



Submitted via <http://www.regulations.gov>

May 17, 2022

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

**Re: Proposed Rule "Updating the Davis-Bacon and Related Acts"
(Docket Number 2022-05346; RIN 1235-AA40)**

Dear Ms. Looman,

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) appreciates the opportunity to comment on the proposed rule Updating the Davis-Bacon and Related Acts issued by the United States Department of Labor's Wage and Hour Division.

SWACCA is a national, 501(c)(6) non-profit trade association that advocates for the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents approximately 400 wall and ceiling construction employers – including many of the largest employers in our industry – who perform commercial framing, drywall, and interior systems work nationwide. Our contractors employ thousands of carpenters, drywall finishers, plasterers, and other skilled building trades professionals throughout the United States. SWACCA prides itself on a representing contractors who accept responsibility for providing family-sustaining wages and benefits and abiding by labor and employment standards, workers' compensation laws, and unemployment insurance requirements. SWACCA is a voice for these responsible, law-abiding entrepreneurs competing in construction markets across America on the basis of quality services, efficient execution, and the thoughtful implementation of training and innovation.

SWACCA is a member of the Construction Employers of America coalition and will rely on the very supportive comments submitted by that organization as to the majority of the issues presented by the proposed rule. We wish to particularly highlight the portion of those comments directed at the issue of employee misclassification, which has had significant detrimental impacts on the construction industry for both employers and workers.

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The purpose of these separate comments is to address the discrete issue of off-site construction facilities and the Department's proposed definition of "Site of Work." In short, these comments endorse the comments submitted by the United Brotherhood of Carpenters on the same issue.

Analysis

The Department noted in the NPRM that offsite construction methods are increasingly used in the construction industry and expected to expand. SWACCA agrees. Concerns about offsite fabrication are not new. The National Labor Relations Act recognizes this in the *Construction Industry Proviso* exception to Section 8(e), which otherwise proscribes agreements that would prohibit an employer from handling the products of another employer.

In 1967, the United States Supreme Court ruled that the *Construction Industry Proviso* permitted an agreement between labor and management that covered employees would not handle premachined doors, instead requiring the doors to be machined on the construction site.¹ This is an early example of offsite construction. SWACCA submits that premachined doors have become the norm in the industry and are an example of a construction product that was once built on the construction site that is now built in a manufacturing setting. There are countless other examples including pre-cut boards, mechanical/sheet metal assemblies, and component coatings/finishes.

More recently, larger building components are being assembled offsite. SWACCA is concerned particularly with the question of whether the proposed rule would apply jobsite prevailing wage rates to labor employed in an offsite manufacturing or fabrication facility that, in the normal course of its business, produces custom wall panels and other framing assemblies. These panels and assemblies do not constitute a complete portion of a building but can be quite large.

The Department proposes to amend the definition of "site of the work" to include off-site construction where the "significant portions" are constructed for specific use in a designated building or work, rather than simply reflecting products that the contractor or subcontractor makes available to the general public. The Department proposes to explain that "significant portion" means that entire portions or modules of the building or work, as opposed to smaller prefabricated components, are delivered to the place where the building or work will remain, with minimal construction work remaining other than the installation and/or assembly of the portions or modules.

¹ National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967).

The proposed rule would benefit from further clarity as to the definition of “significant portions.” As prefabricated building components become larger and more significant to a project, the Department is right to be concerned that the purpose of the Davis-Bacon Act could be subverted by certain offsite construction arrangements. At the same time, there are manufacturing plants that regularly build and fabricate very large, custom wall panels and framing assemblies in a manufacturing setting. A significant number of the plants doing this work employ union-represented employees with collectively bargained wages and benefits. The application of Davis-Bacon jobsite rates to these settings would be inappropriate because there are enormous differences between construction jobsites and established manufacturing and fabrication plants. Moreover, applying a jobsite rate at these manufacturers and fabricators would be disruptive to the collective bargaining relationships and agreements in place at unionized plants.

SWACCA fully agrees with the United Brotherhood of Carpenters, whose comments on this proposed rule state the following:

“While we agree that proximity to the construction site should not matter, we believe that prevailing wages should not extend to the work at facilities where in the normal course of the business the products are manufactured or fabricated for non-federal or non-federally assisted projects. Prevailing wages, of course, should apply to modifications, assembly and installation of fabricated products at the site of the building or work.”²

Conclusion

SWACCA is very supportive of the proposed rule “Updating the Davis-Bacon and Related Acts” and believes that it is an overdue improvement to the regulations. We believe that additional clarity as to the application of the “site of work” definition would make a very good proposed rule even better.

Thank you for your consideration of our comments.

Sincerely,



John Nesse
General Counsel

² Comments of the United Brotherhood of Carpenters (May 12, 2022), p.17. Available at https://downloads.regulations.gov/WH-2022-0001-33510/attachment_1.pdf