



VIA ELECTRONIC SUBMISSION

September 5, 2017

Mary Ziegler
Assistant Administrator for Policy
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments on Information Collections: Davis-Bacon Certified Payroll [Control Number 1235-0008]

Dear Ms. Ziegler:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor's (DOL or the Department) Wage and Hour Division in response to the above-referenced information collection request (ICR) published in the *Federal Register* on July 7, 2017, at 82 Fed. Reg. 31636.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Comments on the Proposed ICR

The Department of Labor is requesting in accordance with the Paperwork Reduction Act of 1995 (PRA) to extend Office of Management and Budget approval of the collection of information related to Davis-Bacon certified payroll. Currently, contractors and subcontractors on federal and federally assisted construction projects subject to the Davis-Bacon and related Acts are required to submit weekly certified payrolls. While ABC continues to advocate for full repeal of the Davis-Bacon Act, we also continue to recommend common-sense reforms to the law. ABC's comments focus on the four questions presented by the DOL.

1) 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.

The Form 347 is an unduly burdensome and unnecessary requirement that should be eliminated. Under the Davis-Bacon Act, 40 U.S.C. 3142(c), and the Copeland Act, 40 U.S.C. 3145, all that is required is that covered contractors and subcontractors provide a "statement" on the wages paid each employee during the prior week. As the Department has previously acknowledged,¹ there is no specific requirement for individualized wage information for each covered worker on certified submissions. Thus, the statutorily required "statement" could consist entirely of the certification that now appears on the back of the current form in a simple declarative sentence that the required wages have been paid for each covered employee. Certainly, nothing in either statute requires the Department to require the detailed information that fills nine (9) columns of payroll information, as well as additional fringe benefit information. Most if not all of the information requested by the current form is duplicative of information that contractors are required to maintain in payroll records which are subject to audit by the Department in order to confirm compliance with the Act(s). Such audits of payroll records are deemed by the Department to be sufficient to ensure compliance with the Service Contract Act, 41 U.S.C. 351, without any lessening of Departmental enforcement. In addition, the Department's estimate of the cost of compliance with the certified weekly payroll requirement using Form 347 is significantly understated and should be reevaluated before reauthorizing the current form.

2) Enhance the quality, utility and clarity of the information to be collected.

A significant obstacle to the quality, utility and clarity of the information to be collected on this form stems from the systemic problems with Davis-Bacon enforcement by the Department. In particular, the survey process leading to the determination of prevailing wages has long been recognized to be arbitrary and unworkable, leading to inflated, outdated and inaccurate prevailing wage determinations and other errors on many projects. Numerous government agency reports and congressional hearings²

¹73 Fed. Reg. 77504, 77507-08 (Dec. 19, 2008), citing Building & Const. Trades' Dept., AFL-CIO v. Donovan, 712 F.2d 611 (D.C. Cir. 1983).

² <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg81435/html/CHRG-113hrg81435.htm>.

have highlighted the DOL's failure to properly determine prevailing wage rates under the Davis-Bacon Act.

As a result of a flawed, unscientific wage calculation methodology, the DOL's published determinations of federal "prevailing" wages in construction no longer reflect actual local wages. In fact, despite years of low union density in the construction industry,³ the DOL's wage survey process somehow mandates union wage rates more than 60 percent of the time. ABC continues to support transferring the prevailing wage survey process away from the DOL's Wage and Hour Division in favor of the Bureau of Labor Statistics, which would use proven statistical sampling techniques to arrive at an accurate, current and fairer approximation of prevailing wages throughout the country.

The DOL's failure to provide detailed information about job duties that correspond to each wage rate makes it difficult to determine the appropriate wage rate for many construction-related jobs. These wage determinations force federal contractors to use outdated and inefficient union job classifications that ignore the productive work practices successfully used in the merit shop construction industry. Further, the DOL has failed to give contractors notice of many of its letter rulings and, with rare exceptions, has not posted such rulings on its website. ABC supports regulatory language requiring the DOL to publish any union work assignment rules that contractors are expected to abide by, and prohibiting the DOL from penalizing contractors for misclassifications based on unpublished work rules.

ABC also supports greater recognition by the DOL of non-apprenticeship forms of employee craft training in Davis-Bacon prevailing wage determinations. Additionally, ABC has argued against so-called "annualization" of fringe benefit credits by the DOL, a practice that reduces the recognition of nonunion fringe benefits while giving full credit only to union benefit plans. Efforts to stop or modify the annualization of nonunion fringe benefits should again be pursued in the current administration.

Despite ABC's commonsense recommendations, as well as repeated criticisms from the Government Accountability Office⁴ and the DOL's own Office of Inspector General,⁵ the agency has implemented few, if any, meaningful reforms in its administration of the Davis-Bacon Act since the early years of the Reagan administration. As a result, the information that contractors are required to submit on the current Form 347 continues to be distorted and burdensome, because the information requested does not truly comply with the Department's statutory mandate to determine truly prevailing wages in the construction industry.

³ <https://www.bls.gov/news.release/union2.nr0.htm>.

⁴ U.S. Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, GAO-11-152, March 2011, at <http://www.gao.gov/new.items/d11152.pdf> (April 13, 2011).

⁵ U.S. Department of Labor, Office of Inspector General, *Concerns Persist with the Integrity of Davis-Bacon Act Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, March 30, 2004, pp. 12–13, at <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf> (April 13, 2011); U.S. Department of Labor, Office of Inspector General, *Inaccurate Data Were Frequently Used in Wage Determinations Made Under the Davis-Bacon Act*, Audit Report No. 04-97-013-04-420, March 10, 1997, at http://www.oig.dol.gov/public/reports/oa/pre_1998/04-97-013-04-420s.htm (April 13, 2011); and U.S. General Accounting Office, *Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement*, HEHS-99-21, January 1999, at <http://www.gao.gov/archive/1999/he99021.pdf> (April 13, 2011).

3) 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.

The Department's estimate of the burden of the collection of information on the Form 347 does not take into account any of the systemic flaws in the wage determination and compliance system outlined above. In particular, the Department's estimate does not take into account the amount of time that contractors must spend educating their payroll administrators, human resource personnel, project estimators and operations managers in the arcane and arbitrary regulations governing the current enforcement of Davis-Bacon. The effort required to determine proper classification of employees in the absence of published information on unwritten union work assignment practices is alone a significant burden that is not accounted for in the Department's estimate of the information collection burden imposed by the Form 347. Each of the items referenced in paragraph two above leads to compliance dilemmas and additional burdens for many contractors, particularly small businesses in the construction industry.

4) 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.

Electronic submissions of the Form 347 should certainly be permitted under all circumstances. But technology is not the answer to the compliance burdens described above. The problem lies in the systemic Davis-Bacon enforcement flaws described above that have been identified repeatedly in previous administrations but have never been meaningfully addressed. ABC is raising these issues here so that the current administration can undertake a thorough review and reconsideration of the enforcement principles that underlie the Form 347 and that create so many burdens on Davis-Bacon Act-covered contractors in the construction industry.

Conclusion

While ABC continues to advocate for full repeal of the Davis-Bacon Act, we ask the agency to consider these common-sense reforms to enforcement of the Act, which directly affect the information that contractors are required unfairly to submit on the Form 347.

Thank you for the opportunity to submit comments on this matter.

Respectfully Submitted,



Ben Brubeck
Vice President of Regulatory, Labor and State Affairs