United Association of Journeymen and Apprentices of the
Plumbing and Pipe Fitting Industry of the United States and Canada

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Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S–3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments on U.S. Department of Labor Proposed Rule, *Updating the Davis-Bacon and Related Acts Regulations*, 87 Fed. Reg. 15,698 (Mar. 18, 2022), RIN 1235-AA40

Dear Sir or Madam:

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("UA"), on behalf of its approximately 360,000 members, appreciates the opportunity to comment on the U.S. Department of Labor ("DOL") proposed rule, *Updating the Davis-Bacon and Related Acts Regulations*, 87 Fed. Reg. 15,698 (Mar. 18, 2022) ("NPRM"). The Davis-Bacon and Related Acts (collectively referred to herein as the "DBA") are intended to ensure that government participation in private markets through federal and federally-assisted construction does not undermine local wage standards. For far too long, however, the DBA has fallen well short of that intent, owing in large part to an ineffective regulatory regime.

The UA strongly supports the proposed rule because it addresses fundamental shortcomings with the current regulations and much more closely aligns with the purpose and mandates of the DBA. The UA wishes to commend DOL's leadership and staff on developing a comprehensive package of proposals in the NPRM that breathes much-needed life into the DBA and puts the interests of American workers front and center—just as the DBA was enacted to do. Our comments are organized in the general order in which the DBA is administered, beginning with the development of wage rates, proceeding to the application of such wage rates on projects, and then concluding with enforcement. Our comments underscore many aspects of the proposed rule which the UA supports as is and, in other instances, provide concrete input on how DOL can address issues for which DOL requests comments in the NPRM.

During its review of the NPRM, the UA consulted with NABTU and sister unions about issues addressed by the NPRM that are of interest to the building trades as a whole. In addition to providing its own comments and perspective on the NPRM, the UA wishes to express its support for the comments submitted by North America's Building Trades Unions ("NABTU").

Analysis

I. The Return to the Three-Step Process and Recognition of Negotiated Variable Rates Advance the Purpose and Letter of the Davis-Bacon Act

In the NPRM, DOL rightly focuses on measures that reduce the use of weighted averages to calculate prevailing wage rates and produce greater numbers of wage rates which reflect the actual rates that are prevailing in the area. In proposing to return to the historic three-step process for setting rates and to recognize functionally equivalent rates under collective bargaining agreements as the same for modal purposes, DOL takes giant steps toward achieving those goals.

Specifically, through proposed Section 1.2, DOL would replace the solitary more than 50-percent majority threshold with the three-step process that had been enshrined for nearly half a century prior to 1982: (1) apply the rate paid to the majority of workers (more than 50 percent); if none, then (2) apply the wage rate paid to greatest number of workers, provided it is paid to at least 30 percent of workers, and, if none, then (3) use the weighted average rate. As pointed out in the NPRM, the decision in the 1980s to eliminate the 30-percent threshold was based on a misplaced concern that identifying a single prevailing wage rate would favor union rates that "more often tend to be the same across companies." 87 Fed. Reg. at 15,705. Indeed, recognizing a predominant single wage rate (i.e., a modal wage rate) fits the plain meaning of "prevailing" rate as envisioned in the DBA. *Id*. The NPRM also rightfully observes that "using an average to determine the minimum rate on contracts allows a single low-wage contractor in the area to depress wage rates on Federal contracts below the higher rate that may be generally more prevalent in the community." *Id.* at 15,704.

The UA fully agrees with the agency's sentiment above. The DBA itself does not require a determination based on majority rule (more than 50 percent) or the average of wages paid as defined in 29 C.F.R. § 1.2. As NABTU details in its comments, the legislative and administrative history associated with the DBA supports utilizing the wage actually being paid over those that have been mathematically contrived. Using modal rates better aligns with the reality of what is actually being paid and has been agreed upon by employers in the area. Weighted averages do not have any semblance to the rates that specific employers have agreed to pay, can be reduced by a select number of low paying contractors, and can have the effect of depressing wages in the area. This runs directly contrary to the purpose of the DBA, as explained in the NPRM, to protect local wage standards prevailing in the local area and ensure that federal and federally assisted construction projects do not have the effect of depressing such local standards. 87 Fed. Reg. at 15,698. For all of these reasons, weighted averages should be used only as a last resort.

The UA also strongly supports DOL's proposed revisions to Section 1.3(e) to expressly treat variable wage rates paid by a contractor to employees within the same classification as the same wage where the workers are paid rates that are functionally equivalent. In so doing, DOL is wisely undoing the damage done by the Administrative Review Board (ARB) decision of *Mistick Construction*, ARB No. 04-051, 2006 WL 861357 (Mar 31, 2006), which applied a too-strict interpretation of what constituted the "same wage" for purposes of setting wage rates. The UA completely agrees with DOL that *Mistick*'s "mechanical, 'to the penny' approach ultimately

undermines rather than promotes the determination of actual prevailing wage rates." 87 Fed. Reg. at 15,706.

In addition to supporting DOL's position that variable rates that are functionally equivalent should be recognized as the same rate for prevailing wage purposes, the UA appreciates the NPRM's express acknowledgement that zone rates in a collective bargaining agreement ("CBA") should be treated as the same rate for purposes of determining prevailing wages. *See* 87 Fed. Reg. 15,706. To expand upon this example, DOL should expressly acknowledge other common variable rates recognized in CBAs, including but not limited to, rates of pay based on shifts that expand beyond normal business hours and hazard pay for workers exposed to hazardous conditions.

Moreover, while the NPRM addresses situations involving the "frequent use" of market recovery rates (87 Fed. Reg. at 15,706-07), DOL should expressly recognize as "functional equivalent" payment of wages that are a small amount higher than the rates required by the CBA's scale (i.e., "over scale" payments). Failing to credit such payments unnecessarily penalizes contractors and employees and runs counter to the letter and purpose of the DBA.

II. The Proposed Steps to Address Stale Prevailing Rates Are Sound

The UA supports DOL's efforts in the NPRM to address stale wage rates, including but not limited to by:

- **permitting the adoption of state/local prevailing wage determinations** as outlined in proposed Section 1.3(g)-(j), if among other things, the state/local government's criteria for setting wage rates are substantially similar to DOL's wage determination methodology; and
- **making periodic adjustments to non-CBA rates** that are three or more years old by adjusting them regularly using the U.S. Bureau of Labor Statistics' Employment Cost Index data or its successor (proposed Section 1.6(c)(1).

The NPRM cites to a 2011 Government Accountability Office ("GAO") report[1] and a 2019 DOL Office of the Inspector General ("OIG") report,[2] both of which found a troubling amount of out-of-date wage determinations and underscored the need to improve the timeliness of the wage survey process. As the GAO's 2011 review of the wage survey and determination processes found, DOL is often far behind its goal of conducting wage surveys every three years. While the UA understands that this is largely due to staff and resource limitations, it nevertheless leads to frustratingly out-of-date prevailing wage rates for projects. For example, the 2019 OIG's report found nearly six percent of DOL's unique published "non-union" (i.e., not set pursuant to CBAs) rates as of September 2018 had not been updated in 21 to 40 years. *See*

[1] Gov't Accountability Office, GAO-11-152, Davis-Bacon Act: Methodological Changes Are Needed to Improve Wage Survey (2011) (2011 GAO Report), available at https://www.gao.gov/products/gao-11-152.

[2] Department of Labor, Office of the Inspector General, Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates (2019) (2019 DOL OIG Report), available at https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf .

2019 DOL OIG Report at 5. By comparison, 0.05% of unique published collectively bargained wage rates were that stale. The findings of these reports clearly demonstrate a pressing need for a mechanism to regularly update non-CBA rates based on a supportable methodology.

The UA understands that surveys are time consuming and appreciates DOL's need to balance completing accurate surveys and producing rates from surveys that are not already outdated by the time a wage determination is published. *See* 2011 GAO Report at 17. The UA also understands that DOL has made strides in recent years to improve the length of time it takes to complete a survey. According to the DOL OIG's analysis of a sample of surveys initiated from fiscal year 2013 to 2015, the time to complete a wage survey decreased from an average of five-to-seven years in 2002 to 2.6 years in 2015. *See* 2019 DOL OIG Report at 4. While it makes sense to use state and local rates or wage inflators such as those available through the Bureau of Labor Statistics (e.g., the Employment Cost Index) as a fall-back option for combatting stale rates, the UA encourages DOL to continue to prioritize its own wage surveys as the first and best option.

To the extent it becomes necessary to look to state and local wage rates, many states offer sound methodologies for setting prevailing wage rates, while others use methodologies that raise many of the same concerns that DOL has expressed with its own methodology; for example, by favoring averages or limiting the pool of sources of wage data that may be considered. As a result, without proper safeguards, adopting state/local prevailing wage determinations could be susceptible to abuse, e.g., if those state or local laws provide less stringent methodologies and produce wages lower than what otherwise would be set by the DBA. The factors set forth in proposed Section 1.3(h) of the proposed rule would help avoid this issue. Further, the UA agrees with NABTU's comments that the state and/or local wage rates should only be used if DOL has not completed a wage survey in the area for that type of construction in more than three years.

The fall-back option of using the Employment Cost Index published by the Bureau of Labor Statistics to update rates when necessary is another welcome change. However, this approach is obviously no substitute for greater efforts to conduct surveys within three years, as it is preferable to use real wage data collected for prevailing wage purposes for the specific areas, as opposed to the wage data for the Employment Cost Index which is collected for other uses. As such, the UA encourages DOL to use properly vetted state and/or local prevailing wage laws before relying on any indices, like the Employment Cost Index, that do not reflect actual wages paid.[3]

III. Expanding the Scope of Consideration of Wages More Closely Linked to the Local Area Should Improve Accuracy of Prevailing Wage Rates

The NPRM raises the question of whether to retain the current prohibition against considering wage data from nearby metropolitan counties for purposes of determining rates for rural counties, and vice versa, when county-level data is insufficient. The UA's view is that this

[3] Notably, the DOL OIG in its 2019 report suggested consideration of the use of Occupational Employment Survey ("OES") data "for more timely and up-to-date prevailing wage rates in those situations where they will not otherwise have adequate data." *See* 2019 DOL OIG Report at 8. The UA shares the WHD's concern summarized in that report that the OES uses an average rate, which as noted above allows low paying contracts to depress otherwise prevailing rates. As such, OES is not an adequate replacement for surveys.

prohibition should be eliminated because it contributed to bizarre county groupings that fail to reflect actual labor markets and commuting patterns. *See* 87 Fed. Reg. at 15,718-19. As explained in NABTU's comments, the DBA is designed to protect "local" rates paid in "local" labor markets, as opposed to artificial rates contrived from combinations of counties that are in some cases hundreds of miles apart. The UA submits that allowing DOL to consider data from nearly counties, whether "metropolitan" or "rural," when county-level data is insufficient will lead to more accurate rates which reflect the economic connectivity between rural areas and metropolitan centers.

IV. Updating Wage Determinations When Contracts Change and Making Them Effective by Operation of Law Will Help Ensure the Correct and Up-to-Date Wage Requirements Apply on Projects

DOL's proposed rule provides two important safeguards to help ensure that reasonably up-to-date wage determinations are applied to a project. These include updating wage determinations when there is a change in a contract or order, as well as a fundamental requirement that wage determinations are applicable by operation of law.

Proposed Section 1.6(c)(2)(iii) provides:

> Where a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised.

Likewise, the proposed rule would provide that if a particular contract is not tied to the completion of a specified project, updates to wage determinations would be implemented on anniversaries.

The UA strongly supports efforts to update contracts that may span over several years or have clear start and stop periods at which updated wage determinations can be incorporated. However, the UA believes that DOL should make clear that the example in the proposed rule "where an agency exercises an option provision to unilaterally extend the term of a contract" is not the only circumstance where a revised wage determination would be used in the case of options to extend the contract. To that end, the UA encourages the DOL to revise the above example to state that an updated wage determination should be incorporated "where an agency, unilaterally *or mutually with the contractor*, exercises an option provision to extend the term of a contract."

Relatedly, proposed Sections 1.6(f) and 5.5(e) provide welcomed additions reinforcing the need to include the correct wage determination on a project and stating that regardless of whether a contract includes a wage determination, the wage determination is effective by operation law. The UA strongly supports this requirement as it helps ensure that employees are not penalized for administrative oversights made by the contracting agency.

V. DOL and Federal Agencies Should Closely Scrutinize the Use of Multiple Types of Construction on Covered Contracts

DOL is proposing to explicitly state in Section 1.6(b) that when a contract includes more than one type of construction, the contracting agency must incorporate the wage determination ("WD") for each type of construction where total work in the category is "substantial" (a term that is left to be defined in sub-regulatory guidance, i.e., currently All Agency Memoranda ("AAM") 130 (Mar. 17, 1978), AAM 131 (July 14, 1978) and AAM 236 (Dec. 14, 2020)). The UA appreciates that it is appropriate in certain cases to have more than one wage determination that covers the types of construction on a project, but urges DOL to closely scrutinize attempts to use the catch-all "heavy" classification to cover work that could fit within a non-catch-all construction type, like "building."

AAM 130 defines the "building" classification very broadly while the "heavy" classification is defined as a "catch-all" classification that includes "projects that are not properly classified as either 'building,' 'highway,' or 'residential.'" While AAM 130 lists numerous examples of construction that are traditionally recognized as "heavy" work (e.g., sewers), work that can be included within the definition of "building" construction should never be classified as "heavy." Because the "heavy" type wage determinations generally include less skilled classifications and lower rates, the UA has seen parties advocate—in many cases successfully—for "building" work to be classified as "heavy" work, both to trigger the "substantial" threshold for inclusion of a "heavy" wage determination and to pay the lower rates for the work under that wage determination. This problem is particularly pronounced on wastewater treatment plant projects, for example. When it occurs, persons working in UA classifications are cheated out of the wages to which they are entitled and the DBA's mandate to protect their local wage standards goes unfulfilled.

In AAM 131, DOL states that, in cases where an agency incorporates multiple WDs, "the advertised and contract specifications should identify as specifically as possible the segments of work to which the schedules will apply." DOL also advises agencies to seek a determination from DOL "on close questions or when the appropriate classification is in dispute." Given the disparity in wages between catch-all "heavy" category and the very broad "building" category of construction, agencies and DOL should ensure there is a substantial justification for using the catch-all "heavy" category instead of including such work within the "building" type of work under the standards set forth in AAM 130. To the extent this issue is not addressed in the NPRM, the UA urges DOL to address it in sub-regulatory guidance to contracting agencies.

VI. The "Site of the Work" Definition Must Reflect the Present-Day Realities of Construction, Including the Massive Growth of "Off-Site" Fabrication

Among the most consequential aspects of the 2022 NPRM for members of the UA, and workers generally, is the "site of the work" definition. The UA is among the leading craft unions representing workers in fabrication shops (or "fabrication plants," as DOL commonly refers to them) throughout the United States. Today, a large and ever-increasing number of UA members work in these fabrication shops, creating custom pipe bends, formations, or assemblies that are

incorporated into the piping systems of buildings and other works. The UA uses the term "custom" to describe the components created in these shops because the components are made-to-order for the specific systems and project in question. If they are not used on those systems and projects, the components generally cannot used on other systems or projects. In other words, they become "scrap pipe." While UA members also manufacture piping products for sale as standard catalogue items, custom fabricated piping components represent the overwhelming majority of UA fabrication.

At the time of the DBA's enactment, virtually all pipe fabrication occurred on the construction site where the building or work would remain. By the 1990s, when the 6th and D.C. Circuits issued their respective decisions addressing "site of the work" in *L.P. Cavett Co. v. U.S. Dept't of Labor*, 101 F.3d 1111, 1115 (6th Cir. 1996), *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1453 (D.C. Cir. 1994), and *Building Constr. Trades Dep't AFL-CIO. v. U.S. Dep't. of Labor Wage Appeals Bd. (Midway)*, 932 F.2d 985, 992 (D.C. Cir. 1991), the UA estimates, based on experience and consultations with contractors, that the percentage of *mechanical* construction performed in "off-site" fabrication shops for a typical construction project had grown, but was still in the single digits. The percentage of total construction (mechanical, electrical, etc.) performed in off-site fabrication shops was smaller still.

In developing the 2000 final rule, DOL recognized the growth in off-site fabrication and endeavored to address DBA coverage of such work by amending the definition of the "site of the work" to include a site away from the location where the building or work will remain if the site is established specifically to support the contract or project and "a significant portion" of the building or work is constructed at the site. 29 C.F.R. § 5.2(l)(1). Yet, even in 2000, DOL remarked on several occasions in its discussion of the final rule that the practice of performing construction away from the eventual location of the building or work and then transporting the products of that construction to the eventual building or work location was "rare." 65 Fed. Reg. 80,274-75.

Today, we live in a very different construction world. Several years ago, in an effort to better understand the rapid growth in pre-fabrication it was witnessing, the UA retained FMI to study the rise of prefabrication in the principal markets in which UA members work—building, industrial, and science and technology—along with the reasons for that rise. According to that study, released in 2017, prefabrication in those markets had grown to an estimated 25 percent of total construction put in place[4] in 2016, and accounted for 57 percent of the total addressable market (i.e., the percent of installed construction that can be performed with prefabricated parts).

In 2016, a staggering $151 billion was spent on prefabrication across all construction markets. Amazingly, FMI predicted that this number would rise to just under $236 billion by 2020—a 70 percent increase in four years. In addition, FMI estimated that prefabricated mechanical components—the kinds created by UA members—represented over 40 percent of that spending. In the building market (i.e., commercial/office, multifamily, and institutional), prefabrication spending was expected to increase from 24 percent of total construction in 2016 to 32 percent by 2020. In the industrial market (i.e., power, oil and gas, and manufacturing), such spending was projected to grow from 27 percent of total construction in 2016 to 35 percent in 2020.

[4] Construction put in place measures the construction that is installed or erected at project sites during a given time period. In contrast, construction starts measures construction at the time the work begins.

As part of the FMI study, signatory contractors were asked whether their firms utilize prefabrication and/or modularization on projects. As of 2016, 90 percent did. In addition, 88 and 71 percent of private and public project owners, respectively, responded affirmatively to the same question. The reasons why include the ability to leverage prefabrication to meet increasingly shorter project deadlines, greater labor efficiency in the shop environment, and the reduced risks of errors and safety incidents associated with performing complex work in a controlled setting. The present reality—attested to by prominent UA contractors—is that most contractors today seek to fabricate as much as they possibly can. And, as construction technology continues to evolve, their ability to fabricate more in the shop and less on the building site will continue to increase.

While the UA has not commissioned a follow-up study measuring the actual growth in off-site fabrication in the five years since the 2017 UA-FMI study, the UA experience and other research demonstrates that ever more project construction is being performed in shops away from the eventual location of the building or work. *See, e.g.*, Dodge Data & Analytics, *Prefabrication and Modular Construction 2020* (2020); McKinsey, *Modular Construction: From Projects to Products* (2019).

The result of this massive growth in fabrication is a huge and ever-widening hole in DBA coverage on federally funded and assisted projects. Unless this gap is addressed, there will be an increasing number of projects where a large percentage of the work is being performed in facilities without any DBA protections. Such an outcome could not have been contemplated in 1931, when the DBA was enacted and virtually all fabrication was performed at the site where the building or work would remain. Nor was this outcome contemplated by DOL in 2000, when it issued the 2000 final rule describing significant off-site fabrication work as a real but "rare" possibility.

The present reality is likewise different from the situations before the courts in *L.P. Cavett*, *Ball*, and *Midway*. Each of those cases involved questions of DBA coverage for drivers transporting materials from off-site locations, under regulations that extended DBA coverage to off-site locations based largely on geographical proximity. For reasons explained in NABTU's comments, the courts in those cases applied a too-narrow interpretation of the statutory language "directly upon the site of the work" in concluding that, by "site of the work," Congress actually meant the eventual location of the public building or public work in the contract for construction.

In the current NPRM, DOL, recognizing the major growth in off-site fabrication, rightly proposes to revise DBA coverage of off-site construction of "significant portions" of a building or work so that coverage is not limited to facilities established specifically for the performance of a contract or project. Today, the vast majority of UA fabrication shops produce custom fabricated components for multiple projects at a time. Therefore, in the absence of this proposed change by DOL, the massive hole in DBA coverage described above will remain and grow ever wider.

The UA appreciates DOL's invitation to comment on the definition of "significant portion" proposed in the NPRM because this is an area requiring a different approach. Under the NPRM, the definition of "site of the work" in Section 5.2 would be amended to describe a "significant portion" of a building or work to "mean[] one or more entire portion(s) or module(s) of the building or work, as opposed to smaller prefabricated components, with minimal construction work remaining other than installation and/or assembly of the portions or modules at the place where

the building will remain." While well-intentioned, this definition draws an unwarranted and counterproductive distinction between "entire portion(s) or module(s)" of a building or work and "smaller prefabricated components"—one that lacks statutory foundation under the DBA.

The great majority of the work that UA members perform in facilities away from the eventual location of the building or work is prefabrication of smaller, custom piping components that are integral to the mechanical, piping/plumbing and other systems of the building or work. Other crafts fabricate a large volume of smaller, custom components as well. Modularization is growing but the UA experience and the UA-FMI study above demonstrate that it is less widespread than pipe and other similar prefabrication, due in part to obstacles related to coordination and front-end engineering and design collaboration. As such, by drawing an unnecessary distinction between "bigger" components and "smaller" components, the definition of "significant portion" in the NPRM excludes most of the project-specific, off-site construction that has been ushered in by the technological developments DOL is attempting to address. In short, the size of the components does not matter under the DBA and, in order to address the hole in DBA coverage discussed above, DOL must dispense with any such focus in the "site of work" definition.

For the same reasons as are explained in NABTU's comments, the UA also submits that interpreting "directly upon the site of the work" in Section 3142 of the DBA to mean only the eventual location of the building or work is inconsistent with the plain text of the statute. If, as will increasingly be the case, a significant portion of project construction is to occur at a site other than the eventual building location, then that too is a "site of the work" under a plain reading of the statute. If Congress intended to foreclose the possibility of multiple sites of the work, it would have referred to the "site of the public building or public works," as it did in Sections 3142(a) and 3145(a). It did not, however, and, because today a significant amount of project construction is performed at multiple sites, DBA coverage must be extended to those sites. In this regard, the UA believes that there is no need to draw a distinction between "primary" and "secondary" sites because any location where a significant portion of the project construction is being performed is a "site of the work" under the DBA, irrespective of its proximity to the eventual building location.

For all of the foregoing reasons, the UA urges DOL to adopt a "site of the work" definition that is more reflective of the growth in fabrication and modularization in the construction industry and that meaningfully addresses the large and widening hole in DBA coverage of project-specific work. Specifically, the UA proposes the same definition as NABTU, which is as follows:

> (1) "Site of the work" includes all of the following:
>
> (i) the physical place or places where the building or work called for in the contract will remain;
>
> (ii) the construction of significant portions of a covered building or public work away from the physical place or places where the building or work called for in the contract will remain, provided that such construction work is for specific use in that building or public work and does not simply reflect the manufacture or construction of a product made available to the general public. A ''significant portion'' of a covered building or

public work means one or more portion(s), module(s) and/or individualized fabricated component(s) that are integral to the building or public work. For example, important segments of public works, such as lock and dam projects and bridges, at locations other than the locations where the permanent structures will remain when their construction is completed shall be considered a "significant portion" of such covered project and shall therefore be subject to the requirements of the DBA. A ''significant portion'' of a covered building or public work also means one or more portion(s), module(s) and/or individualized fabricated component(s) that are integral to a mechanical, electrical, piping/plumbing, or building envelope system of the building or public work. For example, where a pipe fabrication shop/plant develops custom pipe bends, formations, or assemblies that are to be incorporated into the piping system of a covered project, that work shall be considered a "significant portion" of such covered project and shall therefore be subject to the requirements of the DBA.

(iii) Any dedicated support sites, defined as:

(A) Job headquarters, tool yards, batch plants, borrow pits, and similar facilities that are dedicated exclusively, or nearly so, to performance of the contract or project.

(B) Locations adjacent or virtually adjacent to the physical place or places where the building or work called for in the contract will remain at which workers perform activities associated with directing vehicular or pedestrian traffic around or away from the primary construction site.

(2) With the exception of locations defined in paragraph (1)(ii) of this definition, site of the work does not include:

(i) Permanent home offices, branch plant establishments, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project;

(ii) Batch plants, borrow pits, job headquarters, tool yards, etc., of a material supplier, which are established by a material supplier for the project before opening of bids, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract; or

(iii) Operations within fabrication shops/plants that do *not* produce portion(s), module(s) and/or individualized fabricated component(s) that are integral to a mechanical, electrical, piping/plumbing, or building envelope system of a covered building or public work.

VIII. A More Expansive Definition of "Building or Work" Should Improve Consistency in Davis-Bacon Coverage When Addressing a Portion of Building or Work or Lease-Construction Arrangement

Sections 3.2 and 5.2 of the proposed rule add a sentence to the definition of "Building or Work" stating "[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work." The proposed rule also adds language to definition of "public building or public work" to clarify that these terms include "construction, prosecution, completion, or repair of a portion of a building or work … even where the entire building or work is not owned, leased by, or to be used by the Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work is carried on by authority of or with funds of a Federal agency to serve the interest of the general public."

The NPRM indicates that these provisions are intended to clarify that the prevailing wage requirements apply "even when the construction activity involves only a portion of an overall building, structure, or improvement" and when the government is ultimately responsible for the construction activity at issue (e.g., in a lease-construction arrangement). 87 Fed. Reg. at 15,725-26. The UA supports this clarification, which will hopefully improve consistency in the application of the prevailing wage requirements across federal contracting agencies.

IX. A Consistent Application of Apprenticeship Ratios and Wage Rates Based on Locality of Where Work Performed Aligns with the Purpose of the Act

DOL proposes to amend Section 5.5(a)(4)(i)(D) to require contractors employing apprentices to work on a DBA project in a locality other than the one in which the apprenticeship program was originally registered to adhere to the apprentice wage rate and ratio standards of the project locality. The UA agrees with DOL and the NPRM that this approach better aligns with the DBA's purpose and applicable DOL Employment and Training Administration ("ETA") regulations. Requiring contractors to comply with host state's apprentice ratio standards will help to prevent out-of-state contractors from gaining an unfair advantage over in-state contractors by importing lower rates and ratios. Contractors will indeed exploit this loophole unless it is closed.

X. The UA Supports the Proposed Conformance Rules with Slight Modification

The UA strongly supports any efforts by DOL to decrease the need for conformances. In the UA's experience, the conformance process has been exploited by unscrupulous employers that attempt to undercut wages for workers that would receive higher pay if properly classified. Sections 5.5(a)(1) and 1.3 of the proposed rule provide two significant changes in this regard. This includes amending Section 5.5(a)(1)(iii)(B) to state explicitly that conformances cannot be used to split or subdivide classifications listed in a wage determination, and that conformance is appropriate only where work which a laborer or mechanic performs is not within the scope of any classification listed on the wage determination, regardless of job title. Proposed Sections 5.5(a)(1)(ii) and 1.3(f) would also add a "frequently recurring classifications" category to

allow DOL to develop wage and fringe benefit rates for classifications for which conformance requests are regularly submitted.

The UA believes these changes will help ensure that work suggested in a conformance request is not performed by an existing classification. The UA also supports listing on wage determinations wage and fringe benefit rates of classifications for which the agency received insufficient data through wage surveys but that are necessary to complete the project (i.e., key classifications or other classifications for which conformance requests are regularly submitted). This will create greater awareness by contractors and contracting agencies of these key rates before bidding and cut down on need for conformances.

Beyond what is proposed by DOL, fitting with the requirement that the wages paid must reflect the classification of work actually performed, the UA encourages the agency to also consider publishing, or requiring the publication of, conformance requests. Given the unending attempts by unscrupulous contractors to exploit the conformance process, transparency is needed. Publishing conformance requests would allow the parties like the UA to evaluate the legitimacy of a request and the extent the requested classification aligns with the work performed.

Relatedly, the existing rule calls for the input of "the laborers and mechanics to be employed in the classification (if known), or their representatives." See 29 C.F.R. § 5.5(a)(1)(ii)(B). The proposed rule does not attempt to alter this requirement. The UA requests that DOL amend this language to include labor organizations, such as the UA, and contractors that may perform the work at issue as "interested parties" that are entitled to provide input. Such a definition aligns with the definition of "interested parties" elsewhere in applicable regulations (see, e.g., Section 1.3(a) of the proposed rule). Limiting input to unions that presently represent the affected employees fails to reflect the reality that the UA and its sister unions advocate for all working people in the industry, including those they do not yet represent, and possess a deep knowledge of the industry which allows us to speak whether the three conditions to a conformance are met (primarily that the work is not performed by an existing classification and that the classification is used in the area by the construction industry industry). The UA and other unions are resources that DOL should leverage to combat exploitation of the conformance process.

XI. Additional Enforcement Mechanisms in the NPRM Will Deter Bad Actors

The proposed rule offers several important additions that, if enforced, should help deter bad actors from cheating workers out of prevailing wage and benefits. These include cross withholding; flow down of contractual obligations from upper tier to lower tier subcontractors; an express reinforcement that the wage requirements apply to laborers and mechanics regardless of the contractual employment relationship; a consistent debarment methodology; the inclusion of interest in restitution payments; the availability of make whole relief; and express confidentiality of informants. Each of these items are addressed in more detail below.

Regarding cross withholding, proposed Sections 5.5(a)(2) and 5.5(b)(3) require contracting agencies to withhold any liabilities required by any other covered contract held by the same prime

contractor and places priority for withholding wage claims over other claims. In addition, in proposed Section 5.2, DOL defines "prime contractor" to include:

> controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (e.g., a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing any construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract.

The UA strongly supports the proposed steps to subject contractors to withholding regardless of whether they are on that project. Likewise, the UA strongly supports subjecting contractors to cross withholding for back wages owed on contracts held by different but related legal entities (e.g., joint venturers or partners on federal contractors). The fact is that some individuals may be pulling the strings of one contractor that qualifies for set asides, while also using their own, possibly larger company with more assets, to address non set-asides. It is vital that the agency enforces this requirement given the resource limitations that may prevent WHD from pursuing back wages for an inactive project. Where contractors jump from one project to the next under various names, enforcing wages owed for past projects on active projects is a vital tool.

The UA also strongly supports the steps taken by DOL to explicitly address the flow down of liability from upper-tier to lower-tier contractors (proposed Sections 5.5(a)(6) and (b)(4)) and to reinforce that prevailing wage requirements apply to laborers or mechanics regardless of the employer's characterization of such individuals as employees or independent contractors (proposed Sections 1.2, 3.2, 5.2, 5.5(a)(3) and (c)). These steps will help close potential loopholes that contractors may have previously used to circumvent prevailing wage requirements.

Regarding debarment, through proposed Section 5.12, DOL has proposed several different changes to the debarment procedures, the most important of which include the adoption of contractor "disregard of obligations" as the sole debarment standard, the express application of the rule to "responsible officers," and the ability to impose debarment on entities in which the violating contractors, subcontractors and their responsible officers have an "interest" as opposed to a "substantial interest."

As for uniformity in the debarment standard for violations, the UA agrees that a single consistent standard and approach makes good sense as a matter of policy. As DOL points out in the NPRM, the use of the previous "aggravated or willful" standard for DBRA violations provided errors and inconsistency in application, leading to confusion to stakeholders as to which standard applied and whether an aggravated or willful standard required something more than that which is required for an employer to be found to "disregard" their obligations so as to be subject to debarment under the Davis Bacon Act. 87 Fed. Reg. at 15,756.

Further, the express application of debarment to "responsible officers" and entities in which violators have an "interest" is extremely important. A debarment rule should apply to the greatest

extent possible to the individuals behind an unscrupulous contractor and other entities associated with the debarred contractor. Absent such an approach, such individuals can avoid accountability by setting up shop as another entity. These enhancements to the DOL's enforcement program will hopefully send a message to unscrupulous individuals that they cannot cheat workers out of the wages and benefits to which are entitled and avoid the consequences of their actions or inactions.

The UA also supports the safeguards DOL proposes to make it possible for underpaid or misclassified workers to report violations. This starts with a clear commitment in the proposed rules to expressly protect the identify of workers or informants that come forward as a part of a complaint or investigation (proposed Section 5.6(c)). It continues with the inclusion of antiretaliation violations against a whistleblower employee and associated make whole relief (proposed Sections 5.5(a)(11) and (b)(5) and Section 5.18). The chances of employees coming forward, and employers paying employees swiftly, are also improved by requiring employers to pay interest if they fail to pay required wages (see, e.g., proposed Sections 5.5(a)(1)(vi) and 5.10).

The UA recommends DOL add to the list of remedies for retaliatory treatment against workers (including discharge) lost wages if a terminated or former employee does not return to the same employer. As employees who have been terminated often do not wish to return to the employer that retaliated against them, the UA encourages DOL to include among the list of examples for make whole relief and remedial actions detailed in Section 5.18(c), the payment of lost wages and interest resulting from gaps in employment as a result of their termination.

XII. The Proposed Changes to Recordkeeping Requirements, Including Work by Employees in Multiple Classifications, Will Promote Greater Accountability

DOL proposes two key recordkeeping items: (1) clarifying in proposed Sections 3.4(b), 5.5(a)(3)(i)(A) and 5.6(a)(2)(i) that payroll records must be preserved at least three years after the prime contract is completed; and (2) in proposed Sections 3.4(b) and 5.5(a)(3)(B) expressly stating that it is the obligation of contractors that have workers performing multiple classifications to accurately record information of work performed under each classification. The UA strongly supports both requirements.

Preserving contracts for at least three years after a prime contract is completed ensures that such records will not be eliminated on a rolling basis and provides a consistent standard for contractors to follow. It also may help to preserve evidence of violations of previous subcontractors for which a prime contractor or upper tier subcontractor may be held responsible.

Also, definitively placing the burden on contractors to distinguish between classifications should improve transparency for those contractors that may otherwise claim ignorance to the applicability of the rule. It should also discourage contractors from challenging the work performed by individuals after the fact, e.g., if they fail to provide documentary support that an employee was performing work purportedly for a lesser paid classification than their title suggests.

XIV. The Proposed Information Collection Changes Are a Good Start, and May Be Improved by Taking Additional Steps to Enhance Transparency

The proposed rule offers several areas to improve transparency in federal contract activity and clarify the current landscape of where key information, such as current wage determinations and Davis Bacon Related Acts can be found. The UA recommends that DOL build upon these steps in a few ways.

First, under proposed Section 1.4, federal agencies are required to report to DOL proposed construction programs for the upcoming three fiscal years, including options. A key purpose of this requirement is to allow DOL to assess whether an updated wage determination is required in connection with the utilization of the option. *See* 87 Fed. Reg. at 15,712. The UA supports this reporting requirement. To further improve transparency, the UA encourages DOL to publicly post these reports online, or at least provide a streamlined mechanism for interested parties to request the reports. As these projects are funded by tax dollars, labor organizations and the public should have ready and easy access to this information.

Second, DOL's proposed rule calls for simply eliminating references to wdol.gov in favor of more general references and terms (see, e.g., proposed rule Sections 1.2, 1.5, and 1.6). This does not substantively alter the practice for publication of wage determinations. As it stands, without a FOIA request, interested parties are often required to research solicitation materials and assume that such materials contain the most recent applicable wage rates for the project. To further enhance transparency regarding applicable wage determinations for projects, DOL should require the applicable wage determination for projects and any conformances that were granted for that project to be published online. This may promote greater compliance with prevailing wage requirements by contractors and provide interested parties, including employees and employee representatives, another key source to readily identify what wage rates apply to the project.

DOL also proposes to eliminate the references to related acts in Appendix A of Part 1 and agency offices in Appendix B of Part 1. The UA supports this approach as providing outdated information presents problems, including suggesting a narrower scope of Davis Bacon coverage and potentially directing potential complainants to incorrect resources. Notably, upon reviewing the website listed at the proposed Section 1.1(a)(1), https://www.dol.gov/agencies/whd/government-contracts, there is now a table that lists current "related acts" by statutory citation. Unlike the current Appendix A, this list does not provide the name of these acts, but instead only statutory citations. To improve transparency and better assist stakeholders with readily identifying the related acts, the UA recommends including on this list the names of these acts.

XV. Prevailing Wages Have Minimal Impact on Project Costs, While Offering Substantial Benefits

The DBA was not enacted to provide low-cost projects. It was enacted to protect local wage and benefit standards for working people. As such, cost should not be a key consideration in this rulemaking. Nevertheless, questions about the cost impact of prevailing wage protections frequently arise and are addressed in this case, to an extent, in the NPRM's regulatory review required pursuant to Executive Order 12866. *See* 87 Fed. Reg. at 15,763. In determining the

benefits of improved prevailing wage rates, DOL rightfully observes in the NPRM that any increased wage costs contractors may face are largely offset by better work quality, increased productivity and reduced turnover. *Id*. at 15,776-77. Indeed, contrary to suggestions by opponents of prevailing wage laws, the overwhelming majority of studies on the subject, many of which have been peer-reviewed, show that prevailing wage laws do not materially impact project costs due in large part to key factors including but not limited to improved labor productivity.[5]

Further, there is a large body of research demonstrating the ample benefits of prevailing wage laws. Studies show prevailing wage laws increase the number of bidders on public works projects; generate higher tax revenue and local spending in host jurisdictions; improve worker efficiency, productivity, and project safety; increase investments in apprenticeship training; and promote compliance with applicable laws and regulations.[6] Overall, it is not up for serious debate that the net benefits associated with stronger prevailing wages outweigh their potential costs.

Conclusion

The UA applauds DOL for the steps undertaken in the NPRM to update the DBA regulations and more effectively carry out the DBA's mandate to preserve and not undermine local labor standards. The proposed rule achieves these objectives in several respects, from reducing the use of weighted averages in favor of wages that are actually paid to workers, to providing enhanced enforcement tools and worker protections to combat efforts by unscrupulous contractors to circumvent their obligations to workers. The UA urges DOL to adopt the recommendations offered herein and looks forward to the implementation of a final rule that fulfills the mandate of the DBA in a manner that reflects the construction industry of today and the foreseeable future.

Respectfully submitted,

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General President

[5] *See, e.g.,* Lina Stepick & Frank Manzo IV, *The Impact of Oregon's Prevailing Wage Rate Law: Effects on Costs, Training, and Economic Development,* U. of Or. & Ill. Econ. Pol'y Inst. (2021); Kevin Duncan & Russell Ormiston, *What Does the Research Tell Us About Prevailing Wage Laws?*, 44 Lab. Stud. J. 139 (2019); Kevin Duncan, *The Effect of Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations on Highway Maintenance Costs*, 68 Indus. & Lab. Rel. Rev. 212 (2015); Fadhel Kaboub & Michael Kelsay, *Do Prevailing Wage Laws Increase Total Construction Costs?*, 2 Rev. Keynesian Econ. 189 (2014); Hamid Azari-Rad et al., *Making Hay When It Rains: The Effect Prevailing Wage Regulations, Scale Economies, Seasonal, Cyclical and Local Business Patterns Have On School Construction Costs*, 27 J. of Educ. Fin. 997 (2002).

[6] *Id.* There are over 70 empirical studies by universities and non-profit organizations across the United States documenting the positive effects of prevailing wage laws. The UA would be pleased to provide DOL with additional information on these studies at any time.