



May 16, 2022

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: 87 FR 15698, Updating the Davis-Bacon and Related Acts Regulations

The Council of State Community Development Agencies (COSCDA) is a national association dedicated to state actions on community development, housing, homelessness, and disaster recovery. COSCDA members administer U.S. Housing and Urban Development – Office of Community Planning and Development programs (HUD-CPD) to accommodate local-based projects and services. States primarily serve low-to-moderate income persons in small and rural communities; these localities are often well outside of urban/metropolitan areas requiring considerable travel. Frequently-supported activities include infrastructure development, housing preservation and expansion, and business assistance. To carry out this important work, COSCDA members partner with varying public and private entities which includes contractors engaged in construction and related industries.

COSCDA welcomes release of the latest Davis Bacon and Related Acts (DBRA) proposed rule. As the Department of Labor (DOL) notes in the federal register notice (FNR), it has been four decades since the last rule was established. During this time, labor and market conditions have changed extensively. Stakeholders engaged on DBRA-affiliated projects have in turn had to navigate rules and processes not necessarily aligned with current conditions. Particularly, varying access and availability of prevailing wage rates as well as compliance standards have posed considerable issues for both federal program administrators and contractors. DOL in the proposed rule recognizes this predicament and offers several avenues to address these matters.

We appreciate the opportunity to submit comments on the proposed rule. Efficiencies which can be realized through this update will advance federally-supported developments nationwide. This is especially critical for directing federal resources to distressed and underserved populations.

General Comments

Davis Bacon requirements apply to HUD-CPD programs which includes the Community Development Block Grant (CDBG) and HOME Investment Partnerships (HOME) programs. COSCDA recognizes the importance

of ensuring prevailing wages are paid on projects as required by federal investments. State HUD-CPD administrators aim to meet a sufficient compensation level in partnership with contractors.

HUD-CPD administrators through four decades of experience have seen the varying challenges in applying Davis Bacon which ultimately pose additional time and costs to projects. The reporting process proves difficult to complete in many jurisdictions at both the administrative and contractor levels; due to capacity and resource limitations, it is especially burdensome for smaller jurisdictions and contractors to meet this process. Further, inconsistent and delayed communications occur on wage classifications depending on the location and job. The \$2,000 project threshold set by the 1931 Davis Bacon Fair Labor Standards Act of 1931 is meaningless in 2022, a notable 91-years after the enactment of the Act. Any project funded by HUD-CPD will total well-above this level and trigger Davis Bacon compliance.

In response, COSCDA suggests several practical reforms to streamline reporting and promote efficiency in Davis Bacon compliance –

1. The \$2,000 project threshold is not relevant to current project development costs. Projects even on a smaller infrastructure or housing scale amount to many times more than this level. Therefore, we recommend DOL work with Congress on revising this threshold to be more responsive to modern projects. A higher project threshold means prevailing wages can be met on larger projects with multiple workers; it would also avoid additional costs incurred by Davis Bacon compliance on smaller projects.
2. An analysis of impediment led by DOL and HUD would determine how and to what extent Davis Bacon labor standards impact project development. The study provides an opportunity to assess outcomes associated with labor standards including project timelines and costs. A cross-agency study would also show a more program-specific examination for HUD-CPD programs. Additionally, we'd urge that this analysis include study regarding how labor standards influence utilization of diverse business enterprises, including Minority Business Enterprises (MBEs), as well as minority worker hours. With the pending rule underway, the report could be completed to show results on both current and future policies.
3. Improved interagency coordination would also support more efficiencies in labor standards compliance. Projects funded through HUD-CPD investments often receive other sources of public financing which also require Davis Bacon or similar labor standards. Despite meeting the same or near-same requirements on demonstrating prevailing wages, separate processes must be carried out for each funding entity. A process which, for instance, determines prevailing wages through the lead funding source - and other programs using this in their respective reporting - would streamline reporting and avoids duplicative information collection.
4. Improved surveying also supports better wage determinations in many places. Currently, wage classifications are difficult to secure depending on the job and location. Contractors are especially hard to reach in small and rural communities where contractors are often smaller and non-union. Since the highest survey returns are received from union-affiliated contractors and industries, it is much more challenging to attain surveys informing wage decisions in rural communities. A greater emphasis on surveying facilitates better outcomes in wages, reporting, and related compliance.
5. Training should also be better supported by DOL to aid contractors, administrators, and associated stakeholders in meeting Davis Bacon compliance. The availability of training tools and guidance varies by state and region. While experienced contractors and program administrators may be able to successfully meet compliance, newer contractors and administrators need training support. Training should be accessible and updated responsive to federally-supported projects.

6. Better guidance is sought for both existing and emerging wage classifications as well. A transformation of the modern economy means employed positions will adjust to meet infrastructure demands. In addition to surveying, wage determinations can be accommodated through greater monitoring of industries and tracking roles therein; these may include, for instance, roles related to broadband and weatherization.
7. Wage reporting timelines present challenges to contractors and adjustments should be made to better reflect employer pay periods. Davis Bacon standards maintain reporting of wages on a weekly basis. Employers however operate on a different schedule with compensation handled often bi-monthly or every two weeks. As a result, additional time and costs are incurred by the contractor to comply with Davis Bacon's weekly reporting requirement.
8. A revision to the on-site interview requirement would alleviate time and costs associated with current reporting. Administrative duties involved in conducting in-person interviews includes considerable time with travel to and from job sites. Direct interviews with employees can be facilitated instead through modern communications allowing a more efficient means to capture the same level of information.

Further details on these recommendations and issues in Davis Bacon compliance can be found in COSCDA's September 2021 [letter](#) to HUD's Office of Davis Bacon and Labor Standards.

Proposed Rule

The latest rule seeks several revisions to ensuring prevailing wages on federally-supported projects. COSCDA shares the following responses to the proposed updates:

1. *The proposed rule includes several elements targeted at increasing the amount of information available for wage determinations and speeding up the determination process. In a proposal to amend § 1.3 of the regulations, the Department outlines a new methodology to expressly give the WHD Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied. Such a change would help improve the currentness and accuracy of wage determinations, as many states and localities conduct surveys more frequently than the Department and have relationships with stakeholders that may facilitate the process and foster more widespread participation. This proposal would also increase efficiency and reduce confusion for the regulated community where projects are covered by both DBRA and local or State prevailing wage laws and contractors are already familiar with complying with the local or State prevailing wage requirement.*

The Department also proposes changes, in § 1.2, to the definition of "prevailing wage," and, in § 1.7, to the scope of data considered to identify the prevailing wage in a given area. To address the overuse of weighted average rates, the Department proposes to return to the definition of "prevailing wage" in § 1.2 that it used from 1935 to 1983. Currently, a single wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise a weighted average is used. The Department proposes to return instead to the "three-step" method that was in effect before 1983. Under that method (also known as the 30-percent rule), in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. The Department also proposes to return to a prior policy on another change made during the 1981-1982 rulemaking related to the delineation of wage survey data submitted for "metropolitan" or "rural" counties in § 1.7(b). Through this change,

the Department seeks to more accurately reflect modern labor force realities, to allow more wage rates to be determined at smaller levels of geographical aggregation, and to increase the sufficiency of data at the statewide level.

COSCD A views these proposals as meaningful policy changes benefitting all levels of Davis Bacon compliance. In updates to § 1.2 regarding area, the Department seeks to issue wage rate determinations with a single rate for each classification. We agree with this update to apply data from relevant counties in determining the wage rate; for instance, this is particularly supportive to broadband projects. The ability to apply state and local wage rates where federal standards are met can also be useful. If intragovernmental wages meet federal wages, the process may allow Davis Bacon reporting to avoid delays in identifying certain federal prevailing wages. On updating the prevailing wage definition and reverting to the previous determination process, we favor a change which can alleviate the need to collect widespread and often cumbersome data to determine federally-accepted wage rates. Lastly, regarding the update on wage survey data, COSCD A supports this action to improve data on wages at the local and state levels. State HUD-CPD administrators have viewed certain wage rates shared for Davis Bacon compliance as out of sync with comparable jobs and locations. An effort to enhance data for reporting purposes strengthens compliance and more accurately reflects level of wages paid by location and role.

2. *Proposed revisions to §§ 1.3 and 5.5 are aimed at reducing the need for the use of “conformances” where the Department has received insufficient data to publish a prevailing wage for a classification of worker—a process that currently is burdensome on contracting agencies, contractors, and the Department. The proposed revisions would create a new procedure through which the Department may identify (and list on the wage determination) wage and fringe benefit rates for certain classifications for which WHD received insufficient data through its wage survey program. The procedure should reduce the need for conformances for classifications for which conformances are often required.*

COSCD A acknowledges the need to improve data on wages per role and industry, and welcomes this effort to accommodate wages in cases which information is inadequate. Lacking data on wages and benefits of certain roles may result in delayed compensation and additional administrative tasks. Instead, DOL’s revised approach should promote transparency and help contractors and program administrators move forward sooner on wage determinations. It is suggested here that the agency produce the updated process to replace conformances with stakeholders involved; a pilot or trial development on a smaller scale may help to address any issues ahead of a wider launch.

3. *The Department also proposes to revise § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Bureau of Labor Statistics Employment Cost Index. The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing rates in the area.*

In echoing similar statements on collecting better data, COSCD A supports this development to maintain updates on certain non-collectively bargained prevailing wage rates. Accurate and timely data on wages and benefits helps stakeholders at all levels of federal prevailing wages. Workers outside of collectively bargained roles can be compensated fairly – even without information readily available compared to peers in other collective bargained positions. Contractors and program administrators also benefit by obtaining more relevant information which accommodates project development especially budgeting and prevailing wage reporting. Finally, COSCD A welcomes the Department’s intent to identify and retain workers’ email addresses, and the activity may be an additional way to send interview forms.

4. *The Department also seeks to strengthen enforcement in several critical ways. The proposed rule seeks to address the challenges caused by the omission of contract clauses. In a manner similar to its rule under Executive Order 11246 (Equal Employment Opportunity), the Department proposes to designate the DBRA contract clauses in § 5.5(a) and (b), and applicable wage determinations, as effective by “operation of law” notwithstanding their mistaken omission from a contract. This proposal is an extension of the retroactive modification procedures that were put into effect in § 1.6 by the 1981-1982 rulemaking, and it promises to expedite enforcement efforts to ensure the timely payment of prevailing wages to all workers who are owed such wages under the relevant statutes.*

COSCD A agrees with actions to secure adequate compensation for workers in a timely manner. Improved enforcement as outlined in the proposed rule should be pursued however not at the expense of either contractor or program administrator. Renewed practices to expedite wages should be completed without added time or costs incurred by employers or program administrators. Revised enforcement activities therefore should be carried out in a way that can complement current processes and avoid putting added responsibilities on these other parties. COSCD A also supports the proposal to use electronic signatures on payrolls.

5. *In addition, the Department proposes to include new anti-retaliation provisions in the Davis-Bacon contract clauses in new paragraphs at §§ 5.5(a)(11) (DBRA) and 5.5(b)(5) (Contract Work Hours and Safety Standards Act), and in a new section of part 5 at § 5.18. The new language is intended to ensure that workers who raise concerns about payment practices or assist agencies or the Department in investigations are protected from termination or other adverse employment actions.*

Finally, to reinforce the remedies available when violations are discovered, the Department proposes to clarify and strengthen the cross-withholding procedure for recovering back wages. The proposal does so by including new language in the withholding contract clauses at §§ 5.5(a)(2) (DBRA) and 5.5(b)(3) (Contract Work Hours and Safety Standards Act) to clarify that cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract. The proposal also seeks to create a mechanism through which contractors will be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities in appropriate circumstances— if, for example, those entities are controlled by the same controlling shareholder or are joint venturers or partners on a Federal contract. The proposed revisions include, as well, a harmonization of the DBA and Related Act debarment standards.

While COSCD A has no specific comments or response on these proposals, we concur with the agency’s engagement on anti-retaliation practices and efforts to recover back wages.

Thank you again for your consideration and opportunity to weigh in on the proposed Davis Bacon rule. Overall, the changes included in the rule would provide critical updates to federal labor standards and appropriately respond to ongoing challenges in wage determination and reporting. Further, COSCD A emphasizes the need to partner with stakeholders on implementing these changes. State administrators of HUD-CPD programs are available to further engage on applying any new concepts to implementation. We also request consideration to the aforementioned issues and recommendations offered in the opening comments. Updates to address these challenges outlined are not only welcomed but necessary to reduce time and costs associated with enforcing prevailing wage rates.

We look forward to partnering with DOL and HUD on implementing the revised Davis Bacon policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Dianne E. Taylor". The signature is written in a cursive, flowing style.

Dianne E. Taylor
Executive Director