Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) to NIST's Request for Comments Concerning Semi-Annual Enforcement Reports

Document Number 2024-07656

The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) submit these comments in response to National Institute of Standards and Technology‘s notice of information collection concerning the Semi-Annual Enforcement Report, which federal contracting agencies are required to submit to the DOL, pursuant to 29 CFR § 5.7 (b) of the Davis-Bacon and Related Act regulations.[1]

SMART represents over 203,000 members in diverse industries, with over 136,000 workers in the sheet metal trade, which encompasses a broad range of work functions in the construction industry. SMACNA is a national employer association representing 3,500 unionized sheet metal contractors. This letter responds to NIST’s solicitation of comments to “permit” the Department of Commerce to “Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility” and “Evaluate ways to enhance the quality, utility, and clarity of the information to be collected.” The recommendations in these comments would impose no additional duties on contractors and subcontractors who are not prime contractors, direct contractors with CPO, or awardees and would greatly benefit lower-tier contractors who comply with the DBRA and Contract Work Hours and Safety Standards Act (CWHSSA) but compete for work with persistent violators.

[1] 89 Fed.Reg. 25572 **(**April 11, 2024**)**, *Notice of Information Collection, Request for Comment*.

Introduction

NIST correctly states that, in order to fulfill its obligations under 29 CFR § 5.7 (b), the CHIPS Program Office (CPO) must "collect contract and enforcement information from CHIPS and Science Act Incentives Program awardees, the Commerce Department's direct contractors, and other prime contractors [collectively referred to herein as "local designees"] that administer the Department's programs" that are subject to Davis-Bacon requirements. NIST proposes that such entities complete and submit a Semi-Annual Enforcement Report every six months, by the 21st of April and the 21st of October each year so that CPO can use this information to complete its Semi-Annual Enforcement Report to the DOL by the due dates (April 30 and October 31).

In the construction industry, rooting out fraud by DBRA and CWHSSA violators requires diligent oversight of local enforcement efforts by the headquarters of federal contracting agencies. In its oversight role, the CPO has a formidable task for many reasons. First, this is the first DBRA enforced and administered by the Department of Commerce. Second, as demonstrated by peer-reviewed academic studies, fraud is rampant in the construction industry. In a recent rulemaking, the DOL cited research showing that "between 12 and 21 percent of the construction industry workforce were either misclassified as independent contractors or working 'off-the-books.'"[2] Third,

[2] *Employee or Independent Contractor Classification Under the Fair Labor Standards Act***,** 89 Fed.Reg.1638 (Jan. 10, 2024), *citing* Russell Ormiston, Dale Belman, & Mark Erlich (2020). "An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry." *See also*, Laura Valle-Gutierrez, Russ Ormiston, Dale L. Belman & Jody Calemine (2023). *Up to 2.1 Million U.S. Construction Workers Are Illegally Misclassified or Paid Off the Books*. Century Foundation. https://tcf.org/content/report/up-to-2-1-million-u-s-construction-workers-are-illegally-misclassified-or-paid-off-the-books/ .

unlike state or local grantees tasked with first-line responsibility for enforcement, prime contractors and/or upper-tier contractors may have a disincentive to report violations to the CPO because they have the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. Furthermore, under the recently updated Davis-Bacon regulations, prime contractors have strict liability, i.e., there is no requirement that the prime contractor knew of or should have known of the subcontractors' violations.

Summary of Recommendations

In light of the importance of Semi-Annual Enforcement Reports to enforcement of the DBRA and CWHSSA and the ease with which computerized records can be searched to create computer-generated reports, SMART and SMACNA encourage the CPO to mandate submission of certified payroll records (CPRs) electronically in accordance with DBRA regulations. We further urge the CPO to design a standardized form that mandates disclosure of quantitative metrics that would facilitate the CPO's oversight of the effectiveness of local review of CPRs and other monitoring processes on CHIPs projects. Electronic submission of CPRs is a key technological advancement permitted under Davis-Bacon regulations,[3] which "expands the ability of contractors and contracting agencies to comply with the requirements of the Davis-Bacon and Copeland Acts"[4] and affords contracting agencies, prime contractors, upper-tier

[3] Note that the pertinent regulation, 29 CFR § 5.5(a)(3)(ii)(A), which authorizes a contracting agency or prime contractor to "permit or require contractors to submit certified payroll records through an electronic system," also requires an that contracting agencies or prime contractors permit an alternative means of submission of CPRs when a contractor or subcontractor is "unable or limited in its ability to use or access the electronic system." Thus, a mandate that CPRs be submitted electronically on CHIPS projects would not impose a hardship on small contractors who lack access to an electronic system.

[4] 89 Fed.Reg. at 57631.

contractors, and others greater ability to conduct relevant searches to detect violations and complete reports without spending increased amounts of time.[5]

Based on pertinent DOL and FAR regulations, a 2021 GAO Report, the Semi-Annual Enforcement Report forms used by selected federal agencies, [6] and other sources, SMART and SMACNA recommend that the CPO: 1) adopt a standardized form for the use of local designees that includes detailed reporting on CPR review, employee interviews, on-site inspections, complaints, and violations; 2) provide detailed instructions to local designees on the information needed to adequately respond to each inquiry;[7] and 3) create payroll review guidance that provides specific direction on selecting CPRs to review, includes parameters on how to determine the percentage of CPRs to review and on how to select a sample to review, and incorporates local factors, such as size of project and number of employees. Regarding the

[5] Early AAMs addressing Semi-Annual Enforcement Reports were constrained by the practical need to streamline and simplify the required information based on data that was not computer-generated. In the mid-1960's, the DOL required the Semi-Annual Enforcement Reports to disclose the number and format of employee interviews; the number of complaints against contractors and subcontractors; the number of contractors and subcontractors found in violation; the identity of the initiator of the complaints, i.e., employee, union, or "other"; the scope of investigations, i.e., limited or "full scale"; and other pertinent information. *See* AAMs No. 60 (1964) and 65 (1965). Several years later, the DOL solicited input from contracting agencies through AAM No. 79 (1968) to determine a reporting paradigm that would result in improved compliance by contracting agencies who, at that time, had inconsistent compliance with semi-annual reporting requirements. The DOL then issued AAM No. 80 (1969), which removed the required disclosure of key information, such as disclosure of the number of employee interviews, the number of complaints against subcontractors, and the number of subcontractor violations.

[6] *See e.g.*, HUD FORM 4710i, Semi-Annual Labor Standards Enforcement Report - Local Contracting Agencies (HUD Programs): "Item 1. Enter the number of employers (contractors, subcontractors, lower-tier subcontractors) against whom complaints were received during the report period. List the names of the employers against whom complaints were received and the contracts involved using the contract name or number."

[7] *See e.g.*, AAM No. 65 (1965) (now rescinded), which provided the following instructions to submitters: a "recorded interview should include not only the employee's responses as to his duties, classification, and hourly rates paid [including overtime rates], but also any details available as to what work the employee was actually performing, and what tools, if any, he was using." The instructions define "full scale investigation" as an "investigation, complete and detailed, into the administration of labor standards provisions and the construction contract when there is reason to believe that there has been violation of contract clauses." By providing these instructions, the DOL reiterated to the contracting agencies their obligations (as set forth in DOL regulations) to conduct employee interviews in fulfilling their day-to-day enforcement role.

contents of the standardized form, we recommend that local designees be required to disclose the following information on their Semi-Annual Enforcement Reports to the CPO:

- Number of complaints against contractors and subcontractors[8] and the initiator of the complaint (employee, union, and other)
- Number of interviews of workers based on complaints and initial response time for complaints
- Estimate of the number of FTE hours devoted by each local designee to routine review of CPRs to monitor compliance with DBRA and CWHSSA requirements
- Number of violations by contractors and subcontractors detected through routine review of CPRs
- Number of follow up interviews of workers following routine review of CPRs to verify classifications of work, rate of pay, fringe benefits, and hours worked
- Number of on-site inspections to check type of work performed and number and classifications of workers
- Number of on-site inspections that disclosed a failure to post the Davis-Bacon poster and the applicable wage determination(s) and approved conformances at the site of the work
- Number of investigations conducted by local designees when compliance inspections reveal that violations may have occurred
- Names of contractors and subcontractors targeted for greatest risk of non-compliance
- Amount of wage restitution due under the DBRA and CWHSSA
- Number of employees due wage restitution under the DBRA and CWHSSA

The submission of these quantitative metrics by local designees on a standardized Semi-Annual Enforcement Report would enable CPO to effectively monitor compliance efforts of local designees and ensure that the local designees fulfill their day-to-day enforcement duties

[8] *See* Department of Energy's *Semi-Annual Davis-Bacon Enforcement Report in the Performance and Accountability for Grants in Energy (PAGE) system*: "Number of contractors/subcontractors against whom complaints were received" and "Number of contractors/subcontractors found in violation."

https://www.energy.gov/eere/better-buildings-neighborhood-program/articles/semi-annual-davis-bacon-enforcement-report

Argument

A. A 2021 GAO Report Recommends Improvements in Oversight of Local Compliance Efforts, with a Focus on Targeted Monitoring of CPRs

The GAO's 2021 report, *DAVIS-BACON ACT: Army Corps of Engineers Provides Guidance on Wage Requirements, but Opportunities Exist to Improve Monitoring,*[9] provides an excellent roadmap for the CPO to use in determining how to best implement its enforcement and oversight obligations. In recommending improvements in oversight of local compliance efforts, the GAO emphasizes the importance of providing CPR review guidance to Army Corps regional offices and adherence to "federal internal control standards," which state that "agencies should document the results of ongoing monitoring."[10] The GAO's investigation and report form the basis for SMART and SMACNA's recommendations that the CPO create payroll review guidance that provides specific direction to local designees concerning monitoring CPRs and that the CPO create a form for semi-annual reporting that incorporates the disclosures listed on page 6 above.

Regarding improved guidance, the GAO Report states that Army Corps documents describe how regional staff should monitor and enforce compliance but "sections on monitoring lack information that could help the Corps better ensure that employees working for federal

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[9] Government Accountability Office (March 10, 2021). *DAVIS-BACON ACT: Army Corps of Engineers Provides Guidance on Wage Requirements, but Opportunities Exist to Improve Monitoring*. GAO-21-203R

[10] *Id*. at 4.

construction contractors are paid the prevailing wage."[11] The Report describes the following deficiencies in the Army Corps' "payroll review guidance," including that it:[12]

- Gives districts "autonomy to determine their own implementation practices for payroll reviews";
- Lacks "specificity on selecting" CPRs to review;
- Does not include "parameters on how to determine the percentage of CPRs to review or on how to select a sample to review"; and
- Does not incorporate "local factors," such as "size of a project or number of employees" in selecting CPRs

The GAO Report states that, "without such information, some districts may not have considered local factors while others may be unclear about payroll review selection."[13] The Report concludes that: "As a result, the Corps may not be monitoring contractors' adherence to the Act as effectively as it could be. For example, the Corps may be missing an opportunity to strengthen payroll reviews by efficiently targeting monitoring resources (e.g., to contractors with the greatest risk of noncompliance)."[14]

Regarding documentation of regional offices' monitoring of CPR review, the GAO Report states that "there is no direction for Corps district staff to use a **standard form to document each payroll review**, nor is there a procedure to document that all elements of the payroll review have been performed (e.g., checking the correctness of classifications and wage rates)."[15] The Report further states, as a result of a lack of standardized documentation, Corps

[11] *Id*. at 4.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*. (emphasis added)

headquarters "may not be monitoring contractors' adherence to the Act as consistently as it could be. Specifically, the Corps lacks assurance that all districts' payroll reviews consistently document completion of every element."[16] The Report recommends that the Army Corps include "directions for checking the number and classification of workers and the type of work performed" and to require documentation of examination of CPRs "against these on-site observations."[17]

The GAO recommendations reflect the requirements in DOL regulation 29 CFR § 5.6(a)(3), which states that, in undertaking investigations, a federal agency must ensure that their "frequency" and scope is sufficiently thorough to "assure compliance":

> Such investigations will include interviews with workers, which must be taken in confidence, and examinations of certified payrolls, regular payrolls, and other basic records required to be maintained under § 5.5(a)(3). In making such examinations, particular care must be taken to determine the correctness of classification(s) of work actually performed, and to determine whether there is a disproportionate amount of work by laborers and of apprentices registered in approved programs. Such investigations must also include evidence of fringe benefit plans and payments thereunder. Federal agencies must give priority to complaints of alleged violations.

The Federal Acquisition Regulations also require "examination of the "payrolls and payroll statements to ensure compliance with the contract and any statutory or regulatory requirements" and state that "particular attention should be given" to the correctness of classifications and

[16] *Id.*

[17] *Id.* at 4-5.

rates; fringe benefits payments; hours worked; deductions; and disproportionate employment ratios of laborers, apprentices or trainees to journeymen.[18]

B. Since Monitoring CPRs is an Indispensable Tool in Detecting Violations, Semi-Annual Reporting on Routine Review of Certified Payroll Records and Violations Detected Therefrom Should be Required

Armed with CPRs, which are mandated by law to facilitate detection and prevention of illegal kickbacks on federal construction projects,[19] federal agencies and their local designees are able to interview workers and contractors and compare the CPRs to other employer and worker records to determine if violations have occurred. Since CPRs serve their intended function only if contracting agencies and local designees undertake ongoing and routine review of them, oversight of the local designees' diligent assumption of this duties is imperative. The extreme importance of CPR review in detecting violations supports the inclusion of the quantitative metrics relating to CPRs on page 6 above.

In FAQs regarding enforcement of another DBRA, the Bipartisan Infrastructure Law,[20] the DOL describes the value of CPR review as a tool for "funding recipients and agencies" in detecting "signs of potential violations," including signs that workers "may be underpaid and/or

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[18] 22.406-6 Payrolls and statements.

[19] Section 1 of the Copeland Act (the penal section), which is now codified as 18 U.S.C. § 874, June 25, 1948, ch. 645, § 1, 62 Stat. 740 and 862, makes it a crime for a federal contractor to require or coerce workers to return a portion of their contractual pay to their employer. Section 2 of the Act, which is now codified as 40 U.S.C. § 3145, Pub. L. No. 107-217, Aug. 21, 2002, 116 Stat., 1304, 1313, 1315, directs the Secretary of Labor to make reasonable regulations for federal contractors, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. 40 U.S.C. § 3145(a).

[20] *Frequently Asked Questions: Protections for Workers in Construction under the Bipartisan Infrastructure Law:* https://www.dol.gov/agencies/whd/government-contracts/protections-for-workers-in-construction/frequently-asked-questions

misclassified." The FAQs state that "some wage discrepancies may be evident from a comparison of the certified payrolls with the applicable wage determination(s), such as, for example, where a contractor used an incorrect wage rate for a classification, or paid fringe benefits in cash but not for all hours worked." In the FAQs, the DOL further states that CPRs "may exhibit other signs of a potential violation," such as:

- A disproportionately high proportion of apprentices to journeyworkers on site
- A pattern of having an inordinately high number of laborers for the kind of work being performed
- The same split of hours between two labor classifications, week after week.
- Some workers consistently show significantly fewer hours on the CPR than other workers on the work site
- The hours on the CPR do not match up with the daily reports for the work site

In its Prevailing Resources Book,[21] the DOL states that the "initial examination" of CPRs "should cover the current or most recent certified payrolls as well as those for selected periods which reflect the practice of the contractor during the life of the contract."

The pivotal role of CPRs to effective enforcement is described in the U.S. Navy's 2008 comments to the DOL regarding proposed changes to CPRs during the Bush administration, which would have greatly diminished their utility as an enforcement tool.[22] In that rulemaking, the Navy Labor Advisor commented that removal of access by federal contracting agencies to employee addresses and social security numbers on CPRs would be a "substantial impediment to effective" enforcement since it would "substantially inhibit" their ability to contact employees for investigative interviews:

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[21] *See "*Examination of certified payrolls" in *Specific Steps in Conducting DBRA Investigations* https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book/dbra-investigative-procedures-remedies#_Preliminary_Steps

[22] *Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*, 73 Fed.Reg. 62229-02 (Oct. 20, 2008).

> If address and social security information is no longer routinely available to the contracting agencies, it would be a substantial impediment for effective DBRA enforcement for the following reasons. First, the identity of individual employees could no longer be definitely established. Second, any need to contact such workers to conduct investigative interviews would be substantially inhibited. Many such workers are on the job site for only a limited amount of time and therefore, the ability to affirmatively identify them and contact them after they have completed their work on the job site is imperative to effective DBRA enforcement. Finally, if violations exist and back wages are collected on behalf of such employees, it may be difficult or impossible to distribute back wage payments to them without their address and social security information.

Based on the comments of the Navy and other stakeholders opposing the proposed rule,[23] the DOL made several modifications to address the concern that "eliminating access to social security numbers could work as a hardship for those monitoring compliance."[24]

C. The "Semi-Annual Enforcement Reports," Mandated by 5.7(b), are an Important Tool in the Complementary Framework Mandated by DOL Regulations to Aid in Fulfillment of its Enforcement Obligations

As stated in All Agency Memorandum issued in 1998,[25] Semi-Annual Enforcement Reports are "essential to DOL in fulfilling its responsibilities under Reorganization Plan Number 14"[26] and in achieving a "coordinated and effective prevailing wage enforcement program." The

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[23] *See also* Illinois Department of Labor's November 17, 2008 comments, which state: "Currently, these recordkeeping requirements enable federal agencies to effectively enforce the Davis-Bacon Act and the Copeland Anti-Kickback Act. Eliminating these records will only hinder DOL's efforts to timely and accurately enforce their laws." *See also*, the West Virginia Department of Labor's November 7, 2008 comments, which state: "[E]nforcement at the state level will be undermined in states such as West Virginia that require contractors to submit the federal payroll reporting form (WH Form 347) on state-funded projects under 'little Davis-Bacon' Acts such as Chapter 21, Article 5 of the West Virginia Code titled Wages for Construction of Public Improvements. The deletion of worker addresses and social security numbers from the federal certified payroll report will translate to weakened enforcement in not only our state but other state labor agencies that also enforce similar 'little Davis-Bacon' Acts.'"

[24] Final Rule, 73 Fed.Reg. 77504-01, 77507 (Dec. 19, 2008).

[25] AAM No. 189, Semi-Annual Enforcement Reports (Feb. 5, 1998).

[26] In transmitting the Reorganization Plan No. 14 of 1950 (64 Stat. 1267) to Congress, President Truman noted that "the principal objective of the plan is more effective enforcement of labor standards," and that the plan ''will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.'' Special Message to the Congress Transmitting Reorganization Plan No. 14 of 1950,

reporting requirements in § 5.7 are important tools in the DOL's oversight of whether contracting agencies fulfill their enforcement duties. In the context of CHIPs enforcement, the CPO stands in the shoes of the DOL vis-à-vis local designees (awardees, prime contractors, etc.) DOL regulation 29 CFR §5.7 requires submission of two types of reports: incident-driven reports in §§ 5.7(a)(1) and (2) and semi-annual enforcement reports in §5.7(b). These separate reports collectively serve a key function in DOL's oversight role. The former imposes an ongoing obligation on contracting agencies to submit a "detailed enforcement report" to the Administrator about specified violations[27] and the latter report provides data that enables an audit of the efforts undertaken to assure compliance.

Since contracting agencies and their designees – awardees, grantees, etc. - have "day-to-day enforcement responsibility,"[28] their vigilance in performing duties within their purview is critical to the protection of workers who are the intended beneficiaries of the DBRA. Those duties include both functions pertaining to incorporation of Davis-Bacon contract clauses and appropriate wage determinations in DBRA covered bid solicitations and contracts,

reprinted in 5 U.S.C. app. 1 (Mar. 13, 1950) (1950 Special Message to Congress). Under Reorganization Plan, the federal contracting or other administering agency has the primary responsibility for the enforcement of the DBRA/CWHSSA labor standards provisions included in its contracts. The Secretary of Labor has coordination and oversight responsibilities, including the authority to investigate labor standards compliance as warranted. Pursuant to the authority under the Reorganization Plan No. 14 of 1950, the Secretary has issued the regulations referenced in to coordinate the administration and enforcement of DBRA/CWHSSA labor standards.

[27] In a recent rulemaking, *Updating the Davis-Bacon and Related Acts Regulations*, 88 Fed.Reg. 57526 (Aug. 23, 2023), the DOL upgraded the circumstances under which a contracting agency must submit an incident-related report. In regulations adopted in 1983, for Related Act violations, contracting agencies were not required to submit reports on underpayments of less than $1,000 unless violations were "aggravated or willful." 48 Fed.Reg. 19450 (Apr. 29, 1983). Under the updated regulations, contracting agencies were not required to submit reports on underpayments of less than $1,000 unless "there is reason to believe that the contractor or subcontractors has disregarded its obligations to workers or subcontractors."

[28] 29 CFR § 5.6(a), 48 CFR § 22.406-7, § 22.406-8.

and post-award functions to ensure that contractors and subcontractors pay covered workers the required amounts, including:

- Reviewing certified payrolls in a timely manner. 29 CFR 5.6(a)(3).
- Conducting worker interviews. 29 CFR 5.6(a)(3).
- Conducting investigations, as appropriate, and forwarding refusal to pay and/or debarment consideration cases to WHD for appropriate action. 29 CFR 5.6(a)(3).
- Submitting enforcement reports (29 CFR 5.7(a)) and semi-annual enforcement reports (29 CFR 5.7(b)) to the DOL.
- Posting the Davis-Bacon poster [WH 1321] and the applicable wage determination(s) and approved conformances at the site of the work (29 CFR 6.6(a)(1)(i))[29]

Each of these complementary functions is indispensable in detecting underpayment of hourly wages and/or overtime, misclassification of workers as apprentices or lower-paying job classifications, and fringe benefit fraud.[30] The quality and utility of the Semi-Annual Enforcement Report would be greatly improved by matching the disclosure requirements to reflect each of the complementary duties of contracting agencies and their local designees in DBRA regulations. Accordingly, each of the disclosures on page 6 related to conducting worker interviews, on-site inspections, and investigation is warranted.

[29] The requirements 29 CFR 6.6(a)(1)(i) are far less effective than the legal requirements in some states that contractors and subcontractors provide individual notice to the worker of the prevailing rates applicable to their job classification.

[30] Russell Ormiston, Mark Erlich & Dale Belman (2021). *Payroll Fraud in New York's Construction Industry: Estimating its Prevalence, Severity and Economic Costs*.

https://faircontracting.org/wp-content/uploads/2016/06/Duncan-Waddoups-FOIA-CPR-paper.pdf

D. A Comparison of the Total Dollar Amount of CHIPS Awards to the Number of DBRA Violations is a Reliable Indicator of Whether a Local Designee is Devoting the Necessary Resources to Fulfill their Enforcement Obligations

Section 5.7(b) provides an overview of an agency's enforcement efforts relative to the dollar amount of the contract awards. As stated by the Department of Army, the Semi-Annual Enforcement Report "highlights two related activities: contract awards and labor standards enforcement activities. The contract award information comprises the first two data elements of the report while the labor standards enforcement data comprises the balance."[31] The ratio of the dollar value of prime contracts awarded by the CPO to the number of violations provides detected by local designees would provide the CPO with information on the diligence of a local designees in investigating violations of the DBRA and CWHSSA. A comparison of the ratios of various prime contractors would provide a useful measure of effort and should prompt the CPO to investigate whether a prime contractor needs to devote more resources, including staff hours, to more effectively fulfill its day-to-day enforcement obligations, including CPR review, employee interviews, and investigations.

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[31] Department of the Army (U.S. Army Corps of Engineers), Pamphlet No. 1180-1-8 (Aug. 15, 2022). https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER%201180-1-8.pdf?ver=GyvpMHAnpL-WrXaiEOb9KQ%3d%3d

E. Imposition of Robust Reporting Requirements in Semi-Annual Enforcement Reports Upon Local Designees Would Support the Biden Administration's Unprecedented Efforts to Improve Enforcement of DBRA and CWHSSA and Enhance Coordination between the DOL and Contracting Agencies

Consistent with the Biden administration's pro-worker agenda, the CPO can facilitate a high level of collaboration with the DOL by imposing probative reporting obligations on local designees. The Biden administration has undertaken unprecedented steps to improve enforcement and enhance collaboration between the DOL and contracting agencies to root out rampant violations. First, the DOL has upgraded its enforcement framework through its Davis-Bacon rulemaking. In the Final Rule, *Updating the Davis-Bacon and Related Acts Regulations*, the DOL adopted critical changes to its enforcement framework to root out fraud, including:[32]

- Clarifies that prime contractors are strictly liable for back wages owed to employees of any subcontractor on the project;
- Clarifies that upper-tier subcontractors (in addition to prime contractors) may be responsible for violations by lower-tier subcontractors;
- Provides that the labor standards contract clauses and appropriate wage determinations are effective "by operation of law" and considered to be incorporated even when they have been wrongly omitted from a covered contract;
- Eliminates the heightened Related Act regulatory "aggravated or willful" debarment standard;
- Adopts "cross-withholding" rules, whereby agencies may "withhold contract monies due a prime contractor from contracts other than the contract under which the alleged violations occurred" when sufficient funds are no longer available on the contract under which the violations were found; and
- Adopts anti-retaliation protections for workers

[32] *See* AAM No. 244 (Aug. 8, 2023), *Final Rule: Updating the Davis-Bacon and Related Acts Regulations* for a summary of key enforcement changes adopted in the Final Rule.

Second, the White House Task Force on Worker Organizing and Empowerment's[33] Report to the President that included recommendations for executive action to strengthen federal contract labor and employment practices.[34] One recommendation was for OMB and DOL to direct "all contracting agencies to designate an agency labor advisor responsible for policies and practices to improve implementation and compliance with labor requirements for federal contractors."[35] To implement that recommendation, OMB and DOL issued a joint memorandum, *Strengthening Support for Federal Contract Labor Practices*, which among other things, highlighted the importance of labor advisors in preventing or mitigating labor standards violations:

- Labor advisors can facilitate early resolution of issues and help prevent or mitigate labor violations, and
- Partner with agency industry liaisons to coordinate assistance for agency contractors seeking help in addressing and preventing labor violations

It is self-evident that neither the DOL nor CPO headquarters can fulfill their respective roles, which are outlined in the joint memorandum, in preventing and mitigating prevailing wage and overtime violations without effective coordination. Since the CPO is the partner responsible for oversight of the compliance efforts of prime contractors, awardees, and direct contractors, it must ensure that these local designees effectively implement each of the complementary functions (CPR review, employee interviews,

[33] Executive Order No. 14025, Apr. 26, 2021.

[34] *See* Task Force's Report to the President (Feb. 7, 2022), at 36.

[35] M-23-08, Memorandum for the Heads of Executive Departments and Agencies, Strengthening Support for Federal Contract Labor Practices (Jan. 10, 2023). https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-08-Labor-Advisor.pdf

investigating complaints, etc.) involved in enforcement and complete a standardized Semi-Annual Enforcement Report that mandates each of the disclosures on page 6.

Conclusion

In sum, Semi-Annual Enforcement Reports are an essential component of the CPO's oversight of the day-to-day enforcement efforts of awardees and prime contractors. To increase their quality and utility, SMART and SMACNA recommend, at a minimum, that the CPO: 1) mandate the submission of CPRs electronically (with appropriate alternatives for submission when a small business lacks access); 2) adopt a standardized form for the use of local designees that includes detailed reporting on CPR review, employee interviews, on-site inspections, complaints, and violations; 3) provide detailed instructions to local designees on the information needed to adequately respond to each inquiry; and 4) create payroll review guidance that provides specific direction on selecting CPRs to review, includes parameters on how to determine the percentage of CPRs to review and on how to select a sample to review, and incorporates local factors, such as size of project and number of employees. Development of a detailed Semi-Annual Enforcement Report would facilitate ensuring that prime contractors and awardees fulfill their enforcement obligations, which would benefit local contractors and subcontractors in communities by rooting out pervasive violators who cheat to compete.

Date submitted: June 10, 2024