May 17, 2022

Jessica Looman
Acting Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W. Washington, D.C. 20210

Re: Industry Comments on Proposed Update to Davis-Bacon and Related Acts Regulations

Dear Acting Administrator Looman:

The undersigned organizations respectfully submit our comments on the notice of proposed rulemaking (NPRM or the proposed rule) issued by the Wage and Hour Division (WHD) of the Department of Labor (DOL) proposing to update the Davis-Bacon and Related Acts Regulations.[1]

Our organizations represent firms engaged in the financing and development of construction and substantial rehabilitation of multifamily and healthcare housing under federal housing acts, including the National Housing Act, through which Davis-Bacon Act prevailing wage rate requirements apply.[2] Such housing will be referred to herein as "FHA-assisted projects".

We appreciate the considerable effort evident in the NPRM and offer our comments below on how the application of Davis-Bacon wage rates to construction and substantial rehabilitation of FHA-assisted projects under federal housing acts can be further improved.

[1] 87 Fed. Reg. 15698 (March 18, 2022).

[2] See § 212(a) of the National Housing Act (12 U.S.C. § 1715c(a)), § 104(b)(1) of the Native American Housing Assistance and Self Determination Act of 1996 (25 U.S.C. § 4114(b)(1)), § 12(a) of the United States Housing Act of 1937 (42 U.S.C. § 1437j(a)), and § 811[(j)(5)] of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. § 8013(j)(5)).

I. EXECUTIVE SUMMARY

While considerable effort was put forth in developing the proposed rule, an opportunity has been missed to support the development of more affordable housing and healthcare facilities in this country and to develop a true prevailing wage for residential construction. Our comments below cover the following recommendations:

1. We recommend that WHD, by rulemaking, create a policy and practice favoring a single residential wage decision for FHA-assisted projects, including incidental items, based on the overall residential character of the project.
2. For FHA-assisted projects, we urge WHD to increase the threshold for when items of work are sufficiently "substantial" to warrant consideration of separate wage rates from $2.5 million to $15 million (or at a minimum to $5 million or a level that accurately reflects the combined impacts of inflation and rising construction costs).
3. For FHA-assisted projects, we urge WHD to revise the proposed regulation to effectively fix the wage rates as those in effect on the date an application for a firm commitment is submitted.
4. We recommend that WHD modify Davis-Bacon construction classifications to also permit FHA-assisted structures of more than four stories to be considered Residential construction, consistent with advances in the construction of multifamily structures that have occurred since 1985, as reflected in the International Building Code.
5. We urge the WHD to engage directly in a deeper examination of the process of determining prevailing wages with the objective of either broadening participation, utilizing other data sources such as other BLS data, or even looking to private payroll processing providers.

II. MULTIPLE WAGE RATES FOR A SINGLE PROJECT ("SPLIT WAGE DECISIONS")

Our organizations are disappointed that the proposed update to Davis-Bacon and Related Acts Regulations did not address the split-wage concern that we and our respective member firms have raised with WHD and with the Department of Housing and Urban Development (HUD). What is commonly referred to as a "split-wage decision" is a determination to apply multiple wage rates to a single project.

A. The "bucketing" and "split wage" problems.

Davis-Bacon wage rates apply to multifamily and healthcare housing construction or substantial rehabilitation projects that are assisted or insured by the Federal Housing Authority (FHA) by way of a provision in the National Housing Act.[3] Historically, an office of the Department of Housing and Urban Development (HUD) has applied the Davis-Bacon Act to FHA-assisted projects, under the direction and oversight of WHD.

Split wage decisions on FHA-assisted projects arise from WHD's current practice of "bucketing," which HUD must apply to these projects. The practice consists of identifying subcomponents of residential construction and combining (or bucketing) them into different types of construction like building, heavy, and/or highway. Any buckets of items of work with a total cost of $2.5 million or more are assigned separate wage rates, which results in frequent multiple wage rate decisions ("split-wage" decisions).

[3] See 40 U.S.C. § 3142(b).

One problem with split-wage decisions on FHA-assisted projects is that they require developers to pay the same worker at different rates to do the same work on the same day, in different parts of the development. A laborer's work installing drywall in an accessory clubhouse, fitness center, or maintenance building must be accounted for separately from the same work the same laborer performs in the main apartment building, perhaps on the same day, based on the premise that the character of project is fundamentally different in one part of the project vs. another. This introduces substantial operational complexity and risk. As a direct result, it can be hard for developers of workforce and affordable rental housing projects to find contractors willing to work on FHA housing projects and to take on the additional operational burden and potential liability for incorrectly applying wage rates.

The current practice of bucketing also introduces a substantial level of avoidable uncertainty and disruption. That uncertainty and disruption are illustrated by an actual case[4] in which:

- HUD initially specified three wage schedules (residential, building, and highway);
- On appeal, WHD specified two wage schedules (residential and building);
- When the developer requested a single, residential wage schedule, WHD responded by specifying four wage schedules (residential, building, highway, and heavy); and
- Upon reconsideration, WHD reinstated the decision to specify two wage schedules (residential and building).

B. The proposed rule fails to address the "bucketing" and "split wage" problems.

The proposed rule fails to resolve this issue. Rather, it implicitly codifies the "bucketing" practice in proposed § 1.6(b),

> When a contract involves more than one type of construction, the solicitation and contract must incorporate the applicable wage determination for each type of construction involved that is anticipated to be substantial.

The accompanying explanation of that provision[5] similarly appears to implicitly codify the practice, as follows:

> The Department … proposes language stating that when a construction contract includes work in more than one type of construction (as the Department has proposed to define the term in § 1.2),[6] the contracting agency must incorporate the applicable wage determination for each type of construction where the total work in that category of construction is substantial. This accords with the Department's longstanding guidance published in AAM

[4] This case predated AAM 236 so it was based on the application of a $1 million threshold for "substantial" rather than $2.5 million.

[5] 57 Fed. Reg. at 15714.

[6] Section 1.2 provides as follows:

> *Type of construction (or construction type).* The term "type of construction (or construction type)" means the general category of construction, as established by the Administrator, for the publication of general wage determinations. Types of construction may include, but are not limited to, building, residential, heavy, and highway. As used in this part, the terms "type of construction" and "construction type" are synonymous and interchangeable."

130 (Mar. 17, 1978) and AAM 131 (July 14, 1978).[7] The Department intends to continue interpreting the meaning of ''substantial'' in subregulatory guidance.[8,]

C. Comments

The NPRM requests comments on ways to improve the standards for when and how to incorporate multiple wage determinations into a contract.[9] For the reasons set forth below, we recommend that WHD, by rulemaking, replace its current "bucketing" practice with a policy and practice favoring a single residential wage decision for FHA-assisted projects, including incidental items, based on the overall residential character of the project. For consistency, we recommend that this policy also apply across all projects that fall under any of the federal housing Acts.[10]

1. A policy and practice favoring single wage rate determinations would be consistent with prior long-standing policy and practice.

Until recent years, long-standing policy and practice reflected in HUD documentation prepared with the cooperation and advice of DOL was to generally apply only a residential wage decision to FHA-financed construction and rehabilitation projects, including incidental items of work – based on the overall residential character of the project.

That practice was documented in 1986 in HUD's Labor Relations Letter No. 96-03, which was prepared with the cooperation and advice of DOL:

> The primary component, which determines the character of the project and the type of wage schedule that applies, is the housing.…
>
> Recently on some projects involving housing development it has been estimated that the cost of certain incidental items such as site improvement might exceed the DOL guide for "substantial" by absolute or relative cost. The mere existence of cost that may be "substantial," however, does not justify the use of multiple wage schedules.…

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[7] Footnote in original:

> AAM 130 states that where a project ''includes construction items that in themselves would be otherwise classified, a multiple classification may be justified if such construction items are a substantial part of the project . . . [but] a separate classification would not apply if such construction items are merely incidental to the total project to which they are closely related in function,'' and construction is incidental to the overall project. AAM 130, p. 2, n.1. AAM 131 similarly states that multiple schedules are issued if ''the construction items are substantial in relation to project cost[s].'' However, it, it further explains that ''[o]nly one schedule is issued if construction items are 'incidental' in function to the overall character of a project . . . and if there is not a substantial amount of construction in the second category.'' AAM 131, p. 2.

[8] Footnote in original:

> Most recently, on December 14, 2020, the Administrator issued AAM 236, which states that ''[w]hen a project has construction items in a different category of construction, contracting agencies should generally apply multiple wage determinations when the cost of the construction exceeds either $2.5 million or 20 percent of the total project costs,'' but that WHD will consider ''exceptional situations'' on a case-by-case basis. AAM 236, pp. 1–2.

[9] 87 Fed. Reg. at 15714.

[10] See § 212(a) of the National Housing Act (12 U.S.C. § 1715c(a)), § 104(b)(1) of the Native American Housing Assistance and Self Determination Act of 1996 (25 U.S.C. § 4114(b)(1)), § 12(a) of the United States Housing Act of 1937 (42 U.S.C. § 1437j(a)), and § 811[(j)(5)] of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. § 8013(j)(5)).

> Generally, any housing development project (4 stories or less) is classified as "residential." This classification is not altered by the cost of incidental items, even if such costs exceed the guide(s) for "substantial." Except in the most extraordinary circumstances, such as where local industry practice clearly demonstrates otherwise, only residential wage schedules shall be issued for housing development projects. Multiple schedules shall not be issued because of the incidental items noted above and other similar items. HUD Field Labor Standards and Enforcement staff shall consult with the appropriate Headquarters Labor Standards and Enforcement representative in advance where the issuance of multiple schedules is contemplated for a housing development project. [11]

HUD's Handbook 1344.1 includes a similar description of this policy and practice.[12]

2. A policy favoring a single wage rate determination for FHA-assisted projects would more accurately map wage rates to the statutory standard of "projects of a similar character" surveyed to determine prevailing wage rates.

The Davis-Bacon Act requires contractors covered by the Act to pay wages based on –

> wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in [the relevant area].[13]

A policy favoring assigning residential wage rate schedules to FHA-assisted projects, rather than assigning multiple wage rates using a "bucketing" approach, would accurately map wage rates for jobs performed on FHA-assisted projects with rates prevailing for the corresponding classes of laborers and mechanics employed on "projects of a character similar to" the FHA-assisted project.

For example, the prevailing wage rate applicable to a plumber plumbing bathrooms in a clubhouse that is a part of a multifamily complex being constructed is captured more accurately in a survey of rates paid to plumbers in "residential" projects, which include construction of town or row houses, apartment buildings four stories or less, single family houses, mobile home developments, multi-family houses and married student housing,[14] than in a survey of plumbers working on "building" projects, which includes projects to construct arenas, churches, city halls, civic centers, detention facilities, hospitals, industrial building, museums, passenger and freight terminal buildings and shopping centers.[15] That is, construction of a clubhouse is more like the construction of an apartment building of four stories or less, or a single family home, than it is like the construction of a hospital or a detention facility.

Therefore, the policy and practice of generally applying a Residential wage decision to such incidental construction meet the "of a character similar to" standard of the Davis-Bacon Act far more accurately than does the current bucketing approach.

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[11] LR Letter No. 96-03, Sec. IV. (Dec. 2, 1996).

[12] HUD's Handbook 1344.1, FEDERAL LABOR STANDARDS REQUIREMENTS IN HOUSING AND URBAN DEVELOPMENT PROGRAMS, Chapter 2, *Davis-Bacon Wage Decisions*, Sec. 3-6, pp. 3-4 (Rev 2, Feb. 2012).

[13] 40 U.S.C. § 3142(b).

[14] See AAM 130 at p. 4 (illustrative examples under the Residential classification).

[15] See *id*. at p. 3 (illustrative examples under the Building classification).

3. Residential construction warrants a single wage rate because the definition of residential construction (and only the definition of residential construction) expressly encompasses all incidental items of work.

A policy and practice favoring a single wage rate determination for FHA-assisted projects would be consistent with the AAM 130 definition of residential construction because that definition explicitly includes all incidental items of work, as follows:

> Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.

This definition, which explicitly includes all incidental items of work, is different from the AAM 130 definitions of building construction, which include only the incidental items consisting of the installation of utilities and equipment and is different from the definitions of highway and heavy construction, neither of which includes any incidental items of work.

WHD's interpretations implicitly reflect this unique definitional treatment of incidental items of work. Specifically, we note also that AAM 130 and AAM 131, WHD's principal interpretations of the application of multiple wage rates to a single project, cite no examples involving residential construction.

- AAM 130 cites as an example:
    - A project to construct a water treatment plant ("heavy construction," which is defined in AAM 130 not to include any incidental items of work).
- AAM 131 cites as examples:
    - A project to construct a building and also include the paving of parking lots (the AAM 130 definition of building construction does not include incidental paving of parking lots);
    - A project to construct runway that included the construction of a small (nonresidential) building (the AAM definition of highway construction does not include any incidental items of work); and
    - A project to construct a highway that also includes construction of a (nonresidential) building in a rest area (the AAM definition of highway construction does not include any incidental items of work).

In sum, none of the examples cited in AAM 130 or AAM 131 addresses the unique circumstance of a residential construction project, for which the AAM 130 definition explicitly incorporates "all incidental items such as site work, parking areas, utilities, streets and sidewalks" within the scope of "residential construction." Accordingly, a policy and practice favoring a single wage rate determination would be consistent with AAM 130 or AAM 131.

III. THE MONETARY THRESHOLD OF "SUBSTANTIAL"

A. Brief history of the threshold for "substantial"

AAM 131 describes the threshold for when items of work are sufficiently "substantial" to warrant consideration of separate wage rates where the cost of the work is more than approximately 20 percent of the total project costs, noting that "when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost."

WHD's practice applying AAM 131 was historically to consider items of work to be substantial if they exceeded 20 percent of the project cost or $1 million. We appreciate that WHD increased the monetary threshold from $1 million to $2.5 million in December 2020, when it issued AAM 236.

This was a necessary change because the outdated $1 million threshold had exacerbated the uncertainty and disruptive impacts of the "bucketing" approach described above. In our view, however, the increase to $2.5 million did not fully capture the impacts of inflation on construction costs since the time WHD began applying the $1 million threshold during or prior to 1987, and so it also contributes to avoidable uncertainty and disruptive impacts.

AAM 236 recognizes that the $2.5 million threshold may not always be "a reliable indicator of when construction items of a different category are substantial" and accordingly indicates that WHD "will re-evaluate annually whether an update to the monetary threshold is warranted by inflation and rising costs." To date, WHD has not issued any update to the $2.5 million threshold, nor is that threshold addressed in the proposed regulations.

B. Comments

We urge WHD to increase the $2.5 million as that threshold applies to FHA-assisted projects or, at a minimum, increase the threshold to reflect the combined impacts of inflation and rising construction costs, since AAM 236 was released.

The $2.5 million threshold is 20 percent of $12.5 million. As a result, the $2.5 million threshold is an implicit conclusion that any project over $12.5 million is "very large." This is relevant because, by current HUD standards, a loan financing an FHA-assisted multifamily project is not considered to be a "large loan" unless it is over $75 million.[16] A threshold set at 20 percent of the MAP Guide threshold as a guide for "very large projects" would be equal to $15 million.

In our view, this level would be more in line with current applicable construction costs (particularly taking into account that the size of the loan is likely to be less than the total cost of the underlying construction project), and so would fully support a substantial increase to the $2.5 million threshold.

Accordingly, we recommend that WHD increase the $2.5 million threshold to $15 million (or at a minimum to $5 million). In addition, we recommend that WHD specify and apply an annual process to update any monetary "substantial" threshold, rather than the less precise declaration that "WHD will re-evaluate annually whether an update to the monetary threshold is warranted by inflation and rising costs."

[16] See MAP Guide, § 3.10. Large Loan Risk Mitigation; available here: https://www.hud.gov/sites/dfiles/OCHCO/documents/4430GHSGG.pdf

IV. EFFECTIVE DATES OF DAVIS-BACON WAGE RATE UPDATES FOR PROJECTS UNDER THE NATIONAL HOUSING ACT

A. The proposed rule does not change the current update process for FHA-assisted projects

WHD updates its wage determinations from time to time to reflect newer survey results. Under current 29 C.F.R. § 1.6(c)(3)(ii), any wage rate update would apply to any project if it has not yet reached the earlier of "initial endorsement" or the beginning of construction. Proposed § 1.6(c)(ii)(C), which addresses that update process for FHA-assisted projects, is substantively identical to the current provision.

> In the case of projects assisted under the National Housing Act, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

B. Comment

We urge WHD to revise the proposed regulation to effectively fix the wage rates as those in effect on the date an application for a firm commitment is submitted. Specifically, we recommend substituting "the application is submitted" for the proposed language "the mortgage is initially endorsed."

Any wage rate update after the application is submitted for a construction or substantial rehabilitation project is disruptive. For example, a rate change can trigger a need to revise and repeat already completed procedural steps, both for the developer and for the Department of Housing and Urban Development (HUD), creating an unwarranted regulatory barrier to the successful completion of a housing project. Because the initial endorsement (or the start of construction) occurs relatively far along in the FHA financing process, the current and proposed provisions create a high risk that an updated wage rate will result in disruption. There are developers who go through the HUD application process to build affordable housing, secure LIHTC equity and subordinate debt, only to get to the closing table to find that the Davis-Bacon wage rates have been updated so substantially that the deals cannot close.

To reduce that risk of disruption to the development of workforce and affordable rental housing, we recommend that WHD revise proposed § 1.6(c)(ii)(C) to effectively lock in the wage rates in effect on the date of the submission of the application for a firm commitment. While a rate change just prior to the submission of an application would still be disruptive, creating certainty as to the applicable wage rates at the time of application would substantially reduce the risk that updates would serve as a regulatory barrier to successful completion of housing projects.

V. DAVIS-BACON WAGE RATE CATEGORY FOR RESIDENTIAL BUILDINGS OF 5 STORIES OR MORE

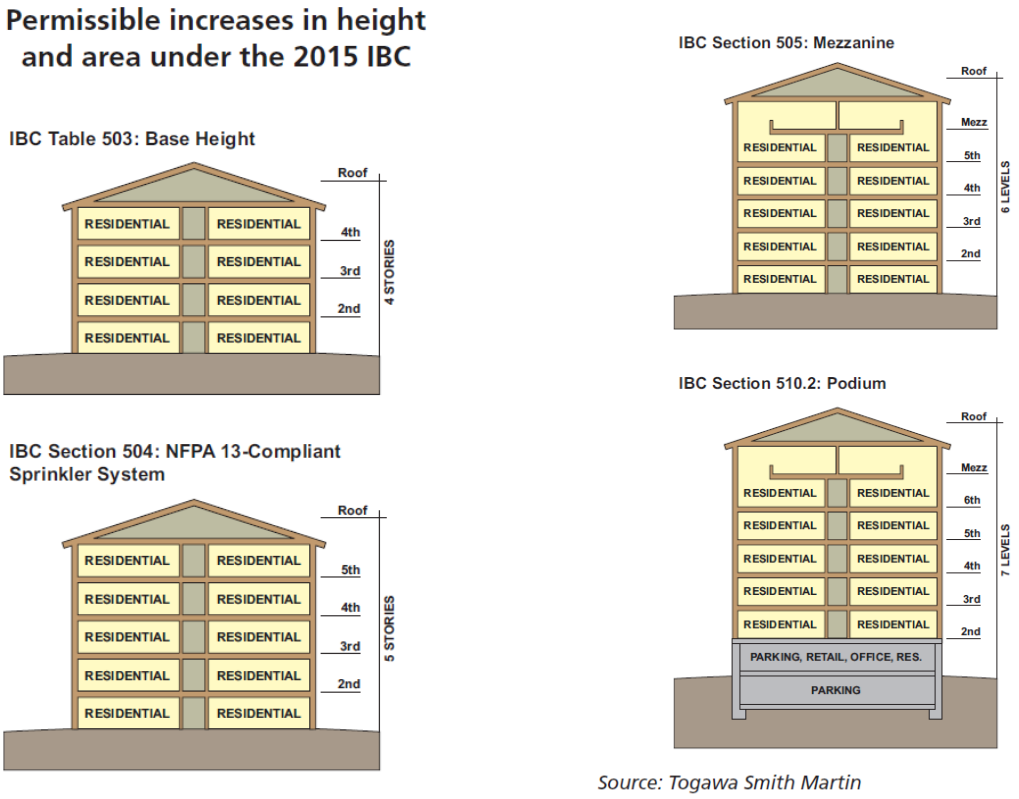
Another area that we believe warrants updating to remove an unnecessary regulatory barrier is the story-limitation on construction classified as Residential. Under current policy and practice, residential Davis-Bacon wage rates are applicable only to multifamily structures four stories or less. That standard has not been updated since 1985, and the proposed rule does not change it.

A. Comment

We recommend that WHD modify Davis-Bacon construction classifications to also permit multifamily structures of more than four stories to be considered Residential construction,

consistent with advances in the construction of multifamily structures that have occurred since 1985.

Modern building code reflected in the International Building Code (IBC)[17] defines building types in terms of building height and characteristics, not number of stories. For example, each of the examples below are considered to be Residential Group R buildings.



Source: Togawa Smith Martin

This seemingly simple change to reflect current HUD Multifamily-accepted building codes (e.g., the IBC is referenced in the HUD Multifamily Accelerated Processing (MAP) Guide) would have a substantial economic impact in reducing rental housing construction costs and regulatory burdens. This change could encourage new construction and would be a catalyst for the preservation of public, workforce, and affordable housing.

VI. DETERMINING PREVAILING WAGE RATES

We share the objective of the Davis-Bacon and Related Acts, and WHD, of ensuring that construction workers on projects under National Housing Acts are paid prevailing wages. We also acknowledge that the Davis-Bacon Act places a substantial, and maybe unrealistic, burden on WHD, to determine wages that are "prevailing," across corresponding classes of laborers and mechanics, across four different possible construction character types, for every civil division in every state (and the District of Columbia). The burden on WHD has been identified in a GAO

[17] For more information about the International Building Code, see the International Building Code website at: https://www.iccsafe.org/products-and-services/i-codes/2018-i-codes/ibc/

report critical of the wage determination process, its data quality, and the usefulness of the data given its many problems. [18]

The proposed rule would abandon the approach to determining prevailing wages WHD has used since 1983, in favor of the approach WHD used from 1935 to 1983.

As noted in the GAO report and acknowledged within the proposed rule, the wage determination process has been subject to criticisms due to the overall low participation rates of the survey, the underrepresentation of non-union labor in the published survey results, and the multitude of published outdated wage rates.

The proposed rule intends to address these issues through several changes that aim to improve the overall wage determination process. The rule seeks to address shortfalls in the wage determination process in the following ways:

1. Reverts back to the three-step method in effect before 1983 for determining wages;
2. Adds new methodology to expressly give discretion for the WHD Administrator to adopt state and local wages;
3. Changes the definition of prevailing wage;
4. Changes the scope of data used to identify prevailing wages in a given area;
5. Uses a new method to update non-CBA wages using the BLS ECI index; and
6. Modifies the process of conformance to allow determination of wage and fringe benefits.

The proposed changes offer suggestions that will address some of the criticisms but fall short of addressing the survey process and the low participation rate of non-union labor in the surveys while offering no new suggestions on how to improve the overall process.

Before responding to each of the topics the proposed rule seeks to address we note that the suggestions made will address some of the outstanding issues. However, WHD has missed an opportunity to reexamine the overall survey process, seek alternative data sources that could fit the needs of the Davis-Bacon Act, or provide concrete steps that would increase the participation of a much broader cohort of all construction firms regardless of size, ownership and whether or not organized.

A. Reversion to a three-step method for wage determination is problematic in determining a true prevailing wage.

The rule proposes to revert to a wage determination process called the “three-step method” that was used from 1935 to 1982.” The three-step method identified as prevailing (1) any wage rate paid to a majority of workers and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers and, if there was none, then (3) the weighted average rate. Reversion to the three-step method results in a change to the definition of prevailing wage that will not accurately reflect the prevailing wages for the residential construction market.

Since 1983, the wage determination process has used a two-step process that only included steps 1 and 3. The rationale offered for reverting to the three-step method was to reduce the reliance on the average rate described in step 3. The proposed rule presents data that there has been an

[18] GAO, Davis-Bacon Act, Methodological Changes Needed to Improve Wage Survey, 2011

increase in the use of the average wage even though that does not conform with the definition of prevailing wage as viewed by WHD.

It is disappointing that WHD is suggesting a reversion to a standard that has not been used for 40 years and states in the proposed rule: "the Department believed a change was preferable because the 30-percent threshold could in some cases not account for up to 70 percent of the remaining workers."[19] The Department also stated that it agreed with the concerns expressed by certain commenters that the 30-percent rule was "inflationary" and gave "undue weight to collectively bargained rates."[20]

While the proposed approach would seem to address the use of a low number of respondents in order to determine wages, it would not address the underlying problems and would certainly revert to a more inflationary measure and give more weight to a much smaller number of respondents.

The lack of survey participants, especially for non-union contractors, is well documented. A reversion to a methodology that allows WHD to make a determination on a smaller subset of respondents is not moving the process to a more modern and complete representation of the construction industry.

Survey participation concerns are further described within Section 1.3 *Obtaining and compiling wage rate information* that specifically discusses the goal of modernizing the regulations governing the determination of Davis-Bacon wage rates. Under 29 CFR § 1.3(d), which covers how wages are determined for federal and federal-assisted projects for building and residential construction, WHD recognizes that unlike highway construction, which nearly always uses federal support, residential housing construction often does not and is most frequently privately funded.

For that reason, the survey method should rely on a "prevailing wage" more heavily weighted towards private industry. However, private industry has no incentive to participate in a survey method that provides no direct benefit to their business. Further, those businesses often view the reporting requirements of Davis-Bacon surveys as an operational burden and choose not to participate.

As a result, the WHD is left to use federal or federal-assisted residential building surveys to determine the Davis-Bacon wages even though that plays a minor role in the overall industry. Although WHD urges greater participation, it offers no solutions or incentives to increase the participation rate. We do not support WHD's suggestion of increasing the use of federal project data to determine the prevailing wages for residential construction as it will not be reflective of the actual prevailing wages for residential construction across the marketplace.

B. Use of state and local wages does offer a good proxy for determining prevailing wages.

As the WHD seeks to facilitate the process of determining prevailing wages, the use of state and local wages does offer a good proxy as many states conduct their own survey processes. The added flexibility afforded to the Administrator in the proposed rule is a positive step in getting a deeper understanding of the relevant wages. However, WHD correctly identifies the fact that states will differ in their approach from others states as well as the process that WHD follows.

This acknowledgement and change offers a solution in that the WHD has an opportunity to go a step further. Expanding the use of the data, not just when WHD does not have sufficient data to

[19] See 46 Fed. Reg. at 41444.

[20] Id.

determine a wage, but in all circumstances can provide a comparative wage and help gain a greater understanding whenever there are material discrepancies or when the overall respondent rate is low for a wage determined through the Davis-Bacon survey. Prior to fully embracing this process, WHD should understand the process that each state follows to ensure they are fairly representative of prevailing wages. For example, the state of New Mexico does not allow non-union businesses to participate in their wage survey process, which would not be reflective of true "prevailing wages" across the state.

C. The use of ECI to update non-CBA wages should be reevaluated due to declining participation rates in the ECI survey.

WHD proposes to add a process step to 29 CFR § 1.6(c)(1) that would update non-collective bargain (CBA) wage rates by applying the BLS's Employment Cost Index (ECI) index. The proposed change would apply the index to any published wage that is more than three years old to update the published wage. The proposed rule goes further by citing that in 2018 over 7,100 non-CBA rates were between 11 and 40 years old and seeking input on the usefulness of the ECI index to update these outdated wages.

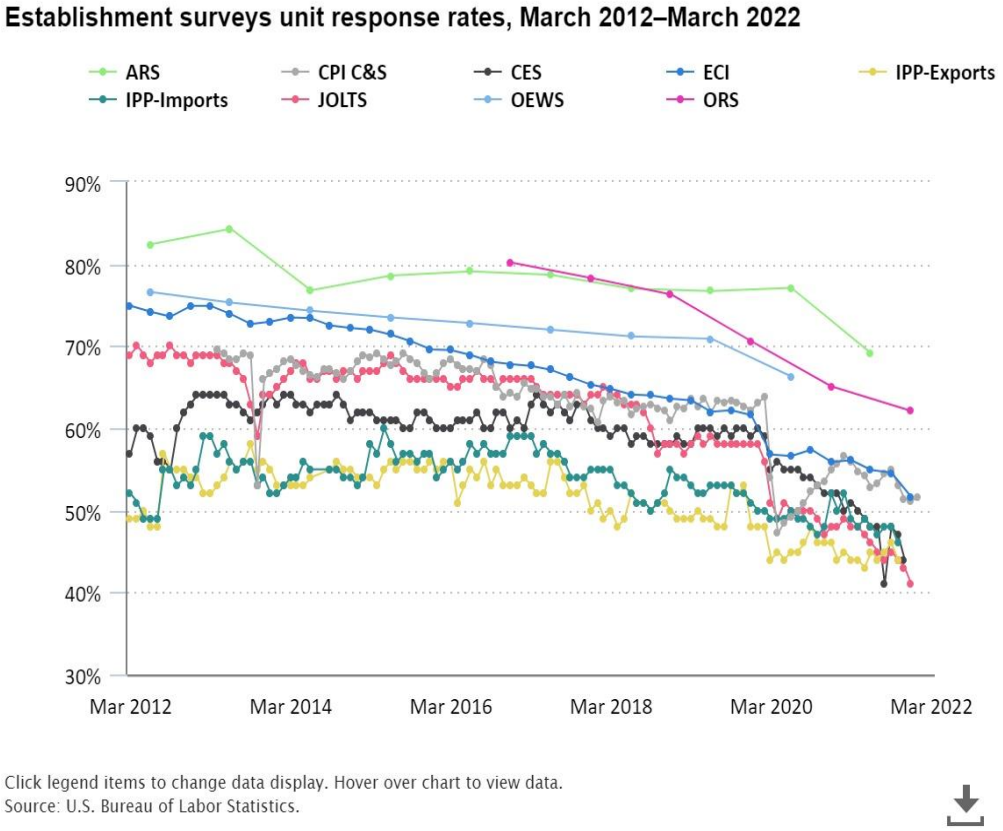
The ECI is produced quarterly by BLS and reflects the change in the National Compensation Survey over time. The idea of using a cost index has merit, but as noted in the graph below, the participation rate over the past ten years on the ECI has dropped from over 70% to just over 50%. This raises concern as to the ongoing reliance on a survey that only covers 11,500 businesses if the participation rate drops further.

Second, the ECI is measure across many industries and only has one data set that may cover the residential construction industry titled Construction.[21] This broad category may or may not cover residential construction since that is not described in detail on the ECI release. It is also not possible to tell whether the index includes both CBA and non-CBA wages in their survey. The BLS utilizes surveys for many of its economic, wage, and cost indices, yet they face the reality that survey participation is shrinking across all of their surveys.

The chart below[22] shows participation rates over the past ten years. The ECI survey participation rate shows a continual decrease over the period noted to a level today that is just above 50%. Across the board participation rates are showing a downward trend. The chart does not show Davis-Bacon wage participation rates, but it too will likely show a similar trend. This calls for a deeper examination by WHD of its reliance on an outdated survey method.

[21] https://www.bls.gov/news.release/eci.toc.htm

[22] Source: https://www.bls.gov/osmr/response-rates/home.htm



Rather than relying on an index to update both three-year-old data or for severely outdated non-CBA data, the WHD should focus its efforts on identifying ways to capture more non-CBA wage data. Last, indexing a wage rate that is potentially forty years old is problematic as the validity of that wage is unknown.

C. Comment

We urge the WHD to engage directly in a deeper examination of the process of determining prevailing wages with the objective of either broadening survey participation, utilizing other data sources such as other BLS data, or even looking to private payroll processing providers.

Throughout the proposed rule, WHD acknowledges that the majority of residential construction is not performed as part of a federal or federal-assisted project. For that reason, obtaining a reasonable and complete representation of the entire market's prevailing wages is very difficult since construction firms on private jobs have no incentive to participate in the survey process. Further, since the vast majority of residential construction is performed on behalf of the private industry and the federal or federal-assisted projects make up only a small fraction, the private market should define what the prevailing wages are. With low participation rates in the Davis-Bacon survey, the WHD is trying to define the prevailing wages using data from an extremely small portion of the industry that is simply not representative of the actual prevailing wages. As previously requested, WHD must undertake a thorough analysis, with industry input, to determine the true prevailing wage rates.

VII. CONCLUSION

We appreciate the opportunity to respond to the NPRM, and our comments offered above seek to further improve how Davis-Bacon wage rates are applied to construction and substantial

rehabilitation of FHA-assisted projects under federal housing acts. The issues raised are of immediate concern to our members and are currently having an adverse impact to FHA-assisted projects. The changes outlined in this letter will modernize Davis-Bacon and greatly support the dire need for more affordable housing and healthcare projects under the HUD programs.

Sincerely,

Mortgage Bankers Association
National Multifamily Housing Council
National Leased Housing Association
National Apartment Association
National Affordable Housing Management Association
Manufactured Housing Institute
Institute of Real Estate Management
National Association of Home Builders
Council for Affordable and Rural Housing
National Association of Housing Cooperatives
National Association of Affordable Housing Lenders