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May 17, 2022

SUBMITTED VIA REGULATIONS.GOV

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: RIN 1235-AA40, Updating the Davis-Bacon and Related Acts Regulations

Dear Secretary Walsh:

We write regarding the proposed rule titled “Updating the Davis-Bacon and Related Acts Regulations.”¹ Republican Members of the Committee on Education and Labor (Committee), which has jurisdiction over the *Davis-Bacon Act of 1931*, have long been troubled by the Department of Labor (DOL or Department) Wage and Hour Division’s (WHD) implementation of the Act, and we agree that its regulations desperately need updating. However, we are concerned that the sweeping proposed rule fails to modernize Davis-Bacon regulations and compounds existing issues with WHD’s implementation of the program.

We are further disappointed that DOL denied a congressional request²—and requests from numerous stakeholders—to extend the Notice of Proposed Rulemaking’s (NPRM) comment period. This will prevent Congress and the regulated community from fully understanding the multitude of proposed changes and offering meaningful suggestions that could resolve the many identified problems with the implementation of the *Davis-Bacon Act*.

¹ Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15,698 (proposed Mar. 18, 2022) [hereinafter Proposed Rule].

² Letter from Sen. Richard Burr and Rep. Virginia Foxx to Martin J. Walsh, Sec’y of Lab. (Mar. 29, 2022), https://republicans-edlabor.house.gov/uploadedfiles/db_comment_extension_letter_3.29.22_final.pdf.

Unfortunately, the flawed proposed rule fails to address long-standing issues with the Davis-Bacon program, which has been consistently criticized by the Government Accountability Office (GAO) and DOL's Office of Inspector General (OIG) for the inaccuracy of the collected data. The proposed rule also unfairly favors union wage rates, increases the cost of federal construction, hurts taxpayers, harms America's infrastructure, and reduces competition from qualified small businesses. For these reasons, and as explained more fully below, we urge the Department to abandon its misguided proposal and work with the regulated community to achieve necessary reforms to Davis-Bacon regulations to provide clarity and ensure integrity in the program.

The Proposed Rule Fails to Fix the Unscientific Wage Survey Process

Despite numerous criticisms from GAO and the OIG, the proposed rule fails to reform WHD's unscientific prevailing wage determination process. While the proposed rule attempts to address persistent issues, such as out-of-date wage determinations, it ignores the fundamental issue that the wage survey process itself leads to the inaccurate calculation of prevailing wages which do not reflect true market rates.

Fixing the broken wage survey process has long been a priority of Committee Republicans. In the 112th Congress, the Subcommittee on Workforce Protections held a hearing titled "Examining the Department of Labor's Implementation of the Davis-Bacon Act." In his testimony, James Sherk argued that "two aspects of the ... methodology are particularly problematic: the use of a non-representative sample and excessively small samples. These errors render Davis-Bacon wage estimates scientifically meaningless."³ He continued as follows:

[DOL's] methods for calculating prevailing construction wages are scientifically unsound. The [GAO] report demonstrates that [WHD] calculates Davis-Bacon rates with a self-selected sample instead of a representative sample. Non-representative samples do not provide reliable information. WHD does not use basic statistical techniques, such as measuring non-response and weighting their data to mitigate this bias. Even if WHD did use a representative sample they have too few responses to be accurate.⁴

We are disappointed that the Department did not consider alternative methods to improve the accuracy of its data, including calculating wage rates using Bureau of Labor Statistics (BLS) data from the Occupational Employment Statistics survey and National Compensation Survey. Such a change would ensure more statistically representative and timely wage data and is estimated to reduce federal construction costs by approximately 10 percent; accurate prevailing wages would stretch construction appropriations across more projects and create at least 30,000 new jobs on

³ *Examining the Department of Labor's Implementation of the Davis-Bacon Act: Hearing Before the Sucomm. On Workforce Protections of the H. Comm. on Educ. & Labor*, 112th Cong. 30 (Apr. 14, 2011) (statement of James Sherk, Senior Lab. Pol'y Analyst in Lab. Econ., Heritage Found.).

⁴ *Id.*

federal construction projects.⁵ The Department itself recognizes the validity of introducing BLS data into calculating prevailing wage rates in its proposed rule, seeking to update non-collectively bargained wage rates every three years based on BLS Employment Cost Index data.⁶ Yet, without changing its underlying collection methods, Davis-Bacon wage rates will continue to be inaccurate and bear little resemblance to true market rates in the construction industry.

The Proposed Rule Inappropriately Favors Union Wage Rates

Despite claiming to “modernize” the Davis-Bacon regulations, the proposed rule instead goes back in time to revive the definition of prevailing wage that was in place from 1935 to 1983. Returning to this definition is a blatant attempt to ensure that union wage rates prevail over non-collectively bargained rates. While unsurprising given the Biden administration’s claims to be the most “pro-union administration in American history,”⁷ the blatant way in which the Department tips the scales in favor of special interests is disappointing and misguided, since just 12.6 percent of construction workers choose to belong to a union.⁸

The proposed rule repeals Reagan-era reforms⁹ addressing concerns that collectively bargained rates were given undue weight. Specifically, the proposed rule changes the methodology for determining the prevailing wage to reinstate the 30 percent rule so that, if a majority of wage survey respondents do not report the same rate, DOL will identify any wage rate that is paid to more than 30 percent of the workers as prevailing before using a weighted average.¹⁰

Lowering the threshold for what is considered *prevailing* to less than a majority of responses is nonsensical and is clearly aimed at making it easier for union wage rates to prevail, because collective bargaining agreements often set a uniform wage for an entire group of workers. Mr. Sherk explained in his testimony that Davis-Bacon wage rates are set by a flawed survey process that does not produce representative samples, favoring unions:

Most businesses do not return Davis–Bacon wage surveys. Davis–Bacon surveys take considerable time and effort to complete and many contractors do not expend staff resources to complete them.... Those employers who do respond tend to be those with large staffs. Unions also devote considerable effort to facilitate unionized employers completing and returning the surveys. Consequently, Davis–Bacon rates are based on neither a representative sample nor a universal census of

⁵ JAMES SHERK, HERITAGE FOUND., LABOR DEPARTMENT CAN CREATE JOBS BY CALCULATING DAVIS–BACON RATES MORE ACCURATELY (Jan. 21, 2017), <https://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more#:~:text=The%20Davis%E2%80%93Bacon%20Act%20requires,local%20workers%20at%20lower%20wages.>

⁶ Proposed Rule, *supra* note 1, at 15,717.

⁷ THE WHITE HOUSE, REMARKS BY PRESIDENT BIDEN IN HONOR OF LABOR UNIONS (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/>.

⁸ News Release, BLS, Union affiliation of employed wage and salary workers by occupation and industry, Table 3 (Jan. 20, 2022), <https://www.bls.gov/news.release/union2.t03.htm>.

⁹ Procedures for Predetermination of Wage Rates, 47 Fed. Reg. 23,644 (May 28, 1982).

¹⁰ Proposed Rule, *supra* note 1, at 15,703.

construction workers. They are based on a self-selected sample of large, unionized businesses.¹¹

The OIG found that even under the current majority threshold, union wages were adopted in 48 percent of WHD's wage determinations, despite the fact that less than 13 percent of the U.S. private construction workforce is unionized.¹² By adopting a lower standard for determining whether a wage is prevailing, the proposed rule attempts to reward union firms by making it easier to ensure they reach the appropriate threshold to have their wage rates adopted. As a matter of public policy, Davis-Bacon wage rates should reflect market forces and provide accurate data on wages prevailing in a given area. It is inappropriate for DOL to put its thumb on the scale and reward special interests at the expense of nonunion contractors and American taxpayers.

The Proposed Rule Will Increase Inflation, Burden American Taxpayers, and Hurt America's Infrastructure

As America confronts historic inflation and a supply chain crisis, it is baffling that the Department is seeking regulatory changes that will directly exacerbate these challenges and harm the nation's infrastructure. Contrary to DOL's claims, the proposed rule will do nothing to create good jobs or improve infrastructure projects. Instead, the rule will drastically increase the cost of federal construction, thereby leading to fewer workers being hired and fewer completed infrastructure projects.

As it stands today, the *Davis-Bacon Act* and its regulations dramatically inflate labor costs, which are passed on to the American taxpayer in the form of higher construction costs. A report from the Joint Economic Committee estimated that Davis-Bacon determined wages tend to inflate labor costs an average of 22 percent above market rates.¹³ Brian Riedl, a senior fellow for budget, tax, and economic policy at the Manhattan Institute, testified before the Committee that the *Davis-Bacon Act* contributes to making "America's transportation infrastructure...among the most expensive, bureaucratic, and slowly built in the world."¹⁴ Further, the Congressional Budget Office has estimated that repealing the *Davis-Bacon Act* would save taxpayers \$17.1 billion between 2021 and 2030.¹⁵

The proposed rule will only increase inflationary pressures and construction costs, further burdening taxpayers. It returns to the 30 percent rule, which was eliminated in the 1982 reforms

¹¹ Statement of James Sherk, *supra* note 3, at 25-26.

¹² DOL OIG, BETTER STRATEGIES ARE NEEDED TO IMPROVE THE TIMELINESS AND ACCURACY OF DAVIS-BACON ACT PREVAILING WAGE RATES (Mar. 29, 2019), <https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf>.

¹³ JOINT ECON. COMM. REPUBLICANS, HIGHWAY ROBBERY: THE DAVIS-BACON ACT INCREASES COSTS, DECREASES EMPLOYMENT (Mar. 31, 2011), https://www.jec.senate.gov/public/_cache/files/1ac1b544-b9ce-447d-bade-f88f5dafa4b2/dba-increases-cost-decreases-employment-03-31-2011.pdf.

¹⁴ *Building Back Better: Investing in Improving Schools, Creating Jobs, and Strengthening Families and our Economy: Hearing Before the H. Comm. on Educ. & Labor*, 117th Cong. (April 28, 2021) (statement of Brian Riedl, Senior Fellow in Budget, Tax, & Economic Policy, The Manhattan Institute for Policy Research).

¹⁵ CBO, REPEAL THE DAVIS-BACON ACT (Dec. 9, 2020), <https://www.cbo.gov/budget-options/56809>.

to the Davis-Bacon regulations. The 30 percent rule was eliminated in the midst of rapidly rising inflation, buoyed by a finding from GAO that the *Davis-Bacon Act* resulted in unnecessary construction and administrative costs of several hundred million dollars annually and had an inflationary effect on the areas covered by inaccurate wage rates and the economy as a whole.¹⁶ As the Biden administration finds itself in a similar inflationary environment, it is unconscionable that it would reverse course on this common-sense policy. The NPRM even acknowledges that these changes may contribute to inflation, but it ultimately dismisses these concerns.¹⁷ While this dismissal is characteristic of this administration and its failure to take inflation seriously, it is nevertheless unacceptable: American taxpayers deserve better from their government.

Ultimately, increased construction costs will lead to fewer construction projects and harm America's infrastructure. With the recently enacted *Infrastructure Investment and Jobs Act* (IIJA) —which authorized billions of dollars for many projects that will be covered by prevailing wage requirements—the government has the responsibility to ensure that projects maximize delivery and that taxpayer dollars are spent effectively. Analysis from the American Action Forum (AAF) found that the proposed rule would diminish the federal government's return on investment on infrastructure spending.¹⁸ The analysis notes with regard to IIJA spending: "Since the pot of money related to that spending remains the same, increasing the labor costs associated with each project necessarily reduces the total number of projects that can be funded." If the administration is sincere in its stated goal of protecting America's infrastructure projects, the proposed rule must be abandoned, or it will exacerbate the inflation crisis and harm American taxpayers.

The Proposed Rule Discourages Small Businesses

As the Department seeks to reward its union allies with the proposed rule, it discourages small, qualified contractors from bidding on federal and federally assisted construction projects. The current Davis-Bacon regulations and flawed wage survey process already act as a major barrier to small businesses working on federal contracts, and these proposed updates to "modernize" longstanding definitions and expand the scope of covered projects will only make this barrier more challenging.

Small businesses make up the vast majority of the construction industry. According to the Small Business Administration, 3.3 million construction firms in the U.S. are classified as small businesses, and these firms employ more than 81.8 percent of all construction professionals.¹⁹ According to the Associated Builders and Contractors, excessive paperwork, legal fees, confusing union work rules, and potential liabilities and penalties for accidentally misclassifying

¹⁶ GAO, THE DAVIS-BACON ACT SHOULD BE REPEALED (Apr. 27, 1979), <https://www.gao.gov/assets/hrd-79-18.pdf>.

¹⁷ Proposed Rule, *supra* note 1, at 15,705.

¹⁸ Dan Bosch, AM. ACTION FORUM, DOL PROPOSES UPDATES TO DAVIS-BACON ACT REGULATIONS (Mar. 23, 2022), <https://www.americanactionforum.org/insight/dol-proposes-updates-to-davis-bacon-act-regulations/>.

¹⁹ U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, 2021 SMALL BUSINESS PROFILE (Aug. 30, 2021), <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30144808/2021-Small-Business-Profiles-For-The-States.pdf>.

workers associated with Davis-Bacon compliance already discourage small businesses to bid on federal and federally assisted contracts.²⁰

This proposed rule will exacerbate challenges for small businesses by changing longstanding definitions and procedures, causing uncertainty and confusion, and requiring these businesses to hire lawyers and additional staff to ensure compliance. For example, the proposed rule updates definitions such as “site of the work” to include sites where prefabricated buildings are produced and “scope of work” to include energy infrastructure, which the Small Business Administration’s Office of Advocacy says may lead to more small firms being required to comply with Davis-Bacon labor standards.²¹

Unlike large businesses, small firms do not have the resources to hire an army of lawyers and staff to comply with changes to longstanding definitions in the *Davis-Bacon Act*. The proposed rule estimates a cost per firm of \$78.97 annually including one hour to read the regulation and one half-hour to implement the regulation.²² This is patently absurd. It is a gross underestimation of the time and resources necessary to ensure compliance.

The NPRM is more than 100 pages long and, by DOL’s own admission, one of the most sweeping overhauls to the Davis-Bacon program in decades. Instead of taking the opportunity to reform the Davis-Bacon program to encourage small businesses to compete, the Department missed the opportunity to make productive reforms and dismissed the concerns of small businesses. Unless DOL takes small businesses’ concerns into account as it continues its rulemaking process, the final rule will prevent most small businesses from competing on Davis-Bacon covered construction projects.

Conclusion

We are concerned that the proposed rule does nothing to modernize the Davis-Bacon regulations and fails to address existing and longstanding criticisms of the Department’s unscientific wage survey process. The proposed rule instead reverts to a decades-old definition of prevailing wage to reward the administration’s Big Labor allies. It will increase inflation, harm taxpayers, diminish the number of infrastructure projects, and hurt small businesses. We agree the Davis-Bacon regulations have long needed updating, but this proposed rule completely misses the mark. We urge the Department to withdraw this imprudent proposed rule and work with stakeholders to provide clarity to the program and ensure its integrity.

²⁰ASSOCIATED BUILDERS & CONTRACTORS, ABC PREVAILING WAGE/DAVIS-BACON ACT SURVEY (Mar. 3, 2021), <https://www.abc.org/Portals/1/News%20Releases/ABC%20National%202021%20Survey%20on%20Prevailing%20Wage%20Davis%20Bacon%20Policies%20FINAL.pdf?ver=2021-03-03-102740-943>.

²¹ U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, DOL PROPOSES TO UPDATE PREVAILING WAGE METHODOLOGY UNDER DAVIS-BACON ACT (Mar. 21, 2022), <https://advocacy.sba.gov/2022/03/21/dol-updates-prevailing-wage-methodology-under-davis-bacon-act/>.

²² Proposed Rule, *supra* note 1, at 15,780.

The Honorable Martin J. Walsh

May 17, 2022

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Thank you for your consideration of our views.

Respectfully submitted,

A handwritten signature in blue ink that reads "Virginia Foxx". The signature is written in a cursive, flowing style.

Virginia Foxx
Ranking Member

A handwritten signature in blue ink that reads "Fred Keller". The signature is written in a cursive, flowing style.

Fred Keller
Ranking Member
Subcommittee on Workforce Protections