SQUIRE PATTON BOGGS

Squire Patton Boggs (US) LLP
2550 M Street, NW
Washington, D.C. 20037

O +1 202 457 6000
F +1 202 457 6315
squirepattonboggs.com

Jennifer A. Harper
T +1 202 457 6417
jennifer.harper@squirepb.com

January 19, 2023

To Whom It May Concern:

On behalf of the Modular Building Institute ("MBI") and its membership of over 400 modular construction businesses throughout the United States, I write this letter in follow up to our EO 12866 meeting on January 18, 2023 regarding the U.S. Department of Labor's final rule updating the Davis-Bacon and Related Acts originally published in the Federal Register on March 18, 2022, at 87 Fed. Reg. 15698. In conducting a review of the final rule, I urge OIRA to return the rule to the DOL if the definition of the "site of work" continues to include a legally untenable expansion of the Davis-Bacon Act ("DBA") to offsite construction in a newly-invented category the DOL has called "secondary construction sites." If this part of the final rule remains unchanged, then the rule will violate the statutory language of the DBA, abrogate judicial precedent, and the DOL will have exceeded its legislative authority. To comply with the DBA and long-standing law, the rule must remove offsite construction facilities from DBA coverage. There is no other reasonable alternative.

MBI is the leading association for the modular construction industry and represents more than 400 manufacturers, contractors, and dealers in the modular building sector throughout the United States. Its members include both union and open-shop businesses and many engage in the construction of a wide range of federal, state, and local government projects, including single and multi-family affordable housing projects, defense and military construction, government administrative buildings, public school buildings and classrooms, disaster recovery shelters, public health facilities, multi-use container storage, and mobile field offices.

Modular construction has long been recognized by the U.S. General Services Administration ("GSA"") as a greener, faster, more cost-effective, and smarter alternative to traditional stick-built construction. Along with the GSA's approval of modular construction, the U.S. Departments of Housing and Urban Development, Defense, and Energy are increasingly promoting the industry as a responsible, environmentally conscious, and taxpayer friendly solution.

In fact, when President Biden unveiled his new Plan to ease the burden of housing costs through innovative financing options**,** he specifically referenced modular, panelized, and manufactured housing as a progressive and cost-effective approach to helping to solve the affordable housing crisis in America.

Unfortunately, the DOL's proposed rule will raise the cost of projects like affordable housing, constrain agency budgets, and undermine the very reason President Biden and federal agencies support modular construction as a viable solution to public needs.

As you are aware, the DOL has proposed extensive changes to its current regulatory framework implementing the DBA. For numerous reasons, we find the rule is deeply flawed in its unauthorized expansion of the DBA's statutory scope and the DOL's estimate of the costs of compliance. For a comprehensive explanation of these inherent problems, I recommend that OIRA review MBI's comments submitted to the DOL as well as the Small Business Administration's ("SBA") public comments on the proposed rule, both of which go into great detail regarding the serious defects in the DOL's proposed coverage and costs, particularly with respect to small businesses, and which should serve as the basis for appropriate revisions in the final rule.

As MBI explained in its public comments to the Wage & Hour Division ("WHD"), the Department has profoundly underestimated the true costs of expanding the DBA to statutorily exempt offsite modular construction factories. The WHD's cost estimate was an absurdly low amount of $78.97. In coming to this amount, the Department allotted only one hour for review of the proposed rule and a half hour to implement it. Not only does that estimate fail to account for the significant economic impact, it appears to be deliberately low to avoid offering alternatives. In today's inflation economy, it is hard to believe that $78.97 will buy a family of four weekly groceries. Yet the WHD is suggesting a rule which places an entire industry under DBA's coverage for the first time in history will not take more than an hour and a half to review and implement.

For any small business government contractor, less than two hours to read and implement a rule with significant economic impact is totally unrealistic. The proposed rule alone was a whopping 432 pages in length and implements more than 50 material changes to the current prevailing wage regulations. Just reading through the rule is a labor-intensive process and requires hours of parsing through dense text and unfamiliar concepts for an exempt modular business contractor. Non-specialist modular business owners will not be able to understand the complexities of the rule in a mere hour. They are far more likely to spend dozens upon dozens of hours working with attorneys and consultants learning the intricacies of the DBA and the proposed rule, then dozens more hours having to adjust and manage their payroll and benefits programs for hundreds of employees. This does not include fees and expenses for upgrading or purchasing new time-keeping and payroll software systems, updating personnel policies and notices, training company personnel, and either hiring or engaging outside experts such as compliance professionals, none of which the DOL took into account in reaching its cost estimate. For MBI's small business members, the overall costs can rise into the thousands and possibly tens of thousands of dollars—significantly higher than the $78.97 claimed by the DOL.

The SBA also opposed the DOL's proposed rule in part because the DOL severely underestimated the compliance costs of the rule and overlooked the negative effect the rule will have the ability of small businesses to adequately compete for federally-funded construction projects. The SBA called upon the DOL to provide a more accurate analysis of the number of

small businesses affected by the rule as well as reasonable alternatives that will reduce the cost impact on small businesses. If the DOL had not taken these serious concerns into account and adjusted the costs upward to reflect the actual costs of compliance, I urge OIRA to return the final rule for reconsideration.

Let us turn to the impact on government programs. The American domestic modular construction industry is largely comprised of small businesses, including veteran, minority, and female-owned enterprises. Feedback we have received from MBI's small business members indicates that many do not have the working capital necessary to cover the additional costs imposed by the DOL expanding the DBA beyond its statutory mandate to include off-site modular construction. This is particularly acute in high wage scale counties. Many newly covered small businesses will not be able to withstand the rapid increase in DBA pay scales even with a price adjustment. Further, they do not have the operational and administrative processes in place to track labor hours at the level of detail needed to comply with prevailing wages. Nor do they have the expensive payroll systems in place that will be necessary to manage the DBA wage payment and certified payroll requirements. The accounting alone is overly complex, and there is little if no information available from the DOL offering real, practical guidance outside generic examples unrelated to modular construction techniques. Newly covered small businesses who cannot afford a company-wide transformation of their operations will no longer be able to participate or be competitive in federal contract opportunities. These businesses will be shut out, preventing their ability to participate equally in federal and federally-funded public works and public buildings. This undermines the federal government's ability to procure the best competitive bid for construction projects and instead drives the costs up to a point that only a few construction companies with economies of scale will be able to compete. This means the President's encouragement towards modular solutions in projects like affordable housing will fail.

Additionally, the higher costs required to implement DBA prevailing wages will cause prices for domestically manufactured modular components to rise, which creates a competitive disadvantage for U.S.-based contractors compared to off-shored modular components suppliers that do not similarly face DBA rules. As a result, the final rule, if implemented as proposed, could contribute to the diminution of the domestic construction industry.

I have heard from MBI's small business members who would be newly covered under the DOL's proposed rule expressing grave concern because their budgets are extremely limited and they cannot afford the huge capital costs that would be required to restructure their operations. As a result, some have reported they will have to seek fewer government projects or none at all. This makes no sense when Congress made it clear through the Small Business Act that federal agencies should be encouraging greater participation from small businesses in procurement. Nor does it align with President Biden's goal to lift regulatory burdens and reduce price pressures in the economy. Revising the DBA regulations to increase construction costs when the labor market is tight and supply chains are restricted is inexplicable. The outcome will disproportionately affect critical sectors where small businesses can help most. I respectfully request that OIRA consider the negative impact of the rule on the President's priorities with

respect to affordable housing, and the negative impact the rule can have on competition in government procurement.

Finally, as MBI pointed out in its public comments, the DOL's expansion of the scope of coverage to include off-site construction directly violates the plain language of the Davis Bacon Act. Under the DBA, a covered contractor or subcontractor must pay prevailing wages to all mechanics and laborers employed "directly on the site of the work." The DOL's proposed rule revises the definition of "site of the work" to encompass construction contractors that are not performing work any work directly on the site. This has the effect, as the DOL acknowledged, of forcing a contractor that is located 3000 miles away from the construction site to become covered by the DBA the same as a contractor with mechanics and laborers employed directly on the site of work. Except that directly violates the statutory language of the DBA. If changes to the statutory scope of the DBA are to be made, it is black letter law that the DOL must reserve such action for Congress.

The DOL's proposed rule expressly states that modular construction companies located offsite are now going to be covered by the DBA. But time and again, courts have made clear that the DOL may NOT expand the DBA to offsite workers. In fact, back in 2000 the Department was forced to revise its regulatory definition of "site of the work" in view of three U.S. appellate court decisions invalidating the Department's attempt to extend coverage to off-site workers. That led to the current rule exempting "permanent, previously established fabrication plants "not on the site of work, even where the operations for a period of time may be dedicated to the performance of a contract."[1] We think this framework makes sense. It is transparent, unambiguous, and respects the DBA's statutory language and judicial holdings.[2]

By expanding the meaning of the "site of work" to include to include offsite construction, and modular construction in particular, the DOL is rewriting the DBA to include an entirely new category of coverage that the Act does not permit, Congress never contemplated, and courts have expressly rejected. Indeed, the phrase "secondary worksites" does not exist in the DBA and courts have refused to read such offsite workers into the law's scope of coverage. It is therefore confounding to see the DOL reverse its current regulatory framework that legally complies with the DBA in favor of a rule that plainly violates the Act and ignores judicial precedent.

[1] *See* 29 C.F.R. § 5.2(l)(3) (2000).

[2] *See Trucking v. Pa. Prevailing Wage Appeals Bd.,* 30 A.3d 616 (Pa. Commw. Ct. 2011) (holding "the definition in the 2000 amendment to 29 C.F.R. § 5.2(l), adopted by the Board, to be a reasonable interpretation of the phrase 'directly on the site of the work,' which is equally applicable to the similar phases 'directly upon the public work project' and 'at the job site' in Section 2(7) of the Act."); *Sheet Metal Workers' Int'l Ass'n v. Duncan*, 229 Cal.App.4th 196 (Cal. App. 2014) (relying in part on the DBA to interpret similar state prevailing wage law to preclude work "performed at a permanent, offsite, nonexclusive manufacturing facility"); *United States v. BKJ Solutions, Inc.*, Case No. CIV-09-730-M (July 20, 2012) (W.D. Okla. 2012) (finding that "construction" as used in the DBA and Miller Act applies to work performed at the actual work site and not to fabricating the shells of the modular units off-site).

This action is a serious overreach. Congress has not provided the DOL with authority to expand the DBA's statutory language via rulemaking or by "interpretation." Only Congress, through legislative action, has the constitutional authority to make such changes to the law. Unless and until Congress passes new legislation, the DOL must adhere to the DBA as written and preserve the offsite exclusion. If the DOL moves forward with the rule as proposed, we suspect the Department will face legal challenges; consequently wasting taxpayer dollars trying to defend a rule that disregards court precedent and Congressional intent.[3]

Instead of this outcome, the final rule should continue to exempt offsite construction from the definition of "site of work." By the very terms of the DBA, offsite laborers and mechanics who perform no construction work on the actual site of the public building or public work cannot be covered employees. The final rule should maintain the current regulatory framework that properly applies the DBA's statutory scope of coverage. As proposed, the rule is inconsistent with the DBA and if "secondary" worksites have not been withdrawn accordingly, they should be withdrawn from the final rule prior to publication.

I note a much needed revision of the Wage & Hour Division's outdated methodology for making wage determinations is a welcome opportunity for modernization, particularly because the DOL has never fully surveyed the modular construction industry when making wage determinations, so that job categories and wage determinations remain completely out of step with current market rates in the industry. However, a wholesale rewriting of the statutory language of the DBA is not within the DOL's legislative authority and not one that I believe will withstand legal scrutiny. If the DOL wishes to ensure compliance with the DBA's statutory scope and the prevailing court decisions rejecting an expansion to offsite construction, then withdrawal of "secondary" worksites from the final rule is the only option.

I trust OIRA will coordinate with the DOL to ensure the final rule maintains the current rule's exceptions to permanent, offsite construction facilities consistent with the DBA and 29 C.F.R. § 5.1(l) (2000). So you can hear from business owners personally, we have gathered in the enclosed attachment a sample of the comments MBI members submitted to the DOL.

Thank you again for your attention to these important concerns.

[3] The proposed rule even disregards past Department decisions finding off site construction to fall outside DBA coverage. *See*, *e.g.*, Pub. Works Case No. 2007–009 (May 5, 2008), Wasco Union High School District (Department determined that modular units to be installed at a school site were not subject to prevailing wages because the units were fabricated at a permanent, offsite facility that was not integrally connected to the project site); Pub. Works Case No. 2008–008 (May 28, 2008) (Sunset Garden Apartments) (Department determined that the prevailing wage law did not apply to the fabrication of construction materials at a permanent, offsite facility).

Sincerely,

Jennifer A. Harper, Esq.
SQUIRE PATTON BOGGS (US) LLP