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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

SUBMITTED ELECTRONICALLY

Re: Proposed Revision to WD-10 Survey Form
Our File No. 2015-000

To whom it may concern:

These comments are submitted by the Washington State Building and Construction Trades Council ("Council") regarding the U.S. Department of Labor's ("DOL") proposed revisions to the WD-10 form used by the agency to solicit wage data for purposes of determining the prevailing wage. The Council is an organization composed of forty-eight local unions and sixteen regional building trades councils made up from fourteen international unions in the construction trades, including: International Brotherhood of Electrical Workers; International Brotherhood of Teamsters; International Union of Bricklayers; International Union of Elevator Constructors; International Union of Painters; Laborers' International Union of North America; Operative Plasterers' and Cement Masons' International Association; International Association of Sheet Metal; United Association of Plumbers and Pipefitters; United Union of Roofers; International Union of Operating Engineers; International Brotherhood of Boilermakers; International Association of Heat and Frost Insulators; and International Association of Iron Workers. The Council's mission is to promote the economic and employment security of construction workers. In pursuit of this goal, the Council advocates before the executive, legislative, and judicial branches of government on behalf of its affiliates to promote the interests and well-being of construction workers. The Council's comments will focus on ways in which DOL can improve the WD-10 form and its instructions.

The Davis Bacon Act ("DBA") establishes a wage floor – known as the "prevailing wage" – that prevents contractors on federal and federally assisted projects from driving down local area labor standards. Prevailing wages are wage and fringe benefit rates that DOL's Wage and Hour Division ("WHD") establishes by locality, for each classification of construction worker, based on data it collects from construction projects in the area. To determine the prevailing wage, WHD

conducts annual wage surveys. WHD uses the WD-10 form to solicit wage data from contractors and interested parties. Local unions in the construction industry use the WD-10 form to report wage data from local projects on which their members worked.

Changes to the WD-10 Form Will Streamline the Collection of Wage Data and Encourage Survey Participation – The Council commends DOL's proposed changes to the WD-10 form that eliminate requests for information that are overly burdensome and unnecessary for determining the prevailing wage. For example, the form currently asks respondents to identify each project's "peak week" – the week in which the largest number of workers performed work on a project. This question discourages survey participation because it is extremely difficult and burdensome for respondents to identify the peak week on projects carried out the previous year. By restricting wage data submissions to one single peak week, the current form limits the amount of data that respondents submit per project, which is contrary to the agency's data collection goal. More importantly, DOL's regulations do not contemplate any such limitation. To the contrary, the regulations suggest that DOL should capture the *total* number of workers employed in each classification on each project. 29 C.F.R. §1.3(b)(1)

The Council also agrees with DOL's proposal to remove the question about whether the project reported on the WD-10 is subject to state prevailing wage law. This question is unnecessary because there are no statutory or regulatory restrictions on the utilization of data from state prevailing wage. The question on state prevailing wage projects is therefore unnecessary and deters interested parties from submitting wage data where the answer to the question is not readily available.

Clarification that Certain Questions Are Not Mandatory Will Result in Greater Participation – The proposed changes seek to clarify that several questions in the WD-10 form are not mandatory. Such clarifications are critical because there is a misconception among respondents that DOL will not consider submissions unless every question in the WD-10 form is answered. This results in a lower survey participation rate.

Additional Clarifications Are Necessary to Improve Clarity – In addition to the proposed clarifications, the Council recommends that DOL make the following additional changes to the form and/or the instructions to provide further clarity to responders:

- On page 1 of the revised form, in the field that requests the name of the Prime Contractor on the project, add the clause "if known." This will signal that the form will be accepted even without this information. Although the form's accompanying instructions state that the name of the Prime Contractor is optional, DOL should make that point clear on the face of the form just as it is proposing to do with regard to the questions on project value.

- With respect to the instructions, the following five modifications should be made to the section titled, "Project Type(s):"

    - The definitions for Building and Heavy construction should include the terms "construction, alteration, or repair," which are consistent with the language used in the definition for Residential and Highway construction.

- To avoid confusion, the definition for Building construction should state that residential buildings that are five stories in height or greater qualify as Building construction.

- The definition for Highway construction suggests that when participating in a highway construction survey, respondents should exclude highway projects that are "incidental" to building or heavy construction. DOL should remove this instruction because respondents should not bear the burden of making such a determination. Most respondents will not know or understand the standard to apply in making such a determination, and many do not understand what type of projects qualify as "Heavy." Such a decision is best left to the expertise of the agency's wage analysts.

- The definition for Heavy construction should include a few examples of what type of project qualifies as Heavy – i.e., dredging projects, outdoor electrification projects, pipelines. The definition should also include a hyperlink to All Agency Memo. (AAM) 130 (Mar. 17, 1978), which includes a detailed list of projects that DOL has placed under the Heavy construction category.

- The instructions relating to AAM 236 should be struck because AAM 236 provides guidance to contracting officers on when to use multiple wage determinations on a DBA-covered project. Such guidance is not applicable to the survey process, and even if it did apply, such a determination is best left to the expertise of the agency.

- In the instructions, the DOL should strike the "Other Classifications" category in the sections titled, "Labor Classification Number" and "Labor Classification Name." No other key classifications exist apart from those already listed in the proposed Directory. The "Other Classification" category will only encourage unscrupulous contractors to subdivide key classifications for the purpose of paying workers less.

- The instructions suggest in the section titled "Sub-Classification Number," that respondents should select the "other sub-classification" option where the sub-classifications listed in the proposed Directory do not reflect the work performed on a project. The Directory, however, does not include that option. DOL should revise the Directory to expressly include the "other sub-classification" option.

- The instruction on DOL's long-standing policy on working supervisors/forepersons is vulnerable to misinterpretation. The instruction provides that a foreperson should only be reported in a survey if they devote at least 20 percent of their workweek to performing the work "of a classification in the 'Classification and Sub-classification Directory'". This statement is confusing because if a respondent is reporting work that falls under the "other" category, such work will not appear in the Directory. The Council suggests replacing the supervisor/foreperson instruction in this section, and wherever else it appears in the instructions, with the following: "Working supervisors/forepersons should only be reported if they spend at least 20 percent of their workweek performing duties that are manual or

physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial."

- In the form's instructions, DOL should add examples of clarifying information that respondents may wish to include in the "Additional Remarks" section of the form. DOL should consider including the following instruction: "Respondents may include clarifying comments in this section. For example, where wage rates vary among workers in the same classification due to wage escalators or wage increases in the workers' collective bargaining agreement, respondents should explain that here. Or where a respondent submits wage data for work that was not performed within the survey time frame, but the underlying project was active during the survey time frame, the respondent should explain that here."

Changes to the Proposed Classifications and Sub-Classifications Directory Are Needed – As stated above, DOL should strike the "Other Classification" option from its proposed Directory because it will encourage unscrupulous contractors to subdivide traditional classifications and invent "new" low wage classifications. As the Wage Appeals Board explained in *Fry Brothers*, "under the DBA it is not permissible to divide the work of a classification into several parts according to the contractor's assessment of each worker's skill and to pay for such division of the work at less than the specified rate for the classification." WAB No. 76-06 (June 14, 1977). The Board warned that if a contractor is permitted to "classify or reclassify, grade or subgrade traditional craft work as he wishes . . . [t]here will be little left to the Davis-Bacon Act." *Id.* Not long after *Fry Brothers*, the D.C. Circuit Court of Appeals similarly recognized that one of the DBA's principal objectives is to address the practice of "under classification" where contractors whittle away at prevailing wages by reclassifying craft work to avoid paying employees higher wages. *Building Trades v. Donovan*, 712 F.2d 611, 625 (D.C. Cir. 1983).

The preservation of traditional key classifications in the construction industry – e.g., bricklayers, electricians, ironworkers, pipefitters – is important for a number of reasons. First, due to their extensive training, multiskilled workers in key classifications command strong family-sustaining wage rates and benefits.[1] Research also shows that multiskilled workers in key classifications have greater job satisfaction and easier career development as a result of their training.[2] Second, it is important to preserve and promote well-established key classifications because failing to do so will discourage young workers from seeking out apprenticeship opportunities. Accordingly, DOL should adopt policies and procedures that prevent and discourage contractors from splicing traditional craft classifications.

CONCLUSION

The Council appreciates DOL's continued efforts to improve the overall quality and accuracy of DBA prevailing wage rates. Such measures are critical to ensuring that construction

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[1] Robert W. Glover, *Construction Industry Craft Training in the United States and Canada*, Construction Industry Institute, at 23 (2007).

[2] *Id.* at 23-24.

workers are properly compensated for their work. DOL's proposed changes to its survey collection form coupled with the Council's recommendations will promote more accurate reporting and ensure an increased level of participation from contractors and interested parties.

Thank you for your attention to this important matter.

Sincerely,

/s/Kristina Detwiler

Kristina Detwiler

KD:lt

cc: Mark Riker