

Congress of the United States
Washington, DC 20515

July 11, 2013

Ms. Mary Beth Maxwell
Acting Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Ms. Maxwell:

We are concerned by your March 22, 2013, Wage and Hour Division (WHD) guidance letter and All Agency Memorandum (AAM) No. 212 changing the applicability of the Davis-Bacon Act (the Act) to survey technicians. As noted in your March correspondence to the International Union of Operating Engineers (IUOE), this change reverses longstanding Department of Labor (DOL) policy with respect to the application of Davis-Bacon to survey crews.

As you well know, DOL's policy regarding the application of Davis-Bacon to survey crews dates back to 1955, when then-acting Assistant Solicitor James Baird opined that survey work was often a preconstruction activity, and therefore not covered by the Davis-Bacon Act.¹ In 1960, then-Secretary Arthur Goldberg expanded upon this view by stating members of survey crews are exempt from the Davis-Bacon Act except when they "perform manual work, such as clearing brush and sharpening stakes."² There has been no material change in DOL's policy in this area in the interim.

Despite DOL's longstanding policy, and in response to the March 22, 2013, guidance from WHD, government contracting officers began to inform contractors that effective April 1, 2013, surveyors would be reclassified as laborers and mechanics under the Act. However, it is our understanding there is currently no wage rate available for survey technicians, and contractors are being encouraged to submit a conformance request³ to WHD to comply with the new interpretation. Furthermore, it appears WHD provided little advance notice to contractors regarding the changes set forth by the WHD guidance letter and AAM No. 212. In testimony before the Education and the Workforce's Subcommittee on Workforce Protections, the National Society of Professional Surveyors stated WHD engaged in no outreach with affected stakeholders prior to issuing the guidance.⁴

¹September 14, 1955, Letter of Interpretation concerning survey crews.

²August 2, 1962, letter from Secretary of Labor Arthur Goldberg attached to AAM No. 39.

³As explained on DOL's website Davis-Bacon Conformance occurs when "the data does not contain sufficient information to issue rates for a particular classification of worker needed in the performance of the contract. Because of this, Davis-Bacon provisions contain a conformance procedure for the purpose of establishing an enforceable wage and benefit rate for the missing classification."

⁴"Promoting the Accuracy and Accountability of the Davis-Bacon Act." Subcommittee on Workforce Protections, June 18, 2013.

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In its March 22, 2013, guidance letter, WHD stated: "As we have not closely examined survey crew classifications and duties in detail in recent years, we believe it is appropriate to identify and evaluate the extent of physical and manual work performed by various survey crew classifications in use today." We are concerned the letter does not explain the basis upon which WHD made the determination survey crews should be covered by the Act. Without explanation or justification, WHD overturned almost 60 years of precedent.

Given the scope of this change regarding the application of Davis-Bacon, its implications for stakeholders, and to better understand the process by which WHD arrived at this change, we ask you to provide the following no later than July 25, 2013:

1. All communications related to the promulgation of this policy change, including the IUOE's August 4, 2011, request;
2. All legal memorandum or other supportive material related to the policy change;
3. All public outreach and notices advising this change was under consideration;
4. The date DOL posted AAM No. 212 on its website;
5. A timeline for completing a wage determination for this new classification;
6. Implementation guidance for contracting officers; and
7. All economic analysis conducted regarding this change to federal contracts.

If you have any questions regarding this request, please contact Loren Sweatt, with the House Committee on Education and the Workforce, at (202) 225-7101 or Viktoria Ziebarth at (202) 225-5821 with the House Committee on Small Business.

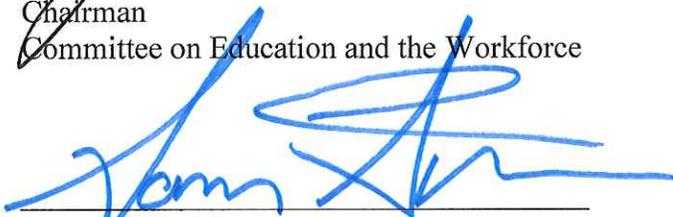
Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



TIM WALBERG
Chairman
Subcommittee on Workforce Protections



SAM GRAVES
Chairman
Committee on Small Business

Enclosure