



August 15, 2022

Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20001

RE: Document Number 2022-12918 – Report of Construction Contractor's Wage Rates; Agency Information Collection Activities; Comment Request

Dear Ms. DeBisschop:

On behalf of the National Association of Home Builders of the United States (NAHB), we submit these comments on the Department of Labor (DOL) Wage and Hour Division (WHD) Information Collection Request (ICR) on the Report of Construction Contractor's Wage Rates that was published in the Federal Register on June 15, 2022.¹ As interested stakeholders in this regulatory activity, NAHB urges the Department to consider the following concerns and recommendations in response to the revisions to the Davis-Bacon Act (DBA) prevailing wage rate survey process introduced in this ICR.

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 700 state and local home builder associations around the country. NAHB's builder members construct about 80% of the new housing units, making housing a large engine of economic growth in the country.

I. Background

On March 18, 2022, WHD issued a Notice of Proposed Rulemaking (NPRM) to amend the regulations implementing the Davis-Bacon and Related Acts (DBRA). As the agency noted in the NPRM, this proposal marked the first comprehensive regulatory review in nearly 40 years, dating back to a final rule issued under the Reagan administration in 1983. The 2022 NPRM proposes to revise and implement new definitions from the 1983 rulemaking, among other changes.²

Then, on June 15, the agency issued this ICR soliciting comments on several changes to the DOL WD-10 form — Davis-Bacon Wage Survey Report of Construction Contractor's Wage Rates — in order to improve the overall efficiency of the DBA survey process. Specifically, WHD proposes to change the form so that the respondent will no longer be asked to determine a peak week(s) of construction for reported projects,

¹ 87 Fed. Reg. at 36,152.

² 87 Fed. Reg. at 15,698.

identify the project value, or identify contractors or subcontractors on the project. Additionally, the proposed form uses a “picklist” of labor classifications from which a respondent may choose, rather than requiring the respondent to manually enter the labor classification into an open text field. At the same time, the ICR proposes to add a new WD-10A pre-survey form that will be used to identify potential respondents to the WD-10 form.

In its 2022 NPRM, the agency noted the Davis-Bacon Act and 71 active Related Acts apply to roughly \$217 billion in federal and federally assisted construction spending annually and provide minimum wage rates for an estimated 1.2 million U.S. construction workers,³ and residential construction plays an essential role within the covered sectors. Davis-Bacon prevailing wage requirements apply to a number of Department of Housing and Urban Development (HUD) programs, including various Federal Housing Administration (FHA) Multifamily Mortgage Insurance programs (most notably under National Housing Act section 221(d)(4)) that NAHB multifamily members use to construct and substantially rehabilitate apartment properties affordable to low- and moderate- income families.⁴ Other HUD programs of interest to NAHB’s membership that are covered under DBRA include the Home Investment Partnerships Program (HOME) block grant, the Community Development Block Grant (CDBG), and Project-Based Housing Choice Vouchers. Each of these programs has a different threshold for DBRA applicability. For example, DBRA applies to HOME projects when 12 or more HOME-assisted units are under contract,⁵ to CDBG construction work when there are eight or more units,⁶ and to project-based voucher program deals when there are nine or more assisted units in the property.⁷ As noted, these and other federal housing programs almost exclusively deal with multifamily projects, and as a result, the rate at which single-family builders participate on covered projects is lower than multifamily builders.

II. About the Residential Construction Industry

The residential construction (*i.e.*, home building) industry in the United States is predominantly comprised of small businesses whose employees generally choose not to join or be represented by a union.⁸ In fact, residential construction remains an industry of independent entrepreneurs, with close to 80% of homebuilders and specialty trade contractor firms being self-employed independent contractors. Among firms with paid employees, 63% of homebuilders and two-thirds of specialty trade contractors generate less than \$1 million in total business receipts.⁹ According to a 2020 NAHB member census, at least 91% of builders reported a dollar volume of less than \$15 million (which is still well below the \$39.5 million

³ 87 Fed. Reg. at 15,699.

⁴ 12. U.S.C. §1715l(d)(4); *see also* National Housing Act §212, 12. U.S.C. §1715c, requiring the application of DBA to the 221(d)(4) program.

⁵ Cranston Gonzalez National Affordable Housing Act, 12 U.S.C. §286.

⁶ Housing and Community Development Act of 1974, §110, 42 U.S.C. §5310.

⁷ U.S. Housing Act of 1937 §12(a), 42 U.S.C. §1437j(a).

⁸ *Union Members – 2021*, U.S. Department of Labor, Bureau of Labor Statistics, Jan. 20, 2022, <https://www.bls.gov/news.release/pdf/union2.pdf> (Accessed May 10, 2022). Because most residential construction does not use union labor, this number is likely much smaller for the residential construction industry.

⁹ Natalia Siniavskaia, Ph.D., *Home Building Census*, National Association of Home Builders, July 1, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf> (Accessed April 22, 2022).

threshold for the SBA's size standard classification for all residential construction¹⁰), with the median annual revenue at \$2.6 million. In 2020, NAHB's builder members had an average of 15.6 employees on payroll, with a median of five paid employees.¹¹

a. About Multifamily Builders

The 2017 Economic Census by the U.S. Census Bureau found multifamily builders are a small fraction of overall residential construction establishments (roughly 0.5%), yet these firms are integral to the economy of the home building sector. According to the census, the 3,200 firms classified as multifamily builders with payroll employees reported an average of \$14.6 million in annual revenue, and these builders employ an average of 14 payroll workers.¹²

Consistent with the breakdown of all residential construction firms, an overwhelming majority of NAHB's multifamily member builders can be easily classified as small businesses. As of the 2020 NAHB member census, roughly 83% of multifamily builders have less than 50 employees, with a median of 10 employees on payroll. Additionally, 63% of these multifamily firms generated less than \$15 million in business activity, while the median annual revenue reached slightly more than \$7 million.¹³ Despite a comparatively higher median annual revenue and employee count than other builder categories, multifamily builders face unique cost challenges compared to other residential builders. For example, NAHB found multifamily builders have some of the lowest residual revenue compared to residuals reported by specialty trade contractors and remodelers.¹⁴ They can also face significantly more challenges when attempting to provide affordable housing due to the steep competition for and administrative burdens associated with the various federal support programs.

III. Compliance Burdens Discourage Participation on DBRA-Covered Projects and Wage Surveys

As discussed in NAHB's comments¹⁵ on Updating the Davis-Bacon and Related Acts Regulations,¹⁶ the primary deterrent among NAHB's DBRA-covered members in submitting WD-10 forms is not a lack of interest among these businesses, but the complexity of the form and lack of dedicated human resources

¹⁰ U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, Aug. 19, 2019, [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%202019%2C%202019 Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%202019%2C%202019%20Rev.pdf) (Accessed April 20, 2022).

¹¹ Paul Emrath, Ph.D., *Who Are NAHB's Builder Members?*, National Association of Home Builders, April 5, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-who-are-nahb-builder-members-april-2021.pdf> (Accessed April 22, 2022).

¹² Natalia Siniavskaia, Ph.D., *Home Building Census*, National Association of Home Builders, July 1, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf> (Accessed April 22, 2022).

¹³ Paul Emrath, Ph.D., *Who Are NAHB's Builder Members?*, National Association of Home Builders, April 5, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-who-are-nahb-builder-members-april-2021.pdf> (Accessed July 12, 2022).

¹⁴ Natalia Siniavskaia, Ph.D., *Home Building Census*, National Association of Home Builders, July 1, 2021, Page 9, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf> (Accessed July 12, 2022).

¹⁵ <https://www.regulations.gov/comment/WHD-2022-0001-40967>.

¹⁶ 87 Fed. Reg. at 15,698.

or administrative staff that would allow owners to avoid incurring costs to participate in this process. Despite the proposed revisions in this ICR that aim to “improve the overall efficiency of the DBA survey process,”¹⁷ NAHB believes the agency will not experience a significant difference in employer participation – particularly that of non-union employers, like most NAHB’s members – until the DBA prevailing wage survey process as a whole undergoes substantial change. Therefore, NAHB recommends DOL conduct a comprehensive study and assessment of alternatives to the current prevailing wage determination methodology.

While NAHB does not recommend the agency adopt any specific alternative, both government and non-government options can, with minor adjustments, satisfy the requirements under DBA while also having a proven record of high participation rate. For example, by using Bureau of Labor Statistics (BLS) data to develop DBA prevailing wage determinations, WHD could use data from two BLS surveys, the Occupational Employment and Wage Statistics (OEWS) and National Compensation surveys, to serve as an alternative method for DBA wage determinations.¹⁸ Not only did BLS see a response rate of nearly 70% for the OEWS from 2018 to 2021,¹⁹ but response rates for the construction industry in past years were roughly 80%.²⁰

Among other options, the agency should also assess outsourcing the wage data collection processes to a verifiable third-party organization better equipped to collect greater quantities of data to achieve the most representative rates at the lowest level of civil subdivisions as possible. At the same time, any alternatives to be considered by DOL should also improve the percentage of businesses choosing to participate in prevailing wage determination surveys or, if using a statistically random sample, apply a sufficient, representative sample of wages in the area in which these rates will be determined.

Additionally, the Department requires contractors to file separate WD-10 forms for each of the wage rates for the different types of construction (residential, building, heavy and highway) performed on the project. Historically, related construction items on certain multifamily housing projects, such as club houses, roads, parking and landscaping, were considered incidental to the project and the residential classification of a project would not be altered.²¹ In other words, a contractor could assume an apartment project of four stories or less was “residential” construction, and it would only receive the single “residential” Davis-Bacon wage determination. Only after the implementation of All Agency

¹⁷ 87 Fed. Reg. at 36,153.

¹⁸ James Sherk, *Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately*, *The Heritage Foundation*, Jan. 21, 2017, <https://www.heritage.org/jobs-and-labor/report/labor-department-cancreate-jobs-calculating-davis-bacon-rates-more> (Accessed July 12, 2022).

¹⁹ U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wage Statistics, *Technical notes for May 2021 OEWS Estimates*, March 31, 2022, https://www.bls.gov/oes/current/oes_tec.htm (Accessed July 14, 2022).

²⁰ Phipps, Polly A., and Jones, Carrie K., U.S. Department of Labor, Bureau of Labor Statistics, *Factors Affecting Response to the Occupational Employment Statistics*, November 2007, Exhibit 9, <https://www.bls.gov/osmr/research-papers/2007/pdf/st070170.pdf> (Accessed July 14, 2022).

²¹ The Department of Housing and Urban Development assigned the residential wage determination to multifamily projects with four stories or less in accordance with Labor Relations Letter 96-03.

Memoranda Number 130 and 131²² were many FHA-insured multifamily projects assigned multiple wage determinations, which significantly increased administrative burdens for builders and agency staff, caused unpredictable and often last-minute cost increases and caused unnecessary construction delays. As it relates to Form WD-10, we urge the Department to return to the policies outlined in Labor Relations Letter 96-03 and recognize a single wage determination for projects deemed residential and consider other construction items incidental to the overall project, thereby reducing the burden placed on contractors for filling out multiple versions of the same form.

IV. DOL Should Make Additional Changes to the WD-10 Form and Survey Process to Allow for More Representative Prevailing Wage Rates

In the roughly 90 years since its implementation, the wage determination process under the DBA has evolved into a scientifically unsound and fundamentally flawed methodology, resulting in prevailing wage rates that are misrepresentative of the real wages being paid in any given area. In some cases, prevailing wages are raised to unrealistic, impracticable levels, resulting in the current methodology making DBRA programs practically unusable in certain parts of the country. To alleviate the issue of these unrealistic, misrepresentative wage rates, DOL must implement additional changes along with these latest revisions to Form WD-10.

Specifically, DOL should allow for the reporting of apprentice wage rates as part of its wage survey. Apprentices are essential to the execution of work performed on a construction site, especially considering the severe worker shortage within the industry.²³ By including certain supervisors, NAHB is concerned the wage rates for a significant portion of the work performed is not properly reported and, as a result, excluded from the agency's calculation of prevailing wages. Therefore, NAHB recommends allowing the regulated community to report the wage rates of apprentices on qualifying construction projects to help achieve more representative wage rates of a given area.

Additionally, DOL policy states it will not use wage rates for federal and federally assisted projects for the residential and building categories of construction unless there is insufficient data for non-federal project rates.²⁴ As it relates to the wage survey forms, NAHB recommends the agency maintain its policy of not factoring in Davis-Bacon wage rates from covered projects in its initial calculation of prevailing wages as another way to keep wages more representative of the actual rates paid in given areas.

V. DOL Must Conduct More Analysis on its Burden Estimate for Completing Forms WD-10 and WD-10A

NAHB is also concerned by the burden estimate included in the ICR, which indicates the time per response to complete both forms WD-10 and WD-10A is at most 30 minutes. However, and as mentioned in NAHB's

²² In general, AAM 130 and AAM 131 directed that a "substantial" construction item could be assigned its own separate wage determination from the project. Also, the construction item could be considered "substantial" construction if its cost exceeded 20 percent of the total project cost or \$1 million dollars.

²³ According to the U.S. Bureau of Labor Statistics, found there were 334,000 open construction positions as of June 2022. *Job Openings and Labor Turnover – June 2022*, <https://www.bls.gov/news.release/pdf/jolts.pdf> (Accessed Aug. 2, 2022).

²⁴ 29 CFR 1.3(d).

previous comments, the primary deterrent among NAHB's DBRA-covered members in submitting wage survey data forms is the complexity of the form and lack of dedicated human resources or administrative staff that would more easily allow covered businesses to participate in this process. In addition to calling for a revised regulatory burden estimate for the agency's NPRM, NAHB strongly urges DOL to revise the estimate in this ICR *before* the agency moves forward with a final rulemaking to update the DBRA. In the meantime, NAHB welcomes the opportunity to offer additional data and direct feedback from our members on this issue to provide the agency with a more realistic estimate of the burden placed on the regulated community.

VI. Conclusion

NAHB appreciates DOL's consideration of our comments and welcomes the opportunity to work with the agency and address the concerns of the residential construction industry. The Department must find solutions to the overly burdensome prevailing wage rate survey process in order to produce a meaningful, representative estimate of the wage rates of a given area. Please contact me via email (bmannon@nahb.org) or phone (202-266-8265) if you have any questions or require any additional information.

Sincerely,



Brad Mannion
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National Association of Home Builders
of the United States