



FOUNDATION FOR FAIR CONTRACTING OF CONNECTICUT, INC.

1268 Main St., Suite 202
Newington, CT 06111



May 13, 2022

U.S. Department of Labor
Wage and Hour Division
Attn: Jessica Looman, Acting Administrator
200 Constitution Avenue NW
Washington, D.C. 20210

U.S. Department of Labor
Division of Regulations, Legislation, and
Interpretation
Attn: Amy DeBisschop, Director
200 Constitution Avenue NW
Washington, D.C. 20210

**Re: Notice of Proposed Rulemaking on Updating the Davis-Bacon and Related
Acts Regulations
RIN 1235-AA40**

Dear Ms. Looman and Ms. DeBisschop,

The Foundation for Fair Contracting of Connecticut (FFC) is a non-profit organization which monitors public works construction projects covered under the State of Connecticut's Prevailing Wage Law and the Davis-Bacon Act (DBA). We accomplish this by reviewing public documents prepared and/or submitted by owners and contractors. We focus on proper payment of prevailing wage rates, proper classification of workers, licensing, and properly administered state apprenticeship standards.

The FFC was formed in 1994 by both labor and management organizations for the purpose of promoting a level-playing field in Connecticut's construction industry. At our core, we believe that protecting and strengthening prevailing wage standards is paramount to establishing fair contracting practices. Unfortunately, previous administrations have chipped away at the regulatory system responsible for administering the DBA, resulting in lower wages for construction workers and unpoliced wage theft. We commend President Biden and Secretary Walsh for their leadership in proposing updates to the DBA regulations for the first time in forty years. The Notice of Proposed Rulemaking (NPRM) referenced above aims to modernize the DBA and hold contractors who flout the law accountable.

Currently, Davis-Bacon wage rates are based on either the same wage paid to 51% or more of workers in a particular classification, or, if none, a "weighted average". The most significant change the NPRM offers is to return to the three-step procedure used before 1982 in which prevailing wages will be calculated based on a wage that is paid to at least 30% of workers of a particular classification in a particular geographic area. If there is none, only then will the weighted average be used. The NPRM explains that this change in the methodology is necessary because "an average to determine the minimum wage 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...". Restoring the historical definition of

prevailing wage will mean rates reflect the actual wage rate that most frequently appears in a county rather than an arbitrary average.

Enforcement remains a key component to deterring contractors from exploiting their workers for cheap labor. According to the US DOL's WHD's 2021 "Low Wage, High Violation Industries," the construction industry consistently ranks among the top three industries for noncompliance. Both federal and state governments have seen austerity budgets cut vital agency services, including that of our DOL. Dwindling resources and workforce attrition coupled with illegal labor practices, including wage theft, the exploitation of undocumented workers, cash-only payments, employee misclassification, tax fraud, and unsafe job sites have made the construction industry a haven for those who value profits over people.

The NPRM's enforcement proposals are long overdue. The FFC supports all of the NPRM's enforcement measures, especially the new anti-retaliation provision to all DBRA contracts that "it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate, or to cause any person to do the same," against any worker for engaging in a number of protected activities including "notifying any contractor of any conduct which the worker reasonably believes constitutes a violation; filing any complaints, initiating or causing to be initiated any proceeding, or otherwise asserting any right or protection; cooperating in an investigation or other compliance action, or testifying in any proceeding; or informing any other person about their rights under the DBA, Related Acts, or the regulations". Undocumented and other workers are easy prey for low-road contractors because of their reluctance to report illegal activity to government officials for fear of deportation or other retaliation. While some workers may turn to local unions and other workers' rights organizations, many labor violations simply go unreported. Worker cooperation is critical to enforcement of the DBA.

The FFC is particularly encouraged by the NPRM's debarment language. In Connecticut, our state Department of Labor has not held an administrative hearing on debarment in 30 years. We have been working with our DOL Commissioner and legislature to address the lack of enforcement and debarment proceedings in our state. The FFC's proposed legislation, which last month passed both chambers of our general assembly with bipartisan support, and was signed into law by Governor Ned Lamont on May 10, 2022, will direct our labor commissioner to debar contractors who have violated our state's prevailing wage law resulting in at least \$50k in back wages or \$50k in civil penalties. The "disregard of obligations" standard is the right approach for the USDOL. Sadly, our organization's experience is that some contractors will seemingly violate prevailing wage standards as a part of their business model. Knowing that government agency resources have waned, the benefit of circumventing the law outweighs the risk of being caught. And if they are caught, paying back wages and a civil penalty is a mere slap on the wrist. Debarring a contractor from bidding on federal projects for a period of time is a real consequence for illegal behavior and sends a message to government contractors that we expect them to be responsible stewards of public monies. A 3-year debarment will help disincentivize contractors from violating the DBA and related acts.

We support the NPRM's provision to make clear that DBA labor standards apply even when there is no employment relationship between a contractor and worker. The NPRM states that

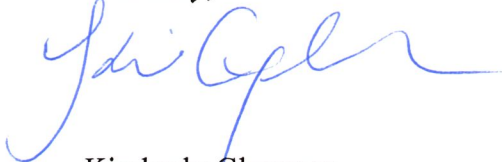
words “employee,” “employed,” or “employment” in the regulations are not to be interpreted so as to limit coverage to workers even when the employer categorizes them as “independent contractors.” It is widely recognized that contractors misclassify their employees as independent contractors to circumvent certain tax obligations. This practice has been embedded in the construction industry for far too long and it hurts all of us. Responsible law-abiding companies are left subsidizing the fraud of unscrupulous employers. We applaud the USDOL for including this clarification in the NPRM.

Further, we support the NPRM’s proposal to strengthen current regulations to ensure prime contractors and subcontractors are responsible for violations of lower-tier subcontractors. The NPRM states that being “responsible for compliance” means the prime contractor must cover any unpaid wages for subcontractor violations. This language is in line with other states like Connecticut and will hopefully encourage contractors to better vet their own subcontractors for previous wage violations or tax fraud. Lastly, we want to mention that we support the NPRM’s proposal to update Davis-Bacon recordkeeping requirements. Contractors and subcontractors must maintain records of each worker’s correct classification or classifications of work actually performed and the hours worked in each classification. Maintaining accurate public records like certified payroll records are critical to transparency and accountability in the construction industry.

The DBA is a vital tool to addressing inequities in the construction industry. The proposed updates to the regulation will help keep unethical contractors from receiving lucrative government contracts by strengthening worker protections and enforcement, including debarment and anti-retaliation measures. These proposed reforms are long overdue. We hope the NPRM’s updates are fully approved and adopted quickly.

Thank you for taking time to review our comments.

Sincerely,



Kimberly Glassman
Director