach would be arbitrary and serve purposes not contemplated by the Act.

One further observation. The proposed amendment to the prevailing wage definition would seriously impact the infrastructure spending contemplated under the Investment and Jobs Act enacted last November. That Act included approximately $550 billion in new spending, almost all of which will fall under Davis-Bacon Act requirements. Given the fixed amount of money available under that Act, the Department's current proposal, which necessarily with increase labor costs, will ultimately reduce the number of projects the Act will be able to fund.

To conclude, implementation of the 30 percent rule would result in an increase in the labor costs of federal construction projects by unjustifiably relying on only the highest wage earners in the Department's wage rate determinations. That this would be done in the current inflationary

[7] *See, e.g.,* James Sherk, Labor Department Can Create Jobs by Calculating Davis– Bacon Rates More Accurately (Jan. 21, 2017), at 4, https://www.heritage.org/sites/default/files/2017-01/BG3185_0.pdf (explaining that, whereas "[o]nly 14 percent of construction workers are covered by union contracts…, the GAO reports that 63 percent of Davis– Bacon rates are union rates.").

economic conditions makes no sense because there is no statutory reason to change the current regulations. The Department should reject the amendment and retain the current definition.

III. The proposal to rely on BLS employment cost index data will unjustifiably inflate wage rate determinations.

The NPRM states "the Department proposes to add language to [29 C.F.R.] § 1.6(c)(1) to expressly permit adjustments to non-collectively bargained rates on general wage determinations based on U.S. Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) data or its successor data." 87 Fed. Reg. 15,717

Although a greater use of BLS data for the Department's wage determinations would be welcome as providing more accurate data than currently in use,[8] this particular proposed amendment would unjustifiably inflate applicable Davis-Bacon wage rates because the NPRM makes no changes in the Department's voluntary wage survey process. That survey process is demonstrably unscientific and inaccurate, as it relies on unrepresentative, self-selected, and unreliably small sample sizes, among other problems.[9] BLS uses more accurate statistical sampling techniques to establish market wage rates and wage escalators, but the NPRM proposes only to use the Employment Cost Index (the escalator) without also adopting the underlying BLS wage determinations. This mixing of two different methodologies for determining the applicable prevailing wage will only entrench the Department's unreliable and inaccurate Davis-Bacon Act wage determinations while also unjustifiably inflating those rates with the unrelated BLS escalator.

A more accurate and proper methodology would be to completely scrap the current wage survey process and adopt the appropriate BLS data in its entirety, a change that some have estimated could result in more than 30,000 new construction jobs a year.[10]

IV. The proposal to dissolve the distinction between urban and rural work areas is unjustified and will inflate construction costs.

Under current regulations, wage determinations are made at the county level where possible and, if insufficient data exists, the geographic area is expanded to surrounding counties. When expanding the geographic boundaries, however, urban and rural areas are kept separate since the wage rates in such areas typically differ. *See* 29 C.F.R. § 1.7(b). This distinction comparts with the Davis-Bacon Act requirement that wage determinations be made in respect of "the civil subdivision of the State in which the work is to be performed." 40 U.S.C. § 3142(b). In its 1981–82 rulemaking, the Department agreed with this understanding, explaining that to combine urban and rural rates in such circumstances would be "inappropriate." 47 Fed. Reg. 23,647.

The current NPRM proposes to eliminate this practice by counting together both urban and rural wage rates in its wage rate surveys. Such a practice, however, will result in urban wages being overrepresented because such data is more forthcoming than its counterpart in rural area. The result again will be an unjustified inflation of labor costs that is not motivated or justified by

[8] *See generally id.*

[9] *Id.* at 2ff.

[10] *Id.* at 12-15.

either the text of the Davis-Bacon Act or the intent of Congress. That increase will disproportionately impact rural areas, as they are typically less well positioned to pay higher wages. The Department should retain the current form of 29 C.F.R. § 1.7(b).

V. The proposal to treat certain different wage rates as functionally the same is arbitrary and unjustified, will unfairly privilege union wages, and will improperly inflate construction costs.

Under the NPRM, "the Department proposes to amend [29 C.F.R.] § 1.3 to include a new paragraph at § 1.3(e) that would permit the Administrator to count wage rates together—for the purpose of determining the prevailing wage—if the rates are functionally equivalent and the variation can be explained by a CBA or the written policy of a contractor." This change is designed to get around the 2006 decision of the Department's Administrative Review Board ("ARB") in *Mistick Construction,* ARB No. 04-051, which held the meaning of "same wage" for determining prevailing wage rates precluded the Department from treating different wage rates as functionally the same. *See* 87 Fed. Reg. 15,699.

This proposed change is not justified. The Department's rules for counting wages, whether for purposes of the majority 50 percent rule under the current regulations or for the proposed 30 percent rule, already favor the wage rates of union contractors because of their greater participation in wage surveys and the more uniform rates characteristic of collective bargaining agreements. As already noted, 14 percent of construction workers who are covered by union contracts account for 63 percent of applicable Davis–Bacon Act wage rates.[11] Abrogating the ARB's *Mistick Construction* decision and introducing additional agency discretion for which rates are sufficiently similar for the prevailing wage determination, especially where the agency is directed to look for justification in collective bargaining agreements, will only increase the likelihood of finding union rates to be the prevailing rates, leading to the unjustified inflation of labor costs. The Department should reject this proposed change to its regulations.

VI. The proposal to enforce applicable prevailing wage rates by operation of law rather than by contract is not supported by the Davis-Bacon Act.

Currently, contractors are not held responsible for compliance with the Davis-Bacon Act unless the required clauses have been included in the project's governing contracts. *See* 4 U.S.C. § 3142(c) (requiring stipulations on prevailing wage rates to be included in contracts). This rule comports not only with the governing statute but also with general contract law principles, which puts the onus for compliance in this respect on the government as the party in the best position to know if the Davis-Bacon Act requirements apply to the particular contract in question.

The NPRM seeks to undermine this rule by declaring the imposition of Davis-Bacon Act requirements "by operation of law." *See* 87 Fed. Reg. 15,724 ("[T]he Department proposes to add language to [29 C.F.R.] § 3.11 explaining that the requirements set forth in part 3 are considered to be effective as a matter of law, whether or not these requirements are physically incorporated into a covered contract."). Invariably, this change will lead to greater litigation, and the consequent

[11] *See supra* note 7.

waste of government and private resources, because, without direct contractual notice to contractors, the risk of unknowing violations will abound.

The vast extent of government contracting in the American economy, together with the potential applicability of Davis-Bacon Act requirements to contracts that are silent on the matter, heightens the risk of inadvertent and completely avoidable noncompliance. The consequences to contractors could be severe, which will only raise the government's cost of construction over the long term—representing yet another way the newly proposed regulations will greatly increase the costs of public infrastructure projects. The statue requires the government to include the proper clauses in covered contracts, and so do principles of contracting in good faith. As such, there is no legal or policy justification for this proposed change to the applicable regulations.

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Thank you for your time and attention. If we can provide any additional information or otherwise be of further assistance, please do not hesitate to contact us.

Respectfully submitted,

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