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VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Amy DeBisschop
Director, 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: Updating the Davis-Bacon and Related Acts Regulations Notice of Proposed Rulemaking (RIN 1235-AA40)

Dear Ms. DeBisschop:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the U.S. Department of Labor (hereinafter “DOL” or “Department”) Wage and Hour Division’s (hereinafter “WHD”) notice of proposed rulemaking (hereinafter “NPRM”) on the Updating the Davis-Bacon and Related Acts (hereinafter “DBRA”) Regulations. The NPRM was published in the Federal Register on March 18, 2022.

The Associated General Contractors of America is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America’s leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. The bulk of these firms work on federal and federally assisted projects covered by the DBRA.

AGC applauds the Department’s efforts around its most significant review of the DBRA regulations in 40 years. We also appreciate the clarity the NPRM would provide contractors as they focus on rebuilding the nation’s infrastructure. Over the previous 40 years, contractors increasingly have been forced to rely on varying and many times conflicting layers of case law, guidance and regional interpretations by both the DOL and contracting agencies in their compliance with DBRA. The bulk of this proposal puts into

regulation what the Department considers acceptable as well as how it regularly interprets requirements via investigative and enforcement practices. While we might not entirely agree on every proposal, at the very least, contractors could now have more regulatory text to point to as concrete guidance in their DBRA compliance, instead of having to deal with an enforcement action after the fact with costly litigation or penalties.

AGC also appreciates the stakeholder outreach and inclusion provided prior the rulemaking. We were excited to participate in industry meetings and provide our input on the current state of the DBRA regulations as well as our opinions on what specifically was in desperate need of reforms. AGC had previously developed thoughtful and long-standing considerations of DBRA reform, both regulatory (32 considerations) and statutory, which were shared with the WHD. While we appreciate that several of those regulatory considerations of reform were considered and included in some form in the NPRM, we also are disappointed that only so few were considered out of roughly 32 regulatory reforms AGC shared. We hope that the Department reconsiders and consults our regulatory reform considerations as it finalizes these updates. AGC also believes that for the first comprehensive review of the DBRA regulations, the Department is missing several huge and unique opportunities to substantially improve the DBRA regulations. We recommend the Department focus on truly modernizing the regulations through clarity rather than added complexity and burden on contractors.

Additionally, WHD is requesting extensive comments on the proposed rule and has asked for specific data from the federal construction contractor community. The Department itself recognizes that this rulemaking “represents the most comprehensive review of the Davis-Bacon Act regulations in 40 years.” WHD is proposing significant material changes at the federal, state and contract level that will require extensive consultation, discussion and coordination with AGC chapters and members to assess their impact and practicality. To best accommodate your request, AGC would like the opportunity to reach out to its members regarding the impact of the proposed rule on their companies. Unfortunately, sixty days does not warrant our membership organization enough time to draft a survey, receive feedback from members, analyze the results, and draft as thoughtful a response to your request for comments that we would have liked. Also, in construction, spring denotes the beginning of peak construction season and many of those who would provide AGC with thoughtful feedback are currently focused on recruiting workers for the season amidst a historic workforce crisis. As a result, again it will be extremely difficult for AGC to get as meaningful feedback as we would have liked from its members in time to properly prepare comments before the May 18 deadline. AGC formally submitted a request¹ for a 60-day extension to the current comment period, which was casually and quietly denied.² AGC believes that for the most significant review and update to the DBRA rules in 40 years, more time is needed for the Department to receive truly thoughtful input from all stakeholders impacted, not just the few consulted prior the rulemaking. WHD understands the DBRA and governing regulations are extremely complex and many organizations with affected members by this update need time to gather and educate themselves to provide thoughtful input. AGC questions, why the rush?

¹ Associated General Contractors of America (March 22, 2022), *Request for a 60-Day Extension for Public Comments on RIN 1235-AA40 - Updating the Davis-Bacon and Related Acts Regulations Notice of Proposed Rulemaking*, retrieved from <https://www.regulations.gov/comment/WHD-2022-0001-0034>.

² U.S. Department of Labor (April 21, 2022), *Comment Period Extension Request Declination*, retrieved from <https://www.regulations.gov/document/WHD-2022-0001-5513>.

Regardless of the rigid timeline of the existing comment period, AGC would like to take the opportunity to address the following specific topics of the proposal by the Department:

Reverting to the (pre-1983) 3-Step Process is Unnecessary and a Missed Opportunity at True Modernization of the Wage Determination (hereinafter “WD”) Process

AGC is disappointed and believes that WHD has missed a huge and unique opportunity to substantially improve the process of determining wages. Instead, the proposal appears to just make it easier on the WHD itself to set prevailing wages with less of the data it already collects, or lack thereof. DOL’s almost exclusive reliance on voluntary wage surveys to produce and update WDs has created a compensation system for DBRA covered construction that poorly reflects the construction labor market in many parts of the country. WHD should focus on how to collect more accurate data, instead of being able to rely on less or even at times inappropriate data, to determine wages that are truly prevailing. Inaccurate WDs and classifications hinder the ability of contractors to compete, and many times expose them to unexpected liabilities.

The Department recognizes in the NPRM that contracting agencies and contractors alike are plagued with issues regarding WHD’s WDs, including missing classifications, woefully outdated WDs, and/or many times completely inaccurate WDs which leave it up to the contractors themselves to sort out after award of a project. This proposal, along with others contained in the NPRM, is intended to supplement the wage survey program, but unfortunately does not help increase the accuracy and amount of wage data. Instead, WHD intends to continue to collect the same data, through the same methods, and utilize less and potentially improper data in producing WDs.

This proposal, amongst others in the NPRM, is obviously a response to the low participation of contractors in the Department’s wage surveys. A major reason for the lack of contractor participation in wage surveys, and therefore lack of utilizable data, is the Department’s insistence that wage rate and fringe benefit data be reported by how many workers in each craft classification were employed on each construction type by individual county and by individual project. Extracting this data from contractor payroll records is painstaking, especially when a survey is occurring during the high construction season (typically spring-fall). The Department should revise its wage survey process to allow contractors to report this information by the wage and fringe benefits paid to individual craft classifications in each county by construction type, instead of broken-down project-by-project.

Variable Rates that are “Functionally Equivalent” Could Place Certain Contractors at a Competitive Disadvantage

The use of a functionally equivalent rate in the manner the Department proposes could create wage rate and competitive inequities in many circumstances. For example, WDs CA2, for building, heavy and highway construction in three California counties, lists 25 different groups for “power equipment operator for all other work.” Each group has a different wage rate, ranging from \$48.25/hour to \$52.93/hour. All groups have the same fringe benefit (FB) rate of \$27.20/hour. Each group has a different list of equipment that they operate. Power equipment operators for cranes, piledriving and hoisting have 13 groups. Operators for tunnel work have 7 groups. In addition, there are hourly additions for premium pay and hazardous material work for each power equipment operator classification.

What would the “functionally equivalent” rate for the 25 groups of power equipment operators be in this WD? The difference between the lowest and highest wage rate is \$4.68/hour (9.7%). Would the WHD simply use the rate in the middle of the range, or allow some percentage variation from a base “functional” wage? Would this be the “appropriate” “slight variation” WHD has in mind? How would premium and hazardous material pay figure into this one “functional” rate?

A functional rate that is less than the CBA rate in a WD that would otherwise use the CBA rates and classifications could put contractors that are signatory to those CBAs at a competitive disadvantage in bidding, since the signatory contractors would be contractually obligated to pay the higher CBA rate while nonsignatory contractors would be free to pay the lower functional rate. Despite the Department’s assurance that special rates would not be permitted, the use of “functional” wage rates might create incentives for contractors and unions to negotiate rates that accommodate this practice and preserve their competitiveness. When does this calculation/balance become too complicated, impractical, uncompetitive, more than a “slight variation” and “inappropriate?”

Expanding the Definition of Area on Highway Projects Spanning Multiple Counties is Logical and True Modernization

A large highway project can encompass several counties. Under current practice this can, and many times does, result in multiple WDs being issued and applicable to the same project. These WDs may have different wage rates for the same craft classifications, may not have the same classifications, or the job duties for the same classifications may be different in neighboring counties. Determining which WD applies and when, what to do about conflicting job duties for the same classification in different WDs, and classifications that are in one WD and not in another are common issues when multiple WDs are issued for the same project. This proposal properly addresses this situation by authorizing DOL to issue one WD for the entire project, regardless of its geographic scope and provides logical relief and harmonization to both contractors and contracting agencies alike. AGC believes this to be in the spirit of true modernization as most highway projects utilize the same workers from the same area and the entire project should be considered a construction market.

Wage Rates from Federal Projects Should not be Used for Building and Residential Projects

DOL should not use wage data from federal projects for building or residential construction wage rates (or highway and heavy construction if it can be avoided). AGC is not aware of any significant deficiencies in the sources of private data for building and residential construction that would necessitate a change in the current practice or regulation.

Adoption of State and Local Wage Rates and Periodic Adjustments to Update Outdated Open Shop Rates Could Increase Accuracy if Done Properly

AGC appreciates the Department’s interest in considering less traditional methods to try to improve the accuracy of outdated rates. Adopting state and local wage rates could improve the accuracy and timeliness of rates if done properly. The viability and practicality of this proposal depends almost entirely on how much confidence one has in state procedures for collecting wage rate data and calculating prevailing wages. The proposal also gives the Administrator ultimately the authority to accept particular state and local rates, even with change. If the Department finalizes this proposal, any WD that includes state prevailing wages should transparently indicate which rates have been adopted and whether those rates have been modified from the original state rate.

Likewise, periodically adjusting woefully out-of-date open shop rates through creative and non-traditional methods where the Department cannot gather enough data could also improve the accuracy of rates if done thoughtfully. The Employment Cost Index (ECI) is a high-quality data series: large sample size, gathered and calculated according to scientifically sound principles. Updated each quarter and posted, with a press release, one month after the quarter (e.g., on the last business day of April--April 29, 2022--for Q1 2022).

There are, however, some choices about which series to use (apart from not seasonally adjusted or seasonally adjusted data). BLS posts data for wages and salaries and for total compensation, which includes employer-paid benefits and required payments for employer taxes and workers compensation. And data is posted for all private industry workers in the construction industry and in "construction, and extraction, farming, fishing, and forestry occupations" combined. If the Department considers this proposal, they should specify which series to use.

Metro and Rural Wage Data Should not be Mixed; Defined Market Approaches Should be Used Instead

The prevailing rate should be based on a civil subdivision or other area that shares a common sphere of economic influence. Combining of counties or other civil subdivisions should only be done when they are economically related and part of the same sphere of influence, such as the NPRM grants to highway projects. But the Department should also retain flexibility in this matter instead of prescriptiveness. Every state, county, city and especially construction market is unique and so should the prevailing rate be based.

The Department's reliance on urban data for rural WDs to make up for insufficient rural data has resulted in erratic WDs and inappropriately impacted competitive bidding." The utilization of urban rates in rural counties have a selective impact on rural contractors and local construction workforces as urban contractors travel with their own workforces and undercut the locals. The Department needs to further clarify this proposal and set specific definitions and limitations to how it would identify a "contiguous local construction labor market." Instead, a defined market approaches should be utilized. Again, the Department should be proposing ways of increasing the collection of accurate utilizable wage data instead of being able to use less and inappropriate data in setting WDs.

Again, this proposal, amongst others in the NPRM, are obviously a response to the low participation of contractors in the Department's wage surveys. A major reason for the lack of contractor participation in wage surveys, and therefore lack of utilizable data, is the Department's insistence that wage rate and fringe benefit data be reported by how many workers in each craft classification were employed on each construction type by individual county and by individual project. Extracting this data from contractor payroll records is painstaking especially when a survey is occurring during the high construction season (typically spring-fall). The department should revise its wage survey process to allow contractors to report this information by the wage and fringe benefits paid to individual craft classifications in each county by construction type, instead of broken-down project-by-project.

Frequently Conformed Rates Should be Included in Wage Determinations

As previously mentioned, inaccurate WDs and missing classifications are more the norm than not for DBRA covered projects. The current process leaves the burden upon the contractor to seek out accurate rates, almost always after award of a project. This can hinder the ability of contractors to compete, and many times exposes them unknowingly to liabilities. As DOL notes, it receives thousands of conformance requests every year because, again, so many WDs lack necessary classifications. With the lack of more

thoughtful ideas in this NPRM to increase the Department's collection of accurate utilizable wage data, this is logical preemptive action by the Department to provide contractors more information upfront in the contract bidding and award process.

Coverage of a Portion of a Building or Work Proposal is not Consistent with the Davis-Bacon Act (hereinafter "DBA")

This proposal seems to be directed to space that is leased by the government in privately owned/constructed facilities. All Agency Memoranda (hereinafter "AAM") 176 outlines five factors to consider when determining when construction performed to accommodate a government lease is substantial enough to be subject to the DBA. When a government agency is a party to a lease that includes construction to accommodate government requirements (e.g., build out offices, security provisions), DOL may consider the lease to also be a contract for construction if the amount of construction is substantial (over the \$2000 threshold for DB applicability) and the government will occupy the space for an extended time.

In *District of Columbia v. Department of Labor*³. The court ruled that the DBA did not apply to the CityCenterDC project because DC was not a party to the construction contract and because the project was not a "public work" under the DBA. The court held that to be a public work:

- (1) The project's construction must be publicly funded; or
- (2) The government must own or operate the completed facility, as with a public highway or public park.

The court noted that

the Department says that the phrase "construction . . . carried on directly by authority of or with funds of a federal agency" includes situations where D.C. neither builds the project nor expends funds for construction, but merely leases land to a developer who then pays for the construction by contracting with a general contractor. We disagree. DOL did not cite any cases where it has previously interpreted this regulatory language to stretch to situations in which there is no public funding for the construction. So, too, the Department has cited no cases in which the similar language in the National Industrial Recovery Act or the Miller Act has been applied to a project with no public funding for the construction. In light of the history, context, and terms of the regulation, the Department's reading of its regulation is not reasonable. It would vastly expand the coverage of the regulation – and indeed would stretch the regulation beyond what the statute can reasonably bear. Put simply, the interpretation that the Department offers to this Court is inconsistent with the regulation, see *Auer v. Robbins*⁴, and if adopted would make the regulation inconsistent with the statute, see *Chevron*⁵.

The Department is proposing the same approach and definition here that the circuit court rejected in the CityCenter case. The DBA does not apply to all contracts "for which the government is responsible." According to the court, the DBA cannot reasonably be read to cover construction contracts to which D.C. is not a party. That reading would require erasing the phrase "to which the Federal Government or the District of Columbia is a party" from the statute. The courts acknowledged that it was not at liberty to

³ *District of Columbia v. Department of Labor*, 819 F. 3d 444 (D.C. Cir. 2016).

⁴ *Auer v. Robbins*, 519 U.S. 452 (1997).

⁵ *Chevron*, 467 U.S. 837 (1984).

rewrite laws in that fashion. With all due respect, the Department is not at liberty to do so either.

Additionally, this proposal is especially open-ended – covering construction carried on “directly by authority of or with funds of a federal agency to serve the interest of the general public, even where construction of the entire building or work does not fit within this definition.” It’s not really a “definition” at all. “Directly by authority of . . . to serve the general public” can cover a lot of situations that do not involve a construction contract, such as the CityCenter leases. But even under this approach, they would still be subject to the DBA because they don’t have to “fit within this definition.”

The DBA applies only to publicly funded projects, or when the government owns or operates a facility. The Department’s “longstanding” policy, or administrative or judicial decisions to the contrary that predate the court of appeals decision in CityCenter, do not constitute authority to amend the DBA through regulations and AAMs. If the Department seeks to change DBA coverage, it must seek legislative change.

Contractor, Prime Contractor, Subcontractor Definitions Should Not Include “Business Owner”

The Department is silent on the status of “business owner” in the NPRM. According to Section 15f06 of the Field Operations Handbook (hereinafter “FOH”), an employee who owns at least a bona fide 20 percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive. The salary and salary basis requirements do not apply to the exemption of business owners under the Fair Labor Standards Act regulations at 29 CFR 541.101. An individual with a 20 percent or greater interest in a business who is required to work long hours, makes no management decisions, supervises no one and has no authority over personnel does not qualify for the executive exemption. To qualify for the exemption, a minority owner with at least a bona fide 20 percent interest in the business must be actively engaged in management.

AGC reminds the Department that business owners meeting this definition are exempt from DBA coverage, are regularly employed and integral to projects. AGC opposes the inclusion of business owners in the definition of “contractor” or “subcontractor.”

Surveying Work Should not be Covered

The Department may recall AAM 212 which extended DBA coverage to those performing surveying work. It became clear soon thereafter that a distinction had to be made about those who were salaried exempt and supervising the crew versus which tasks and workers fell under the definition of laborers and mechanic. The Department received a flood a conformance requests (SF 1444) because surveyor rates did not appear in the applicable local wage determinations. Much to the industry’s relief, the Department then issued AAM 235 rescinding AAM 212 and once again confirmed that surveying work is not covered by the DBA. DBA is one of the most complex regulations with which construction contractors are required to comply; further flipflopping on this issue, amongst others in the NPRM, would only introduce added confusion that will take significant time and effort by both the industry and the Department to sort out. AGC believes that nothing in industry practice has changed to warrant a change in this issue and that surveying work should continue to not be considered covered by the DBA.

Site of Work and Related Provisions are an Unnecessary and Massive Expansion of DBA

DOL proposes to revise the site of work to (1) “further encompass” certain construction of “significant portions” of a building or work at a secondary site, (2) clarify application of the site of work to include

flaggers, (3) better delineate material suppliers and (4) set clear standards for truck drivers. DOL also proposes to use the term “nearby dedicated support site” to describe locations such as batch plants that are part of the site of work because they are dedicated exclusively, or nearly so, to the project and are adjacent or nearly adjacent to a primary or secondary construction site.

The 2000 rule amended the definition of the site to include a site away from the building or work where the site is established specifically for the contract and a “significant portion” of a building or work is constructed. Transportation between the sites is also covered. The *Ball*⁶ and *Cavett*⁷ decisions involved facilities that were no more than 3 miles from the site of work. This proposal seeks to use a more subjective standard of “nearby” to extend coverage off-site facilities.

The site of work provisions have been settled through litigation for decades now and the regulatory changes made in response to litigation have made application of the “site of work” and “adjacent or virtually adjacent” more consistent and predictable. Contractors understand the current site of work regulations and it appears the DOL is trying to get around the litigation and excessively expand the definitions. Additionally, the current limitation of DB coverage to adjacent or virtually adjacent facilities imposed by the *Ball* and *Cavett* decisions does not need further elaboration and does not apply to “nearby” facilities.

“Site of Work” Background

*Building and Construction Trades Department, AFL-CIO v. U.S. Department of Labor Wage Appeals Board and Midway Excavators, Inc.*⁸

The court in *Midway* held that:

The Act [DBA] covers only mechanics and laborers who work *on the site* of the federally-funded public building or public work, not mechanics and laborers employed off-site, such as suppliers, materialmen, and material delivery truck drivers, regardless of their employer. . . . Material delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor . . . 29 CFR 5.2(j), insofar as it includes off-site material delivery truck drivers in the Act’s coverage, is invalid.

Following *Midway*, DOL published an interim final rule amending the regulations to state that “the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not ‘construction, prosecution, completion, or repair.’” Truck drivers employed by a contractor or subcontractor who transport materials to or from the ‘site of the work’ would not be covered for any time spent off-site, but would remain covered for any time spent directly on the ‘site of the work.’” At the same time, DOL noted that the *Midway* decision held that the Midway truck drivers who were engaged in making deliveries to the site were not covered under DBA even though they spent brief periods of time on the site.”

⁶ *Ball, Ball and Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994).

⁷ *L.P. Cavett Company v. U.S. Department of Labor*

⁸ *Building and Construction Trades Department, AFL-CIO v. U.S. Department of Labor Wage Appeals Board and Midway Excavators, Inc.*, 932 F.2d 992 (D.C. Cir. 1991).

⁹ 29 C.F.R. 5.2.(j)(2).

DOL proposed to define this incidental time on site as less than 20 percent of an employee's workday or workweek. The 20 percent threshold was incorporated into FOH 15e16(c) on *material supplier* truck drivers. Specifically, if a material supplier truck driver "undertakes to perform a part of a construction contract as a subcontractor" such as "warranty and/or repair work," and if such work exceeds 20 percent of the driver's time in a workweek, the driver is covered for all on-site time during the workweek.

*Ball, Ball and Brosamer, Inc. v. Reich*¹⁰

This case involved a portable concrete plant two miles from the construction site. The court held that:

The Secretary maintains that the regulations at 5.2(l)(2) satisfy the geographic limiting principle of the Davis-Bacon Act and *Midway*. This might be the case if the Secretary were applying the regulatory phrase "so located in proximity to the actual construction location that it would be reasonable to include them" only to cover batch plants and gravel pits located in actual or virtual adjacency to the construction site. *See* 29 CFR 5.2(l)(1). But such an application is not before us and we express no opinion on its validity. Instead, the Secretary attempts to find any tiny crack of ambiguity remaining in the phrase "directly upon the site of the work" and cram into it a regulation that encompasses other sites miles from the actual location of the public works.

In *Midway*, we determined that "not surprisingly, that Congress intended the ordinary meaning of its words." 932 F.2d at 992. That is, the limitation in the statute making it applicable to "mechanics and laborers employed directly upon the site of the work" restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed."

In the end, we reach the same conclusion we did in *Midway*. The statutory phrase "employed directly upon the site of the work," means "employed directly upon the site of the work." Laborers and mechanics who fit that description are covered by the statute. Those who don't are not.

*L.P. Cavett Company v. U.S. Department of Labor*¹¹

The court in this case held that an asphalt plant 3 miles from a highway project was not a site of work. Specifically:

In reaching our decision, we rely on the reasoning employed by the D.C. Circuit in *Ball, Ball & Brosamer, Inc. v. Reich*.

In reaching its decision [in *Midway*], the [DC Circuit] court commented that "[n]othing in the legislative history suggests, as DOL has ruled, that Congress intended the employment status of the worker, rather than the location of his job, to be determinative of the Act's coverage."

The statutory phrase "employed directly upon the site of the work" means that only employees working directly on the physical site of the public work under construction have to be paid prevailing wages.

¹⁰ *Ball, Ball and Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994).

¹¹ *L.P. Cavett Company v. U.S. Department of Labor*, 101 F.3d 1111 (6th Cir. 1996).

Moreover, if the geographic proximity of the Davis-Bacon Act were expanded in the manner advocated by the Department of Labor, we would create the difficult problem of determining which off-site workers were indeed closely enough “related” to the public work site to justify inclusion under the Act. The *Ball* court noted as much when it stated, “[T]he Secretary attempts to find any tiny crack of ambiguity remaining in the phrase “directly upon the site at the work” and cram into it a regulation that encompasses other sites miles from the actual location of the public works.”

*In the Matter of Rogers Group, Inc., John C. Haydon and Rose Transport, Inc.*¹²

In this case, WHD argued that, when the time spent on site by material delivery truck drivers employed by DBA contractors and subcontractors during the course of the day is “significant,” the de minimis exception cannot exempt them from DBA coverage for this “significant” time. WHD contended that the truck drivers spent their entire day furnishing materials and were on the sites between one and 52 times a day, for between 10 minutes and seven and one-half hours.

The administrative law judge (ALJ) rejected this argument, holding that in *Midway* the DC Circuit concluded that laborers and mechanics employed off-site are not covered by the DBA. Material delivery truck drivers who come onto the site only long enough to make their deliveries are not employed directly on the site of the work. The DC Circuit reiterated this interpretation in *Ball, Ball & Brosamer, Inc.* The Sixth Circuit relied on this reasoning in *Cavett*.

In response to these decisions, the Department published proposed revisions to its position on DBA applicability to truck drivers. The Department noted that truck drivers who transport material to or from the site would not be covered for time spent off-site, but would be covered for any time spent directly on the site that is more than de minimis.

The Department argued that the 2000 revision to 29 CFR 5.2(l)(1)¹³ is entitled to *Chevron*¹⁴ deference. The ALJ did not agree. This deference was rejected in *Midway*. Where the intent of Congress is clear, the court and agency must give effect to the unambiguously expressed intent of Congress. Both *Midway* and *Cavett* found no ambiguity in the plain language of the DBA. The Department’s interpretations of the DBA and the scope of the *Midway* decision and its regulation are not entitled to deference either. Neither is the Field Operations Handbook (FOH). The FOH is contrary to the Sixth Circuit precedent expressly excluding material delivery truck drivers from DBA coverage. In addition, agency interpretations contained in agency manuals and guidelines such as the FOH lack the force of law and do not warrant *Chevron*-style deference.

The Department did not allege that the truck drivers employed by Rogers performed any work while on the site other than unloading the materials they delivered. The Department argued that a court must consider both the location where the drivers spent the majority of their time and the time spent on the site during each delivery. According to the ALJ, the Department infers from *Midway* that material delivery truck drivers were not entitled to DBA wages based on where the drivers spent most of their time and the amount of

¹² *In the Matter of Rogers Group, Inc., John C. Haydon and Rose Transport, Inc.* Case No. 2012-DBA-00005 (5/28/13), Available at: [https://www.oalj.dol.gov/Decisions/ALJ/DBA/2012/WAGE_and_HOUR_DIVISI_v_ROGERS_GROUP_INC-ROS_2012DBA00005_\(MAY_28_2013\)_162104_CADEC_SD.PDF](https://www.oalj.dol.gov/Decisions/ALJ/DBA/2012/WAGE_and_HOUR_DIVISI_v_ROGERS_GROUP_INC-ROS_2012DBA00005_(MAY_28_2013)_162104_CADEC_SD.PDF).

¹³ *Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*, 65 Fed. Reg. 80278 (December 20, 2000) (to be codified at 29 CFR Part 5). Available at: <https://www.govinfo.gov/content/pkg/FR-2000-12-20/pdf/00-32436.pdf#page=12>.

¹⁴ *Chevron, U.S.A. v. Natural Res. Def. Counsel*, 467 U.S. 837 (1983).

time they spent on the site during each trip.

The ALJ disagreed. The *Midway* court concluded that material delivery truck drivers who come onto the site merely to drop off deliveries are not covered because their work serves the same function as materialmen, who are excluded from the DBA. Under *Midway* and *Cavett*, truck drivers who deliver materials from off-site facilities to the site are not covered because they are not employed directly on the site of the work. Material delivery truck drivers who enter the site of work only long enough to deliver construction materials, like those employed by Rogers, are employed off-site and not subject to the DBA.

DOL has not issued any opinion letters that specifically address the parameters of the site of the work as published in the 2000 regulatory amendments. The Administrative Review Board has also issued a limited number of decisions that address “site of the work.” The following decisions provide limited guidance:

In re Abbe & Svoboda, Inc.,¹⁵ the Board applied the previous regulatory definition of “site of the work” and found that laborers performing clean up duties on the ground below bridges that were being painted per the covered contract were on the site of the work.

In re Forest M. Sanders,¹⁶ the Board held that a borrow pit was part of the site of the work if it was dedicated exclusively, or nearly so, to the performance of the road project and if it was adjacent or virtually adjacent to it, and remanded the case to WHD for further consideration.

In re Gary J. Wicke,¹⁷ the Board held that although the previous definition applied in this case, it affirmed WHD’s determination that a borrow pit 3-5 miles from construction site was not on the “site of work,” not adjacent or virtually adjacent to it, or exclusively dedicated to the project, noting that the Administrator’s determination was consistent with the court of appeals decisions and the revised regulations.

Current DOL Site of Work Guidance

The site of the work is currently defined as “the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.” 29 CFR § 5.2(l)(1); *see also* FOH 15b04.¹⁸ Batch plants, borrow pits, job headquarters, tool yards, etc., are part of the site of work, provided they “are dedicated exclusively, or nearly so, to performance of the contract or project” and are “adjacent or virtually adjacent to the site of the work” as defined in 29 CFR § 5.2(l)(1). 29 CFR § 5.2(l)(2) (emphasis added); FOH 15b04. However, the site of the work does not include permanent home offices, branch plant establishments, tool yards, etc., “whose location and continuance in operation are determined wholly without regard” to the particular contract or project. 29 CFR § 5.2(l)(3). The regulations further address permanent facilities of materials suppliers.

As listed in FOH 15b04, examples of site of the work include:

1. If a small office building is being erected, the “site of work” will normally include no more than the building itself and its grounds.

¹⁵ *In re Abbe & Svoboda, Inc.*, ARB No. 01-063, 2004 WL 1739870 (ARB July 30, 2004).

¹⁶ *In re Forest M. Sanders*, ARB No. 05-107, 2007 WL 4248530 (ARB Nov. 30, 2007)

¹⁷ *In re Gary J. Wicke*, ARB No. 06-124, 2008 WL 4462982 (ARB Sept. 30, 2008)

¹⁸ Available at: <https://www.dol.gov/agencies/whd/field-operations-handbook>.

2. In the case of larger contracts, such as for airports, highways, or dams, the “site of the work” is necessarily more extensive and may include the whole area in which the construction activity will take place.
3. Where a very large segment of a dam is constructed up-river and floated downstream to be affixed onto a support structure, the secondary construction site would be within the meaning of “site of the work” for Davis-Bacon purposes if it was established for and dedicated to the dam construction project.

This definition has been in place since the Department’s December 20, 2000, final regulations, effective January 19, 2001, that revised the definitions of “site of the work” and “construction, prosecution, completion, or repair.” 65 FR 80268-01 (Dec. 20, 2000). The revisions were made to clarify the regulatory requirements in response to three U.S. Court of Appeals decisions that held that DOL’s application of the prior regulatory definitions was inconsistent with the DBA limitation to those workers employed “directly on the site of the work.” 65 FR at 80270. The preamble to the final regulations includes the following DOL guidance and observations:

1. DOL is “constrained” “to limit prevailing wage coverage of off-site, dedicated support facilities to those that are either adjacent or virtually adjacent to the construction location.” 65 FR at 80271.
2. Dedicated support facilities are viewed as included within the site of the work only where they are located on, adjacent, or virtually adjacent to the site of the public building or public work. 80271-72.
3. The Department does not precisely define the terms adjacent or virtually adjacent. It believes that the courts intended it to apply the site of work requirement “narrowly, but with common sense and some flexibility” and determinations should be made on a case-by-case basis. 80272.
4. Establishing a specific maximum distance beyond which off-site facilities would not be covered “would be ill-advised.” “[I]t can be almost impossible to determine the exact outer boundaries of large public works projects, such as . . . a major highway construction project. Thus, a numerical figure representing the maximum distance a dedicated facility can be located from the construction site would be arbitrary and impractical to apply.” “[T]he site of work limits for the construction of a single building in an urban location would likely be restricted, and a dedicated facility located only a few city blocks away from the building “would most likely not be considered ‘virtually adjacent’ for Davis-Bacon purposes.” 80272-73.

“The Site of Work”, “Significant Portions”, and “Nearby Dedicated Support Site” Have Already Been Litigated

The site of work regulatory requirement does not apply to related acts that extend DB coverage to all laborers and mechanics employed in the “development” of a project (citing housing acts). The material supplier exception does not apply to work under statutes that extend DB coverage to all laborers and mechanics employed in the “development” of a project, regardless of whether they are employed by contractors or subcontractors. The adjacent or virtually adjacent limitation on coverage of material suppliers was adopted after the *Ball*¹⁹ and *Cavett*²⁰ decisions. And the provision that exempts transportation of material

¹⁹ *Ball, Ball and Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994)

²⁰ *L.P. Cavett Company v. U.S. Department of Labor*, 101 F.3d 1111 (6th Cir. 1996)

to or from the site is from the 1992 interim final rule implementing *Midway*²¹.

As covered above, the site of work provisions have been settled through litigation for decades now and the regulatory changes made in response to litigation have made application of the “site of work” and “adjacent or virtually adjacent” more consistent and predictable. Contractors understand the current site of work regulations and it appears the DOL is trying to get around the litigation and excessively expand the definitions. Additionally, the current limitation of DB coverage to adjacent or virtually adjacent facilities imposed by the *Ball* and *Cavett* decisions does not need further elaboration and does not apply to “nearby” facilities.

We anticipate that by dramatically revising and expanding the definitions as proposed, the result would lead to further costs and compliance nightmares. Why drastically rewrite existing guidelines that contractors currently are familiar with? AGC recommends that the WHD instead put into regulation the already clear and existing rules that contractors regularly turn to in compliance and have for a long time. In a nutshell, why create unnecessary confusion?

AGC also recommends that the Department:

- Limit Davis-Bacon Act coverage to the physical site of construction;
- Revise regulations to codify the enforcement practice of applying a de minimis threshold that excludes coverage of activities at the site of the work that amounts to 20% or less of the employees’ work hours that week; and
- Expand application of the de minimis rule to all covered workers and activities at the site of the work, not just truck drivers who are loading and unloading materials.

Flagger Distinctions and Thresholds Should be Retained

The Department proposes to clarify, in the definition of “nearby dedicated support sites,” that such workers, even if they are not working precisely on the site where the building or work would remain, are working on the site of the work if they work at a location adjacent or virtually adjacent to the primary construction site, such as a few blocks away or a short distance down a highway.

Coverage of flaggers and traffic directors is addressed in 15e10 of the FOH. Flagger duties are manual and physical in nature and integrally related and necessary to the construction activities at the site. Employees of traffic service companies which operate as subcontractors on DBA projects are generally covered. However, traffic service companies that rent equipment to the prime contractor and perform only incidental functions at the site in connection with delivery of equipment are regarded as material suppliers and not covered by DBA unless they spend a substantial amount of time (20% or more) in a workweek on the site (15e16).

The Department should maintain the distinction between flaggers and employees of traffic service companies, as well as retain the 20% threshold for traffic service company employees.

²¹ *Building and Construction Trades Department, AFL-CIO v. U.S. Department of Labor Wage Appeals Board and Midway Excavators, Inc.*, 932 F.2d 992 (D.C. Cir. 1991)

Material Supplier Distinctions and Thresholds Should be Retained

The Department proposes to clarify the distinction between subcontractors and material suppliers. Employees of material suppliers are not currently covered under the DBA and “most of the Related Acts.” The Department proposes three criteria for the exemption:

- (1) the employer’s only obligation for work on the contract is for delivery of materials, which can include pick-up, but not exclusive of, delivery;*
- (2) the employer also supplies material to the general public; and*
- (3) the employer’s facility is not established specifically for the contract or located at the site (citing Zachery, AAM 31, 45, 53).*

If the employer engages in other construction work at the site, it is a subcontractor rather than a material supplier.

DBA coverage of material suppliers is largely already addressed by 15e16 of the FOH, and AGC recommends that Department retain the current FOH guidance on material suppliers and/or that the Department clarify its current guidance.

Truck Driver Distinctions and Thresholds Should be Retained

DBA coverage of truck drivers is largely addressed by section 15e22 of the FOH. The DOL proposal would eliminate the de minimus rule and the 20% threshold for suppliers that come on site for functions like equipment repair. DOL maintains that there is “uncertainty” about how and when the de minimus rule applies. The Department should revise regulations to codify the enforcement practice of applying a de minimis threshold that excludes coverage of activities at the site of the work that amounts to 20% or less of the employees’ work hours that week

The FOH (FOH 15e17) explains contractors’ obligations under the DBA and Contract Work Hours and Safety Standards Act (“CWHSSA”) when using the services of a truck driver who owns and operates his or her own truck as follows:

As a matter of administrative policy, the provisions of DBRA/CWHSSA are not applied to bona fide owner-operators of trucks who are independent contractors. For purposes of these acts, the certified payrolls including the names of such owner-operators need not show hours worked nor rates paid, but only the notation owner-operator. This position does not pertain to owner-operators of other equipment such as bulldozers, scrapers, backhoes, cranes, drilling rigs, welding machines, and the like. Moreover, employees hired by owner-operators are subject to DBRA in the usual manner.

This proposal is silent on truck owner-operators. AGC requests that DOL expressly adopt in the final rule the above policy limiting contractors’ obligations under DBA and CWHSSA with regard to such owner-operators.

Transportation Distinctions and Thresholds Should be Retained

DOL proposes to cover “transportation” that:

- (1) Takes place entirely on the location of the site;
- (2) Of portions of the building or work between a “secondary construction site” and a “primary construction site”;
- (3) Between a “nearby dedicated support site” and either a primary or secondary site;
- (4) A driver’s or driver’s assistant “onsite activities essential or incidental” to offsite transportation “where the time spent is not so insignificant that it cannot be practically recorded”; and
- (5) Any transportation and related activities whether on or offsite under a related statute that extends coverage to laborers and mechanics employed in the construction or “development” of a project.

Items 1, 2, 3 and 5 are reflected in current regulations. The essential or incidental activities in item 4 related to the transportation of material include loading, unloading, and waiting time where time is not so insubstantial that it is not practical to precisely record. This is the same standard as the “de minimis” standard in the Fair Labor Standards Act (FLSA). DOL assumes that in the vast majority of cases it will be feasible to record the time spent on site.

DBA coverage under the transportation proposal is largely dependent on the proposal for the site of work. If “secondary construction sites,” “nearby dedicated support sites” and “related activities” under related acts are covered, truck driver DBA coverage will be significantly expanded. This proposal is also silent with respect to truck owner-operators. It appears to eliminate them. The proposal for drivers and driver’s assistants to cover time that “is not so insignificant that it cannot be practically recorded” is impractical. The FLSA FOH advises that:

- “In recording working time, insubstantial, or insignificant periods of time outside the scheduled working hours may be disregarded. The courts have held that such trifles are de minimis. This rule applies only where a few seconds or minutes of work are involved and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to pay for any part, however small, of the employee’s fixed or regular working time”; and
- “It has been found that in some industries, particularly where time clocks are used, there has been the practice of recording the employee’s starting and stopping time to the nearest 5 minutes, or to the nearest 1/10 or 1/4 of an hour. For enforcement purposes, this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in the failure to compensate the employees properly for all hours they have actually worked.”

AGC again recommends that the current regulations and guidance with respect to truck drivers, including the de minimis rule and the 20% threshold, should be codified. The proposal is not consistent with *Midway*, *Ball* or *Cavett*, and the proposal for drivers and driver assistants is impractical and unnecessary.

“Development Statute”

“Development statute” means a statute that requires payment of DBA prevailing wages to all laborers and mechanics employed in the development of a project, regardless of the site or whether the laborer or

mechanic is employed by a contractor or subcontractor.

In *Cavett*, the Department contended that even if the court decided that the phrase “site of the work” in the DBA was unambiguous, the Secretary is not precluded from applying the broader definition of that phrase (encompassed in 29 CFR 5.2(l)) to the contract in question because it is covered by the Federal-Aid Highways Act (a Davis-Bacon Related Act). The Department asserts that unlike the DBA, the Federal-Aid Highways Act does not contain language limiting its scope to employees working “directly on the site of work.”

The Federal-Aid Highways Act specifically notes that the prevailing wage determination shall be “in accordance with” the Davis-Bacon Act. According to the court, this means that the Federal-Aid Highways Act incorporates from the DBA not only its method of determining prevailing wage rates but also its method of determining prevailing wage coverage. In other words, if 29 CFR 5.2(l) is inconsistent with the DBA it must also be inconsistent with the Federal-Aid Highways Act.

AGC points out the court’s observation in *Cavett* and recommends that, if the Department believes that DBA coverage under development statutes, or under any related act, is different than it is under the DBA, it has the obligation to promulgate regulations defining that coverage before it can apply or enforce different standards.

Contract Clauses by Operation of Law Should be Clarified

The Department has always maintained that the DBA clauses required by the regulation are applicable by operation of law, even when they are not physically in the contract. However, this has never been “official.” Before the Department enforces the DBA and initiates action for back wage collection, it retroactively incorporates the clauses and the appropriate WD into the contract. This proposal would make that step unnecessary. As the Department notes, if this creates a back wage liability for the contractor because the contracting agency failed to include the clauses and WD in the contract, the contractor must be compensated for the additional costs.

AGC asks for further clarifications. It is absolutely necessary that prime contractors be compensated for any increased costs caused by a contracting agency failure.

Post-Award WD Correction Should be Clarified

DOL can direct an agency to include a WD after contract award. Contractors must be compensated for any increased costs under current regulations. The Department is proposing that the Administrator may “otherwise” direct the retroactive requirement. It is not clear from the wording of this proposal whether the authorization for the Administrator to “otherwise” direct the retroactive requirement is referring to including the WD after contract award or the requirement that contractors must be compensated for any increased costs as a result.

AGC recommends additional clarification on this point. Does this proposal authorize the Administrator to deny compensation to contractors when a WD is retroactively included in a WD? If a WD is not included in a contract because of the failure of a contracting agency, and is not retroactively included by the Administrator, what consequence does this have for contractors with respect to any increased costs? Again, it is absolutely necessary that prime contractors be compensated for any increased costs caused by a contracting agency failure.

Conclusion

AGC reiterates our appreciation for the Department's efforts regarding its most significant review of the DBRA regulations in 40 years and hopes it provides necessary clarity on the DBRA that make sense for today's contractors. AGC also appreciates the opportunity to engage in the rulemaking process and looks forward to working with the WHD as it continues to amend regulations that impact construction employers. If we can aid in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "E. J. Walsh". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Cc: Martin J. Walsh, Secretary
U.S. Department of Labor

Jessica Looman, Acting Administrator
Wage & Hour Division
U.S. Department of Labor