Southern Nevada Building Trades Unions
Affiliated with the North America Building Trades Unions
Rick Johnson - President
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Filed Electronically
U.S. Department of Labor
Wage and Hour Division

Re: Comments on DOL's Notice of Proposed Rulemaking on Updating Davis-Bacon and Related Acts Regulations (RIN 1235-AA40)

To Whom it May Concern:

On behalf of the fourteen affiliates of the Southern Nevada Building Trades Unions and the over 25,000 members represented by those affiliates throughout southern Nevada, including Las Vegas and greater Clark County, I submit the following comments concerning The Wage and Hour Division's Notice of Proposed Rulemaking on Updating Davis-Bacon and Related Acts Regulations (RIN 1235-AA40).

There is no doubt that the Davis Bacon Act is an integral piece of federal legislations that has stood the test of time and produced results that have lifted generations of working men and women out of poverty. It also establishes wage floors to ensure contractors on federal and federally assisted projects provide a living wage and benefits to construction employees on those projects. Without the Act, local area labor standards would be driven down and tax dollars would reward low road contractors, which would create a race to the bottom in wages and benefits for construction workers.

It is no secret that previous Presidential administrations have attempted to hamper or outright dismantle the regulatory system that administers the Davis Bacon Act. This has resulted in lower wages for construction workers and increased wage theft throughout the construction industry. This is why the SNBTU is happy to support the proposed rule that is now under consideration by the DOL.

If the DOL's proposal rule is adopted, many of the Davis Bacon Act's protections for the hard-earned wages of construction workers will be restored. Furthermore, the proposed rule will ensure that contractors compete for government contracts on the basis of merit, rather than on who can exploit the construction workforce in the most scurrilous ways, which harms the industry as a whole.

There are four main topics within the proposed rulemaking that the SNBTU wishes to support in further detail below. Those are (1) the improvement to the methods for calculating wages; (2) strengthening the DOL's enforcement mechanisms; (3)

I. SNBTU Supports the Proposed Rules Method for Calculating Davis-Bacon Wages on Project

The DOL's proposed rule will restore the law to its intended purpose of ensuring that prevailing wages reflect those wages that are actually paid to workers in the community where the work will be performed. The rule also ensures that construction workers are shielded from exploitation by low road contractors. In 1982, the DOL changed the original regulatory definition of "prevailing wage" that had been in place for close to 50 years. As a result of the 1982 change, more than half of all Davis Bacon Act wage rates are based on artificially weighted averages that do not mirror the actual wages paid to workers in the community. It should go without saying, but the average rates paid to literally no single person are not "prevailing" in any sense of the word and watered-down wages not only hurt the workers themselves and their families, but also make it difficult for high-road contractors to compete for government contracts funded with our tax dollars. DOL's proposed rule will restore the original definition of "prevailing wage" ("Three-Step Rule") and ensure that Davis Bacon Act wage rates reflect the actual wage rates that most frequently appear in the county in which the work will be performed, rather than based on a contrived average. Under the Three-Step Rule, DOL will calculate the prevailing wage for each job classification in a county, as follows:

(1) The prevailing wage is the same wage rate paid to a majority of workers in a job classification.

(2) If no single wage is paid to a majority of workers, any single wage paid to the greatest number of workers is deemed the prevailing wage (e.g., the same wage rate paid to 50% or 40% of workers in a job classification).

(3) If, however, no single wage is paid to at least 30% of workers, then the weighted average of all wages paid is deemed the prevailing wage.

The 1982 regulatory change distorted the definition of "prevailing wage" because it eliminated step two of the Three-Step Rule, which forced the widespread utilization of the thoroughy watered-down weighted averages.

Support for this calculation is provide by the legislative history of the Act and subsequent amendments. Congress delegated to the Secretary of Labor the broadest authority imaginable to determine which rates prevail. 74 Cong. H6516 (daily ed. Feb. 28, 1931) (during the House floor debate, Rep. William Kopp (R-IA) emphasized that although "the term 'prevailing rate' has a vague and indefinite meaning…the power will be given…to the Secretary of Labor to determine what the prevailing rates are.") This position is also supported by case law. *See, e.g. Building Trades v. Donovan,* 712 F.2d 611,616 (D.C. Cir. 1983).

It is important to note that the term "prevailing wage" has no fixed meaning. In fact, under different laws, it can have different meanings. As an example, under the Service Contract Act, the local "prevailing rate" may be derived from an arithmetic median or mean. Under certain guestworker programs, the term "prevailing wage" may be the rate negotiated in a collective bargaining agreement, or it may be tied to an arithmetic mean or median. And the 27 states that have state prevailing wage laws (i.e., Little Davis-Bacon Acts) define "prevailing wage" in many different ways. In Nevada, our state laws call for adoption of CBA rates, benefits and work rules

when the union rate prevails. A rate prevails when a more of 30% of wages are the same rate. *See* NRS Chapter 338.

On many occasions, legislation seeking to abolish the Three-Step Rule through failed. This demonstrates Congressional approval for DOL's method for determining the prevailing wage. *See, e.g.,* Federal Construction Costs Reduction Act of 1977 (S. 1540, H.R. 6100); *Davis-Bacon Act – Fringe Benefits (H.R. 404): Hearings Before the General Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 88th Cong. at 38-39, 125, 219, 225-230 (Mar. 1, 7, 12, 21, 22, and 26, 1963). In eliminating the Three-Step Rule in 1982, DOL improperly relied on factors that Congress did not intend for it to consider. The legislative history shows that the Act's sole focus is on protecting construction workers from substandard wages. *See, e.g., U.S. v. Binghamton Constr. Co.*, 347 U.S. 171, 176-77 (1954); 74 Cong. Rec. 6,510, 6,513 (daily ed. Feb. 28, 1931) ("[I]t is our chief concern to maintain the wages of our workers and to increase them wherever possible. . . for to fail in this regard would be…permitting a gross injustice to be perpetrated upon our citizens."). That should be the only goal in mind for rulemaking.

In 2006, the DOL further diminished wages with an amended definition of "prevailing wage." At that time, the DOL's Administrative Review Board forced the agency to abandon its long-standing policy of treating variable rates paid to union-represented workers in the same classification as a single rate for purposes of calculating the prevailing wage. *See Mistick Construction,* ARB Case No. 04-051 (Mar. 31, 2006). That single change generated more prevailing wage rates based on artificially weighted averages, which are simply not "prevailing.".

The DOL's proposed rule must be adopted to rectify this problem. The proposed rule will restore the pre-2006 practice of treating negotiated wage differentials forming part of a worker's total compensation package as one single rate. In the construction industry, the privately negotiated differentials include shift premiums for work performed during late or undesirable hours, hazard pay for workers exposed to extraordinary hazards on the job, call-back work periods, and zone pay for work in certain distant geographic locations. The DOL's pre-2006 policy is consistent with the Act's legislative history and DOL's longstanding preference for prevailing wages that reflect the *actual wages* paid to workers instead of artificial mathematically generated averages. The current policy in place has created artificially depressed wages and that practice must end.

Under current rules and practice, the local Davis-Bacon rates based on weighted averages ("SU rates") do not get updated until DOL re-surveys the area, which often takes many years. This has resulted in SU rates being less than the local minimum wage in some places. This is completely unacceptable.

The SNBTU supports DOL's proposed rule establishing a process for regularly updating SU rates using DOL's Bureau of Labor Statistics' Employment Cost Index data. Although it is preferable for Davis-Bacon rates to reflect the ***actual wages*** paid to workers in their communities, where a weighted average prevails it is critical that DOL not allow those rates to become stagnant. Outdated wages not only undermine the purpose of the Act, but they also discourage workers from entering the construction workforce. The ability to attract and recruit new entrants into the construction industry is more important today than ever before because of the infrastructure work that the Bipartisan Infrastructure Law will generate. The construction industry must attract

thousands of new workers to meet the demand for labor. It will be unable to do this if the industry is merely offering artificially deflated wages.

II. SNBTU Supports the Proposed Rule's Strengthening of Enforcement

The proposed rule will strengthen enforcement on Davis-Bacon projects. The expanded enforcement is something that is long overdue. It is well known that the construction industry is one in which wage and hour requirements are all too often ignored in favor of benefitting contractors bottom lines. According to the DOL's own data, the construction industry consistently ranks among the top three industries for noncompliance with wage and hour laws protecting workers. The construction industry is filled with shady fly by night operators who engage in illegal labor practices. Those practices include wage theft, exploitation of undocumented workers, cash-only payments under the table, employee misclassification, tax fraud and unsafe job sites. Strengthening wage enforcement on Davis Bacon projects is incredibly important to protecting workers throughout the industry and that is one reason the proposed rule is needed.

The DOL must implement front-end measures to mitigate the risk of noncompliance and strengthen its back-end enforcement to catch non-compliance. SNBTU fully supports front-end enforcement measures that include the DOL's proposal requiring covered contracts include a provision expressly stating independent contractors are also entitled to the prevailing wage rate, strengthening record-keeping requirements, and clarifying that Davis Bacon Act requirements apply by operation of law and are binding on all contractors regardless of whether the contracting agencies erroneously omit those contractual requirements.

The DOL's back-end enforcement proposals are also fully supported by the SNBTU. These proposals have special importance because many courts have suggested that workers on Davis-Bacon projects are not entitled to take their wage theft claims straight to court and instead their only recourse is through the DOL's administrative complaint process. The DOL's proposed rule will protect workers from retaliation, strengthen procedures for cross-withholding to ensure recovery of back wages, and will adopt a strong and uniform standard for contractor debarment. SNBTU fully supports each and every one of these measures.

III. SNBTU Supports the Proposed Rule's Methods for Ensuring Davis-Bacon Wages Reflect Area Wages

Under current rules and regulations, when the Department does not receive sufficient wage data for a particular county for purposes of publishing a Davis-Bacon wage rate, the DOL collects data from distant non-neighboring counties. Why survey data from many miles away? Because current regulations prohibit the DOL from considering urban county wage data in establishing Davis-Bacon rates for even adjoining rural counties, and vice versa. *See* 29 C.F.R. § 1.7(b). The proposed rule restores the previous policy of permitting the Department to look to neighboring communities for wage data and to ignore the previous arbitrary geographic designations. SNBTU believe that DOL should eliminate the urban/rural distinction and wherever a county yields insufficient wage data for a classification, DOL should look to the adjacent and adjoining counties with similar labor markets and without regard to the population density, population, or lack thereof.

The urban/rural distinction rule is particularly important in large western states like Nevada. Eliminating the urban/ rural limit is important for Davis Bacon rates in Nevada.

IV. SNBTU Supports the Proposed Rule's Intent to Prevent Contractors from Splitting Up Traditional Work Classifications Into Other Classifications for the Purpose of Paying Workers Less for their Labor

Under its current practice, when the DOL does not receive enough wage information for a specific job classification, it will omit that classification from its wage determination. This then leads to confusion and uncertainty with respect to calculating labor costs for bid proposals. Moreover, it also encourages abuse on the part of low-road contractors seeking to pay the lowest possible wage to workers. The current system places responsibility on the contractors to request that DOL add missing job classifications through a conformance process. Contractors often abuse this process by splitting off certain job duties performed by key classifications listed on the wage determination and then fabricating new low-wage subclassifications. In part, due to the short timelines associated with conformance requests and the need to avoid delays in the procurement process, such conformance requests are often simply approved with little or no scrutiny. With the number of Infrastructure Bill projects on the way, this process would only increase under current practice.

SNBTU supports the DOL's proposed rule authorizing it to proactively add missing classifications to wage determinations using the existing standards under the conformance process. This will guard against abuses by low road contractors and enhance predictability in bidding for good contractors. DOL's proposed rule will assist in preserving key craft classifications, which is what Congress has long intended.

On behalf of the fourteen affiliates of the Southern Nevada Building Trades Unions and the tens of thousands of highly dkimembers thereof, I wish to thank you for your consideration of these comments. We look forward to seeing the proposed rule adopted and to seeing the new rules work to better the construction workforce and wages for millions of American workers.

Sincerely,

William H. Stanley

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Southern Nevada Building Trades Unions