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Division of Regulations, Legislation, and Interpretation,
Wage and Hour Division,
U.S. Department of Labor, Room S-3502,
200 Constitution Avenue NW, Washington, DC 20210.

Re: Regulatory Information Number (RIN) 1235-AA40

As Director of Labor Relations for a major trade association, representing the highway, heavy and utility construction industry in Ohio, I am writing to submit a formal comment related to the United States Department of Labor's ("DOL") proposed rulemaking "Updating the Davis-Bacon and Related Acts Regulations" posted on March 18, 2022.

The proposed rules are not simply clarifications and updates to Davis Bacon ("Davis Bacon" or "the Act") as asserted. Rather, several of the proposed rules are thinly veiled attempts to amend Davis Bacon through the rulemaking process rather than by an act of Congress.

The Scope of Davis Bacon is explicitly limited.

Under the express language of Davis Bacon, the Act applies only to "mechanics and laborers employed directly on the site of the work." 40 USC §§3141-3148; §3142 (c)(1).

This plain language is simple and unambiguous. Under its terms, Davis Bacon applies only to mechanics and laborers, and only if they are "employed directly on the site of the work."

The DOL's proposed rules are neither clarifications nor updates of Davis Bacon – they are attempts to administratively amend the Act to extend Davis Bacon to both apply to workers who are not mechanics and laborers and to extend the scope of the work covered by Davis Bacon to include work that is not performed "directly on the site of the work."

Congress alone possess the power to amend Davis Bacon and attempting to do so administratively would be legally illegitimate, would have a detrimental effect on federally funded construction and would ultimately penalize taxpayers.

1. Davis Bacon does not apply to transportation drivers and the coverage of Davis Bacon cannot be extended to transportation drivers via rulemaking.

Every court of law to consider the issue of whether Davis Bacon covers transportation drivers has determined that material delivery truck drivers who come onto the site of work merely to pick up or drop off construction materials are not covered by Davis Bacon. *Bldg. and Constr. Trades Dep't, AFL-CIO v. U.S. Dep't of Labor Wage Appeals Bd.*, 932 F.2d 985, 992 (D.C. Cir. 1991) ("Midway"); *H. B. Zachary Co. v. U.S.*, 344 F.2d 352 (Ct. Cl. 1965); *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994); *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111, 1112 (6th Cir. 1996); *Frank Bros. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 882–83 (7th Cir. 2005); *Wheeler v. Graco Trucking Corp.*, 985 F.28 108, 114 (3d Cir. 1993).

This is consistent with the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2021 Westlaw Ed.) ("NLRA"), under which truck drivers transporting materials to or from construction sites are not considered to be performing work on the site of constriction, regardless of whether they spend time on the site dumping their load or being loaded.[1] *See Rochester Reg. Jt. Bd. Local 14A*, 363 N.L.R.B. No. 179, *3 (2016); *Techno Constr. Corp. v. Local Union 282, Int'l Bhd. of Teamsters*, 333 N.L.R.B. 75, 82 (2001).

In fact, it is well settled law under the NLRA that trucking employees who deliver materials, supplies, or equipment from an off-site location to the site of construction are not

[1] Under the NLRA the only trucking work that is considered to take place on the site of construction occurs when trucks move materials, equipment, or supplies from one point **on the site of construction** to another point **on the site of construction**. *Techno Constr. Corp.*, 333 N.L.R.B. 75, 79 (2001) (emphasis added).

working on the site of construction, even if those truck drivers spend time on the construction-site picking up or delivering materials. *Local Union No. 282*, 197 N.L.R.B. 673, 675, n.8 (1972); *Jt. Council of Teamsters No. 42 (Cal. Dump Truck Owners Assoc.)*, 248 N.L.R.B. 808, 815 (1980); *Remsco Associates, Inc.*, 197 N.L.R.B. 673, 675, n8 (1972); *Robert E. McKee, Inc.*, 254 N.L.R.B. 783, 786-87 (1981); *Gen. Truck Drivers, Chauffeurs, Warehousemen and Helpers of Am., Local No. 957 v. NLRB*, 934 F.2d 732, 737 (6th Cir. 1991).

This distinction between on-site trucking (transporting materials within the boundaries of a construction-site) and off-site trucking (transporting materials to and from the construction-site) is based on the understanding that delivering materials to and from a site of construction does not directly impact the site. In *Northwood Stone & Asphalt Co.*, 298 N.L.R.B. 395, 397 (1990), the National Labor Relations Board found that:

> Various types of transportation work involving deliveries to, or pickups from, construction job sites are not "on-site" construction work because they involve only incidental contact with the site.

See also, Teamsters (AGC of California), 248 NLRB 808, 815-817 (1980).

Davis Bacon does not cover Transportation drivers, regardless of how long they spend loading and unloading on a site of construction. Transportation drivers are not "mechanics and laborers employed directly on the site of the work." This is also demonstrated by the DOL's candor in acknowledging that in order to accomplish its goal of bringing transportation workers under the Act, it is necessary "to amend the definition of 'construction, prosecution, completion, or repair' in section 5.2 to include 'transportation.'" Proposed rules at 15734. The DOL's proposed amendment is neither a clarification nor an updating of the Act, it is a fundamental change to the Act by adding "transportation" as a category of work covered by Davis Bacon, contrary to the Congressional limitations of the Act to covering only mechanics and laborers employed directly on the site of work.

Raising the price of transporting construction materials and supplies will only serve to increase the cost of covered government projects, increase federal deficits, and ultimately add to the burden borne by taxpayers. The proposed new rules relating to transportation drivers should be withdrawn.

2. Material Suppliers and modular construction workers are not covered by Davis Bacon and cannot be brought within the scope of Davis Bacon through the rulemaking process.

The proposed rules attempt to expand the coverage of Davis Bacon to cover both workers who make pre-engineered/modular construction components manufactured off the site of construction and the suppliers of construction materials (if they fail to meet a newly established criteria). Both attempts to expand the scope of Davis Bacon are contrary to the plain language of the Act.

Davis Bacon requires contractors and subcontractors on government-funded projects to pay only mechanics and laborers "*employed **directly** on the site of the work*" a minimum wage rate determined by the Secretary of Labor to be prevailing in the area in which the work is performed.

Davis Bacon does not cover Material Suppliers.

In 1935, Congress amended the Act to provide for the predetermination of wage rates. *Universities Research Ass'n, Inc.*, 450 U.S. at 776-77. This 1935 amendment broadened the scope of coverage from "public buildings" to "public buildings and public works" and adopted the current coverage formulation, which requires contractors and subcontractors to pay prevailing wage rates only to "mechanics and laborers employed directly upon the site of the work." Davis Bacon Act, as amended 1935, Public Act 403, 74th Congress, S. 3303, reprinted in Legislative History at 16-18. While discussing which employees Davis Bacon would cover, the Committee of Labor specifically clarified that Davis Bacon would not apply to material suppliers because the

materials used at construction-sites are often assembled at off-site locations and transported to the site. 75 Cong. Rec. 12366 (emphasis added). Thus, the employees of material suppliers were exempt from Davis Bacon because their work primarily takes place off-site. *Id.*

In passing the Federal Road Act (which incorporates Davis Bacon), Congress again examined Davis Bacon and confirmed that Davis Bacon does not apply to off-site material suppliers. 102 Cong. Rec. 10967. *Id.*

Material suppliers have been excluded from the scope of Davis Bacon since the inception of the Act. The proposed rulemaking ignores the legislative history of Davis Bacon and turns established precedent on its head, essentially determining that material suppliers are covered by the Act unless they meet a set of criteria fabricated from whole cloth. The DOL's proposed rule would expand the coverage of Davis Bacon to include material suppliers unless the material supplier supplies materials to the general public and has refrained from establishing a facility to manufacture the materials specifically for the contract or project. Neither is a requirement under Davis Bacon, and the fact that a material supplier does not make its materials available to the general public and/or has established a specific facility for purposes of manufacturing materials only for a covered project does not change the fact that Davis Bacon does not cover material suppliers. The proposed rule in this regard amounts to a fundamental amendment to Davis Bacon, and one which would reclassify material suppliers as "mechanics and laborers," clearly contrary to the plain language of the Act.

Raising the price of construction materials by requiring their manufactures to pay a higher prevailing wage will only serve to increase the cost of covered government projects, increase federal deficits, and ultimately add to the burden borne by taxpayers. The proposed rules relating to material suppliers should be withdrawn.

Workers assembling modular/prefabricated components are not covered by Davis Bacon if they do not work on the site of construction.

When Congress determined that Davis Bacon would only apply to mechanics and laborers employed directly on the site of construction, it clearly intended to exclude all workers who are not employed directly on the site of construction. Workers assembling modular construction components at a remote location are clearly not employed directly on the site of construction and are not covered by Davis Bacon.

The existing regulation, 29 CFR 5.2(i), clearly provides "that the manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work . . ." However, in order to extend the coverage of Davis Bacon to workers constructing prefabricated and modular construction components, the DOL has clearly identified that it will be necessary "to amend the definition of 'site of the work' to include offsite construction." This proposed amendment is neither a clarification nor an updating of Davis Bacon – it is a proposal to change the Act by removing the requirement that covered work take place directly on the site of the work in order to expand the scope of Davis Bacon to cover off site work – in direct conflict with the plain language of the statute. This is a fundamental change in the scope of the Act and not a clarification – it is not an appropriate object for rulemaking.

Attempting to bring workers engaged in modular construction under the scope of Davis Bacon is neither a clarification nor an updating of the Act, it is an attempt to amend the Act (by deleting the term "directly" for the plain language of the Act) through the rule making process, which is neither proper nor legal. Workers engaged in the assembly of modular construction

components are not covered by Davis Bacon and as a matter of law, the DOL cannot change this fact through the proposed rulemaking.

Raising the price of modular construction will only serve to increase the cost of covered government projects, increase federal deficits and ultimately adding to the burden borne by taxpayers. The proposed rules relating to workers assembling prefabricated/modular construction components should be withdrawn.

3. **Davis Bacon does not cover Survey Workers.**

Survey workers are not covered by Davis Bacon for several reasons.

a. Land Surveying is procured as part of the architectural and engineering professional services and not as construction services.

The Brooks Act, 40 U.S.C. §§ 1101-1104, excludes professional surveying from the construction bidding process and requires that it be negotiated as part of the architectural and engineering services contract.

The Act defines "architectural and engineering services" to include:

> (C) other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, ***surveying and mapping***, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, ***construction phase services***, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

40 U.S.C. § 1102(C).

The Federal Acquisition Regulations further clarify that:

> Professional surveying and mapping services of an architectural or engineering nature. Surveying is considered to be an architectural and engineering service and shall be procured pursuant to section 36.601 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to section 36.601. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves

traditionally been considered architectural and engineering services shall be procured pursuant to provisions in parts 13, 14, and 15.

FAR 36.601-4.

Because Congress and the Federal Procurement Regulations treat professional surveying and mapping as professional services of an architectural or engineering nature it is distinctly different from the building or construction work covered by the DBRA. Therefore, like engineers and architects, surveyors should be treated as exempt learned professionals under the Davis Bacon Act regulations. 29 C.F.R. § 541.301.

b. **S**urvey crew members are either professional land surveyors or overseen by professional land surveyors.

Surveying is the art and science of making measurements and creating information for use in engineering and boundary determinations. Surveying involves understanding and recovering historical monuments and land boundaries and laying out proposed improvements. Surveying is primarily an intellectual profession that requires years of education and training, the ability to research historical title information, advanced mathematical skills, the ability to interpret evidence found in the field, and the exercise of professional judgment in the field. Surveying requires more precise measuring than other trades perform.

Recovering land monuments, setting control points, and laying out of construction involves only physical activity that is incidental to the intellectual work and its purpose is to extend the design to the land or to gather and provide information and not to construct improvements. Technology improvements have reduced the physical labor required of individuals performing survey work and has increased the intellectual requirements due to the use of sophisticated instruments.

Survey work must be done by or under the direction of a professional surveyor licensed by a state licensing board. Surveying in Illinois is defined and regulated by the Illinois Professional Land Surveyors Act of 1989, 225 ILCS 330/1-49 ("IPLSA") and regulations issued under the IPLSA. The IPLSA requires any defined work to be overseen by a licensed Professional Land Surveyor and places professional duties and obligations on the Professional Land Surveyor. Individuals performing IPLSA-covered work need not be licensed themselves but must be overseen by a Professional Land Surveyor.

Professional Land Surveyors must have a baccalaureate degree in land surveying or a related science with twenty-four credit hours of land surveying courses from an accredited college. To become licensed, an individual must apply with the Illinois Department of Financial and Professional Regulation, pass the fundamentals of surveying exam, serve as a professional land surveyor in training for an equivalent of four years, and pass the principles and practices of surveying exam. Professional licensed land surveyors must complete continuing education to remain licensed.

c. Survey crews perform primarily intellectual activities with physical or manual tasks being incidental to their work.

Before layout of construction begins, professional surveying and engineering firms typically re-establish land boundary monuments and control points during the pre-construction phase. Control points are semi-permanent to permanent markings placed on the ground that are of known location and elevation. Control points are established based on measurements from the property lines and are typically shown on the construction design drawings. Layout of construction is intended to translate design plans to the ground, so the construction crews know where each improvement is intended to be constructed.

Survey crew members can be referred to by several different titles, such as field survey technicians, field surveyors, field crews, rodman, instrument man, and crew chief. The individuals may or may not be licensed but are typically individuals with strong math skills and computer-aided design experience and who are capable of double-checking each other's work.

Individuals performing survey work typically start their day in the office to prepare for that day's work, then go to a project site and perform work, then may leave the project site to perform other tasks, such as researching. The preliminary work in an office preparing the design information needed for use in the field includes uploading electronic information about the design to the total station, GPS device, or data collector. Individuals performing layout of construction often perform postliminary work in an office downloading information about that day's layout work, which is often reviewed by the individual or by a professional licensed land surveyor. Because it is performed off-site, none of the preliminary and postliminary office work can be covered by the DBRA.

Individuals laying out construction typically perform work in advance of the construction crew. Once on-site, individuals performing construction layout establish their location on the project by setting up and positioning their instruments, such as total stations, GPS devices, and data collectors, over known control points. Once individuals performing layout for construction have established their initial location on the project, they then place wooden stakes (known as lath and hubs) that mark out the improvements that will be constructed. Individuals performing layout for construction typically work in two-person crews that are overseen by a Professional Land Surveyor. The lath and hub communicate the design information, such as vertical and horizontal distance and elevation, to the construction crews who will construct the improvements. After the project is laid out, then the construction crew constructs the improvements based on the information provided by the surveyor's layout.

Survey crews perform much different work than the laborers and mechanics covered by the DBRA because the purpose of the layout is to extend the design work and communicate the design plans to the laborers and mechanics that will actually construct the improvements being laid out. Individuals performing lay out of construction do not construct anything. They are also differentiated from other construction trades because the nature of their work is primarily intellectual, as opposed to physical.

d. The proposed rule's discussion of the history of coverage of survey crews under the Davis Bacon Act is flawed.

First, the proposed rules fail to reference the Department's previous determination that only survey crew members employed by construction "contractors or subcontractors" could be covered. See All Agency Memorandum 212; U.S. Dept. of Labor letter to National Society of Professional Surveyors dated Dec. 2, 2013.

Second, the proposed rules state that "survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics." This directly contradicts the Field Operations Manual which provides that:

> As a general matter, members of the survey party who hold the leveling staff while measurements of distance and elevation are made, who help measure distance with a surveyor chain or other device, who adjust and read instruments for measurement or who direct the work ***are not*** considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.

Field Operations Manual 15e20 (emphasis added). This is the first time that the Department has ever referenced taking measurements as a physical or manual task. As in 15e20, in the 1960s, the Department described physical and manual tasks such as "clearing brush and sharpening stakes" and recognized that it was not "commonplace" for survey crew members to perform such work as a primary part of their duties. U.S. Dept. of Labor Memo. # 39 (Aug. 6, 1962).

Before All Agency Memorandum 212 was issued in March 2013, survey workers were typically not covered by the DBRA. See, United States Senate Committee on Health, Education, Labor, and Pensions letter to United States Department of Labor dated October 31, 2013.

All Agency Memorandum 212 has been roundly criticized and was not implemented. See, United States Senate Committee on Health, Education, Labor, and Pensions letter to United States Department of Labor dated October 31, 2013; All Agency Memorandum 235. The comment in the NPRM goes even further and is even less supported than AAM 212.

For these reasons, the comment should be removed from future iterations of this proposed rule or, at a minimum, revised to reflect that survey crew members are not usually covered by the DBRA but might be if they are employed by contractors or subcontractors performing primarily manual tasks, such as clearing brush or sharpening stakes, on the site immediately prior to or during construction in direct support of construction crews.

e. <u>The U.S. Bureau of Labor Statistics distinguishes between laborers and surveyors.</u>

The Occupational Employment and Wage Statistics include surveyors in the Architecture and Engineering Occupations category and define their work as "Make exact measurements and determine property boundaries. Provide data relevant to the shape, contour, gravitation, location, elevation, or dimension of land or land features on or near the earth's surface for engineering, mapmaking, mining, land evaluation, construction, and other purposes."

Conversely, laborers are included in Farming, Fishing, and Forestry Occupations, Construction and Extraction Occupations, and Transportation and Material Moving Occupations

categories. Construction laborers are defined as performing "tasks involving physical labor at construction sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, and clean up rubble, debris, and other waste materials. May assist other craft workers. Construction laborers who primarily assist a particular craft worker are classified under "Helpers, Construction Trades" (47-3010). Excludes 'Hazardous Materials Removal Workers' (47-4041)."

The proposed rules relating to survey workers should be withdrawn.

4. **The current Davis Bacon enforcement mechanisms are working and should not be changed.**

The proposed new rules also attempt to expand the liability of contractors in a number of ways, including both the creation a a new, defined category of employer -- "prime contractor" – which extends Davis Bacon liability beyond the contracting entity to include all related entities and by making such contractors the guarantor of all subcontractors of any tier. Essentially, the proposed rules would impose strict, vicarious liability on contractors, to the point of debarment.

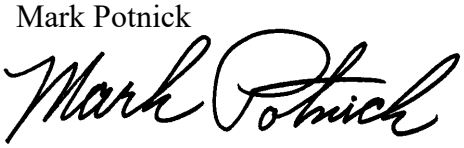
The creation of this strict, vicarious liability would place an undue burden on contractors and given the elevated level of risk involved, would discourage contractors from bidding on work covered by Davis Bacon.

The DOL has offered absolutely no evidence that the current standards for imposing liability on contractors and subcontractors are either ineffective or unworkable – to the contrary, both the Administrator and the courts have established a consistent and workable framework for standards of liability that apply to both contractors and subcontractors. Upsetting this legally established framework in favor of imposing strict, vicarious liability would not improve the enforcement of Davis Bacon, it would impair the ability of government contracting entities to find qualified contractors.

The new rules defining "prime contractor" and changing the current frameworks for contractor and subcontractor liability under Davis Bacon should be withdrawn.

Very truly yours,

Mark Potnick



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