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The undersigned is an attorney who has practiced in the field of prevailing wage for over 40 years. I am also the president and major stockholder of Contractor Compliance and Monitoring Inc., a prevailing wage consulting company that assists public agencies and contractors with state and federal prevailing wage requirements. I have worked with over hundred agencies and over a thousand contractors in my career. I have worked with both union and open shop contractors, have testified as an expert in the field of prevailing wage and am the author of three books on prevailing wage compliance, including AGC of America's Davis-Bacon Compliance Manual. I provide this background in hopes that you will provide sufficient weight to my comments as one who has spent a professional lifetime in this field.

Wage Surveys and Determinations: The calculation of prevailing wages should not be based on a common wage rate paid by 30% of the workforce. A prevailing practice is one which occurs more than 50% of the time. If this wage rate cannot be determined by 50% of the population surveyed, then the proper classification and wage rate must be based on a weighted average taking into account all wage rates submitted and applying a weighted average formula. The U.S. Department of Labor has been reluctant to use the Bureau of Labor Statistics information in the past in determining prevailing wage rates. Yet, in this proposed rulemaking, the U.S. Department of Labor suggests that perhaps metropolitan statistical areas as determined by the Bureau of Labor Statistics might be an appropriate standard to use. If the U.S. Department of Labor (hereinafter U.S. DOL)is willing to accept the calculations and authority of the Bureau of Labor Statistics for part of the Davis-Bacon regulations, why would the U.S. DOL not accept the Bureau of Labor and Statistics data relating to wages.

Under the 30% rule it seems patently clear that almost all rates will then migrate to union collective bargained rates, even when those rates are not truly prevailing in the area. The last time I checked, union rates controlled in less than 40% of the wage determinations, primarily in large metropolitan areas. Establishing a union collectively bargained rate in Humboldt County, California, which is the same as in the San Francisco Bay Area (hundreds of miles away) does a disservice to the worker, the contractor, the awarding agency and the community. Prevailing wages are to ensure that workers are not unfairly exploited on prevailing wage projects. The purpose of the Davis-Bacon Act is not to provide the worker with an inflated wage rate for the area in which they are working. The original purpose of the Davis-Bacon Act was to preserve use of local workforces and create a level playing field between local contractors and contractors from out of the area. Creating an artificially high prevailing wage rate based on the 30% rule does not meet that purpose.

My recommendation is that instead of attempting to conduct wage surveys for each county throughout the country and including the four separate project types, the Department of Labor would be better served by using the data that the Bureau of Labor Statistics already has. A few years ago, I had an opportunity work on a residential project in South Carolina. Those wage rates had not been updated in 18 years. Even when I made a call to the wage hour division to confirm and clarify, I was told there was just too much work to be done and they just could not get to every wage determination. That is a travesty to the workers who the U.S. DOL is supposed to be the protecting.

Certainly, tying ALL of the wage rates to the Bureau of Labor Statistics would be an easy way to keep all prevailing wages current. It would also not skew the wage rates by adopting an artificial 30% rule and would allow for regular and consistent updates. I am in agreement with using state or local prevailing wage rate for wage rates, but only where there is otherwise insufficient information from the Bureau of Labor Statistics.

Single Rates in "Area": Prevailing wages are to be paid based on the tasks that the worker performs and not based on a particular title the worker is given. If a worker spends two hours unloading materials in the morning, that is Laborers work; if they hang drywall for five hours in the afternoon, they must be paid the applicable Drywall rate, and if they performed painting for one hour, the applicable prevailing wage for Painters must be paid. Over the years, many of the trades have created subclassifications which have become almost specialties themselves. Low voltage wiring is almost always performed by a Communication and Tech Installer while other electrical work is performed by Inside Wireman. Those who are engaged in cable splicing or high utility lines, are paid in a different classification. What is needed is more detail and multiple wage classifications within a trade not less. Let us use the Bureau of Labor Statistics information already available. If some minor changes need to be made to that process, then make those changes, but let us not create a new process when that information is already being collected within the DOL.

Periodic Adjustments: I am opposed to annual adjustments to prevailing wage requirements. This will create more confusion in the entire construction process, including local agencies and contracting officers who are already overburdened. I do understand extremely long projects which should have some adjustment for wage increases, but then the contractor should automatically be allowed a 150% increase change order to cover the cost of the wage increase and related payroll burden. Perhaps for any project not completed within 3 years, then an update to the current wage rate upon the 3rd anniversary of contract award or start of work.

Conformances: Every time I complete a conformance request, I include much more than the one page form itself. I enclose a specific scope of work for the trades requested and I also provide the backup documentation for the wage and fringe benefits. That might be wage rates found in a collective bargaining agreement, or wage rates found in a state prevailing wage determination, or it could be a wage rate from some local survey. I think you could make the conformance process easier for your staff if you required those submitting the conformance requests to include the scope of work and any backup documentation relating to the wages and fringe benefits proposed.

If there are multiple wage determinations on a particular project, a contractor should be allowed to use a wage classification and rate from one determination on another type of work without submitting a conformance. For Example: A transit center would have Heavy, Highway and Building determinations. A contractor should be allowed to use a classification and wage rate from the Highway determination for the Building portion of the work, if there is no classification for that work listed in the Building determination.

Another solution would be to allow a contractor to adopt a conforming wage rate from the same County but in a different determination. For example, if I have commercial rates for Communication and Tech Installers, I could adopt that rate for residential work in the same County. The other option is to allow a contractor to use a rate without going through the conformance process which is listed in an adjacent County within the same time window.

Finally, once a conformance is granted, it could be included in the next update for the prevailing wage determination in that particular jurisdictional area. That would eliminate the need for repeated requests for conformances in a particular County.

Multiple Wage Determinations: I agree with the $2.5 million or 20% rule for requiring multiple wage determinations.

Contract Clauses and Wage Determinations: One of the only ways that a contractor is alerted that federal Davis-Bacon applies to a specific project is when there is specific contract language provided and the wage determinations are attached. Under no circumstances should those requirements be diluted. If an agency has mistakenly omitted either of those items, it is not the unsuspecting contractor who should bear that burden.

> A few years ago, I had a contractor working at a veterans hospital. There were no contract provisions in the documents and no prevailing wage determination attached. Yet, this contractor believed that federal Davis-Bacon rates would apply and so he did his best to try and determine what those rates would be. At the end of the project, when his work was audited, the Department of Labor found that he had not used the proper wage determination and so additional wages were due. Had the agency provided the proper wage determination, this never would have happened. It is grossly unfair to the contracting community to allow an awarding agency to transfer liability to a contractor when the agency has failed to meet its obligation in informing the contractor of the appropriate wage rates applicable to the project.

I do NOT agree that "incorporating by reference" contracting terms is just as effective as inserting the full Davis Bacon contract section. Nor do I support the provisions your proposal under "operation of law". If the Agency missed including the information, and the U.S. DOL wants to hold the contractor liable for prevailing wages then the Agency MUST automatically be liable for 150% of the delta between wages paid and the amount the needs to be paid to meet prevailing wage.

This is even more important when you have a DBRA project. Many times, the local agency does not provide any information to the contractor that federal funds are being used on the project. The contractor may proceed with the project, complying with state prevailing wage laws, but then are caught at the end of the project for failing to pay a higher federal rate. Again, the agency must provide this information to a contractor, how else is the contractor to know. Also relating to 1.6(f)(3)(v) applying to Related Acts, it is not the withholding or cross withholding that the Agency should be obligated to engage, but a mandate that the Agency pay the contractor 150% of the delta between what the contractor paid and the amount that should have been paid. That final 150% can be withheld until the contractor pays the full amount due to workers, but additional withholding or cross withholding because of the Agency's error is just flat wrong.

Better Definition between Davis Bacon and Service Contract Act: Construction is the only industry which can be found under both the Davis-Bacon Act and the Service Contract Act. The federal agency letting a contract relating to improvements and rehabilitations to building and facilities, will frequently misclassify construction work under the Service Contract Act. This is extremely confusing to contractors who are used to a particular standard of operations and prevailing wage coverage. Particular regulations need to be established which will trigger Davis-Bacon when the dollar value of the work to be performed reaches a particular level. Rewiring an entire building with fiber optics is Dais Bacon work and not SCA work.

Clarifying Material Supplier, Trucking and De Minimis: The current rule relating to Trucking companies delivering sand, rock, asphalt and other such products remains confusing to contractors. Because they are indeed "Material Suppliers" the issue is whether or not the amount of time they spend on the project site is truly de minimis so as to discount any prevailing wages, or if the 20% rule must apply to these drivers. If a driver spends 20% of their week actually on the jobsite, should prevailing wage then apply to all hours they are on the project. That 20% equates to eight hours within a week or basically two hours per day. Does that rule apply only for the look back at the entire week or can/should it apply to onsite work which equates to 2 hours per day?

Secondary Construction Sites: Prevailing wages have traditionally applied to on-site construction services. Prevailing wages should only be extended to secondary sites when that secondary site is established for the particular purpose of servicing the original jobsite. This should exclude any work performed in a contractor's permanent facility, which is established prior to the advertisement for bid and will continue to operate after the project is complete.

Flaggers: I agree that flaggers are subject to prevailing wage because the work they are performing is adjacent or nearly adjacent to the construction site and are for the purpose of providing safety to those in and around the jobsite.

Apprentices: I support your clarification of the language relating to the employment and use of Apprentices with the following comment: Apprentices which are employed on the project outside of their immediate jurisdictional area, must receive either the wage rate and be employed according to the local ratio which apprentices are subject to based on the location of the project or apply the wage rates and ratio of the actual program in which the apprentice is enrolled, whichever is higher and more restrictive. This will create both a level playing field with other contractors and apprentices who would seek to perform work on the project site, but would not penalize the apprentice for working outside the immediate jurisdictional area of the program in which they are enrolled.

Unfunded Plans: Requiring DOL approval of unfunded plans, especially in the area of vacation and holiday, is unduly burdensome to the contractor and would create massive amounts of work for the Department of Labor. It also creates an uneven playing field between union and open shop contractors, requiring the open shop contractor to essentially pay more than the prevailing wage rate by discounting legitimate holiday and vacation benefits paid by the contractor. Rather, clear regulations relating to the standards under which these unfunded plans would be allowed to receive Davis-Bacon credit is the better approach.

Unfunded vacation and holiday benefits, which an employer keeps on their books, are allowed to count toward meeting Davis-Bacon fringe benefits if all of the following occur:

a) the benefit is in writing and has been provided to the worker;
b) the benefit is vested and will not be forfeited if the worker leaves their employment; and,
c) the benefit is amortized using the employee's regular rate of pay for the calculation of the benefit.

Example: 40 holiday hours + 80 Vacation Hours X RRP (Employee's regular rate or pay) ÷ 2080 = Amount of hourly fringe benefit that can be claimed.

Fringe Benefits and Annualization: The Proposed "Annualization" Exception in § 5.25(c) Should Include a Safe Harbor Provision that Meet the Exception Requirements.

In the Proposed Regulations, the Department proposes adding a new paragraph (c) to the existing §5.25 to codify the principle of "annualization" (*i.e.*, the long-standing method of calculating the amount of Davis-Bacon credit that a contractor receives for contributions to a fringe benefit plan when the contractor's workers also work in private projects). The Proposed Regulations also observes that historically, the Wage and Hour Division ("WHD") has not applied the annualization requirement to defined contribution pension plans ("DCPPs") that provide for immediate participation and accelerated vesting (*i.e.*, vesting after a worker works no more than 500 hours). This should not change. The employee is receiving 100% of the contribution and the employer should receive 100% of the credit for that contribution.

Alternatively, I recommend that DOL revise the Proposed § 5.25(c) to formally adopt a safe harbor provision to automatically qualify defined contribution retirement plans for the annualization exception when they meet the required standards. This could be achieved by adding a new subparagraph (4) to read as follows:

§ 5.25(c)(4) Safe harbor. Fringe benefits provided by a contractor through a defined contribution pension plan shall be considered to be excepted from the annualization requirement, and are not subject to the exception request requirement described in 5.25(c)(2), above, if the defined contribution pension plan meets the following three criteria:

(A) the benefit provided is not continuous in nature;

(B) the benefit does not provide compensation for both public and private work; and

(C) the plan provides for immediate participation and essentially immediate vesting. A plan will generally be considered to have essentially immediate vesting if the benefits vest under the plan after a worker works 500 or fewer hours.

Recommendations on Item Omitted from the Rulemaking

Publication of Scope of Work: The federal government should not be allowed to play "gotcha" with the contracting community. Clear Scopes of Work need to be available to the contracting community to understand how to classify workers. And, a contractor should not be penalized when they comply with the actual wording in the Davis-Bacon wage determination.

> For example, I had a contractor working in Hawaii on a military base. The prevailing wage determination stated that Laborers could lay pipe. This contractor paid its Laborers to lay pipe. The plumbers filed a complaint stating that they claimed the work. The US DOL said they had absolutely no information to make a ruling in this regard. They suggested that I contact the Hawaii Department of Labor, which I did. The Hawaii Department of Labor directed me to contact the plumbers union and ask for a copy of their collective bargaining agreement. The union refused to give me a copy and then the local US DOL office when I told them I had no information stated that the Plumber/Pipefitter rate had to be paid for the laying of the pipe because that is what the plumbers claimed. The laborers were not making any connections, they were merely laying the pipe. The contractor had complied with the literal language in the wage determination and it seemed that nobody really knew the "prevailing practice". Instead, the prevailing practice was determined at some point after the project had started, near its completion. The contractor's only option was to go back to the military base and asked for change order, which was denied. I ask, how is a contractor to know the proper wage rate to pay if there is no Scope of Work provided and the wage determination itself says Laborers can lay pipe?

I do not believe that a Scope of Work for every classification in every wage determination is necessary; but, I do believe there should be a place where contractors could go on the www.sam.gov website to search out jurisdictional scopes of work. And, if more than one trade claims the work, the contractor should be allowed to pay in either of those classifications and be considered compliant with Davis-Bacon requirements.

1099 Employees: Something I see repeatedly on projects, especially in less industrial states and areas, is the use of 1099 employees. We all know there is no such thing as a 1099 employee. There are employees and they are independent contractors. Yet, the contracting community from time to time hires temporary workers which they call 1099 employees and for which no taxes or payroll deductions are made.

I have been repeatedly told by the US Department of Labor that this is wage theft. It is wage theft because the individual worker will have to pay not less than 13% as self-employment tax, and has no unemployment insurance; when in reality they are a temporary employee and should only have to pay their half of Social Security and Medicare. Those workers are also entitled to unemployment benefits and other state and federal benefits due to employees. Yet, every time I reported these instances to the Wage Hour Division, I am told that so long as the worker receives the total amount of the prevailing wage rate on the check, there is nothing that can be done. The U.S. Department of Labor needs to stop talking out of both sides of its mouth. If this is in indeed wage theft, which I believe it is, then the U.S. Department of Labor needs to have a protocol for seeing that these workers receive restitution and the proper classification as an employee on the particular job site.

Contracting Officer Authority: I have been repeatedly told that the comments and decisions of a contracting officer is not final and binding upon the U.S. DOL and that it is only the Regional Office that has the authority to bind the U.S. DOL. This is extremely confusing to local contractors who seek the advice of the Contracting Officer on classifications of work, area practices etc. So either, the DOL needs to grant Contracting Officers with authority to bind the US DOL or the Contracting Officer must affirmatively inform the contractor that the opinion issued by the Contracting Officer is not binding and how to get a binding opinion.

I object to the short period of time provided by the US DOL in response to this rulemaking. US DOL is making over 50 different changes to the Davis Bacon regulations. These are massive changes and should be given sufficient time for discussion and comment. I would have liked to have spent more time to detail comments on every aspect of the rule making, but was not able to do so.

Sincerely,

Deborah E.G. Wilder
President