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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: RIN 1235 AA40, Updating the Davis-Bacon and Related Acts Regulations

Today I respectfully offer comments on the U.S. Department of Labor's (DOL) March 18 proposed rule updating regulations governing the Davis-Bacon Act (DBA) and related acts.

Introduction

The DBA requires the payment of locally prevailing wages on federal construction projects, as well as federal-aid transportation construction projects, the latter being of greatest interest to ARTBA members. The association's membership includes both union and open-shop contractors who build and maintain transportation improvement projects covered by the DBA. We appreciate the opportunity to comment on DOL's proposed regulatory revisions.

DOL states it is amending the DBA regulations "to provide greater clarity and enhance their usefulness in the modern economy." While ARTBA supports these objectives in principle, we do not agree with all aspects of DOL's proposed approach. Importantly, this rulemaking comes as the transportation construction industry faces the welcome challenge of maximizing the benefits of historic federal transportation dollars from the Infrastructure Investment and Jobs Act (IIJA). These record funding levels should also create and support record numbers of jobs in transportation construction and related industries. However, overreaching regulation can put those economic benefits at risk. We provide our comments within that larger context. Ultimately, the industry seeks to build projects – including those that incorporate IIJA funding – as safely, cost-effectively and efficiently as possible. We believe portions of DOL's proposal compromise those values.

DOL's Proposed Rule Needlessly Expands DBA Coverage Beyond Physical Worksites

In transportation construction, the DBA has applied to workers on active project sites, as well as adjacent or virtually-adjacent sites related to the project, such as support sites, batch plants and borrow pits. This has been and remains the most straightforward and manageable interpretation of the DBA's scope. However, DOL's proposal expands coverage to work occurring away from the physical worksite but related to the project being built. Examples include fabrication facilities and materials supply sites.

While the DBA proposal claims to be a "modernization" of the regulations, DOL in fact utilizes an outdated view of a transportation construction project. In days gone by, workers, supplies and suppliers of roadbuilding projects remained in relatively close physical proximity. These tended to fall well within "the civil subdivision of the State in which the work is to be performed," as 40 USC §3142(b) puts it.

However, emerging technologies and innovations have enabled more disbursement of personnel, particularly among those supplying products and materials to the project, when it is more efficient to do so. For example, on a bridge project, the contractor may be using beams fabricated at facilities miles, or even several states, away. That is good news for the taxpayer (not to mention the local economy where the fabrication takes place), but DOL's proposal wants to treat these far-flung work locations as equivalent to the actual project site for purposes of calculating the prevailing wage rates, regardless of any actual disparities.

There are two notable shortcomings to this approach. First, it would require contractors to ensure compliance at a facility that could be located in a distinctly different labor market. Second, an offsite fabrication facility (to use the example above) is likely producing products for multiple transportation projects in different areas of the country. As a result, employees would be paid a varying hourly rate depending on the location of the worksite for which the material or product is being produced. Compliance and enforcement would be needlessly difficult and costly, not to mention illogical.

DOL would also extend the DBA to cover additional types of off-site work, including personnel driving to and from the worksite, flaggers and surveyors. Transportation construction industry concerns with these expansions include the following:

- Offsite Drivers: The proposal would require a prevailing wage for time off-site drivers spend on the worksite, even if that time is de-minimis. Such an extreme level of DBA compliance will be difficult and expensive to enforce, requiring virtually minute-by-minute recordkeeping. Further, it is unclear who would be required to enforce DBA compliance in this regard, be it the prime contractor for the project or the company employing the driver. Finally, full compliance with this new provision would likely require paying the driver different rates depending on when and how long they were on the project site. Therefore, ARTBA opposes DOL's expanding the DBA to off-site drivers. The current DBA rules and guidance are sufficiently detailed to ensure that truck drivers integrally involved in the construction or maintenance of a project are covered by appropriate prevailing wages.

- Flaggers: Under the proposal, all flaggers would qualify for DBA prevailing wages. This approach, however, fails to distinguish between flaggers who are on-site directing personnel and equipment, as opposed to off-site flaggers whose primary responsibility is pedestrian management and directing people away from the worksite. On-site flaggers direct personnel around work vehicles and operations, generally requiring

specialized training. These workers are commonly paid prevailing wages. Off-site flaggers are used primarily for ensuring pedestrians are directed away from the worksite. They do not have specialized training and are not physically present on the worksite. As such, these workers should not be covered by the DBA.

- Surveyors: Additionally, the proposal extends DBA coverage to surveyors. However, the proposed regulations fail to distinguish between the survey work performed by design professionals and the essential surveying tasks that take place as part of construction activities. Licensed surveyors on construction projects are salaried professionals and exempt from the DBA. On a construction project, the workers that set line and grade are surveyors and in some parts of the country are union workers that have many pay classifications, including approved apprentices that are paid based on their degree of expertise and a negotiated schedule. Any new DBA rule must recognize this distinction.

Counterintuitively, DOL would impose a common "local" wage rate structure for both personnel on the job site and those working in distant locations supporting that job site. This is anything but a "modern" approach to DBA policy. DOL should continue applying DBA coverage only to those personnel on the actual physical worksite.

DOL's Proposed Rule Would Impose Risks of Unknown Future Costs on Contractors

DOL's proposal would require contractors to use the most recent prevailing wage rates when a construction contract is extended or amended. This mandate would impose an additional risk on the contractor, which in turn would likely increase project costs for the taxpayer.

When initially bidding on a project, a transportation contractor uses the prevailing wage rate at the time of procurement. For multi-year projects, the contractor can plan for wage escalations, with some contracts including wage escalation clauses as well. However, extensions or amendments to the contract are generally unforeseen events at the time of bid, as are future prevailing wage rates at the unspecified time such a modification would take place.

Contractors "price" such unquantifiable risks into their bids. This provision of DOL's proposal would likely result in higher bids (and thus project costs) for this reason.

This is a timely topic given the many current project cost increases and delays emanating from pandemic-related global supply chain issues. Some transportation agencies have shown a willingness to extend contracts because of these conditions, which are completely beyond the control of the contractor. However, as written, DOL's proposed rule would not require compensation to the contractor for an increase in the prevailing wage rate when a contract is extended or amended, making a difficult situation worse.

If DOL is going to move forward with this portion of the proposal, then it should ensure public agencies reimburse contractors for mandated payment of increased prevailing wages in this

scenario. Changes to contracts are often made for reasons out of the control of either party and it is unfair – and costly – to place the burden of these events solely on the regulated entity.

The DBA Rule Should Include a "Good Faith" Standard for Prime Contractors' Liability Relating to Subcontractors

DOL's proposed rule would hold prime contractors liable for DBA compliance of their subcontractors, with potential penalties including debarment from future work. This provision appears to ignore the fact that transportation construction projects often involve multiple prime contractors and multiple subcontractors, making compliance, enforcement and the chain of liability much more complex. Ultimately, this liability would constitute another form of unforeseen, largely uncontrollable risk which prime contractors will price into their bids for projects.

ARTBA urges DOL to adopt a "good faith" standard for prime contractors in this regard. If a subcontractor commits a DBA violation in spite of its prime contractor's established compliance program, then that prime contractor should not be held liable for a transgression beyond their reasonable scope of knowledge, and in which they did not willfully participate.

DOL's Efforts to Update Prevailing Wage Rates Must Ensure Maximum Contractor Participation

As ARTBA and its members have expressed in recent meetings with DOL officials, transportation contractors often struggle with out-of-date wage determinations. We were pleased that those officials expressed a commitment to improving the timeliness of this process.

Moreover, DOL states that many of the proposed rule revisions are intended to reduce these delays. Specifically, DOL has proposed re-instituting the "30 percent" test, which allows the agency to consider a wage rate to be prevailing if it is paid to at least 30 percent of the workers in a given area. DOL has also proposed to adopt state wage determinations when certain conditions are met.

DOL must strive to ensure maximum contractor participation in wage surveys from both union and open-shop businesses. Additionally, DOL should increase its efforts to convey the importance of these surveys to the industry, as well as make the surveys easier to understand. Most critical should be educational efforts directed at smaller contractors, which usually do not carry a regulatory or compliance specialist on staff. ARTBA and our state chapter affiliates remain prepared to help distribute information about DBA surveys to our members.

Additionally, ARTBA supports DOL's proposal to redefine the term "area" for highway construction projects by using state highway or transportation districts instead of counties, where appropriate. Projects often span more than one county and the use of a single "area" for the purpose of determining wages would ensure workers on a project are paid at the same rate regardless of which county in which they are working.

Finally, DOL has asked for comment on replacing the term "foreman" with the gender-neutral term "working supervisor." ARTBA recommends the term "foreperson" instead, as "working supervisor" is nebulous and could apply to multiple people on a construction site other than the foreperson. Also, there would be less of an administrative burden in changing "foreman" to "foreperson" in necessary legal contracts and documents.

DOL's Compliance Estimates Are Unrealistic

DOL's proposed rule is the first comprehensive update to DBA regulations since 1982. The pre-publication version of the rule ran all of 492 pages. In its "Regulatory Familiarization Costs," DOL "assumes that, on average, 1 hour of a human resource staff member's time will be spent reviewing this rulemaking. Some firms will spend more time reviewing the rule, but others will spend less or no time reviewing the rule."

This estimate is unrealistic. It is important to note the transportation construction industry includes many small, family-owned businesses. According to 2017 Census Bureau data, 93 percent of highway, street, bridge and other heavy and civil engineering construction firms were earning less than $35 million in annual average receipts, placing them below the $39.5 million Small Business Administration (SBA) annual threshold for classification as small businesses. Many of these firms do not maintain staff devoted to regulatory or legal affairs and will have to hire outside counsel to understand and meet the new compliance obligations associated with DOL's proposed rule.

ARTBA recommends DOL reexamine its estimate of the compliance costs included in the proposal. This lack of realism calls into the question DOL's understanding of the regulated community in this case, and the workability of the proposed revisions.

Conclusion

As its top priority, the transportation construction industry remains committed to deploying the historic federal investments from the IIJA, while maximizing safety, efficiency and cost-effectiveness. In contrast, extreme regulation, such as the DBA provisions described herein, can increase risks for contractors, resulting in higher costs for compliance and projects. Instead, DOL should continue to focus on streamlining the wage determination process without expanding the DBA beyond its intended scope of personnel on a construction project site.

Thank you for considering the views of the transportation construction industry on this important issue. ARTBA stands ready to continue our dialogue with DOL moving forward.

Sincerely,

David Bauer

David Bauer
President & CEO