Associated Builders and Contractors, Inc.

VIA MESSENGER DELIVERY

October 12, 2007

Ms. Hazel Bell, Acting Chief
Branch of Management Review and Internal Control
U.S. Department of Labor
200 Constitution Ave, Room S-3201
Washington, DC 20210

Re: Request for Comments concerning proposed collection -- Report of Construction Contractor's Wages (WD-10).

Dear Ms Bell:

On August 31, 2007, ABC wrote Assistant Secretary Lipnic and Wage and Hour Administrator DeCamp to request an extension of time in which to submit comments in response to the above-referenced notice published in the July 20, 2007 *Federal Register,* 72 Fed. Reg. 39850. After subsequent discussions with Department staff, it was mutually agreed that the Department would accept submission of the enclosed comments even thought they would be submitted after the due date. Based on that agreement, ABC withdrew its formal request for the extension.

Accordingly, enclosed are the jointly-submitted comments of the Associated Builders and Contractors, Women Construction Owners & Executives, USA, and the members of the Northeast Region of the National Association of Minority Contractors. A copy of these comments is also being sent to Shirley Ebbesen via email.

Respectfully,

Robert A. Hirsch
Director, Legal and Regulatory Affairs
(703) 812-2039
hirsch@abc.org

Before the
Department of Labor
Wage and Hour Division
Employment Standards Administration

Proposed Collection; Comment Request:
Report of Construction Contractor's Wage Rates (WD-10)
OMB Number 1215-0046

Comments of
Associated Builders and Contractors, Inc.,
Women Construction Owners & Executives, USA and
National Association of Minority Contractors Northeast Region

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Associated Builders and Contractors, Inc., Women Construction Owners & Executives, USA, and National Association of Minority Contractors Northeast Region (hereinafter collectively referred to as the "construction employers' associations" or "associations") jointly submit the following comments in response to the above-referenced notice of proposed collection (Notice) published on page 39850 of the *Federal Register* of July 20, 2007. Pursuant to the Notice, the Department of Labor's Employment Standards Administration's Wage and Hour Division (hereinafter Department) has solicited comments regarding the proposed continued use of Form WD-10, the "Report of Construction Contractor's Wage Rates," to determine the locally prevailing wage rates under the Davis-Bacon Act and related acts.

In soliciting comments from interested parties, the Notice has asked commentators to focus on four areas in particular:

1. Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have a practical utility.

2. Whether the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate.

3. What, if any, enhancements can be made to the quality, utility and clarity of the information being collected.

4. How the burden of the collection of the information can be minimized for those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

The following are the three construction employer associations' comments and recommendations in response to the issues DOL posed in the Notice. These comments and recommendations are intended to be constructive. Our goal is to provide the Department with practical ways in which the current wage survey process can be improved by making it complete and also more efficient. The associations believe that there are a number of functional changes the Department can easily make which, if implemented, would enable the Department to produce wage determinations that are more representative of marketplace wage conditions in communities throughout the

Country and, in turn, would be more reliable than some have charged.[1] The three associations further believe such changes would not only benefit the Department in carrying out its mission under the Act but also to the contracting agencies and taxpayers.

COMMENTS

A. **About the Construction Employers' Associations**: Associated Builders and Contractors, Inc. (ABC) is a national construction industry trade association representing more than 24,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's member companies are "merit shop" companies and our diverse membership is bound by a shared commitment to the construction industry's merit-shop philosophy. The merit-shop philosophy is grounded on the principal of full and open competition, without regard to labor affiliation, where construction contracts are awarded to the lowest responsible bidder through open and competitive bidding. The merit-shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollar.

Conservatively, ABC's members employ more than 5.4 million skilled construction workers, whose training, and skills and experience span all of the twenty-plus skilled trades that comprise the construction industry. The workforces of merit-shop companies comprises more than 80 percent of the private construction industry as a whole. ABC also has 78 chapters throughout the United States. Many ABC members regularly work on federal contracts and others would like to do so. ABC therefore

[1] The associations are mindful of the concerns expressed by the Department's Office of Inspector General in its October 1, 2003 – March 31, 2004 Semiannual Report to Congress (OIG Report) regarding the credibility of the wage determinations due to the questionable reliability of some of the survey data being used. OIG Report at 20. The OIG Report's findings and recommendations are discussed in greater detail in section E below.

represents a significant and representative cross-section of the commercial and industrial construction industry contractors who are directly or indirectly impacted by the proposed collection and resulting wage determinations.

The National Association of Minority Contractors (NAMC) is a nonprofit trade association that was established in 1969 to address the needs and concerns of minority contractors. While membership is open to people of all races and ethnic backgrounds, the organization's mandate, "Building Bridges - Crossing Barriers," focuses on construction industry concerns common to African Americans, Asian Americans, Hispanic Americans, and Native Americans.

NAMC has chapters in 49 states, plus the District of Columbia and Virgin Islands. NAMC's members includes general contractors, subcontractors, construction managers, manufacturers, suppliers, local minority contractor associations, state and local governmental organizations, attorneys, accountants, and other professionals. The Northeast Region of NAMC is comprised of the following states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the District of Columbia.[2]

Women Construction Owners & Executives, USA (WCOE) was conceived in 1983 by 11 women who envisioned a national association to custom fit their unique business needs in the construction industry. They formed WCOE to promote opportunities and business for women-owned firms and policy-making executives in the construction industry.

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[2] Customarily NAMC in its entirety signs on to comments such as these when the concerns and recommendations being expressed are shared and supported by the members of one of NAMC's regions. However, in this instance, the president of the national association has been unavailable to obtain his consent on behalf of all the members of NAMC and it is solely for that reason that NAMC's Northeast Region appears as a signatory to these comments and not NAMC in its entirety.

WCOE has been steadily growing since its inception, adding members and establishing chapters across the country. WCOE represents women general contractors, top-level policy-making executives, architects, engineers, construction project managers, subcontractors and other business women and professionals related to the construction industry.

B. **Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have a practical utility.** As the Department is probably well aware, ABC and NAMC have long advocated repeal of the Davis-Bacon Act (Act).[3] At the same time, unless and until the Act is either repealed or otherwise amended, ABC and NAMC also believe that the collection of wage information by the Department or its designee continues being necessary for the calculation of prevailing wage determinations. Further, all three associations believe that the collection of the type of information being proposed does have practical utility insofar as there remains a statutory requirement for prevailing wage determinations to be calculated by the Department.

The three associations do not believe, however, that the proper performance of the agency's functions with respect to Davis-Bacon requires the collection function to be exercised exclusively, or even predominately, by the Wage and Hour Division (Wage and Hour) of the Department. To the contrary, the associations believe that the Department can and should make greater use of wage data currently being captured by other divisions

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[3] WCOE fully supports all aspects of these comments concerning the Department's survey methodology and prevailing wage determinations. However, WCOE has no position with respect to the repeal of Davis-Bacon does not join ABC and NAMC in their opposition to Davis-Bacon. Details on ABC's position on why the Davis-Bacon is no longer needed are available on ABC's website, at http://www.abc.org/user-assets/Documents/Government%20Affairs/IssueBriefs/DB%206_06.pdf.

and agencies, in particular by the Bureau of Labor Statistics (BLS), and also by state agencies in the course of making their own state prevailing wage determinations. Neither the Act nor the Department's prevailing age regulations at 29 C.F.R. §§1.1 through 1.9 prevents the information collection function from being be carried out by agencies other than, or in addition to, the Wage and Hour Division of the Department.

The collection and use of data from these and similar sources would significantly aid the Department in carrying out its mission under the Act, by increasing the efficiency of its wage determinations and also the reliability of the determinations (due to the increased amount of data that would become available to the Department), while at the same time also greatly minimizing the burden that many responders and potential responders feel is imposed on them by the current survey methodology.[4] The Department's own Office of Inspector General made a similar recommendation as recently as 2004.[5]

C. **Whether the agency's estimate of the burden of the proposed collection on information, including the validity of the methodology and assumptions used, is accurate.** The associations believe that the Department's time estimates regarding the burden imposed on contractors to fill out the survey form are overly optimistic, especially for many, if not a majority, of smaller contractors. Our belief is based upon informal discussions ABC has had with member companies that have responded to the survey in

[4] For the reasons discussed in greater detail in section E below, it should not matter that some potential sources of data may not collect and/or be able to provide fringe benefits data in addition to the base wage data. The fact is that the collection of additional wage data, even if only partial, will increase the amount of data the Department is currently collecting, which is still better. Moreover, reliable methodologies for computing and filling in the missing fringe benefits data exist that the Department could utilize.

[5] The OIG's recommendations are discussed in greater detail in section E of these comments.

the past and member companies that, after looking the survey over, opted not to respond because of the time and effort that it would have taken.

The Department's time estimate of 20 minutes may be valid for the limited number of contractors that routinely fill out the WD-10's. Because of their size and/or the nature of their business, those companies have been able to justify the investment of the time and money needed to set up their accounting systems to enable them to respond to the Department's survey and in particular the WD-10's specific data fields. However, those contractors are not representative of the vast majority of construction contractors. Indeed, a significant number (if not the majority) of merit-shop contractors are small business. Thus, instead of representing the average time it should take to complete the survey, ABC's members have advised that the Department's estimate of 20 minutes is more reflective of the minimum amount of time that it should take for some contractors to complete the survey form, exclusive of the additional time needed to read and fully understand the instructions and gather and maintain the relevant data.

For example, depending on the size of a company, it could take a contractor 20 minutes or more just to locate and assemble the "peak-week" records necessary to complete the survey. Likewise, because of the 5-year intervals between area surveys, most contractors believe it is, and would continue being, essential for them to review the instructions each and every time a survey is conducted. Thus, based on the experience of ABC members, all three associations believe the Department's 20-minutes estimate is not reflective of the true amount of time that is required by contractors to complete a survey.

Consequently, the associations urge the Department to adopt and implement our collective suggestions, discussed under section E below, regarding the ways in which the

current survey methodology and collection process can be modified and expanded. Doing so will go a long way towards making the Department's 20-minute estimate a reality for most contractors. Currently, the 20-minute estimate is not realistic.

Additionally, the associations recommend that the current WD-10 form be modified to include an optional question that asks each responder to indicate how long it took them to complete the survey. For example, if the WD-10 is completed online, this question could be answered automatically via an online session timer, or filled out manually.

D. **What, if any, enhancements can be made to the quality, utility and clarity of the information being collected.** As noted in section B above, the best way for the Department to improve the quality of the information collected by greater reliance on data collected by BLS and other agencies in lieu of, or in addition to, the current collection methodology. In the absence of such action, however, the overall quality and utility of the data being collected in order to calculate reliable area prevailing wage rates will of necessity depend upon the amount of data that the Department receives in response to each survey and the accuracy of that data. There is a direct correlation between the number of contractor responses the Department receives and the ultimate reliability of each wage rate the Department calculates; *i.e.,* as the amount of data received per survey increases, so too does the likelihood that the wage rate calculated will truly be representative of the prevailing wage rate for that area, thereby increasing its reliability and utility. For example, the governing regulations provide that "data from Federal or federally-assisted projects subject to Davis-Bacon" will not be used for calculating wage determinations "unless it is determined that there is insufficient wage

data to determine the prevailing wages in the absence of such data." 29 C.F.R. §1.3(d). Unfortunately, the current population of contractors responding to surveys is small and, based on feedback received from ABC's members, largely consists of contractors working on Federal or federally-assisted projects. This is because the burden of responding to the survey is small for them compared with most other contractors. Therefore, under the current survey methodology much, if not the majority, of the information being collected by the Department for each survey comes largely from Federal or federally-assisted projects, irrespective of what may be the stated intent or desired goal of the regulations.

Below we provide some suggestions that may help the Department in its endeavor to increase the number of contractors responding and also the quantity and quality of the data being collected.

E. **How the burden of the collection of the information can be minimized for those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.** The three associations believe there are a number of things the Department can do that would not only reduce the burden for those who do respond to the Department's wage surveys, but also increase the amount and quality of the data being collected, as well as the number of contractors responding.

As previously noted, in 2004 the Department's OIG recommended that the Wage and Hour contract with BLS, which uses statistical means to obtain wage information from employers. The recommendation arose out of a series of audits the OIG and the

Government Accountability Office (GAO, formerly the General Accounting Office) conducted in response to the discovery of fraudulent data in Wage and Hours wage surveys in the mid 1990s. The audits revealed substantial inaccuracies in collection of data and wage determinations, including a 98 percent error rate in WD-10's when compared to actual payroll data.[6] The audits also suggested that the WD-10 and wage determination process is vulnerable to fraud. The OIG said BLS could help address these and other problems with the current survey, noting that "a statistical approach, such as that offered by BLS, would improve reliability by controlling for bias that may exist in data provided by particular contractors and third parties, who may have a personal stake in the outcome."[7]

However, even if the Department opts not to make use of the BLS statistical survey approach, the Department should nonetheless collect and make use of the raw wage data BLS and other federal and state and local agencies are collecting. Raw data is raw data and there is no rationale basis for the Department to exclude such data.

In this regard, it is extremely noteworthy that BLS is the Department's agency responsible for collecting the data and making the prevailing wage determinations required under the Service Contract Act (SCA). While the parties from whom the SCA data is collected are outside of the construction industry, the wage and fringe benefits data that BLS collects for SCA wage determinations is virtually the same as is required

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[6] *See Inaccurate data were Frequently Used in Wage Determinations made under the Davis-Bacon Act* Report No. 04-97-013-04-420 (March 10, 1997) available at http://www.oig.dol.gov/public/reports/oa/pre_1998/04-97-013-04-420.pdf; *Review of Davis-Bacon Modernization Funding* Report No. 04-98-003-04-420 (February 19, 1998) http://www.oig.dol.gov/public/reports/oa/1998/04-98-003-04-420r.htm; and *Concerns Persist With the Integrity of Davis-Bacon Prevailing Wage Determination* Report No. 04-04-003-04-420 (March 30, 2004) http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf.

[7] *Concerns Persist With the Integrity of Davis-Bacon Prevailing Wage Determination* Report No. 04-04-003-04-420 (March 30, 2004) at 26, http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf.

for making Davis-Bacon determinations. At a minimum, therefore, BLS' data collection expertise and collection methodology could be of significant benefit to the mission and success of Wage and Hour under Davis-Bacon. Thus, here is another reason why Wage and Hour should look to and take advantage of BLS' expertise to carry out, or at least augment, the current data collection being done for Davis-Bacon wage determinations.

Another good source for wage data are the state economic and employment departments. Although these departments customarily report the median wage rates for various worker trade classifications, the raw data that they collect would nonetheless assist the Department in increasing the accuracy of its wage determinations, by increasing the amount of wage data the Department has when making its wage determinations.

At the same time, if the Department is going to continue to rely on its own survey, whether in the absence of or in conjunction with greater reliance on BLS and other sources of wage data, the Department still needs to find and implement ways to stimulate greater participation by contractors. This is not only critical to the overall success and ultimate reliability of each and every survey conducted and resulting wage determination, but also to reducing the burden of responding that the current survey methodology imposes. In fact, the 2004 OIG Report references a May, 1999 GAO report regarding prevailing wage determinations wherein virtually the same concerns were expressed.[8]

There are a variety of ways in which the Department can facilitate greater survey participation by contractors. To start, the Department can foster greater survey participation by allowing contractors to submit their responses electronically and giving

[8] Referencing the 1999 GAO report, page 30 of the OIG Report summarized the GAO's findings and concerns in relevant part as follows: "Wage determination process must promote greater survey participation, improve the accuracy of data submission and increase efficiency of data collection and analysis."

contractors much greater latitude in terms of the form in which their data can be submitted, as well as the business records and other sources from which their data can be derived.[9]

For example, under the governing regulations, the Department has the authority to collect and consider "[s]tatements showing wage rates paid on projects. . ., includ[ing] the names and address of contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, . . . the number of workers employed in each classification on each project, and the respective wages paid such workers." 29 C.F.R. §1.3(b)(1). The associations believe this provision would (and should) allow contractors to submit copies of the relevant pages of the job cost reports they complete following the completion of individual construction projects. We believe the submission of such information is entirely consistent with the current regulations, especially because section 1.3(b)(2) permits the Department to collect and consider "[s]igned collective bargaining agreeing." Unlike a collective bargaining agreement, the job cost report data we urge the Department to accept would be the most project-specific and accurate. This is especially important because labor contracts are becoming increasingly in conflict with one another in terms of their wage rates and classifications for the same work.

Providing data on fringe benefits in the manner currently required by the WD-10 form is also significantly problematic for many contractors. Except for those contractors that participate heavily in Federal or federally-assisted projects, the vast majority of

[9] Providing greater latitude in terms of the form in which data can be submitted and the sources from which data can be derived would go a long way in reducing the burden of completing a survey and facilitating a greater response rate from contractors.

merit-shop contractors do not maintain their accounting records in a way that breaks out fringe benefits data on a per-hourly and/or per-project basis, let alone into the categories of fringes that the current WD-10 does. As a result, while providing base wage data would be relatively easy for most contractors, providing hourly fringe benefits data broken down into the WD-10's current data components ("health and welfare," "pension," "apprentice training," "vacation and holiday," and "additional fringe") is very difficult and extremely burdensome for most contractors. For example, some contractors aggregate fringe benefits and allocate the total benefit cost on a per capita basis. Other contractors calculate fringe as a percentage of wages. There is no single methodology among merit-shop contractors for allocating the cost of fringe benefits among employees, however.

Moreover, in accordance with provisions of the Employee Retirement and Security Act (ERISA), a number of jurisdictions have recognized that a strict line-item approach reflected in the current WD-10 form may not be mandated. Rather, ERISA allows contractors to allocate and pay fringe benefits on the basis of choosing among the specific benefits they want to fund; for example, one contractor may opt to pay 100 percent of their employees fringe benefits as a contribution to their workers' 401(k) plan, while another contractor may choose to split fringe benefits 50-50 between health insurance and life insurance. The point is that, for purposes of a prevailing wage determination, there is no statistically meaningful information that comes from requiring contractors to report their payment of fringes based on which specific fringes they pay.

Because the current WD-10 form does not allow survey contractors and other survey responders to report fringe benefits in alternative ways, and because the amount of

time that most contractors would need to break their data out into the current WD-10 fringe benefit categories could be quite significant, especially for smaller contractors, most merit-shop contractors are opting not to report at all rather than bear the cost and time that would be required to break down their data in order to respond to the current WD-10 format. For the foregoing reasons, the three construction employers' associations recommend the Department modify the WD-10 form to give contractors additional options for reporting fringe benefits and/or allow to contractors to respond to the survey even if the fringe benefits data is not being (or cannot easily be) provided. Support for providing contractors additional options for reporting fringes is clearly justified in light of the fact that the Department does not publish separate wage and fringe determinations; rather, wages and fringes are combined and published as a single area prevailing wage determination for each craft. Again, the goal of the Department should be to increase the number of contractors responding to the survey and the amount of wage data being received, even if some of the responding contractors may only be able to provide partial data or provide their data in aggregate other, is still clearly better than receiving no data at all.[10]

Another area in which the current WD-10 form and resulting wage determination reporting methodology needs to be modified concerns the manner in which the Department solicits and reports wages related to specific trade classifications. For years contractor members of the associations have been frustrated by their inability to learn from the Department's wage determinations exactly which worker classifications are permitted to perform which job duties and at which wage rates on any given project

[10] Even in the absence of receiving complete data responses from every responder to a survey, *i.e.*, both wage and fringe data, the Department has the means to independently compute the appropriate fringe benefit wage rate for the area being surveyed.

subject to Davis-Bacon. A major reason for this problem would appear to be the failure of the current WD-10 survey form to solicit specific, meaningful data from responders regarding their relevant work practices. Currently, the WD-10 form requests responders to provide only the job classification and type of work performed. Under these circumstances, the current WD-10 form provides responders with the opportunity to provide information which may later turn out to have presented an incomplete or only partially inaccurate picture of what actually is taking place. While this is clearly not what the Department may have intended, it is certainly not a situation that the Department should allow to continue and, at a minimum, may be one reason why the Department has been unable to provide more specific information in its published wage determinations.

The Department's failure to publish more specific information is a major source of problems for contractors whenever the Department's wage survey determines that a union wage rate "prevails" for a particular job classification. Under such circumstances, the union's work rules will also prevail. The consequence of this can be extremely problematic and perplexing for contractors because union work rules among the various trades not only can, but most often do, conflict with one another, and are also likely to conflict with the work rules of open-shop contractors. Therefore, when the union rate turns out to be the prevailing wage rate, it is imperative that the Department's published prevailing wage determinations must include not only the prevail rate that will govern in the specific area but also the applicable work rules that will also govern. The need for this information is critically necessary to ensure that each and every contractor that wants to work on Davis-Bacon projects knows precisely what prevailing wage rate applies to what specific tasks regardless of who performs them. With few exceptions, this

information can only be obtained by open-shop contractors if it is published by the Department.

In fact, the Department's failure to publish such information has created, in effect, a "Hobson's choice" for open-shop contractors regarding whether or not to do work that is subject to Davis-Bacon, which also has adversely impacted the level of participation in the Department's surveys. As the Department well knows, a major reason cited by contractors for not responding to a WD-10 survey is that they do not engage in Davis-Bacon work. A significant reason is the possible exposure to retroactive prevailing wage enforcement actions brought by the Department that were directly caused by the Department's failure to provide the requisite work rules or practices information applicable to the specific area and/or project. In fact, this has been a lesson that has been hard-learned. According to comments received from many of ABC's members, because the Department does not publish or otherwise provide this crucial information contractors end up having to rely on what later proves to be misinformation from the union or incorrect information from an ill-informed contracting officer, only to be later subjected to an enforcement action brought by the Department often resulting in the imposition of hundreds of thousands of dollars of back pay, plus interest and legal and other costs, long

after the job is over.[11] This hardly seems fair or reasonable, or an appropriate administration of the Davis-Bacon Act by the Department.

There are several ways in which the Department can easily fix this problem. The Department should specify in every published wage determination what job duties are commonly performed by the job classification(s) listed. In turn, if the wage determination finds that a specific union rate prevails, the wage determination should inform contractors what union work rules apply, or at the very least publish the union work rules and/or make them otherwise accessible to contractors, including requiring the relevant unions to publish the applicable work rules. Alternatively, the Department could publish the prevailing wage job classification descriptions in its regulations. Several states, including Washington and Missouri, have already done this. At a minimum, if unions do not provide this critically material information in response to a Department survey, contractors should be allowed to rely upon the wage determination that was published at the time, without later being subject to and having to defend against a

[11] This is especially problematic where two (or more) unions claim cross-jurisdiction over the same type of work being performed in that area. Further, cross-jurisdictional claims are becoming increasingly commonplace. The following is problem one of ABC's members experienced, which exemplifies the type of problems contractors are generally experiencing because of cross-jurisdictional claims and the insufficiency and/or incompleteness of the wage data being published by the Department: The Department published a wage determination under its current methodology that specified a wage rate for "pipe layer" under one of the laborer categories. The wage determination did not include a wage determination for "helpers." Because of the absence of more specific information in the Department's wage determination, the employer had insufficient information to determine what the Department later said was the proper wage rate that should be paid to Worker A, whose responsibility was to hand pipe to the individual installing the pipe (Worker B). Even though Worker A was really functioning as a "helper," the employer determined that Worker A should be paid the laborer rate for pipe layers, based on the published wage determination. Well after the project was completed, however, the employee filed a claim arguing that pipefitters/plumbers union in the area claimed the work and had cross-union documentation to support their claim. Because of the insufficiency of the Department's current methodology, this vital information was not included in the Department's wage determination and the employer had no reason on its own to know or gain this information beforehand. Nonetheless, based on the Department's subsequent investigation the Department ruled that Worker A should have been paid the pipefitters wage rate, which was $10-per hour more than the laborer's rate the employer had paid. The employer in this case was relatively lucky because only one worker was affected. As a resulted, the employer ended up having to pay $3,000 in additional wages, plus interest, and avoided incurring legal expenses because it had in-house counsel. Most contractors are small businesses and do not have the luxury of in-house counsel.

prevailing wage charge. Contractors should not have to pay wage rates that are higher than the Department's published rate, especially when the higher wage rate is based upon information that should have been timely provided by a union later claiming cross-jurisdiction and made known to contractors in the Department's published wage determination.

No matter which option the Department chooses, there is a fundamental need to include detailed information on job classifications and the applicable work rules or practices in both the Department's data collections and in its published wage determinations.

The Department should also develop instructional materials for contractors that explain the data collection process in easy to understand terms, including providing useful and practical examples of how the WD-10 form should be filled out, based upon the data being used. This information could be published on the Department's website and also made available to the various construction industry trade associations for distribution and training provided to individual contractors. Input from the industry could help the Department greatly in this regard and the three associations would be quite willing to assist the Department in developing such materials, ABC in particular (ABC offices are local and has greater staff capacity to assist).

Additionally, the current WD-10 form should be amended to make it abundantly clear to contractors that the information they provide in response to a survey will be treated by the Department as proprietary and confidential and will therefore not be disclosed to or be accessible by the public. The current WD-10 form alludes to the confidential nature of some of the information provided, but is not clear as to extent or

under what circumstances information would have to be disclosed ("The identity of the Respondent will be kept confidential to the maximum extent possible under existing law."). A number of associations' members have advised that one reason they have not been responding to the surveys is their concern that the information they provided will not be treated as confidential.

Another remedial action the Department can – and should – take to reduce the burden imposed currently by the survey is to allow survey responses not only to be filed on-line electronically, but also program the system so that a partially completed survey can be downloaded and saved for later completion. Currently, information cannot be saved. Currently, therefore, if the survey cannot be completed in one session, the responder will have to begin filling out the survey all over again. This can be especially problematic for smaller contractors, but also for contractors generally because the amount of time it takes for most contractors to complete a survey is considerably longer than the 20 minutes the Department currently estimates (see previous discussion under section C).

Further, while the associations believe that all of these suggestions can be implemented by the Department without the need for further rulemaking, to the extent the Department believes a rulemaking is required, the associations urge the Department to proceed via the route of an interim final rule. All of the actions the associations are recommending are intended to increase both the quantity and quality of the wage information the Department is able to collect and, in turn, the quality and reliability of the Department's wage determinations. As such, implementation of our suggestions would reduce and/or eliminate the burdens imposed on contractors by the current, more limited, collection methodology. The reduction and/or elimination of those regulatory burdens

would be something that contractors should and would support. Thus the normal precautionary need to proceed via a notice of proposed rule is clearly not present.

Finally, should the Department also determine that it would like to entertain discussion and consideration of additional modifications (beyond those recommended herein) that could be made to the current survey methodology that might also be of benefit, the associations urge the Department to proceed by way of a negotiated rulemaking rather than the more traditional notice-and-comment rulemaking process. The number and scope of the interest groups relating to prevailing wage determinations is both small and manageable. Likewise, identifying and agreeing upon modifications to the current survey methodology that would reduce the burden of responding while increasing the quality and quality of the responses received, in particular from contractors that are not now responding, should not be so controversial as to preclude the utility and success of a negotiated rulemaking.

SUMMARY

The goal and objective of these comments is to provide constructive analysis and recommendations to assist the Department in its management and administration of Davis-Bacon prevailing wage determinations. The Department's prevailing wage surveys and wage determinations have been extensively and independently analyzed by the Department's Office of Inspector General (OIG) and also by the General Accounting Office (GAO) on a number of occasions in recent years, including as recently as 2004. The OIG and GAO both found that the Department needs to increase the accuracy and credibility of its wage determinations. Toward that end, both agencies independently

concluded that the Department needs to make changes in its current survey methodology, including finding ways to increase the number contractors responding to surveys.

The associations agree with OIG's and GAO's concerns and the objectives they recommend. These comments and recommendations are therefore specifically aimed at pointing out practical ways in which the Department can change its current survey methodology and publication of prevailing wages and thereby achieve the goal and objectives laid out by the OIG and GAO.

As the associations have outlined in the foregoing comments, there are a number of extremely practical methodological changes that the Department can easily make immediately and without the need for rulemaking that would increase the credibility and usefulness of the wage determinations, while also making it easier and more efficient for contractors to respond. At the same time, even if the Department deems that a rulemaking is necessary in order to make some of the changes we recommend, because the fundamental goal of these changes is to increase the accuracy and credibility of wage determinations, the Department's utilization of an interim final rule is clearly warranted and justified. A negotiated rulemaking may also be warranted for other changes the Department feels should also be considered.

As long as the Davis-Bacon Act continues being law, the Department's prevailing wage surveys and information collections need to be made as efficient and practical as possible for all contractors. Doing so will go a long way in increasing the accuracy and credibility of the resulting wage determinations – goals and objectives which the Department should clearly share with the OIG and GAO, and, more importantly, with the construction industry employers and employees.

Respectfully submitted,

Robert A. Hirsch
Director, Legal and Regulatory Affairs
Associated Builders & Contractors, Inc.
4250 North Fairfax Drive, 9th Floor
Arlington, VA 22203

Deborah E.G. Wilder, President
Women Construction Owners and Executives, USA
4401A Connecticut Avenue NW
Washington, DC 20008

John Macklin
Vice President, North East Region
National Association of Minority Contractors
8527 Lyons Place
Philadelphia, PA 19153