Ohio Contractors Association
1313 Dublin Road • P.O. Box 909 • Columbus, Ohio 43216
(614) 488-0724 • (800) 229-1388 • FAX (614) 488-0728 • www.ohiocontractors.org

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Director Jack Marchbanks, Ph.D.
Ohio Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

Dear Director, Marchbanks,

On behalf of our membership and as the chief steward of transportation related construction issues for those members statewide, the Ohio Contractors Association wishes to express our puzzlement, concern, and dismay at the Department's recently revised Trucking Guidelines, specifically the policy regarding site of work considerations in relation to the Davis Bacon Act.

We are not only concerned about the policy itself, but also the means and methods of its implementation. Recently, we were contacted by one of our members who was informed by ODOT District compliance personnel that an updated version of an existing policy was being enforced on a project. The project on which this revised policy was being enforced was let prior to the announcement and publication of the policy to OCA and the industry. The stated revision date of ODOT's policy is May 2021.

In that instance we were greatly concerned about the attempt to enforce the policy retroactively, however the matter was resolved because the site did not meet the test for being dedicated exclusively, or nearly so to the performance of the project. Moving forward, however, our greatest concern is with the revised policy's arbitrary declaration of a two-mile distance being established to determine if a site is considered adjacent or virtually adjacent to the site of work.

Initially, this change is puzzling based on the history of the Department's policies regarding site of work and what may or may not be considered adjacent or virtually adjacent to the project. Prior to 2016, the Department determined that any off-site facility dedicated exclusively, or nearly so to the performance of the project would be considered adjacent or virtually adjacent if it were located within one mile or less to the project, "as the crow flies". This determination caused misunderstandings and misinterpretations, as it was not consistently applied, and most contractors measured the one mile by driving the distance in a vehicle.

After input from OCA and its members, the Department revised its policy in 2016, and we were informed that it was returning to the federal, Department of Labor interpretation for borrow, waste areas, etc., as set forth in 29 CFR 5.2(1)(2). The 2016 policy eliminated any reference to a specific distance that would or may be considered as adjacent or virtually adjacent to the project. During the life of the Department's 2016 policy, OCA recalls few reports from its members regarding prevailing wage issues on waste or borrow area sites.

Now, suddenly, and without advance notice to OCA or the industry, the Department has again revised its Site of Work policy with a more restrictive caveat that any dedicated site within two miles of the project limits will be considered site of work for the purposes of paying prevailing wages. The latest policy cites the L.P. Cavett Case, determined by the 6th Circuit Court of Appeals in 1996 as the basis for the two-mile consideration. We believe this determination is flawed and without substantiation.

The definition of "site of the work" emanated from three federal appeals court decisions construing the scope of the Davis Bacon Act's (DBA's) prevailing wage rate provisions. As stated in the Midway case, the term "site of the work" clearly connotes a geographical limitation. The extent of the geographic limitation described by the phrase "site of the work" is limited to the physical place where the construction will remain, along with off-site facilities that are dedicated exclusively to the performance of the contract and are located adjacent or virtually adjacent to the site of the work.

The phrase "adjacent or virtually adjacent" originates from the decision in the Ball case where the court held that the DBA was clearly and unambiguously intended to apply only to workers on the actual physical site of the public construction work. In that case, a borrow pit and batch plant located two miles from the construction site did not meet geographic test and, therefore, were not considered on the "site of the work." The Court in Ball said that off-site facilities in actual or virtual adjacency to the construction site could be considered part of that site, but a facility located two miles from the site should not.

The Sixth Circuit Court of Appeals, whose jurisdiction includes Ohio among other states, relied upon the Ball decision and ruled in the L.P. Cavett case that the DBA's phrase "employed directly upon the site of the work" unambiguously means that only those employees working "directly on the physical site of the public work under construction" must be paid the prevailing wage rates.

In the L.P. Cavett case, the state highway agency awarded a contract to resurface approximately 11 miles of highway. The project was financially assisted with federal dollars. After the contract was awarded, the prime contractor established an asphalt plant approximately three miles from the midpoint of the highway site. The plant's output was dedicated exclusively to the project. The prime hired a subcontractor to haul asphalt materials from the batch plant to the highway site. The Sixth Circuit in the L.P. Cavett case said the phrase in the DBA "directly upon the site of the work" is not ambiguous. The Court relied on the reasoning of the decisions in the Ball and in the Midway cases.

We believe that any attempt by the Ohio Department of Transportation to issue a "guideline' creating a benchmark of two or three miles to arbitrarily define "adjacent or virtually adjacent" as part of the "site of the work" is misguided and not supported by the L.P. Cavett case, or the DBA and its regulations. Generally, "adjacent" means a common boundary is shared between two sites, and "virtually adjacent" is understood as two sites separated by a narrow strip of land.

We ask that ODOT reconsider this abrupt change to a policy that has served both the Department and industry well since 2016. There has been no legislative or judicial activity that has spurred this change that we are aware of and question why a 1996 legal case now is used as justification for creating this turmoil. The way in which the policy revision was implemented with initial notice to the industry being a citation given to a contractor who bid and was awarded a contract under the prior policy does not reflect an effective communication strategy between ODOT and the industry it works with. Whatever approval path was employed to affect this change will hopefully include, if not industry input, industry notification prior to citations for non-compliance in advance of that policy's adoption.

Respectfully yours,

Christopher L. Runyan

Christopher L. Runyan, P.E.
President