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August 8, 2014

Mary Ziegler, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave.
Washington, D.C. 20210

Re: Proposed Extension of the Approval of Information Collection Requirement that Contractors and Subcontractors on Federal and Federally Assisted Construction Subject to Davis-Bacon Labor Standards Submit Weekly Certified Payrolls in Accordance with the Copeland Act.

Control Number 1235-0008

Dear Ms. Ziegler:

This is in response to the Notice published by the Wage and Hour Division June 9, 2014, 79 Fed. Reg. 33001 *et seq.*, soliciting comments concerning its proposal to extend Office of Management and Budget ("OMB") approval of its continuing collection of certified payrolls and "Statements of Compliance" submitted by contractors and subcontractors engaged in constructing, repairing or altering public buildings and public works, or buildings or works that are funded in whole or in part by loans or grants from the Federal Government.

The following comments are submitted on behalf of North America's Building Trades Unions ("the Building Trades"), a labor organization composed of fourteen national and international building and construction trades unions and 286 State and local building and construction trades councils, which together represent more than 2.5 million men and women employed or seeking employment in the building and construction industry in the United

States and Canada. Many of the workers represented by the Building Trades and its affiliates in the United States are engaged in or seek employment on federally financed and assisted construction projects that are covered by the Davis-Bacon Act, 40 U.S.C. §§ 3141-44 and 3146-48, or the more than 70 other federal statutes that incorporate Davis-Bacon prevailing wage-setting requirements, which are collectively referred to as "Davis-Bacon Related Acts," and the Copeland Act, 18 U.S.C. § 874, and 40 U.S.C. § 3145. These jobs are generally short-term and intermittent. Consequently, the labor standards protections afforded to these workers by the Davis-Bacon and Related Acts and the Copeland Act are critically important to the workers represented by the Building Trades. It is for these reasons that the Building Trades submit the following comments concerning continued approval of the requirement to collect certified payrolls and "Statements of Compliance" submitted by contractors and subcontractors engaged in constructing, repairing or altering public buildings and public works, or buildings or works that are funded in whole or in part by loans or grants from the Federal Government.

The Wage and Hour Division's Notice solicited comments that address several specific issues. *See* 79 Fed. Reg. at 33002. The Notice indicated that the Wage and Hour Division is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Enhance the quality, utility and clarity of the information to be collected;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Minimize the burden of the collection of information on 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.

I. THE PROPOSED CONTINUATION OF COLLECTION OF INFORMATION IS MANDATED BY THE COPELAND ANTI-KICKBACK ACT, AND, THEREFORE, IS NECESSARY FOR THE PROPER PERFORMANCE OF THE FUNCTIONS OF THE WAGE AND HOUR DIVISION.

For the following reasons, the Building Trades submits that collection from contractors and subcontractors engaged in federal and federally assisted construction of certified weekly payrolls and statements indicating that the payroll is correct and

complete should be continued since it is mandated by the Copeland Act, and, therefore, is necessary for the proper performance of the functions of the Wage and Hour Division, which is responsible for enforcement of the Act.

The Davis-Bacon Act, as amended, 40 U.S.C. § 3141-3144 and 3146-3148, and the Copeland "Anti-Kickback" Act, 18 U.S.C. § 874 and 40 U.S.C. § 3145, guarantee to laborers and mechanics employed on federal construction projects a minimum wage based on locally prevailing wage rates.

The Davis-Bacon Act was enacted during the Great Depression to ensure that workers on federal construction projects would be paid the wages prevailing in the area of construction. The original Davis-Bacon Act was enacted in 1931 and required federal contractors on certain projects to pay the prevailing wage in the area. However, dissatisfaction with the effectiveness of the original Davis-Bacon Act prompted Congress to substantially amend the Act in 1935. In addition, Congress passed the Copeland Act of June 13, 1934, Pub. L. No. 324, ch. 482, §§ 1 & 2, 48 Stat. 948 (originally codified as 40 U.S.C. §§ 276b & 276c), to combat some of the abuses prevalent under the original Davis-Bacon Act.

Section 1 of the Copeland Act (the penal section), which is now codified as 18 U.S.C. § 874, June 25, 1948, ch. 645, § 1, 62 Stat. 740 and 862, makes it a crime for a federal contractor to require or coerce workers to return a portion of their contractual pay to their employer. Section 2 of the Act, which is now codified as 40 U.S.C. § 3145, Pub. L. No. 107-217, Aug. 21, 2002, 116 Stat., 1304, 1313, 1315, directs the Secretary of Labor to make reasonable regulations for federal contractors, "including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week." 40 U.S.C. § 3145(a).

The legislative history of the Copeland Act leaves little doubt that it was intended to penalize contractors who, while performing federal work or work federally assisted construction projects, unconscionably enrich themselves at the expense of their employees in denial of their contracts of employment. In reporting favorably the bill (S. 3041), which eventually became the Copeland Act, the Senate Committee on the Judiciary stated that hearings had "* * * revealed that large sums of money have been extracted from the pockets of American labor, to enrich contractors, subcontractors, and their officials." The report also quoted from "one of the great leaders of labor" that "It has been a common practice for contractors constructing Federal buildings to pay the employees the prevailing rate as determined by the Secretary of Labor and then have them return a certain amount to the contractor. * * *" S. Rep. No. 803, 73rd Cong. 2d Sess. (1934) In the House, whose Committee on the Judiciary also reported the bill (S. 3041) favorably, the Committee report stated: "This bill is aimed at the suppression of the so-called 'kick-back racket' by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay them, but thereafter forces them to give back to him a part of the wages they have received." H.R. Rep., No. 1750, 73rd Cong. 2d Sess. (1934).

More relevant to the question of whether submission of certified weekly payrolls and statements indicating that the payroll is correct and complete should be continued is the fact that Section 2, which was expressly included in the Copeland Act as an aid in the enforcement of Section 1 (the penal provision), authorized the Secretary of the Treasury and the Secretary of the Interior jointly to make reasonable regulations "for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid to each employee during the preceding week." 48 Stat. 948. The functions of the Secretary of the Treasury and the Secretary of the Interior under Section 2 of the Copeland Act were transferred to the Secretary of Labor pursuant to Reorganization Plan No. IV of 1940, 54 Stat. 1236, effective June 30, 1940, in accordance with § 4 of H.J. Res. 551 (Pub. Res. 75), approved June 4, 1940, § 4, 54 Stat. 231, 5 U.S.C. § 133u.

This requirement is implemented by 29 C.F.R. §§ 3.3 and 3.4 and the standard Davis-Bacon contract clauses set forth in 29 C.F.R. § 5.5. Specifically, 29 C.F.R. § 5.5(a)(3)(ii)(A) requires covered federal contractors and subcontractors to submit weekly a copy of their payrolls, listing the name of each laborer or mechanic, an individually identifying number for each employee such as the last four digits of his or her social security number, and each employee's job classification, rate of pay, daily and weekly hours worked, deductions made, and actual wages paid. With the exception of a three-year hiatus from 1948 to 1951, the regulations have continuously required the submission of such payrolls since 1935, immediately after the Copeland Anti-Kickback Act was passed. *See* Construction Regulations and Regulations Issued Pursuant to So-Called "Kick-Back Statute" pt. II (1935), (hereafter cited as "1935 Kick-Back Regulations"); 13 Fed. Reg. 524 (Feb. 4, 1948) (eliminating the provision); 16 Fed. Reg. 4430, 4431 (May 12, 1951) (reinstating the provision).[1/]

Initially the Copeland Act required a "sworn affidavit" with respect to the wages paid, so the regulations required that the payrolls be accompanied by an affidavit from the employer swearing that "the attached pay roll [was] . . . true and accurate" and that

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[1/] Elimination by Secretary of Labor L. B. Schwellenbach in 1948 of the requirement that contractors and subcontractors performing Federal and federally assisted construction contracts file weekly certified payrolls, 13 Fed. Reg. 524 (Feb. 4, 1948, codified as 29 C.F.R. § 3.3(b)), was not challenged. However, the Secretary's action was probably arbitrary, capricious and otherwise contrary to law for the same reasons the D.C. Circuit subsequently held unlawful similar proposed changes in 29 C.F.R. §§ 5.5(a)(3) and 3.3(b) (1982), which require covered Federal and federally assisted construction contractors and subcontractors to submit weekly a copy of their payrolls, listing the name and address of each laborer or mechanic, and each employee's job classification, rate of pay, daily and weekly hours worked, deductions made, and actual wages paid, unlawful. *Building & Construction Trades Dep't, AFL-CIO, v. Donovan,* 712 F.2d 611, 630-633 (D.C. Cir. 1983). *See supra* at 5-6.

no unreported deductions or rebates had been made. See 1935 Kick-Back Regulations, p. 630, pt. II, § 2. In 1958, in a law to improve government procurement opportunities for small business concerns, the Copeland Act was amended to require a "statement" rather than a "sworn affidavit" and to make false statements a criminal offense. Act of Aug. 28, 1958, Pub. L. No. 85-800, § 12, 72 Stat. 967. The regulations thus now require that the payrolls be accompanied by a statement indicating that the payroll is correct and complete, that the wage rates are not less than those determined by the Secretary of Labor, and that the classifications for each laborer or mechanic conform to the work done. 29 C.F.R. § 5.5(a)(3)(ii) (contract provision); see id. § 3.3 (regulatory requirement).

In 1982, Secretary of Labor Raymond J. Donovan proposed eliminating the requirement that weekly payrolls be submitted, while maintaining the required weekly submission of a statement of compliance. See 47 Fed. Reg. 23,677 (May 28, 1982). Pursuant to the 1982 proposed regulations, the statement submitted by covered contractors and subcontractors would have certified that the payrolls, which the employer is required by the regulations to maintain, are correct and complete, that each laborer and mechanic has been paid the full wages earned without impermissible deduction or rebate, and that the wage rates paid are the applicable ones for the classification of work performed. 47 Fed. Reg. at 23,669 (proposed to be codified as 29 C.F.R. § 5.5(a)(3)(ii)); id. at 23,679 (proposed to be codified as 29 C.F.R. § 3.3(b)).

At the time, DOL justified the proposed change as a reduction in unnecessary paperwork, since it claimed the submitted payrolls are "infrequently used by many Federal agencies." Id. at 23,662. DOL estimated that elimination of the requirement would save $100 million in compliance costs. Id. The Building Trades disputed the purported cost savings from eliminating the requirement to submit payrolls, arguing the estimates ignored the enforcement benefits of the payroll reporting requirement. Id. The U.S. District Court for the District of Columbia agreed holding in Building and Construction Trades Department, AFL-CIO, v. Donovan, 553 F. Supp. 352, 354 (D. D.C. 1982), that the proposed regulation "would render the [Copeland Act] largely unenforceable," citing 543 F. Supp. 1282, 1288-89 (D. D.C. 1982) (Memorandum Order granting preliminary injunction). The District Court also found that the weekly reporting requirement is "essential to the achievement of the [Copeland Act's] purposes" because of the transient nature of much of the construction business. Id.

On appeal, the D.C. Circuit did not reach these issues because it found the proposed relaxation of the reporting requirement was contrary to the direct statutory command in the Copeland Act to require contractors and subcontractors to "furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week." Building & Construction Trades Dep't, AFL-CIO, v. Donovan, 712 F.2d 611, 631 (D.C. Cir. 1983). The court concluded that this statutory language means "that the wages paid each employee should be separately reported and sworn to." Id.

The court explained:

> Under the [Secretary of Labor's] reading of the statute, the intent of the reporting provision would be little more than to add a further criminal penalty -- that of perjury -- to the crime of underpaying one's employees. We think the reporting provision was intended to play, in addition, a role in uncovering violations of the law. The most persuasive evidence of this is, of course, the word "each" and the requirement that the submission be "weekly." If the provision were meant only to add perjury to the criminal penalties provided by section 1 of the act, then it would seem unnecessary to have the affidavit refer to "each" employee since a statement as to all of them would presumably be untrue if anyone was underpaid. Under the Secretary's reading, it would also seem to be unnecessary to require a "weekly" submission, since a blanket statement at the end of the contract term would serve to criminalize any single breach during construction. Both of these provisions are most naturally read if one attaches an investigatory purpose to the act, that is, if the requirement was intended to aid in uncovering, not merely punishing, violations. Only a requirement that payrolls be submitted would help uncover violations, either by exposing contractors who accurately reported underpayments or by simplifying the task of investigators in spot-checking for violations or turning up unusual patterns.
>
> Further support for this reading is provided by the initial phrase of the section in the original act, which read, "To aid in the enforcement of the above section." The "above section," section 1 of the act, made it a criminal offense to induce an employee to give up any part of the compensation to which he or she is entitled. Section 2 would only really "aid in the enforcement" of section 1's criminal provision if it helped catch violators rather than if it merely added to the underlying conduct a further penalty with apparently the same or greater elements of proof.

Id. at 631-32.

After reviewing the legislative history of the Copeland Act and concluding that nothing therein contradicts its reading of the statutory language, and to a large extent supports it, the court held in *Building & Construction Trades Dep't, AFL-CIO, v. Donovan* that the Act "clearly contemplated that the statement required to be submitted would provide some amount of wages paid to each employee each week." *Id.* at 632-33. Although the court did not hold that the actual payrolls themselves, complete with their records of deductions and taxes withheld, must be required to be submitted, it nevertheless stated that the weekly statement required by the Copeland Act "must contain at least individualized wage information for each covered employee." *Id.* at 633.

Hence, collection of certified weekly payrolls and statements indicating that the payroll is correct and complete from contractors and subcontractors performing Federal and federally assisted construction should be continued since these requirements are mandated by the plain and unambiguous terms of the Copeland Act, and, therefore, is necessary for the proper performance of the functions of the Wage and Hour Division, which is responsible for enforcement of the Act.

II. BOTH FEDERAL CONTRACTING AGENCIES AND THOSE THAT PROVIDE FEDERAL ASSISTANCE COVERED BY THE DAVIS-BACON AND RELATED ACTS AND THE COPELAND ACT SHOULD ENCOURAGE STATE, LOCAL AND PRIVATE RECIPIENTS TO USE COMMERCIALLY-AVAILABLE ELECTRONIC SYSTEMS TO PROCESS AND SUBMIT CERTIFIED PAYROLLS ELECTRONICALLY THUS MINIMIZING THE BURDEN OF COLLECTING INFORMATION AND ENHANCING THE QUALITY, UTILITY, AND CLARITY OF THE INFORMATION COLLECTED.

The Notice published by the Wage and Hour Division also solicits comments about minimizing the burden of submitting weekly certified payrolls. 79 Fed. Reg. at 33002. The Building Trades support use by federal contracting agencies and those federal agencies that provide federal assistance to state, local and private recipients, which are covered by the Davis-Bacon and related acts and the Copeland Act, to use commercially-available electronic systems to process and submit certified payrolls not only as a means of minimizing the burden of preparing and collecting the information required by the Wage and Hour Division in 29 C.F.R. Parts 3 and 5, but also as more effective way of achieving compliance with those laws and regulations.

Legislative enactments promoting electronic commerce, FAR § 4.5(d), now provide that federal agencies may accept electronic signatures and records in connection with Government contracts. The Wage and Hour Division already allows the use of electronic filing of payrolls as long as agency access and record retention requirements are satisfied. To encourage use of electronic, commercially available systems to process and submit weekly certified payrolls to the Government, the U.S. Army Corps of Engineers issued Procurement Instruction Letter ("PIL") 2011-09, *Authority to Use Electronic Software for Processing Davis-Bacon Act Certified Payrolls in USACE Construction Contracts*, on June 7, 2011. PIL 2011-09 was issued to provide guidance and to "encourage the use of an electronic, commercially available system to process and submit Davis-Bacon certified payrolls to the Government."

Expanded use of commercially-available electronic systems to process and submit certified payrolls electronically to the Government such as the practice recently adopted by the Army Corps of Engineers would not only minimize the burden of weekly collection and submission of certified payrolls required by the Copeland Act and the

Wage and Hour Division's regulations, but also "[e]nhance the quality, utility, and clarity of the information to be collected," another issue about which the Notice published by the Wage and Hour Division solicited comments. *See* 79 Fed. Reg. at 33002.

Accordingly, DOL and OMB should jointly develop a government-wide policy encouraging both federal contracting agencies and those that provide federal assistance to state, local and private recipients covered by the Davis-Bacon and related acts and the Copeland Act to use commercially-available electronic systems to process and submit certified payrolls electronically.

Your careful consideration of these comments is greatly appreciated.

Sincerely,

Sean McGarvey
President