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May 17, 2022

VIA ELECTRONIC SUBMISSION

Jessica Looman
Acting Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Public Comments on RIN 1235-AA40 – Updating the Davis-Bacon and Related Acts Regulations Notice of Proposed Rulemaking

Dear Ms. Looman:

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) is an international trade association representing 3,500 signatory contracting firms with more than 100 chapters throughout the United States, Canada, Australia, and Brazil. SMACNA provides its sheet metal and air-conditioning contractor members with assistance in areas including business management, labor relations, marketing, governmental affairs, and technical research and development – on both a national and local level.

SMACNA provides these comments in support of the DOL's Notice of Proposed Rulemaking, Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15698 (March 18, 2022) (hereafter "Proposed DBA Rule"). As outlined in detail below, SMACNA wholeheartedly supports many of the revisions included in the Proposed DBA Rule that have been advocated by SMACNA for decades. Most of the key proposals would reverse harmful and misguided regulatory changes that were implemented during the Reagan administration to largely undermine the statutory protections afforded by the Davis-Bacon Act.

1. DEFINITION OF "PREVAILING WAGE" – RETURNING TO THE 30-PERCENT RULE IS CONSISTENT WITH THE LEGISLATIVE TEXT AND THE DOL'S LONGSTANDING INTERPRETATION OF "PREVAILING WAGE."

SMACNA fully supports the Proposed DBA Rule's return to the original definition of "prevailing wage" – including the 30 percent rule – that was in effect from 1935 to 1982. SMACNA believes that the original definition is in accordance

with the plain meaning of the legislative text and better effectuates the purpose of the Davis-Bacon Act.

Originally enacted in 1931, the Davis-Bacon Act is "a minimum wage law designed for the benefit of construction workers." United States v. Binghamton Constr. Co., 347 U.S. 171, 178 (1954). Its purpose was "to give local labor and the local contractor a fair opportunity to participate in [ ] building program[s]." Univs. Res. Ass'n v. Coutu, 450 U.S. 754, 773–74 (1981) (quotation omitted); see also S.R. Rep. No. 88-963 (1964) (noting that the Davis-Bacon Act was designed to protect local contractors who were losing bids on federal projects to "outside contractors . . . who recruited labor from distant cheap labor areas.").

To that end, the Davis-Bacon Act requires contractors on most federally funded infrastructure projects to pay employees, at a minimum, "**the 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 civil subdivision of the State in which the work is to be performed . . . .**" 40 U.S.C. § 3142(b) (emphasis added). The Davis-Bacon Act does not define the term "***prevailing***" or "***prevailing wage***," but instead delegates this task to Secretary of Labor. Id. The legislative history of the DBA and subsequent amendments show that Congress delegated to the Secretary of Labor the broadest authority imaginable to determine which rates prevail. See Building Trades v. Donovan, 712 F.2d 611,616 (D.C. Cir. 1983); 74 Cong. H6516 (daily ed. Feb. 28, 1931) (during the House floor debate, Rep. William Kopp (R-IA) emphasized that although "the term 'prevailing rate' has a vague and indefinite meaning . . . the power will be given . . . to the Secretary of Labor to determine what the prevailing rates are.")

For nearly 50 years, "***prevailing wage***" was defined by the Department of Labor to mean "the wage (hourly rate of pay and fringe benefits) paid to the greatest number of laborers or mechanics in the classification on similar projects in the area during the period in question, *provided* that the wage is paid to ***at least 30% of those employed in the classification***." 29 C.F.R. § 1.2(a) (1935). As the DOL notes, determining the prevailing wage required a three-step process: (1) Any wage rate paid to many 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. The second step is referred to as the "30-percent rule."

Then, in 1982, the DOL abruptly removed the second step in the three-step process—the 30-percent rule. See 47 Fed. Reg. 23644, 23645 (May 28, 1982). The new process required only two steps: (1) identifying if there was a single wage rate paid to more than 50 percent of workers, and then (2) if no wage rate is greater than 50 percent of workers, relying on a weighted average of all the wage rates paid. Id. at 23645; see also 29 C.F.R. § 1.2(a)(1) (1982) ("The 'prevailing wage' shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the 'prevailing wage' shall be the average of the wages paid, weighted by the total employed in the classification.").

The DOL's elimination of the long-standing 30-percent rule was first and foremost inconsistent with the text and purpose of the Davis-Bacon Act. "***Prevailing***" means "[t]o be ***commonly accepted or predominant***." Prevail, Black's Law Dictionary (11th ed. 2019); see also Webster's New Collegiate Dictionary (defining "prevailing" to mean "having superior force in influence; most frequent."); Webster's Third New International Dictionary (1976) (defining the term "prevailing" as "most frequent" or "generally current," descriptive of "what is in general or wide circulation or use . . . ."). For a wage to be "***commonly accepted***" or "***predominant***," there is no requirement that the rate be received by a "majority" (i.e., more than 50 percent) of workers. Indeed, if Congress had intended the DOL to determine the "majority" wage, then it could have easily crafted the statutory text to so reflect.

Returning to the DOL's original three-step model is more consistent with the plain meaning of the term "prevailing." That is, the DOL first looks to the majority (i.e., 50 percent) of the workers in the appropriate classification. Obviously, if a wage rate is paid to a majority of workers, it is "commonly accepted" or "predominant." Failing to find a majority wage, the rate paid to the greatest number becomes the standard, which is the next logical step in the search for the "commonly accepted" or "predominant" wage. If this greater number does not represent a substantial portion of the wage pattern of the community – and 30% has been selected as a reasonable measure of substantiality – the DOL then averages all of the wage rates paid in the area.

The Davis-Bacon Act was designed to protect local wage standards – even if they were enjoyed by a minority (i.e., less than 50 percent) of workers. The designers of the Davis-Bacon Act recognized the futility of a statute that would protect a rate only if it was being received by a majority of workers or that was the product of an "averaging" process. In fact, in 1982, the Office of Legal Counsel (OLC) at the Department of Justice reviewed the legislative history and concluded:

> ***There is no suggestion in the legislative history of either the Davis-Bacon or the Service Contract Acts that Congress believed it was establishing a wage standard other than one based on frequency or currency***. Indeed, testimony at the hearings leading up to the 1935 amendments to the Davis-Bacon Act, which first made provision for predetermination of the prevailing wage rates by the Secretary of Labor, indicates a common understanding by spokesmen for labor and management, as well as individual legislators, that the "prevailing" wage was the wage paid to the largest number of workers in the relevant classification and locality. See, e.g., Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on H.R. 12, 122, 7005, 7254 and H.J. Res. 38 before the House Committee on Labor, 72d Cong., 1st Sess. 8, 103, 149-50, 186 (1932). See also Report of the General Subcommittee on Labor of the Committee on Education and Labor, Administration of the Davis-Bacon Act, 88th Cong., 1st Sess. 7-8 (Comm. Print 1963). The legislative history of the 1965 Service Contract Act reflects an assumption that the term "prevailing" as used in that Act

> would be construed and applied in this same fashion. See H.R. Rep. No. 948, 89th Cong., 1st Sess. 2-3 (1965); S. Rep. No. 798, 89th Cong. 1st Sess. 3-4 (1965).
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> ***The definition of "prevailing" wage as the wage most widely paid is consistent with the general purpose of the two statutes***, which is to prevent the exploitation of imported labor and the concomitant depression of local wage rates. See H.R. Rep. No. 2453, 71st Cong. 3d Sess. 2 (1931); H.R. Rep. No. 948, 89th Cong. 1st Sess. 2 (1965). See also [Report of the General Subcommittee on Labor of the Committee on Education and Labor, Administration of the Davis-Bacon Act, 88th Cong., 1st Sess., at 2 (Comm. Print 1963)] ("the Davis-Bacon Act was designed to ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards.") While it would not be inconsistent with this purpose to set the prevailing rate at a higher level than that most widely paid, ***it was precisely to prohibit payment of a lower level of wages than that prevalent in the community that the statutes were enacted***.

5 Op. O.L.C., Determination of Wage Rates Under the Davis-Bacon and Service Contract Acts, at 175–76 (June 12, 1981) ("DOJ DBA Memo").[1]

The DOL's current two-step analysis – which uses an averaging method in all cases where a single wage is not paid to a majority (i.e., more than 50 percent) of workers – does not result in a wage that is "commonly accepted" or "predominant." Indeed, the average rate is an artificial rate that likely is not, in fact, paid to any workers in the locality. What is more, the difference in meaning between "average" and "prevailing" is clear and application of the latter method where one wage is frequently paid would be inconsistent with the statutory language of the Davis-Bacon Act.

As the OLC explained in its 1982 DOJ DBA Memo, "prevailing wage" means the ***current and predominant actual rate paid*** – an average rate should only be used as a "last resort." See 5 Op. O.L.C. at 175–77. As the OLC explained:

> [T]he common understanding of the term "prevailing" as "most current" or "predominant" has been incorporated in the Labor Department's administrative regulations since 1935, regulations which have over the years been discussed at length in oversight hearings and in connection with other proposed amendments to the law. See, e.g., Administration of the Davis-Bacon Act, supra, at 7-8. There is, therefore, some reason to regard Congress' acquiescence in this interpretation as "presumptive evidence of its correctness." [2A Sands, Sutherland Statutory Construction § 47.10 (4th ed. 1973)]

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[1] Available at: https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf.

> We come then to the specific questions whether the Secretary may define the prevailing wage in terms of the average rate, or the lowest rate paid in a given locality. As the above discussion indicates, the answers depend upon whether either rate can be fairly said to reflect ***the rate most widely paid in the relevant locality***. In this regard, there appears to us to be no conceptual problem presented where the most widely paid wage is also the lowest.[] The use of an average, however, may be more difficult to justify, particularly in cases where it coincides with none of the actual wage rates being paid. As noted in the 1963 oversight hearings, in such a situation "[u]se of an average rate would be artificial in that it would not reflect the actual wages being paid in a local community," and "such a method would be disruptive of local wage standards if it were utilized with any great frequency." [Report of the General Subcommittee on Labor of the Committee on Education and Labor, Administration of the Davis-Bacon Act, 88th Cong., 1st Sess., at 8 (Comm. Print 1963)]. The fact remains, however, that if no single wage can fairly be said to be "prevailing," and no single rate "most current," an average may represent the closest approximation of the statute's requirement.
>
> In sum, ***we believe that it is proper under both Acts to define the prevailing wage rate in terms of the lowest rate only where the lowest rate is also that which occurs with greatest frequency***. Use of an average is permissible in situations in which no single rate can fairly be said to be "generally current."

Id. at 176-77 (emphasis added; footnotes omitted).

From 1935 to 1982, the DOL consistently applied the three-step process – including the 30 percent rule – for calculating the "prevailing wage." During this time, Congress made several amendments to the Davis-Bacon Act and Congress made no attempt to nullify the DOL rule or clarify its intent. This should be regarded as Congress' acquiescence in this interpretation as "presumptive evidence of its correctness." 2A Sands, Sutherland Statutory Construction § 49.10 (4th ed. 1973). Indeed, according to the Supreme Court, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" CFTC v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (footnotes omitted)).

For example, in 1964, Congress amended the Davis-Bacon Act to define "prevailing wages" to include fringe benefit payments. Pub. L. 88-349 (July 2, 1964). At the time, Congress made no attempt to negate the DOL's contraction or clarify the legislative intent. To the contrary, prior to passage of the 1964 amendments, the DOL's use of the 30 percent rule was reviewed in depth by the House Special Subcommittee on Labor in oversight hearings. In its 1963 report, the House Subcommittee supported use of the 30 percent rule:

> The subcommittee believes that the Department of Labor exercised its best judgment in attempting to define prevailing wages. It must be remembered that no legislative guideposts were given in the Davis-Bacon Act or the legislative history which would assist the Department. ***It was learned that the so-called 30 percent rule goes back some 25 years, and the Department has followed this rule consistently***.
>
> ***It should be kept in mind that "prevailing" means only a greater number. It need not be a majority***. Therefore, the subcommittee believes that the 30 percent rule should be established legislatively.
>
> ***The subcommittee strongly opposes using an average unless at least 30 percent of those employed in a given classification do not receive the same rate***. As was indicated previously an average rate is per se going to be an artificial rate in that it will not mirror any of the actual wages paid in a community. To that extent it would disrupt such local wages.

Staff of the H. Subcomm. on Lab., 88th Cong., Administration of the Davis-Bacon Act, Rep. of the Subcomm. on Lab. of the Comm. on Educ. and Lab. (Comm. Print 1963) (emphasis added).

In summary, SMACNA believes that returning to the three-step process for determining the prevailing wage – including the 30 percent rule – is necessary to effectuate the text and purpose of the Davis-Bacon Act. Thus, the definition of "prevailing wage" in Section 1.2(a) of the Proposed DBA Rule should be adopted without amendment. It is only by returning to the DOL's long-standing construction of "prevailing wage" that Congress' intent will be effectuated.

2. DEFINITION AND SCOPE OF PROJECT REFORMS – MODERNIZED DEFINITIONS WILL CLARIFY APPLICABILITY OF THE DAVIS-BACON ACT.

SMACNA supports the Proposed DBA Rule's amendments to Section 5.2, which seeks to modernize the definition of "building or work" (as used to delineate contracts for covered construction activities) by adding language to the definitions of "building or work" and "public building or public work" to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement.

The DOL proposes to modernize the definition of "building or work" (as used to delineate contracts for covered construction activities) by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of covered activities. The DOL also proposes to add language to the definitions of "building or work" and "public building or public work" to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Specifically, the Proposed DBA Rule provides that the term "building or work" includes a portion of a building or work, or the installation of equipment or components into a building or work. The proposal includes additional language in the definition of "public building

or public work" to clarify that a "public building" or "public work" includes the construction, prosecution, completion, or repair of a portion of a building or work that is 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.

Separately, the DOL proposes to add a new sub-definition to the term "construction, prosecution, completion, or repair" to clarify when demolition and similar activities are covered by the Davis-Bacon labor standards. Historically, the DOL has understood the standards to cover demolition and removal under certain circumstances. First, demolition and removal activities are covered by Davis-Bacon labor standards when such activities themselves constitute construction, alteration, or repair of a public building or work. Second, the DOL maintains that if future construction that will be subject to the Davis-Bacon labor standards is contemplated on a demolition site (either because the demolition is part of a contract for such construction or because such construction is contemplated as part of a future contract), then the demolition of the previously-existing structure is considered part of the construction of the subsequent building or work and therefore within the scope of the Davis-Bacon labor standards.

Accordingly, the DOL proposes to clarify in its regulations that demolition work is covered under any of three circumstances: (1) where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing public building or work; (2) where subsequent construction covered in whole or in part by the Davis-Bacon labor standards is planned or contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract; or (3) where otherwise required by statute.

SMACNA also supports including a definitional revision/clarification to the Act's use of the term "journeyman", which has been long replaced within the industry CBAs with the term "journey person". Furthermore, SMACNA objects to any suggestion that use of the term "working supervisor" is interchangeable with the skill attainment or definitional responsibilities of "journey person" or that it is appropriate or acceptable for the Davis Bacon Act to confuse the two terms in any way.

SMACNA supports the Proposed DBA Rule's clarification amendments to Section 5.2 because they further the remedial purpose of the Davis-Bacon Act by ensuring that the Act's protections apply to contracts for construction activity for which the government is responsible.

3. FEDERAL PROJECT DATA – USING FEDERAL PROJECT DATA WILL BE HELPFUL IN CALCULATING "PREVAILING WAGE"

SMACNA supports the Proposed DBA Rule's amendments to Section 1.3(d) regarding when survey data from federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements may be used in determining prevailing wages for building and residential construction wages.

Under current regulations, data from federal or federally assisted projects is used in compiling wage rate data for heavy and highway wage determinations but may not be used for determining wage rates for building and residential construction projects. In the Proposed DBA Rule, the DOL notes the challenges it has faced in achieving high levels of participation in residential wage surveys and cites these challenges as a justification for why it may be appropriate to expand the amount of federal project data that is available to use in setting prevailing wage rates for residential construction to include survey data from federal or federally assisted projects.

4. USE AND EFFECTIVENESS OF WAGE DETERMINATIONS – INCORPORATING MOST-RECENT WAGE DETERMINATIONS INTO ANY CONTRACT ENSURES THAT THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT IS EFFECTUATED.

SMACNA supports the Proposed DBA Rule's amendments to Section 1.6, which requires the most-recent version of any applicable wage determination must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order. Specifically, the Proposed DBA Rule amends Section 1.6 to clarify that "archived" wage determinations that are no longer current may only be used when the contracting agency initially failed to incorporate the correct wage determination into the contract and subsequently must incorporate the correct wage determination after contract award or the start of construction. In that circumstance, even if the wage determination that should have been incorporated at the time of the contract award has since become inactive, it is still the correct wage determination to incorporate into the contract. The DOL proposes to rename "archived" wage determinations to be "inactive" wage determinations.

The DOL is also proposing to clarify when contracting agencies must incorporate multiple wage determinations into a contract. The Proposed DBA Rule states that when a construction contract includes work in more than one area and no multi-county project wage determination has been obtained, the applicable wage determination for each area must be incorporated into the contract so that all workers on the project are paid the wages that prevail in their respective areas, consistent with Davis-Bacon. The DOL is further proposing that when a construction contract includes work in more than one type of construction, 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." The DOL intends to continue interpreting the meaning of "substantial" through sub-regulatory guidance, which will allow it greater flexibility than fixing this term in a notice and comment rulemaking.

In addition, the DOL notes that its "longstanding position" has been to require that contracts and bid solicitations contain the most recently issued revision to a wage determination to be applied to construction work to the extent that such a requirement does not cause undue disruption to the contracting process. The DOL is proposing to include language at Section 1.6 to reflect this principle. First, DOL proposes to explain that the most recent version of any applicable wage determination(s) must be incorporated when a contract or order is changed to

include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract. Under these circumstances, the most recent version of any wage determination(s) must be incorporated as of the date of the change or, where applicable, the date the agency exercises its option to extend the contract's term. This does not extend to situations where a contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

In the Proposed DBA Rule, the DOL also observes that modern contracting methods frequently involve a contractor agreeing to perform construction as the need arises over an extended period, with the quantity and timing of the construction not known when the contract is awarded—often referred to as Indefinite Delivery Indefinite Quantity (IDIQ) contracting. For these types of contracts, the DOL proposes to require that contracting agencies incorporate the most up-to-date applicable wage determination(s) annually on each anniversary date of a contract award or, where there is no contract, on each anniversary date of the start of construction, or another similar anniversary date where the agency has sought and received prior approval from the DOL for the alternative date.

5. PERIODIC ADJUSTMENTS TO NON-COLLECTIVELY BARGAINED PREVAILING WAGE RATES – PROPOSED RULE WOULD ENSURE THAT NON-COLLECTIVELY BARGAINED RATES ARE REGULARLY UPDATED.

SMACNA supports the Proposed DBA Rule's amendments to Section 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates. The proposed rule expands the DOL's practice of updating prevailing rates between surveys to include updating non-collectively bargained rates.

The DOL generally publishes two types of prevailing wage rates on the Davis-Bacon wage determinations that it issues: (1) modal rates (under the current rule, wage rates that are paid to a majority of workers in a particular classification); and (2) weighted average rates, which are published whenever the wage data received by the DOL reflects that no single wage rate was paid to a majority of workers in the classification.

Under the current regulations, modal majority wage rates typically reflect collectively bargained wage rates. When a CBA rate prevails on a general wage determination, the DOL updates that prevailing wage rate based on periodic wage and fringe benefit increases in the CBA. However, when the prevailing wage is set through the weighted average method based on non-collectively bargained rates or a mix of collectively bargained rates and non-collectively bargained rates, or when a non-collectively bargained rate prevails, such wage rates on general wage determinations are not updated between surveys, and therefore can become out-of-date.

The Proposed DBA Rule expands the DOL's practice of updating prevailing rates between surveys to include updating non-collectively bargained rates. The DOL proposes to

permit adjustments to non-collectively bargained rates on general wage determinations based on Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data. Under the Proposed DBA Rule, non-collectively bargained rates may be adjusted based on ECI data no more frequently than once every three years, and no sooner than three years after the date of the rate's publication, continuing until the next survey results in a new general wage determination. Non-collectively bargained rates (wages and fringe benefits) would be adjusted from the date the rate was originally published and brought up to their present value. Going forward under the proposed 30 percent rule, any non-collectively bargained prevailing or weighted average rates published after this rule becomes effective would be updated if they were not re-surveyed within three years after publication

SMACNA agrees that Section 1.6(c)(1) is necessary to "keep [non-collectively bargained] rates more current between surveys so that they do not become out-of-date and fall behind prevailing rates in the area." 87 Fed. Reg. at 15764.

6. "FLOW-DOWN" REQUIREMENTS AND RESPONSIBILITY FOR COMPLIANCE – THE MANDATORY "FLOW-DOWN" REQUIREMENT EFFECTUATES THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT.

SMACNA supports the Proposed DBA Rule's amendments to Sections (a)(6) and (b)(4), which provide that prime contractors are responsible for the compliance by any subcontractor or lower tier subcontractor adding new language underscoring that being "responsible for compliance" means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of contracts.

The DOL's current regulations contain explicit contractual requirements for prime contractors and upper-tier subcontractors to "flow-down" the required contract clauses into their contracts with lower-tier subcontractors. The provisions also state that prime contractors are responsible for the compliance by any subcontractor or lower tier subcontractor.

The Proposed DBA Rule includes new language underscoring that being "responsible for compliance" means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. See § 5.5(a)(6) (stating that the prime contractor "or subcontractor" must insert the required clauses in "any subcontracts"). The Proposed DBA Rule also clarifies that underpayments of a subcontractor's workers may in certain circumstances subject the prime contractor itself to debarment for violating the responsibility for compliance provision. See § 5.5(b)(4) (stating that the flow-down clause must "requir[e] the subcontractors to include these clauses in any lower tier subcontracts").

The DOL made clear that "the Department does not intend to place the same strict liability responsibility on all upper-tier subcontractors." 87 Fed. Reg. at 15740. Instead, the DOL made clear that its proposal "is intended to clarify that, in appropriate circumstances, . . . upper-tier subcontractors may be held responsible—both subjecting them to possible debarment

and requiring them to pay back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wages." Id.

SMACNA also supports the changes to §§ 5.5(a)(6) and (b)(4) because the changes are simply a clarification and because the amendments are designed to ensure that responsible contractors compensate their employees appropriately.

Finally, SMACNA supports specific compliance language being included in the Davis-Bacon Rule, including timetables, directing the prime contractor to expedite any new wage changes and contract modifications so they quickly and appropriately reach the lower tier subcontractors and their workforce entitled to the Davis-Bacon Act revisions.

7. DEBARMENT – THE PROPOSED DBA RULE CLARIFIES THE DEBARMENT STANDARDS AND PROCEDURES.

SMACNA supports the Proposed DBA Rule's clarifications to the DOL's debarment regulations because they promote consistent enforcement of the Davis-Bacon labor standards provisions and to clarify debarment standards and procedures.

The Proposed DBA Rule features a series of revisions to the DOL's debarment regulations intended both to promote consistent enforcement of the Davis-Bacon labor standards provisions and to clarify debarment standards and procedures. The DOL is proposing to adopt the Davis-Bacon statutory debarment standard for all debarment cases and to eliminate the Related Acts' regulatory "aggravated or willful" debarment standard. The Proposed DBA Rule would also: (1) adopt Davis-Bacon's mandatory three-year debarment period for Related Act cases and eliminate the process under the Related Acts regulations for early removal from the "debarment list"; (2) expressly permit debarment of responsible officers under the Related Acts; (3) clarify that under the Related Acts (as under Davis-Bacon), entities in which debarred entities or individuals have an interest (as opposed to a "substantial" interest) may be debarred; and (4) make the scope of debarment under the Related Acts consistent with the scope of debarment under Davis-Bacon.

8. MISCLASSIFYING CONSTRUCTION WORKERS AS INDEPENDENT CONTRACTORS – THE PROPOSED DBA RULE MAKES CLEAR THAT AN EMPLOYMENT RELATIONSHIP IS NOT REQUIRED.

SMACNA supports the Proposed DBA Rule's amendments to reinforce the "well established" principle that Davis-Bacon labor standards apply even when there is no employment relationship between a contractor and worker. To this end, to the extent that the words "employee," "employed," or "employment" are used in the regulations, the DOL is revising them to be interpreted expansively to not limit coverage to workers in an employment relationship.

SMACNA has long advocated for increased protections against misclassification. In 1999, SMACNA described misclassification as "***an epidemic in the construction industry***"

(BNA CLR 1999). Little has changed in the past 23 years. If anything, the practice has only become more pervasive. Employee misclassification is a continuous and persistent problem within the construction industry, where dishonest non-union contractors frequently use these arrangements to avoid and evade their legal responsibilities in the areas of payroll taxes, insurance premiums, overtime, and other legal requirements.

For example, a 2021 study by the Midwest Economic Policy Institute looked at worker misclassification in the construction industries in Illinois, Minnesota, and Wisconsin.[2] According to the study, a total of ***10 percent of construction workers across these three states were misclassified as independent contractors***. With respect to wages, independent contractors earned on average ***18 percent less*** than their employee counterparts – an $45,292 for independent contractors, compared with $55,463 for employees. Workers classified as employees also received an additional ***$24,100 per year*** in benefits, including paid leave, health care, retirement, Social Security premiums, Medicare, unemployment insurance, and workers' compensation.

Other states also experience high levels of misclassification in construction. A 2019 report noted that, in 2011, ***19 percent*** of construction workers in California were misclassified as independent contractors.[3] The report found that "***misclassified construction workers earn only 67 cents for every dollar earned by their peers who work as full-time employees***."

The motivation driving the elimination of employee status is simple. The various state and federal tax and insurance obligations associated with hiring employees constituted a significant portion of total labor costs. The ability to eliminate as much as 30 percent (or more) of labor costs by simply reclassifying a company's workforce as independent contractors is a clever and effective method to gain a competitive edge over other contractors, like SMACNA members, who properly classify pay their workers market-leading wages and benefits.

The proposed amendments confirm and make clear that contractors cannot use employee misclassification schemes to avoid their obligations under the Davis-Bacon Act and will aid enforcement efforts on this critical issue in the industry. SMACNA supports these amendments as a good first-step toward reversing the ongoing "epidemic" of misclassification in the construction industry.

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[2] Goodell, Nathaniel, and Frank Manzo IV. 2021. The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois. Midwest Economic Policy Institute (January 2021) (available at: https://midwestepi.files.wordpress.com/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf).

[3] Ratna Sinroja, Sarah Thomason, and Ken Jacobs, Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries, Center for Labor Research and Education, University of California, Berkeley (March 11, 2019) (available at: https://iri.hks.harvard.edu/files/iri/files/misclassification-in-ca-fact-sheet.pdf?m=1559233331).

9. ENHANCED RECORDKEEPING REQUIREMENTS – RECORDKEEPING AMENDMENTS REINFORCE THE DAVIS-BACON ACT'S REQUIREMENTS.

SMACNA supports the Proposed DBA Rule's amendments to reinforce Davis-Bacon recordkeeping requirements. The DOL believes that these requirements will facilitate prevailing wage enforcement.

Specifically, the Proposed DBA Rule clarifies the DOL's "longstanding" approach to require contractors to maintain and preserve basic records and information, as well as certified payrolls. The required basic records include (but are not limited to) regular payroll and additional records relating to fringe benefits and apprenticeship and training. The Proposed DBA Rule would require all contractors, subcontractors, and recipients of federal assistance to maintain and preserve Davis-Bacon and Davis-Bacon Related Acts (collectively, the DBRA) contracts, subcontracts, and related documents for three years after all the work on the prime contract is completed. These related documents include, without limitation, contractors' and subcontractors' bids and proposals, as well as amendments, modifications, and extensions to contracts, subcontracts, or agreements. Moreover, contractors and subcontractors must maintain records of each worker's correct classification or classifications of work actually performed and the hours worked in each classification.

10. ANTI-RETALIATION – ANTI-RETALIATION.

SMACNA supports the Proposed DBA Rule's anti-retaliation amendments in Sections 5.5(a)(11), 5.5(b)(5), and 5.18. The amendments are designed to discourage contractors, responsible officers, and any other persons from engaging in "unscrupulous" business practices that may chill worker participation in federal prevailing wage investigations or other compliance actions.

Currently, debarment is the primary mechanism under the prevailing wage civil enforcement scheme for remedying retribution against workers who assert their right to prevailing wages. Debarment is also the main tool for addressing "less tangible" discrimination, such as interfering with investigations by intimidating or threatening workers. There are also criminal sanctions for certain coercive conduct by federal contractors. Despite these protections against retaliatory conduct, workers who have been discriminated against for speaking up, or for having been perceived as speaking up, currently have no redress under the DOL's regulations and DBRA to the extent that back wages do not make them whole.

As a result, the DOL is proposing to add new anti-retaliation protections in its regulations that would be in all contracts subject to Davis-Bacon or DBRA. These new provisions would state that it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate, or to cause any person to do the same, against any worker for engaging in a number of "protected activities," including: (1) notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of Davis-Bacon prevailing wage statutes or regulations; (2) filing any complaints, initiating or

causing to be initiated any proceeding, or otherwise asserting any right or protection under prevailing wage statutes and regulations; (3) cooperating in an investigation or other compliance action, or testifying in any proceeding related to prevailing violations; or (4) informing any other person about their rights under Davis-Bacon, the Related Acts, or related the DOL regulations.

The Proposed DBA Rule also proposes remedies to assist in enforcement of these anti-retaliation provisions. These include "make-whole" relief and remedial actions to restore workers subjected to a violation to the position—both economically and in terms of work or employment status (e.g., seniority, leave balances, health insurance coverage, 401(k) contributions, etc.)—that the worker would have occupied had the violation never taken place. Other remedies include, but are not limited to: (1) any back pay and benefits denied or lost by reason of the violation; (2) other actual monetary losses sustained as a direct result of the violation; (3) interest on back pay or other monetary relief from the date of the loss; (4) appropriate equitable or other relief, such as reinstatement or promotion; (5) expungement of warnings, reprimands, or derogatory references; (6) provision of a neutral employment reference; and (7) posting of notices that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements.

11. REQUIRING FEDERAL AGENCIES TO REPORT PLANNED CONSTRUCTION – REQUIRING FEDERAL AGENCIES TO REPORT PLANNED CONSTRUCTION ALLOWS THE DOL TO PLAN FOR APPROPRIATE WAGE DETERMINATIONS.

SMACNA supports the Proposed DBA Rule's amendments to Section 1.4 requiring federal agencies to include in their reports proposed construction programs for an additional two fiscal years beyond the upcoming year, including notification of any options to extend the terms of current construction contracts or any significant changes to previously reported construction programs.

Currently, Section 1.4 provides that, "to the extent practicable," agencies that use wage determinations must submit an annual report to the DOL outlining proposed types and locations of construction for the coming year. The DOL has found that these reports are an effective way for the agency to know where federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use. Unfortunately, contracting agencies have not regularly provided these reports to the DOL.

To ensure these reports are submitted, the Proposed DBA Rule removes the "to the extent practicable" language in the regulation that makes the reports discretionary instead of mandatory and expressly requires federal agencies to submit the construction reports. The proposed rule would also: (1) require agencies to include in their reports proposed construction programs for an additional two fiscal years beyond the upcoming year; (2) include new language requiring federal agencies to include notification of any expected options to extend the terms of current construction contracts; (3) require that federal agencies include in the annual report a notification of any significant changes to previously reported construction programs; and (4) eliminate the

current directive that agencies provide notice mid-year of any significant changes in their proposed construction programs.

SMACNA believes the proposed changes to Section 1.4 are necessary to ensure that the DOL is informed of "where Federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use." 87 Fed. Reg. at 15712. Of further value to federal contractors would be DOL reports on project payment issues, wage infractions, legal infractions or other problems occurring on specific projects. In addition, federal bidders and workers would appreciate annual reports on such Davis-Bacon Act compliance matters. Such disclosure would provide certainty to subcontractors when considering projects.

12. POST-AWARD DETERMINATIONS – IT IS APPROPRIATE TO ADOPT THE CORRECT OR OMITTED WAGE DETERMINATIONS VIA SUPPLEMENTAL AGREEMENT OR CHANGE ORDER.

The Proposed DBA Rule includes updates regarding the administrative procedure for enforcing Davis-Bacon requirements when the contract clauses and/or appropriate wage determination(s) have been wrongly omitted from a covered contract. The Proposed DBA Rule includes language in Section 5.5(e) providing that labor standards contract clauses and appropriate wage determinations are effective "by operation of law" in circumstances where they have been wrongly omitted from a covered contract.

The "by operation of law" provision would operate in tandem with the requirement that contracting agencies must insert the contract clause in full into any new contracts and into existing contracts by modification where the clause had been wrongly omitted. While agencies must retroactively incorporate the required clauses upon the request from the DOL, agencies also have the authority to make such changes on their own initiative when they discover that an error has been made.

The Proposed DBA Rule amends Section 1.6(f)(1) to provide that if a contract subject to the labor standards provisions of the Davis-Bacon Act is entered into without the correct wage determination(s), the relevant agency must incorporate the correct wage determination into the contract or require its incorporation. The DOL proposes to add language to Section 1.6(f)(1) expressly providing for an agency to incorporate the correct wage determination post-award "upon its own initiative" as well as upon the request of the Administrator.

The proposed revision to Section 1.6(f) also provides that the agency must either: (a) terminate and resolicit the contract with the correct wage determination or (b) "incorporate the correct wage determination into the contract (or ensure it is so incorporated) through supplemental agreement, change order, or any other authority that may be needed." The proposed regulation also specifies that "[t]he method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law."

SMACNA believes that the revisions to Section 1.6(f) in the Proposed DBA Rule are appropriate and necessary to ensure that employees receive the correct prevailing wages and contractors are fully compensated for the government's failure to include the correct wage determination or omission of a wage determination.

13. DEFINITION OF "AREA" FOR PROJECTS SPANNING MULTIPLE COUNTIES –

The DOL is proposing to revise the definition of "area" in Section 1.2 to address projects that span multiple counties. Under the existing methodology, if a project spans more than one county, a contracting officer is instructed to attach wage determinations for each county to the project and contractors may be required to pay differing wage rates to the same employees when their work crosses county lines. While requiring different prevailing wage rates for work by the same worker on the same project may be consistent with the current regulations, the DOL points out that the Davis-Bacon and Related Acts statutes themselves do not address multi-jurisdictional projects. Issuing and applying a single project wage determination for such projects is not inconsistent with the text of the law. Accordingly, SMACNA supports the DOL's proposal to add language in the definition of "area" to expressly authorize the agency to issue project wage determinations with a single rate for each classification, using data from all the relevant counties in which a project will occur.

The Proposed DBA Rule also revises the definition of "area" to allow the use of state highway districts or similar transportation subdivisions as the relevant wage determination area for highway projects, specifically. The DOL asserts that using state highway districts as a geographic unit for wage determinations would be consistent with the statutory specification that wage determinations should be tied to a "civil subdivision of a state." Moreover, as state highway or transportation districts often plan, develop, and oversee federally financed highway projects, the agency asserts that the provision of a single wage determination for each district would simplify the procedure for incorporating federal financing into these projects.

14. ADOPTION OF STATE/LOCAL PREVAILING WAGE DETERMINATIONS FOR FEDERAL PREVAILING WAGE

The Proposed DBA Rule would expressly permit, under specified circumstances, the determination of Davis-Bacon wage rates by adopting prevailing wage rates set by state and local governments for all types of construction even where the state or locality's definition of prevailing wage differs from the DOL's. Although the existing regulations permit the DOL to "consider" state and local wage determinations and to give "due regard" to state rates for highway construction, the regulations do not specifically address whether the agency may adopt state or local rates derived using methods and requirements that differ from those used by the DOL. To fill this gap, SMACNA supports the proposal that would permit the adoption of such wage rates following a determination that they meet specified criteria.

These criteria are that: (1) the state or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full

participation by all interested parties; (2) the state or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, each of which can be calculated separately; (3) the state or local government must classify laborers and mechanics in a manner that is recognized within the field of construction; and (4) the state or local government's criteria for setting prevailing wage rates must be "substantially similar" to those that the DOL uses in making wage determinations (based on such factors as the state or local government's definition of prevailing wage, the types of fringe benefits it accepts, its classification of construction projects, etc.) These criteria are intended to facilitate the adoption of state and local prevailing wage rates while ensuring adoption of such rates is consistent with the statutory requirements of Davis-Bacon and does not create arbitrary distinctions between jurisdictions where the DOL makes wage determinations by using its own surveys and jurisdictions where the DOL makes wage determinations by adopting state or local rates.

15. "CONTRACT," "CONTRACTOR," "PRIME CONTRACTOR," "SUBCONTRACTOR," AND "TRAINEE" DEFINITIONS

The DOL's current regulations define the term "contract" as including any prime contract and any subcontract of any tier thereunder. The DOL is requesting comment on whether a more detailed definition of the term "contract" is warranted, noting that it may not be necessary to include in the regulatory text a detailed recitation of types of agreements that may be considered contracts because such a list necessarily follows from the use of the term "contract" in the statute.

In addition to the term "contract," the DOL's existing regulations use the terms "contractor," "subcontractor," and "prime contractor," but do not currently define these three terms. The proposed rule includes a definition of the term "contractor" to clarify that it applies to both prime contractors and subcontractors. In addition, the definition would clarify that sureties may also be considered "contractors" under the regulations.

The Proposed DBA Rule also includes a broad definition for the term "prime contractor, clarifying that the label an entity gives itself is not controlling, and an entity may be considered a "prime contractor" based on its contractual relationship with the government, its control over the entity holding the prime contract, or the duties it has been delegated. The proposed definition also includes as a "prime contractor" the controlling shareholder or member of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (e.g., a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing and/or performing the construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract. Under this definition, more than one entity on a contract (for example, both the owner/developer and the general contractor) may both be considered "prime contractors" on the same contract.

The Proposed DBA Rule defines a "subcontractor" as any contractor that agrees to perform or be responsible for the performance of any part of a contract (at any tier) that is subject

wholly or in part to the Davis-Bacon labor standards. Importantly, this proposed definition clarifies that "subcontractors" do not include laborers or mechanics for whom a prevailing wage must be paid, given that the requirement to pay a prevailing wage to ordinary laborers and mechanics cannot be evaded by characterizing such workers as "owner operators" or "subcontractors."

The DOL also proposes to amend the current regulatory definition in Section 5.2(n) of "apprentice, trainee, and helper" to remove references to trainees. A trainee is currently defined as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by the Employment and Training Administration (ETA) as meeting its standards for on-the-job training programs. The ETA no longer reviews or approves on-the-job training programs, however, so this definition is no longer necessary.

16. APPRENTICES

To harmonize the Davis-Bacon regulations and the Employment and Training Administration's (ETA) apprenticeship regulations, the Proposed DBA Rule proposes to revise these regulations to reflect that contractors employing apprentices to work on a DBRA project in a locality other than the one in which an apprenticeship program was originally registered must adhere to the apprentice wage rate and ratio standards of the locality in which the project is situated. The general requirement is that contractors may pay less than the prevailing wage rate for the work performed by an apprentice employed pursuant to and individually registered in a bona fide apprenticeship program registered with the ETA or a recognized state apprenticeship agency (SAA). Under the ETA's regulations, if a contractor has an apprenticeship program registered for one state but wishes to employ apprentices to work on a project in a different state with an SAA, the contractor must seek and obtain reciprocal approval from the project state SAA and adhere to the wage rate and ratio standards approved by the project state SAA. Accordingly, upon receiving reciprocal approval, the apprentices in such a scenario would be considered employed pursuant to and individually registered in the program in the project state, and the Proposed DBA Rule would ensure that the terms of that reciprocal approval would apply for purposes of the DBRA. SMACNA supports the DOL's reasoning those requiring contractors to apply the ratio and wage rate requirements from the relevant apprenticeship program for the locality where the laborers and mechanics are working better aligns with the ETA's regulations on recognition of SAAs and is meant to eliminate potential confusion.

17. PUBLICATION OF GENERAL WAGE DETERMINATIONS AND PROCEDURE FOR REQUESTING PROJECT WAGE DETERMINATIONS –

The Proposed DBA Rule includes several revisions to Section 1.5 intended to clarify the applicability of general wage determinations and project wage determinations. In addition to retitling Section 1.5 as "Publication of general wage determinations and procedure for requesting project wage determinations," the Proposed DBA Rule adds language explaining that a general wage determination contains, among other information, a list of wage rates determined to be

prevailing for various classifications of laborers and mechanics for specified type(s) of construction in a given area.

The Proposed DBA Rule also adds language explaining circumstances under which an agency may request a project wage determination. These circumstances exist when: (1) the project involves work in more than one county and will employ workers who may work in more than one county; (2) there is no general wage determination in effect for the relevant area and type of construction for an upcoming project; or (3) all or virtually all of the work on a contract will be performed by one or more classifications that are not listed in the general wage determination that would otherwise apply, and contract award or bid opening has not yet taken place. In addition, when requesting a project wage determination for a project that involves multiple types of construction, the requesting agency would be required to attach information indicating the expected cost breakdown by type of construction.

18. <u>SCOPE OF GEOGRAPHIC CONSIDERATION IN MAKING WAGE DETERMINATIONS</u> – ELIMINATING THE ANTIQUATED DISTINCTIONS ARE NECESSARY TO ENSURE THAT THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT ARE EFFECTUATED.

SMACNA supports the Proposed DBA Rule's amendments to Section 1.7, which would eliminate the binary "rural" and "metropolitan" designations. SMACNA agrees that the change is appropriate because it is consistent with the DOL's historical practice and better effectuates the text and purpose of the Davis-Bacon Act.

Under the current regulations, Section 1.7 addresses two related concepts. The first is the level of geographic aggregation of wage data that should be the default for making a wage determination. The second is how the DOL should expand that level of geographic aggregation when it does not have sufficient wage survey data to make a wage determination at the default level.

With respect to the first concept, Davis-Bacon specifies that the relevant geographic area for determining the prevailing wage is the "civil subdivision of the state" where the contract is performed. 29 U.S.C. § 3142(b). The DOL has historically used the county as the default civil subdivision for making a wage determination. Under the second concept, if there is insufficient data to determine a prevailing wage rate for a classification of workers in a given county, the DOL will determine that county's wage-rate for that classification by progressively expanding the geographic scope of data (still for the same classification of workers) that it uses to make the determination. The DOL expands the definition to include a group of surrounding counties at a "group" level. If there is still not sufficient data at the group level, the DOL considers a larger grouping of counties in the state called a "supergroup," and thereafter uses data at a statewide level. Although the current regulations do not define the term "surrounding counties" that delineates the initial county grouping level, the provision that describes "surrounding counties" limits the counties that may be used in this grouping by excluding the use of any data from a "metropolitan" county in any wage determination for a "rural" county, and vice versa. The

DOL's current procedures do not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

The regulatory language barring the cross-consideration of metropolitan and rural wage data was added in the 1981-1982 Rulemaking. The DOL now believes that this blanket decision did not adequately consider the heterogeneity of commuting patterns and local labor markets between and among counties that may be designated overall as "rural" or "metropolitan." Moreover, the DOL feels that limitations based on binary rural and metropolitan designations at the county level can result in geographic groupings that at times do not fully account for the realities of relevant construction labor markets.

Beyond the elimination of the metropolitan-rural proviso, the Proposed DBA Rule also seeks comment on other potential changes to the methods for describing the county groupings procedure. The Proposed DBA Rule provides three alternatives:

- The first option is to more precisely define "surrounding counties" to include counties in a group as long as they are all a part of the same contiguous area of either metropolitan or rural counties, even though each county included may not be directly adjacent to every other county in the group.

- The second option on which DOL requests comment would be to limit surrounding counties to solely those counties that share a border with the county for which additional wage data is sought.

- The third option would be to include language defining the "surrounding counties" grouping as a grouping of counties that are all a part of the same "contiguous local construction labor market" or some comparable definition.

SMACNA believes that Options 1 and 3 are the most appropriate for county groupings. These options are the most advantageous because they reflect common construction market realities. For example, these are neighboring areas for contractors and workforce involvement and would accurately reflect the current market in those areas.

19. FREQUENTLY CONFORMED RATES

The DOL is proposing revisions to its regulations at Sections 1.3 and 5.5 aimed at reducing the need for "conformances" where the agency has received insufficient data to publish a prevailing wage for a classification of worker. Conformance is the expedited process by which a classification and wage and fringe benefit rate are added to an existing wage determination applicable to a specific DBRA-covered contract.

Specifically, SMACNA supports the Proposed DBA Rule providing that, where the DOL has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted, it may nonetheless list the

classification and wage and fringe benefit rates for the classification on the wage determination, provided that certain basic criteria for conformance of a classification and wage and fringe benefit rate have been satisfied. These criteria include: (1) the work performed by the classification is not performed by a classification in the wage determination; (2) the classification is used in the area by the construction industry; and (3) the wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination. In other words, for a classification for which conformance requests are regularly submitted, and for which the DOL received insufficient data through its wage survey process, it is permissible to essentially "pre-approve" certain conformed classifications and wage rates, thereby providing contracting agencies, contractors, and workers with advance notice of the minimum wage and fringe benefits required to be paid for work within those classifications.

20. PAYMENT OF BACK WAGES

SMACNA enthusiastically supports the proposed rule featuring several provisions regarding enforcement of Davis-Bacon payment requirements. Existing Davis-Bacon regulations and contract clauses do not specifically provide for the payment of interest on back wages nor expedite payment due. The Administrative Review Board and the DOL's administrative law judges, however, have held that interest calculated to the date of the underpayment or loss is generally appropriate where back wages are due under other similar remedial employee protection statutes. As a result, the Proposed DBA Rule makes clear that interest will be calculated from the date of the underpayment or loss, using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 ("Determination of rate of interest") and will be compounded daily. Contractors and their workforce also would appreciate a tight and enforceable timetable for payment due on Davis-Bacon projects once amounts are determined.

21. ANNUALIZED FRINGE BENEFITS

The Proposed DBA Rule includes a new provision codifying the principle of annualization used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a fringe benefit plan when the contractor's workers also work on private projects. Annualization generally compels a contractor performing work on a Davis-Bacon covered project to divide its contributions to a fringe benefit plan for a worker by that worker's total hours of work on both Davis-Bacon and private projects for the employer in that year, rather than attribute those contributions solely to the worker's work on Davis-Bacon covered projects.

While existing guidance generally requires the use of annualization to compute the hourly equivalent of fringe benefits, annualization is not currently addressed in the DOL's regulations. The proposed rule would require annualization of fringe benefits unless a contractor is approved for an exception and provides guidance on how to properly annualize fringe benefits. In explaining when an exception to the general annualization principle may be appropriate, the Proposed DBA Rule includes language stating that a fringe benefit plan may only qualify for such an exception when three criteria are satisfied: (1) the benefit provided is not continuous in

nature; (2) the benefit does not provide compensation for both public and private work; and (3) the plan provides for immediate participation and essentially immediate vesting. A plan would generally be considered to have essentially immediate vesting if the benefits vest after a worker works 500 or fewer hours. In addition, to avoid any disruption to the provision of worker benefits, the DOL proposes that any plan that does not require annualization under the agency's existing guidance may continue to use such an exception until the plan has either requested and received a review of its exception status, or until 18 months have passed from the effective date of this rule, whichever comes first.

Moreover, while the DOL's current regulations provide that fringe benefits may be used for the defrayment of the costs of apprenticeship programs, the existing rules do not address how to properly credit such contributions against a contractor's fringe benefit obligations. SMACNA, long an outspoken advocate for more robust registered apprenticeship programs, supports the Proposed DBA Rule's attempt to clarify when a contractor may take credit for contributions made to an apprenticeship program and how to calculate the credit a contractor may take against its fringe benefit obligation. Under the proposal a contractor or subcontractor may take credit for the costs of an apprenticeship program only if the program, in addition to meeting all other requirements, is registered with the ETA Office of Apprenticeship, or with a recognized State Apprenticeship Agency. If these conditions are satisfied, under the Proposed DBA Rule contractors may take credit for the actual costs of the apprenticeship program, such as tuition, books, and materials, but may not take credit for additional contributions that are beyond the costs actually incurred for the apprenticeship program. The DOL also emphasizes that the contractor may only claim credit towards its prevailing wage obligations for the classification of laborer or mechanic that is the subject of the apprenticeship program.

22. "OPERATION OF LAW" PROVISION

SMACNA supports the Proposed DBA Rule's updates regarding the administrative procedure for enforcing Davis-Bacon requirements when the contract clauses and/or appropriate wage determination(s) have been wrongly omitted from a covered contract. The Proposed DBA Rule includes language providing that labor standards contract clauses and appropriate wage determinations are effective "by operation of law" in circumstances where they have been wrongly omitted from a covered contract. This provision would operate in tandem with the requirement that contracting agencies must insert the contract clause in full into any new contracts and into existing contracts by modification where the clause had been wrongly omitted. While agencies must retroactively incorporate the required clauses upon the request from the DOL, agencies also have the authority to expeditiously make such changes on their own initiative when they discover that an error has been made.

The DOL intends the proposed "operation of law" language will ensure that, in all cases, a mechanism exists to enforce Congress's mandate that workers on covered contracts receive prevailing wages, notwithstanding any mistake by an executive branch official in an initial coverage decision or in an accidental omission of the labor standards contract clauses. Under the proposal, when the contract clause or wage determination is incorporated into the prime contract

by operation of law, prime contractors would be responsible for the expeditious payment of applicable prevailing wages to all workers under the contract (including the workers of their subcontractors) retroactive to the contract award or beginning of construction, whichever occurs first. The DOL adds, however, that this responsibility would be offset by a new compensation provision that would require that the prime contractor be compensated for any increases in wages resulting from a post-award incorporation of a contract clause or wage determination by operation of law. Accordingly, this proposed procedure will not undermine contractors' reliance on an initial determination by the contracting agency that the DBRA did not apply or that a wage determination with lower rates applied.

23. WITHHOLDING AND CROSS-WITHHOLDING

The DOL's current regulations authorize withholding from the contractor accrued payments or advances on the federal contract equal to the amount of unpaid wages due laborers and mechanics for prevailing wages. The proposed rule seeks to clarify and update the DOL's "cross-withholding" procedure for recovering back wages if sufficient funds are no longer available on the contract under which the violations took place. Under the Proposed DBA Rule, cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract. Furthermore, the proposed rule includes a mechanism through which contractors would be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities in certain circumstances (e.g., if those entities are controlled by the same controlling shareholder or are joint venturers or partners on a federal contract).

The DOL is also proposing language confirming that, consistent with the Davis-Bacon's remedial purpose to ensure that prevailing wages are fully paid to covered workers, the DOL has priority to funds withheld (including funds that have been cross-withheld) for violations of Davis-Bacon prevailing wage requirements. The proposed rule expressly states that the DOL has priority to funds withheld for wage underpayments over competing claims to such withheld funds by: (1) a contractor's sureties; (2) a contracting agency for its re-procurement costs; (3) trustees (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate; (4) a contractor's assignees; (5) a contractor's successors; or (6) a claim asserted under the Prompt Payment Act.

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CONCLUSION

SMACNA enthusiastically supports the aforementioned revisions to the Davis Bacon Act regulations. These valued reforms should be quickly implemented for use with the historic number of anticipated federal projects in the planning stage or soon to be awarded. While beneficial to all federal contractors, these transformational changes would positively impact SMACNA, its members and the unionized construction industry for decades to come. They also would greatly improve the overall program efficiency of the Act, its enforcement, and ensure that

scores of wage determinations do not become "stale" or unfairly outdated. Without question, the proposed reforms advance the goal of the Act, which was initially enacted to prevent unscrupulous contractors and the federal government from undermining local labor payment standards. Submitting bid packages on federal construction with substandard wages drives down the quality of bidding firms as well as the contractors selected. The federal government and the taxpayers suffer from this outcome as contractors selected are often unable to adequately perform on a growing number of extremely complex, high-value federal projects and technically difficult service work.

In conclusion, SMACNA encourages the Biden Administration and the Department of Labor to sufficiently fund the expanded survey, wage calculation, contract oversight and enforcement functions envisioned in the reformed regulations. We also urge the Department to expeditiously implement the necessary changes to the Davis-Bacon Act outlined above **before** wage surveys are conducted and rates are announced for the majority of the large infrastructure projects pending in the months and years ahead. The positive impact of the proposed rule changes on SMACNA, its members, Davis-Bacon Act supporters, and union workforces across the quality-driven public construction industry would be immeasurable.

Most of these important regulatory changes we have long advocated would represent historically significant progress toward achieving the Administration's goal of finally fulfilling the initial statutory intent of the Davis-Bacon Act. Finally, but no less important, the reforms would immediately address a skilled labor crisis in the construction industry by growing support for expanding the registered apprentice programs that produce most of the nation's highly skilled workforce. The beneficiaries of these reforms would include the the federal government, the skilled construction workforce, quality driven contractors and the nation's taxpayers, who deserve a first quality product for every dollar of investment.

Sincerely,

Aaron Hilger
Chief Executive Officer
SMACNA National

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