

Opposition to Proposed Davis-Bacon Reforms

[The Department of Labor recently proposed changes to Davis-Bacon](#) that would apply to contractors and subcontractors who perform construction, alteration, or repair work that is covered by the Davis-Bacon. This Notice of Proposed Rule Making (NPRM) represents the first major update of Davis-Bacon regulations in 40 years, but unfortunately, NUCA must conclude that the proposal reverses many common-sense and necessary reforms to the regulations.

The proposed rule would apply to contracts and subcontracts who perform construction, alteration, or repair work that is covered by Davis Bacon. The most significant revisions of concern to NUCA included in DOL's proposes rule are:

- A return to that "30 percent rule" for setting prevailing wage rates. Currently, if more than 50 percent of wage survey respondents report the same rate, DOL uses that rate as the prevailing wage. Under the proposed rule, DOL would be allowed to use a "predominant" rate of at least 30 percent.
- Revision of the definition of "site of the work" to include sites where prefabricated buildings are produced, and "scope of work" to include energy infrastructure.
- Impose anti-retaliation provisions that would allow DOL to direct contractors and subcontractors to provide relief to employees who are retaliated against through job reinstatement, promotion, back pay with interest, and expungement of negative information from the employee's personnel record.

These changes will inevitably subject many small firms to comply with Davis-Bacon requirements, which will result in significant cost increases at a time when the construction industry is facing formidable workforce challenges and a supply chain crisis.

Under current law, in order for a contractor to have a contract subject to the DBA, the government funding agency must include DOB requirements and wage determinations as part of the contract. If the government agency fails to do so, DOL cannot hold the contractor liable or enforce the requirements unless and until the government agency amends the contract to add the required DBA requirements.

However, the proposed rule stipulates that DBA contract requirements be effective by "operation of law," regardless of a mistaken omission of DBA requirements from a contract. If this provision is adopted in the final rule, DOL will be allowed to enforce DBA requirements against contractors and demand back pay even where the contractor had no knowledge that the requirements applied.

The NPRM also proposes changes to make it easier for DOL to request that contracting and funding agencies withhold contract payments from any contracts if deemed necessary by DOL to secure funds for potential back pay during a DOL DBA investigation.

These changes do not occur in a vacuum. DOL's proposed changes follow the passage of the historic Infrastructure Investment and Jobs Act, which provides substantial federal investment in construction

projects. These changes will jeopardize the success of federally-funded contracts, and are not consistent with federal intent in passing a largely labor-neutral bill.

NUCA strongly opposes these proposed changes as they would both eliminate real-world cost information from merit-based contractors and result in higher costs to consumers. The proposed rule would significantly impact contractors with respect to costs, compliance responsibilities, and enforcement exposure and penalties.

Prevailing wage laws require complex wage and work restrictions that challenge market entry for small contractors, which decreases competition on infrastructure projects. These wage determinations force federal contractors to use outdated and inefficient union job classifications that ignore the productive work practices successfully used in the merit-shop construction industry. Simply put, DOL calculations are not reflective of true prevailing wages as experienced by contractors. If enacted, the NPRM will have significant negative impacts on contractors with respect to costs, compliance responsibilities, and enforcement penalties. This will undermine and compromise the implementation of the Infrastructure Investment and Jobs Act.

NUCA supports policy that encourages the concept that any and all qualified construction contractors to bid on projects at a time when the construction industry continues to face formidable workforce capacity challenges.