AGC of America Summary of U.S. Department of Labor's Proposed Rule to Update the Davis-Bacon and Related Acts

Background

On March 18, 2022, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) released a proposed rule to significantly revise the regulations implementing the Davis-Bacon Act and its prevailing wage for the first time in nearly 40 years. The Davis-Bacon Act and 71 Related Acts collectively apply to an estimated $217 billion in federal and federally assisted construction spending per year and provide minimum wage rates for an estimated 1.2 million U.S. construction workers. Final rule is not expected until the end of 2022, at the earliest.

AGC of America Action

Back in 2015, an AGC of America member-led task force developed a comprehensive list of considerations for Davis-Bacon reform, which it subsequently shared with WHD. The association also met with WHD directly in the pre-rulemaking period in 2021 to provide further construction industry stakeholder input. Several of AGC's recommendations have been included in the proposed rule, including but not limited to:

- Providing the ability to automatically update non-collective bargained rates that are 3 or more years old;
- Providing relief to highway projects that cover multiple counties and wage determinations;
- Permitting DOL to adopt prevailing wage rates set by state or local officials after review; and
- Federal clarity and a single set of standards

AGC of America is reviewing the proposed rule and will seek input to prepare comprehensive comments utilizing the expertise of its members, Chapters and others. AGC of America has prepared this informal summary document of the proposed rule as outlined below.

DEFINITIONS

- Prevailing wage
- Area
- Building or work
  - Energy infrastructure and related activities
  - Coverage of a portion of a building or work
  - Construction, prosecution, completion, or repair
- Contractor
- Subcontractor
- Laborer or Mechanic

SITE OF THE WORK AND RELATED PROVISIONS

- Revising the definition of "site of the work" to further encompass certain construction of significant portions of a building or work at secondary worksites
- Clarifying the application of the "site of the work" principle to flaggers
- Revising the regulations to better delineate and clarify the "material supplier" exemption
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- Revising the regulations to set clear standards for DBA coverage of truck drivers.

WAGE DETERMINATIONS

- Building and residential construction projects
- Adoption of state/local prevailing wage determinations
- Periodic adjustment for open-shop rates
- Scope of consideration
- Proposals for use of "metropolitan" and "rural" wage data
- Proposals for amending the county grouping methodology
- Frequently conformed rates
- Publication of general wage determinations and procedure for requesting project wage determinations.

ENFORCEMENT

- Operation of Law
- Cross-Withholding
- Anti-Retaliation
- Debarment
- Flow-down

DEFINITIONS

- **Prevailing wage**

The Department proposes to redefine the term "prevailing wage" to return to the original methodology (pre-1983) for determining whether a wage rate is prevailing. This original methodology has been referred to as the "three-step process."

This three-step process identified as prevailing:

1. any wage rate paid to a majority of workers; and, if there was none, then
2. the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then
3. the weighted average rate.

The second step is referred to as the "30- percent rule," pre-1983 "prevailing wage" means the current and predominant actual rate paid, and an average rate should only be used as a last resort.

- **Area**

The Department proposes to revise the definition of area to address projects that span multiple counties and to address highway projects specifically. Accordingly, the Department proposes adding language in the definition of "area" in that would expressly authorize WHD to issue project wage determinations with a single rate for each classification, using data from all of the relevant counties in which a project will occur.

The Department's other proposed change to the definition of "area" is to allow the use of state highway districts or similar transportation subdivisions as the relevant wage determination area for highway projects. Using state highway districts as a geographic unit for wage determinations would be consistent with the Davis-Bacon Act's specification that wage determinations should be tied to a "civil subdivision of a State."

As such, the Department proposes to authorize WHD to adopt state highway districts as the geographic area for determining prevailing wages on highway projects, where appropriate.

- **Building or work**
    - **Energy infrastructure and related activities**

      The Department proposes to modernize the definition of the terms "building or work" by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of construction activities encompassed by the definition.

    - **Coverage of a portion of a building or work**

      The Department proposes to add language to the definitions of "building or work" and "public building or public work" to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement.

    - **Construction, prosecution, completion, or repair**

      The Department also proposes to add a new sub-definition to the term "construction, prosecution, completion, or repair," to better clarify when demolition and similar activities are covered by the Davis-Bacon labor standards.

- **Contractor**

The Department proposes to add a definition for the term "prime contractor." The definition begins by identifying as a prime contractor any person or entity that enters into a covered contract with an agency. This includes, under appropriate circumstances, entities that may not be understood in lay terms to be "construction contractors."

- **Subcontractor**

The Department proposes a new definition of the term "subcontractor." The proposed definition would affirmatively state that a "subcontractor" is "any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1." Like the current definition of "contract," the proposed definition of "subcontractor" also reflects that the Act covers subcontracts of any tier— and thus the proposed definition of "subcontractor" would state that the term includes subcontractors of any tier.

- **Laborer or mechanic**

The Department proposes to amend the regulatory definition of "laborer or mechanic" to remove the reference to trainees and to replace the term "foremen" with the gender-neutral term "working supervisors." The Department does not propose any additional substantive changes to this definition.

The Department seeks comment on issues relevant to the application of the current definition to survey crew members, especially the range of duties performed by, and training required of, survey crew members who perform work on construction projects and whether the range of duties or required training varies for different roles within a survey crew based on the licensure status of the crew members, or for different types of construction projects.

SITE OF THE WORK AND RELATED PROVISIONS

- **Revising the definition of "site of the work" to further encompass certain construction of significant portions of a building or work at secondary worksites**

The Department proposes to amend the definition of "site of the work" to include off-site construction where the "significant portions" are constructed for specific use in a designated building or work, rather than simply reflecting products that the contractor or subcontractor makes available to the general public. Specifically, the Department proposes to explain that "significant portion" means that entire portions or modules of the building or work, as opposed to smaller prefabricated components, are delivered to the place where the building or work will remain, with minimal construction work remaining other than the installation and/or assembly of the portions or modules.

- **Clarifying the application of the "site of the work" principle to flaggers**

The Department also proposes to clarify that workers engaged in traffic control and related activities adjacent or nearly adjacent to the primary construction site are working on the site of the work.

- **Revising the regulations to better delineate and clarify the "material supplier" exemption**

The Department proposes to clarify the scope of the material supplier exception consistent with case law and WHD guidance. First, the Department proposes to add a new definition of "material supplier" and to define the term as an employer meeting three criteria:

1. first, the employer's only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup in addition to, but not exclusive of, delivery;
2. second, the employer also supplies materials to the general public; and
3. third, the employer's facility manufacturing the materials, articles, supplies, or equipment, is neither established specifically for the contract or project nor located at the site of the work.

The Department intends to do away with current practice where they consider material suppliers are not covered by Davis-Bacon wages if the time spent loading or unloading at the project site is not more than "de minimis" claiming it to be unnecessary with these new definitions and provisions.

- **Revising the regulations to set clear standards for DBA coverage of truck drivers**.

Specifically, the Department proposes to clarify that truck drivers and their assistants are covered for their time engaged in "onsite activities essential or incidental to offsite transportation," defined as activities by a truck driver or truck driver's assistant on the site of the work that are essential or incidental to the transportation of materials or supplies to or from the site of the work, such as unloading, loading, and waiting time, where the driver or assistant's time is not "so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded."

WAGE DETERMINATIONS

- **Building and residential construction projects**

The Department is considering whether to revise regulations regarding when survey data from federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements (hereinafter "Federal project data") may be used in determining prevailing wages for building and residential construction wage determinations. If both non-federal project and Federal project data for a surrounding-county group is still insufficient to determine a prevailing wage rate, then, for classifications that have been designated as "key" classifications, WHD may expand to a "super group" of counties or even to the statewide level.

- **Adoption of state/local prevailing wage determinations**

The Department is proposing to add a new paragraph, which would explicitly permit WHD to adopt prevailing wage rates set by State or local officials, even where the methods used to derive such rates, including the definition of the prevailing wage, may differ in some respects from the methods the Administrator uses under the DBA and the regulations in 29 CFR part 1. The proposal would permit WHD to adopt such wage rates provided that the Administrator, after reviewing the rate and the processes used to derive the rate, concludes that they meet certain listed criteria.

- **Periodic adjustment for open-shop rates**

This proposal seeks to update non-collectively bargained rates that are 3 or more years old by adjusting them regularly based on total compensation data to keep pace with current construction wages and benefits. Specifically, the Department proposes to add language to expressly permit adjustments to non-collectively bargained rates on general wage determinations based on U.S. Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) data or its successor data. The Department's proposal provides that non-collectively bargained rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication, continuing until the next survey results in a new general wage determination.

- **Scope of consideration**

The Department is considering whether to update language to more clearly describe WHD's process for expanding the geographic scope of survey data, and whether to modify the regulations by eliminating the current bar on mixing wage data from "metropolitan" and "rural" counties when the geographic scope is expanded.

The Department's current procedures do not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

- **Proposals for use of "metropolitan" and "rural" wage data**

The Department believes that limitations based on binary rural and metropolitan designations at the county level can result in geographic groupings that at times do not fully account for the realities of relevant construction labor markets. The Department specifically points to the construction industry in this situation, in which workers tend to commute longer distances than other professionals—resulting in geographically larger labor markets. By excluding a metropolitan county's wage rates from consideration in a determination for a bordering rural county, the concern is that current language ignores the potential for projects in both counties to compete for the same supply of construction workers and be in the same local construction labor market.

The Department, however, has concluded that continuing the longstanding practice of using counties as the civil subdivision basis unit is more administratively feasible. As a result, the Department is now considering the option of eliminating the metropolitan-rural bar and relying instead on other approaches to determine how to appropriately expand geographic aggregation when necessary. The Department believes that the purposes of the Act are better served by using such combined statewide data to determine the prevailing wage when the alternative could be to fail to publish a wage rate at all.

- **Proposals for amending the county grouping methodology**

In addition to considering whether to eliminate the metropolitan-rural proviso language, the Department is also considering other potential changes to the methods for describing the county groupings procedure:

1. Eliminate the metropolitan-rural proviso but not replace it with a further definition or limitation for "surrounding counties." Although containing such an inherent definitional limit, this first option would allow the Department the discretion to develop new methodologies of grouping counties at the "surrounding county" level and apply them as long as it does so in a manner that is not arbitrary or capricious.
2. Limit surrounding counties to solely those counties that share a border with the county for which additional wage data is sought. Such a limitation would create a relatively narrow grouping at the initial county grouping stage—narrower than the current practice of using OMB MSAs.
3. Define the "surrounding counties" grouping as a grouping of counties that are all a part of the same "contiguous local construction labor market" or some comparable definition.

- **Frequently conformed rates**

The Department also proposes that, where WHD has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted, WHD nonetheless may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that the basic criteria for conformance of a classification and wage and fringe benefit rate have been satisfied.

In other words, for a classification for which conformance requests are regularly submitted, and for which WHD received insufficient data through its wage survey process, WHD would be expressly authorized to essentially "pre-approve" certain conformed classifications and wage rates, thereby providing contracting agencies, contractors and workers with advance notice of the minimum wage and fringe benefits required to be paid for work within those classifications.

- **Publication of general wage determinations and procedure for requesting project wage determinations.**

The Department proposes to add language to explain that a general wage determination contains, among other information, a list of wage rates determined to be prevailing for various classifications of laborers and mechanics for specified type(s) of construction in a given area. Likewise, the Department proposes to add language to explain circumstances under which an agency may request a project wage determination, namely, where:

1. the project involves work in more than one county and will employ workers who may work on more than one county;
2. there is no general wage determination in effect for the relevant area and type of construction for an upcoming project; or
3. all or virtually all of the work on a contract will be performed by one or more classifications that are not listed in the general wage determination that would otherwise apply, and contract award or bid opening has not yet taken place.

ENFORCEMENT

- **Operation of Law**

The Department proposes designating the Davis-Bacon and Related Acts contract clauses and applicable wage determinations (WD) as effective by "operation of law" even if those provisions are not explicitly included in a covered contract. Currently, in order for a contractor to have a contract covered by the DBA or DBA Related Acts, the government contracting or funding agency must include as a contract clause the requirements and the applicable WD(s). If the government agency fails to do so, DOL cannot hold the contractor liable or enforce the requirements unless and until the government agency amends the contract to add the required clauses and WD(s).

- **Cross-Withholding**

The Department proposes clarifying and strengthening "cross-withholding" for recovering back wages, whereby payments due on contracts at times may be withheld by agencies other than the agency that awarded the contract in the event of a violation

- **Anti-Retaliation**

The Department proposes anti-retaliation provisions to discourage contractors, responsible officers, and any other persons from engaging in—or causing others to engage in—unscrupulous business practices that may chill worker participation in investigations or other compliance actions and enable prevailing wage violations to go undetected.

- **Debarment**

The Department proposes harmonizing "debarment" standards so that the same conduct will warrant debarment (prohibition from participating in future covered contracts) under both DBA projects and Related Acts projects, a 3-year debarment will be mandatory under both the DBA and Related Acts, and the current provision allowing early removal from the debarment list under the Related Acts will be eliminated.

- **Flow-down**

The Department proposes adding language specifying:

1. The flow down requirement also requires the inclusion in such subcontracts of the appropriate wage determination(s);
2. Codify that the definition would include controlling shareholders or members, joint venturers or partners, and general contractors or others to whom all or substantially all of the construction or Davis-Bacon labor standards compliance duties have been delegated under the prime contract. *These entities would therefore also be "responsible" for the same violations as the legal entity that signed the prime contract*;
3. New language underscoring that being "responsible for . . . compliance" means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses;
4. The underpayments of a subcontractor's workers may in certain circumstances subject the prime contractor itself to debarment for violating the responsibility provision; and
5. Proposes to require upper-tier subcontractors to pay back wages on behalf of their lower-tier subcontractors and subject upper-tier subcontractors to debarment in appropriate circumstances (i.e., where the lower-tier subcontractor's violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors). The proposal would include, in contract clauses, language adding that "any subcontractor responsible" for the violations is also liable for back wages and potentially subject to debarment.