Memo

To: MCAA Government Affairs Committee and MCAA Davis Bacon Task Force

From: Jim Gaffney, Chairman, MCAA Government Affairs Committee

CC: Robert Beck, Tim Brink

Date: September 13, 2023

Re: Recent Publication of Final Davis Bacon Regulations

The Biden Administration's Labor Department published the long-awaited Davis Bacon Act regulatory update in final regulations on August 23, 2023 (57526 Federal Register et seq). The final rules will go into effect on October 23, 2023, barring any intervening judicial action – which may be expected.

The final rules adopt a comprehensive set of updates reaching back to the last comprehensive review under the Reagan Administration in 1981-1982, which were upheld for the most part in 1983 by the U.S. Circuit Court of Appeals in the ***Building Trades v. Donovan*** legal challenge. In that opinion, the court deferred to the then Secretary of Labor's discretion to interpret the law on many of the regulatory changes at issue, in line with the policy of the Act. It is that same permissible exercise of statutory administrative policy discretion that the Biden Administration Labor Department is now claiming to exercise 40 years later.

The final regulations represent a careful and painstaking review and legal and practical analysis of the Davis Bacon Act and Davis Bacon Related Acts administrative procedures: "to provide greater clarity and enhance their usefulness in the modern economy" by modernizing and updating the regulatory regime since the last review some 40 years ago, DoL asserted. The new rules roll back the regressive regulatory interpretations that have gained accretion in successive administrations dating back to the Reagan Administration 1981-1982 rollback of sound Davis Bacon policy in the name of inflation control or diminishing the impact of collective bargaining rates, DoL's analysis laid out, asserting that the goals of inflation control and/or diminishing the effect of CBA rates together or separately were not then and are not now valid statutory aims or policies set out by Congress in the Act.

Below is a capsule summary of the key parts of the final regulations. I should note that in the lengthy final regulatory analysis responding to the great number of comprehensive comments submitted on the regulatory proposal, the Labor Department's Wage and Hour Division was very

responsive to MCAA's comments filed by the MCAA Davis Bacon Task Force that were given very fair and comprehensive responses, as was likewise the case with comments filed by the UA, the Construction Employers of America (CEA) and other union-signatory employer groups. On behalf of the MCAA, I want to thank the members of the MCAA Davis Bacon Task Force for their significant contribution in representing the MCAA membership's interest in this important matter – they are: Chuck Daniel, Chip Mitchell, Carl Neimeyer, Jason Rogers, Bill Schatzman, and Adam Snavely.

MCAA's comments filed May 17, 2022, are linked here.

***Specific Action Item*:**

There is no specific action item to request or act on now. The regulations will be implemented gradually over the long term, and the restoration of due weight to union-sector wage and benefit standards in the wage determination process will take place over time; with the other changes periodically updating blended rates. Enforcement process improvements will also take time to implement and impact policy administration.

In the short term, MCAA's Davis Bacon Task Force and Government Affairs Committee will monitor the rules and be on the lookout for any comprehensive court challenges aiming to upset or frustrate the beneficial rules changes as they occur (and may be expected) and will consider legal involvement by MCAA if warranted.

One key element of the rules that will warrant close observation is the new discretion granted to the DoL to adopt state and local wage determinations as the Federal prevailing wage rates if proper Federal standards are maintained in the state and local wage determination procedures. State and local MCAA groups in areas where that beneficial discretion may be a key opportunity for improvement should be followed closely as the rules take shape over time. MCAA also will be joining in monitoring efforts with our aligned union-signatory employer groups in the CEA.

Two key changes/omissions from the proposal:

1. ***Cutback on offsite prefabrication coverage***: The proposed regulations would have extended prevailing wage coverage to offsite prefabrication (secondary sites) where a significant portion of the project work was being performed. Under the final regulations, the offsite fabrication shop must be dedicated to the covered Federal project – moving closer to accepted judicial expansion of the offsite coverage rules. The regulatory analysis specifically cited concerns about an adverse judicial ruling against broad offsite fabrication coverage, in addition to the political sensitivity to the impact on prefabricated affordable housing units.

   The final regulations now specify, the regulatory analysis says: ***"Specifically, the final rule provides that for a secondary construction site to be considered part of the site of work, in addition to being a location where a significant portion of the building or work is constructed for specific use in the designated building or work, the site must be either established specifically for the performance of the covered contract or project or dedicated exclusively, or nearly so, to the covered contract or project."***

2. ***Federal prevailing wage project not routinely allowed in building or residential project wage surveys:*** DoL did not go forward with specifically allowing Federal project data in residential and building wage survey responses – that was not specifically proposed, but DoL asked for input on that practice. The regulatory analysis said the Wage and Hour Division felt the current practice allowing use of Federal project wage survey responses on residential and building project wage surveys from prevailing rate jobs only if private project responses do not provide sufficient responses for a wage determination allows them sufficient room to ameliorate the Reagan rollback on this issue to use prevailing wage data if necessary to complete a wage determination.

   Current regulations allow prevailing wage project responses on heavy and highway project wage surveys because most of that is prevailing wage work. The disallowance of Federal project data in residential or building projects was based on a fear of compounding the effect of the union rate. MCAA's comments supported the expansion on the basis that Federal projects are a big part of the overall market and so should be considered in evaluating market rates.

Here's a capsule summary of the key changes adopted in the final regulations – all pretty much in line with the proposed regulations that MCAA supported:

1. ***Allow the Wage and Hour Division discretion to adopt state and local prevailing wage determinations***, if the state and local survey/process is open and meets general DoL project specific and work category procedures that are substantially similar to the Federal prevailing wage procedures.

2. ***Return to the pre-1982 30% (3-step) prevailing wage determination process.*** From the inception of the Act in wage determination procedures starting in 1935 to the Reagan rollback in 1983 (40 years ago), DoL used a 3-step process to determine "prevailing" rate: 1) if over 50% of the survey responses show one rate, then that rate is deemed "prevailing"; 2) if fewer than 50%, but 30% or more of survey responses show a single rate, then that rate prevails; and, 3) if no single rate achieves the 30% prevalence standard, then the survey responses are given a weighted average to determine a "blended rate." In DoL's view, blended rates or weighted averages are not actual rates paid to workers, as the statute directs, and have become far too prevalent under the Reagan rollback.

3. ***Allow use of metropolitan county rates with urban counties in cases where the original county survey doesn't provide enough responses***. The Reagan rollback barred the inclusion of metropolitan county rates in urban county wage determinations because the metropolitan counties were more likely to reflect high CBA rates and therefore be inflationary, according to the 1982 rationale.

   The Biden Administration regulatory analysis rejects that 1982 change and rationale, saying the proper prevailing wage policy is to reflect market rates irrespective of CBA rates and inflation concerns, and in many places metropolitan and urban counties reflect one labor market for increasingly mobile construction workers who travel across areas for good paying jobs. This practice, in a judicial challenge that predated the current regulatory proposal, is under court challenge in ***Nevada Chapter of the Associated General Contractors of America v. Walsh*** (U.S. District Court of Nevada, 3:21-CV-00430-MMD-CLD, 8/11/2022), where the district court approved the Wage and Hour Administrator's discretion to apply metropolitan Las Vegas dump truck driver rates in a

rural northern county of the state. (That decision is pending appeal in the U.S. Court of Appeals for the Ninth Circuit now.)

4. ***Allow for varying rates on wage survey returns that are functionally equivalent to be counted together for determining prevailing rates,*** overturning the 2006 Wage Appeals Board ***Mistick Construction*** decision that said varying rates under CBAs that are different – shift differentials, hazard pay etc. – should not be considered the same rates for the purpose of the prevailing wage determination. To the contrary, DoL said in the current regulatory analysis, adding that "[b]efore ***Mistick***, historically, when reviewing wage survey data, the Department has considered wage rates that may not be exactly the same to be ***functionally equivalent*** [emphasis added] – and therefore counted as the same – as long as there was an underlying logic that explained the difference between them.

   For example, some workers may perform work under the same labor classification for the same contractor or under the same CBA on projects in the same geographical area being surveyed and get paid different wages based on the time of the day they performed the work – e.g., a night shift premium. In that circumstance, the Department would count the normal and night premium wage rates as the "same wage" rate for purposes of calculating whether that rate prevailed under the majority rate . . . . Similarly, where workers in the same labor classification were paid different "zone rates" for work on projects in different zones covered by the same CBA, the Department considered the difference between those rates to be compensating workers for the burden of traveling or staying away from home instead of reflecting fundamentally different underlying wage rates for the work actually completed." DoL notes that the impact of the ***Mistick*** rules was to cause a big increase in the incidence of ***weighted average or blended rate*** wage determinations – and is counter to the statutory policy of finding the ***predominate rates actually paid*** to workers.

5. ***Update weighted average/blended rate wage determinations once every three years after***, beginning three years after the original wage survey resulted in a weighted average/blended rate. The DoL will phase this in gradually, and eventually remove the backlog of very old and outdated weighted average WDs in the interim before a new survey is conducted for that area. The DoL will use the BLS Employment Cost Index for this updating, not the Consumer Price Index.

6. ***There are several key enforcement reforms:***

   1) deemed the Davis Bacon Act and Davis Bacon Related Acts statutory requirements incorporated by law into every contract, even where the agency neglected to include the contractual coverage in the project documents (as is currently done now for Executive Order 11246);

   2) added whistleblower protections under the Copeland Act anti-kickback provisions of the law;

   3) strengthened cross-withholding for prevailing wage underpayments by allowing cross-withholding under other contracts a non-compliant contractor has with the government;

   4) enhanced standards allowing debarment for non-compliance;

5) clarified flow-down responsibilities, noting that prime contractors and higher tier subcontractors are liable for payment violations of lower tier subcontractors, and that prime contractors are liable for lower tier non-payment of correct wages, but that subcontractors are liable for lower-tier nonpayment only if there is some intentional action or knowledge of the violation; and

6) added recordkeeping time periods up to 3 years after completion of the prime contract.

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