



# Statement for the Record for Associated Builders and Contractors

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*Testimony of*  
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*Before the*  
House Education and the Workforce Committee  
Subcommittee on Workforce Protections

*On*  
“Promoting the Accuracy and Accountability of the Davis-Bacon Act”

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June 18, 2013

**The Voice of the Merit Shop®**

Chairman Walberg, Ranking Member Courtney and members of the Subcommittee on Workforce Protections:

Good morning and thank you for the opportunity to testify before you today on “Promoting the Accuracy and Accountability of the Davis-Bacon Act.”

My name is Maurice Baskin. I am a shareholder with the law firm Littler Mendelson, P.C. and serve as general counsel to Associated Builders and Contractors (ABC), on whose behalf I am appearing before you today. ABC is a national trade association with 72 chapters representing nearly 22,000 members from more than 19,000 construction and industry-related firms in the commercial and industrial sectors of the industry. ABC’s membership is bound by a shared commitment to the *merit shop philosophy*, based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through competitive bidding. ABC helps its members win work and deliver it safely, ethically and profitably for the betterment of the communities in which they do business.

### **The Davis-Bacon Act**

The Davis-Bacon Act is an 80-year-old wage subsidy law administered by the U.S. Department of Labor (DOL). The law mandates so-called “prevailing” wages for employees of contractors and subcontractors performing work on federally financed construction projects. ABC has long advocated for Davis-Bacon reforms that, if adopted in years past, could have mitigated some of its damage to our economy. But because all attempts at meaningful reform have failed over the years—despite repeated criticisms from the Government Accountability Office (GAO),<sup>1</sup> DOL’s own Office of Inspector General (OIG)<sup>2</sup> and numerous congressional hearings<sup>3</sup>—ABC supports the repeal of the

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<sup>1</sup> Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at <http://www.gao.gov/new.items/d111152.pdf>; See also, Government Accountability Office, *Davis-Bacon Act: Process Changes Could Raise Confidence That Wage Rates Are Based on Accurate Data*, May 1996, at <http://www.gao.gov/archive/1996/he96130.pdf>.

<sup>2</sup> U.S. Department of Labor, Office of the Inspector General, *Concerns Persist with the Integrity of Davis-Bacon Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, 2004, at <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

## Davis-Bacon Act.

As administered by DOL, Davis-Bacon unnecessarily hinders economic growth, increases the federal deficit, and imposes an enormous paperwork burden on both contractors and the federal government. It stifles contractor productivity by raising costs, ignores skill differences for different jobs, and imposes rigid craft work rules. In addition, complexities in Davis-Bacon's implementation make it nearly impossible for many small, qualified merit shop firms to compete on publicly funded projects. At the same time, other laws like the Fair Labor Standards Act, Occupational Safety and Health Act and National Labor Relations Act have superseded the original stated purpose of the Davis-Bacon Act: protecting local workers from unscrupulous "itinerant" contractors. In addition, an elaborate government procurement system already ensures government work is awarded only to responsible bidders.

From a fiscal standpoint, the Congressional Budget Office has estimated that the Davis-Bacon Act raises federal construction costs by \$15.7 billion over ten years, which ABC believes to be a conservative estimate.<sup>4</sup> Numerous studies have shown that repealing Davis-Bacon would create real and substantial savings to the government without affecting workplace productivity, safety or market wages.<sup>5</sup> The contrary view expressed by the minority witness on today's panel has been refuted by numerous studies and

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<sup>3</sup> See, e.g., "Examining the Department of Labor's Implementation of the Davis-Bacon Act," Hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, April 14, 2011, available at <http://1.usa.gov/1Bhvnz>; see also "Joint Hearing to Review the Davis-Bacon Act," Joint Hearing before the Subcommittee on Oversight and Investigations and the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, July 30, 1997 (Serial No. 105-68).

<sup>4</sup> Congressional Budget Office, *Discretionary Savings from Repeal of the Davis Bacon Act*, April 2011, at <http://bit.ly/11Iox3>. Compare Sherk, *Repealing the Davis-Bacon Act Would Save Taxpayers \$10.9 Billion*, Heritage Foundation Webmemo No. 3145, Feb. 14, 2011, available at <http://www.heritage.org/research/reports/2011>.

<sup>5</sup> Thieblot, *The Case Against the Davis-Bacon Act: 54 Reasons For Repeal* (Transaction Publishers 2013); see also Leef, *Prevailing Wage Laws: Public Interest or Special Interest Legislation?*, 30 Cato Journal 137 (Winter 2010); Glassman, Head, Tuerck, and Bachman, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, (Beacon Hill Inst. 2008), available at [www.beaconhill.org/BHStudies/PrevWage08](http://www.beaconhill.org/BHStudies/PrevWage08); Thieblot, *The Twenty-Percent Majority: Pro-Union Bias in Prevailing Rate Determinations*, 26 J. Lab. Research 99 (2005).

Congressional witnesses.<sup>6</sup>

By any objective measure, DOL's wage determinations are vastly inflated above the market rates for private sector construction projects. Evidence of DOL's failed wage survey method is best illustrated by comparing two key numbers. According to the Bureau of Labor Statistics (BLS), only 13.2 percent of construction workers in the United States are covered by any union agreement;<sup>7</sup> yet, according to the latest GAO report, 63 percent of all DOL wage determinations report that wages set by union agreements are "prevailing."<sup>8</sup> In Dr. Thieblot's words, such a result is a "statistical impossibility" for DOL to have achieved by any fair survey method.<sup>9</sup> Despite these facts and findings, Davis-Bacon remains in effect and continues to inflate the cost of federal construction by more than 20 percent.<sup>10</sup>

In the remainder of my testimony, I would like to highlight some of the specific ways in which DOL has failed to properly carry out its statutory mandate to determine truly

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<sup>6</sup> See, e.g., Leef, *supra*, n.5, at 146-152 (refuting claims that prevailing wage laws somehow save money through increased productivity or that workers are safer or better trained on prevailing wage projects). See also Kersey, *The Effects of Michigan's Prevailing Wage Law*, Mackinac Center for Public Policy (2007), available at [www.mackinac.org/article](http://www.mackinac.org/article); Ohio Legislative Service Commission, *S.B. 102 Report: the Effects of the Exemption of School Construction Projects from Ohio's Prevailing Wage Law*, Staff Research Report #149 (2002); Thieblot, A New Evaluation of Impacts of Prevailing Wage Law Repeal, *Journal of Labor Research* 17 (1996). See also Testimony of James Sherk before the Education and Workforce Committee, April 14, 2011 and Sherk's June 3, 2011 letter responding to supplemental statement of the Economic Policy Institute, available at <http://1.usa.gov/11Bhvz>.

<sup>7</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Economic News Release: Union Members Summary*, Jan. 2013, at <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>8</sup> Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at <http://www.gao.gov/new.items/d11152.pdf>.

<sup>9</sup> Thieblot, *The Case Against the Davis-Bacon Act: 54 Reasons For Repeal*, at 36 (Transaction Publishers 2013). In supplemental answers to questions following the April 14, 2011 hearing before this Subcommittee, DOL claimed that the 63 percent figure was "misleading" because it is based on the number of individual wage categories surveyed. See Response of John Fraser, available at <http://1.usa.gov/11Bhvz>. To the contrary, GAO's finding of 63 percent union rates is the most accurate measure of the results of DOL's wage survey process, and DOL's response is itself misleading. By way of example, DOL would apparently identify the Washington, D.C. building construction wage determination as a "mixed" wage determination. But whereas the percentage of unionized construction workers in the District is less than 10 percent, DOL has found that union rates prevail in 32 out of 36 categories, including all of the major trades.

<sup>10</sup> The Beacon Hill Institute at Suffolk University, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, February 2008, at <http://www.beaconhill.org/bhistudies/prevwage08/davisbaconprevwage080207final.pdf>.

“prevailing” wages, with particular emphasis on the deeply flawed wage survey process.

### **Wage Rates and Surveys**

The methodology by which DOL determines Davis-Bacon Act wage rates has repeatedly been shown to be inaccurate and unscientific. Yet, the agency continues to rely on voluntary wage surveys with ridiculously low response rates instead of using sound statistical samples already made available through other government data collections. The resulting wage determinations bear little relation to actual local wages in the areas surveyed. The problems associated with Davis-Bacon wage calculations have been well documented in previous congressional testimony from ABC and, more importantly, reports by GAO and DOL’s OIG.<sup>11</sup> In addition, due to the systematic delays associated with the final publication of many Davis-Bacon rates, wage surveys conducted during the economic “boom” in construction during the previous decade are now being applied to a “bust” economy.

The last GAO report concluded that efforts to improve the Davis-Bacon wage survey process—both with respect to data collection and internal processing—have not addressed key issues with wage rate accuracy, timeliness and overall quality.<sup>12</sup> The report also found that DOL “cannot determine whether its wage determinations accurately reflect prevailing wages,” and “does not currently have a program to systematically follow up with or analyze all non-respondents.”

The 2004 OIG report revealed that nearly 100 percent of the wage determinations that were analyzed contained errors. In 2011, GAO found that “most survey forms verified against payroll data had errors.” In addition, the report stated that more than “one-quarter of the final wage rates for key job classifications were based on wages reported for six or fewer workers.”

Reaffirming yet another longtime ABC concern, GAO found that “contractors have little

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<sup>11</sup> Cited at notes 1-2 above.

<sup>12</sup> Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at <http://www.gao.gov/new.items/d11152.pdf>.

or no incentive to participate in the Davis-Bacon wage survey” as it is currently administered. Contractors that are struggling to stay in business have no time or resources to fill out reports to the government. Furthermore, they don’t trust the government to keep this sensitive wage data confidential, and are justifiably worried about being targeted for DOL audits and inspections.

GAO also recommended that DOL get “technical guidance from experts” on statistical sampling techniques; to ABC’s knowledge, DOL has done nothing to implement this recommendation.

I have personal knowledge of the dysfunctional DOL wage survey process, having challenged a number of wage surveys on behalf of ABC chapters and various coalitions of frustrated contractors and developers in recent years.<sup>13</sup> In case after case, DOL has relied upon completely inadequate survey response numbers (a small handful of unrepresentative wage reports setting the wage rates for thousands of workers). In addition, the agency has violated its own rules for calculating which rates should prevail in a region. DOL has improperly counted union workers who were paid different wage rates, as if they were all paid the same wages, and has improperly imported flawed data from state government wage surveys. Most recently, the agency has expanded its reliance on statewide wage surveys in which data collected in large urban areas is applied to smaller labor markets hundreds of miles away.

Challenging these improper wage determinations takes years and the deck is stacked in DOL’s favor at every turn. When we do “win” one of these cases—and we have actually won some of them—DOL simply conducts the survey again and usually reaches similarly wrong results by other means.

### **Job Classifications**

Once the wage determinations are inaccurately made (as previously described), the errors in setting the prevailing wage are magnified by DOL’s handling of work assignments for

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<sup>13</sup> See, e.g., *Mistick Construction, Inc.*, No. 04-051 (ARB 2006); *Chesapeake Coalition*, No. 12-010 (ARB petition pending).

individual job classifications. When DOL determines that the prevailing wage rate for a classification should be based on a union collective bargaining agreement, the job duties for that classification also likely will be governed by the union's work rules in that agreement. Generally, union work rules are much more restrictive than nonunion job assignments.

Even worse, DOL wage determinations routinely fail to give contractors enough information to decide which trade should perform a given set of job duties. Unlike many state prevailing wage laws, DOL does not require the union bargaining agreements or jurisdictional rules to be published. DOL's failure to provide this information makes it almost impossible for merit shop contractors to figure out the correct wage rate for many construction-related jobs.

### **Certified Payrolls and Fringe Benefits**

Another burden on small business compliance with the Davis-Bacon Act (and also the related Copeland Act) is the requirement that contractors submit weekly certified payroll reports to the government. This is a paperwork nightmare for many contractors and a significant administrative cost factor for every contractor. DOL's recent system upgrades to include electronic filing are a small step in the right direction, but they do nothing to solve the complexities of the certified payroll form itself, and in particular the confusion surrounding the proper credits allowed to nonunion contractors for their bona fide fringe benefit costs.

### **Repeated Failure to Implement Reforms**

ABC and others have repeatedly called on DOL to explore using alternative data to determine wage rates—such as data collected through the BLS Occupational Employment Statistics (OES) program. DOL has refused to pursue this reform to the wage survey process, and has failed to provide a corresponding rationale. Contrary to previous claims by some, there is no statutory obstacle to having BLS conduct Davis-Bacon wage surveys.

ABC also has requested that DOL provide better clarity about job duties that correspond

to each wage rate. Again, DOL has refused to give contractors fair notice of what the job assignment rules are on the published wage determinations. Finally, DOL has failed to make publicly available many of the rulings and interpretations addressing Davis-Bacon issues that have accumulated over the years.

**Pending Legislation to Reform the Act**

ABC supports full repeal of the Davis-Bacon Act, in favor of wage and benefit rates that actually reflect the current construction market. Accordingly, we support the Davis-Bacon Repeal Act (H.R. 2013), introduced by Rep. Steve King (R-Iowa). In the absence of full repeal, however, ABC also supports legislative efforts designed to improve federal wage determinations and limit the negative impacts of DOL’s current policies, including the Responsibility in Federal Contracting Act (H.R. 448), introduced by Rep. Paul Gosar (R-Ariz.). H.R. 448 would require federal construction wage rates be determined scientifically by BLS.

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On behalf of ABC, I’d like to again thank you for holding today’s hearing. ABC is pleased to see the Education and the Workforce Committee take a renewed interest in the problems associated with the Davis-Bacon Act. Ensuring accurate wage rates that reflect open and competitive bidding is a top priority for our members. We look forward to working with the Subcommittee on Workforce Protections on this issue. Mr. Chairman, this concludes my formal remarks; I am prepared to answer any questions that you may have.