



July 28, 2020

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 69 chapters representing more than 21,000 members, we thank you for championing policies focused on creating American jobs, cutting taxes and reducing burdensome, costly and unnecessary regulations.

We also appreciate your leadership in creating the Great American Economic Revival Industry Groups, of which we were honored to be a part. Prior to the COVID-19 outbreak, the construction industry was forecasted to hit a record construction spend of more than \$1.3 trillion. We commend the administration's willingness to reach out to industry leaders and health experts to ensure that we come out of this crisis stronger and safer. Throughout this crisis, timely guidance from the White House and our federal agencies has ensured that construction remains an essential service in many of our states and local communities.

Most recently, we applaud you for issuing Executive Orders on Regulatory Relief to Support Economic Recovery and Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities, which will help to remove burdensome barriers to job creation and help the economy continue to rebound from the COVID-19 crisis.

As builders of our nation's communities and infrastructure, ABC members understand the value of standards and regulations when they are based on solid evidence, with appropriate consideration paid to implementation costs and input from the business community. ABC strongly supports comprehensive regulatory reform, which includes across-the-board requirements for departments and agencies to appropriately evaluate risks, weigh costs and assess the benefits of all regulations.

Further, ABC members stand ready for the chance to safely and ethically build and maintain America's infrastructure. We are encouraged by your commitment to improve our country's crumbling infrastructure by investing in federal and federally assisted construction accounts and programs, accelerating project delivery and creating additional flexibility, which will have a lasting impact on the economy and help provide critical jobs for hardworking U.S. workers.

According to an ABC study,¹ every \$1 billion in extra overall construction spending generates an average of at least 6,500 construction jobs, and every \$1 billion in extra construction spending on infrastructure generates an average of at least 3,300 construction jobs. Any investment in infrastructure would have a profound economic effect not only on the construction industry but the communities where these projects would take place.

ABC has identified the following issues for your administration and federal agencies to consider during their review of regulatory obstacles to economic recovery, which are especially important to address as Congress and your administration work towards legislation making a considerable investment in America's infrastructure:

1. Government-mandated project labor agreement policies that are inconsistent across federal agencies.
2. U.S. Department of Labor policies related to the Davis-Bacon Act that stifle competition and impose enormous burdens on contractor productivity and needlessly increase construction costs.
3. DOL policies that serve as barriers to workforce development.

Before considering our detailed concerns below, allow ABC to provide some highlights of how these issues have a chilling effect on competition and impede job creation and economic recovery:

- Government-mandated project labor agreements:
 - Anti-competitive and costly government-mandated project labor agreements on federal and federally assisted contracts drive up the cost of taxpayer-funded construction projects between 12% and 20%.
 - Government-mandated PLAs unfairly discourage merit shop contractors, which employ more than 87.4% of the U.S. construction workforce, from bidding on the projects. The negative impact of PLAs disproportionately harms small businesses.
 - The needless paperwork, waste and red tape associated with the federal government's evaluation and procurement of federal contracts potentially subject to government-mandated PLAs is especially frustrating. ABC is aware of just 12 contracts (totaling \$1.25 billion dollars) that were procured and built in the United States subject to federal government-mandated PLAs and PLA preferences out of 1,681 federal contracts (totaling \$98.74 billion) exceeding \$25 million from FY2009 through FY2019 that were subject to the Obama administration's pro-PLA Executive Order 13502.
 - In contrast, the prevalence of PLA mandates on federally assisted projects procured by certain blue states and localities are wasting billions of federal tax dollars, slowing the velocity of new infrastructure and stifling job creation and opportunity for all industry professionals during America's economic recovery from the COVID-19 pandemic.

¹ <https://abc.org/News-Media/Newsline/entryid/17036/the-construction-industry-needs-to-hire-an-additional-550-000-workers-in-2020>.

- DOL's Davis-Bacon Act policies:
 - ABC members frequently cite onerous Davis-Bacon Act regulations and compliance costs as reasons why they do not pursue public works projects subject to federal, state or local prevailing wage laws.
 - Regulations implementing the DOL's Wage and Hour Division process to survey contractors and determine prevailing wage rates is inherently flawed and fails to produce accurate, prevailing or timely rates.
 - In recent years, union wage rates have been found prevailing in a substantial majority of classifications, even though the percent of unionized workers in the U.S. construction industry measured by the Bureau of Labor Statistics has fluctuated between 12.6% and 14.5% during the past decade.
 - DOL's failure to provide detailed information about job duties that correspond to each published wage rate makes it difficult to determine the appropriate wage rate for many construction-related jobs. These wage determinations force federal contractors to use outdated and inefficient union job classifications that ignore the productive work practices successfully used in the merit shop construction industry.
 - The Congressional Budget Office has estimated that the repeal of the Davis-Bacon Act would save \$12 billion in federal construction costs between 2019 and 2028. ABC believes the CBO vastly underestimates the cost of the Davis-Bacon Act and this data only addresses construction costs on federal projects. It does not address federally assisted projects subject to the Davis-Bacon Act or other public works projects subject to state and local prevailing wage laws impacting state and local budgets.

- DOL's workforce development policies:
 - To successfully expand apprenticeship opportunities and close the skills gap, all U.S. workers should have the opportunity to participate in DOL's new industry-recognized apprenticeship program, particularly as federal registered apprenticeship programs supply only a small fraction of the construction industry's workforce.
 - While considering new industry programs in 2019, it appears DOL did not take into consideration that the overwhelming majority of America's 8.17 million U.S. construction industry professionals never participated in any federal registered apprenticeship programs but are instead developed through industry-recognized and market-driven apprenticeships sponsored by companies large and small.
 - Graduates of federal registered apprenticeship programs supply just 3.2% of the estimated 550,000 additional construction workers needed to meet industry demands in 2020 alone, according to ABC's estimates prior to the economic downturn caused by the COVID-19 pandemic. At current levels of graduation, it would take more than 30 years for the federal registered apprenticeship program to meet industry demands for just this year.

Government-mandated Project Labor Agreement Policies That Are Inconsistent Across Federal Agencies

A top priority of ABC members is ending anti-competitive and costly government-mandated project labor agreements on federal and federally assisted contracts. When governments mandate or push PLAs on public works projects, U.S. taxpayers suffer from inefficient, anti-competitive and discriminatory procurement policies that studies have found raise the cost of taxpayer-funded projects between 12% and 20%,² which results in fewer infrastructure improvements and reduced construction industry job creation. Further, government-mandated PLAs effectively prevent qualified contractors and the 87.4% of the U.S. construction workforce that choose to not join a labor union³ from fairly competing for contracts to build taxpayer-funded projects on a level playing field.

In previous letters, we respectively urged you to rescind President Obama's Executive Order 13502 and replace it with an inclusive policy similar to President George W. Bush's Executive Orders 13202 and 13208.⁴ This neutral policy would prohibit governments from mandating PLAs and permit contractors to voluntarily enter into PLAs in order to foster full and open competition from all qualified contractors and allow all workers to compete to build America, regardless of whether they execute a PLA with labor unions.⁵

In the absence of full repeal and replacement of the Obama policies, we ask that the administration evaluate existing PLA policies and make the decision-making process requiring PLAs across the federal government uniform, consistent and legal. As it stands now, PLA policies are often inconsistent between federal agencies and even regional offices within a federal agency, which causes frustration and confusion among our member companies pursuing federal contracts across multiple agencies. Since the Federal Acquisition Regulation rule implementing Obama's executive order was finalized on April 13, 2010,⁶ federal agencies procuring direct federal construction contracts—including the U.S. Army Corps of Engineers,⁷

² Most recently, a study published in February 2020 found Connecticut school projects subject to government-mandated PLAs were 19.8% more expensive compared to school projects not built with PLA mandates. Multiple studies measuring the impact of government-mandated PLAs on school construction in New Jersey, Ohio, California, New York and Massachusetts (all states with prevailing wage laws) made similar conclusions and are available at TheTruthAboutPLAs.com, [Research on Government-Mandated Project Labor Agreements](#), updated March 2020.

³ See Bureau of Labor Statistics *Union Members Summary*, <http://www.bls.gov/news.release/union2.nr0.htm>, Jan. 22, 2020.

⁴ <https://www.abc.org/Portals/1/2016%20LegWeek/ABC%20Letter%20to%20POTUS%20on%20Fair%20and%20Open%20Competition%20EO%2022119.pdf?ver=2019-02-27-154512-057>.

⁵ Executive Orders 13202 and 13208 were upheld by the U.S. Court of Appeals for the District of Columbia in *Building and Construction Trades Department, AFL-CIO et al., v. Joe M. Allbaugh, Director, Federal Emergency Management Agency, et al.*

⁶ <https://www.federalregister.gov/documents/2010/04/13/2010-8118/federal-acquisition-regulation-far-case-2009-005-use-of-project-labor-agreements-for-federal#p-24>.

⁷ See USACE's PLA policy: *Procurement Instruction Letter (PIL) 2011-01-R1, USACE Policy Relating to the Use of Project Labor Agreements for Federal Construction Projects* (Dec. 16, 2011) at http://thetruthaboutplas.com/wp-content/uploads/2015/04/USACE-PIL_2011-01-R1_Project_Labor_Agreements_Policy-121611.pdf and *Procurement Instruction Letter (PIL) 2011-01, USACE Policy Relating to the Use of Project Labor Agreements (PLAs) for Federal Construction Projects* (Oct. 15, 2010) at <http://thetruthaboutplas.com/wp-content/uploads/2015/04/USACE-Memo-on-PLAs-PIL2011-01ProjectLaborAgreements-101510.pdf>.

Naval Facilities Engineering Command,⁸ U.S. Department of Veterans Affairs⁹ and General Services Administration¹⁰—have issued guidance memos and new agency procurement policies on the use of government-mandated PLAs and PLA preferences for their specific agency or sub-agency.

For example, the GSA has a controversial (and likely illegal)¹¹ blanket PLA preference policy that awards contractors bonus points for submitting a PLA offer. Stakeholders have argued this policy may be in violation of the federal Competition in Contracting Act and other federal statutes requiring fair, full and open competition, because it acts as a disincentive for non-PLA bidders to submit an offer on the project knowing that they will face a lower ranking solely due to the fact they are not submitting a PLA proposal.

The policy gives GSA a means of passing over a non-PLA proposal if a PLA bidder and a non-PLA bidder have equal technical qualifications, even if the non-PLA bidder is lower priced. The negative impact of the GSA's blanket pro-PLA preference policy on small businesses is particularly exaggerated, as these firms are less likely to spend resources pursuing prime or subcontracting opportunities if they know they are automatically at a disadvantage if they are part of a team unwilling to submit a PLA offer.

ABC contractors and industry stakeholders have communicated concerns to Congress¹² and the GSA that this is a de facto PLA mandate policy in many markets and the blanket pro-PLA policy is needlessly reducing competition and increasing costs in all markets. In addition, the GSA's pro-PLA policy has led to documented delays,¹³ increased costs¹⁴ and poor local hiring

⁸ See NAVFAC's PLA policy: *Naval Facilities Engineering Command (NAVFAC) Use of Project Labor Agreements In Construction Contracts* (Feb. 8, 2011) at <http://thetruthaboutplas.com/wp-content/uploads/2015/04/NAVFAC-PLA-POLICY-MEMO-11-02-Feb-8-2011.pdf> and NAVFAC's *proposed rule comment* on FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects at <http://thetruthaboutplas.com/wp-content/uploads/2015/04/Navy-Comment-on-FAR-Case-2009-005-Use-of-PLAs-for-Federal-Construction-Projects-Docket-FAR-2009-00241.pdf>.

⁹ The VA's Office of Acquisition and Logistics, *Subpart M822.5 – Use of Project Labor Agreements for Federal Construction Projects M822.503 Policy* (effective May 16, 2018) at <https://www.va.gov/oal/library/vaam/vaamM822.asp#M822503>.

¹⁰ See GSA's PLA policy *GSA Public Building Service (PBS) Procurement Instructional Bulletin 11-05* (Aug. 2, 2011), *GSA PBS Procurement Instructional Bulletin (PIB) 10-04 Revision 1* (Sept. 24, 2010), *GSA PBS Procurement Instructional Bulletin (PIB) 10-04* (April 30, 2010), *GSA PBS Procurement Instructional Bulletin (PIB) 09-02* (Aug. 11, 2009).

¹¹ See section on GSA's blanket pro-PLA policy below.

¹² See TruthAboutPLAs.com, *ABC Members Testify in Support of Legislation Restoring Fairness in Federal Contracting*, June 7, 2011.

¹³ The GSA Headquarters at 1800 F St. in Washington, D.C., suffered a 107-day delay as a result of members of a local construction trade council refusing to agree to the terms of a PLA the contractor presented and signed with other labor unions (post award) not represented by the council. (See www.TheTruthAboutPLAs.com, *Delays and Increased Costs: The Truth About the Failed PLA on the GSA's Headquarters at 1800 F Street*, March 5, 2013). Eventually, the GSA instructed the prime contractor to proceed without a PLA and asked for a refund for millions of dollars built into the bid related to costs associated with the PLA. On March 16, 2011, the *House Oversight and Government Reform Committee's* Regulatory Affairs, Stimulus Oversight and Government Spending Subcommittee held the hearing *Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry*. GSA officials testified that the prime contractor on the 1800 F St. building could not finalize a PLA with numerous trade unions in the area. The contractor could only reach an agreement with the local carpenters union, leading to some delays and uncertainty in the project. The financial impact of this delay has not been accurately calculated.

¹⁴ In 2010, the GSA awarded a \$52.3 million contract to a general contractor to build the Lafayette federal building in Washington, D.C., but then forced the contractor to sign a change order and build it with a union-favoring PLA that cost taxpayers an additional \$3.3 million. Prior to award, the project was delayed during the bidding process because the GSA was forced to remove a PLA mandate after a contractor filed a bid protest with the Government Accountability Office. See TheTruthAboutPLAs.com, *GSA Wasted Millions on Union Handout, Where's the Outrage?*, April 10, 2012.

outcomes.¹⁵ Even consultants hired by the GSA to evaluate the economy and efficiency of proposed government-mandated PLAs on GSA projects raised questions about their value in certain markets, calling into question the effectiveness of a blanket pro-PLA policy¹⁶ resulting in less competition and increased costs ultimately shouldered by taxpayers.

While the GSA uses a problematic blanket PLA preference policy, other agencies (USACE, NAVFAC and VA) issue costly and time-consuming formal surveys on FBO.gov/SAM.gov on a project-by-project basis¹⁷ to determine if a PLA is supported by members of the responding federal contracting community. These federal agency PLA surveys typically require detailed answers to up to 22 open-ended essay questions, requiring extensive research and analysis from contractors¹⁸ which costs federal contractors and the federal acquisition workforce time and money to submit and review each response.

For example, in 2019, ABC was made aware of a federal contractor that responded to more than 260 federal agency PLA surveys since the final rule was issued, which takes company personnel at last four hours to complete, on average, depending on the complexity of the survey.

Further, some federal agencies (DOL,¹⁹ VA and GSA) have hired expensive consultants to produce studies recommending whether a PLA is appropriate for a project or series of projects in a market, while in other instances agency officials call federal contractors directly and use this information to make their final PLA determination, which again wastes time and resources ultimately shouldered by taxpayers.

This needless paperwork, waste and red tape within the federal procurement process is even more exasperating because ABC is aware of just 12 contracts (totaling \$1.25 billion dollars) that were procured and built in the United States subject to federal government-mandated PLAs and PLA preferences²⁰ out of 1,681 federal contracts (totaling \$98.74 billion) exceeding \$25 million from FY2009 through FY2019 that were subject to Obama's pro-PLA Executive Order 13502.

We urge your administration to review the problematic patchwork of varying and inconsistent agency PLA policies, which is confusing and frustrating for both large contractors and small businesses pursuing contracts across a single federal agency and/or multiple federal agencies. We also hope you will consider the waste of time and resources associated with government contractors submitting responses to individual federal agency PLA surveys and the acquisition workforce reviewing such responses.

¹⁵ Data collected by Rep Eleanor Holmes-Norton (D-D.C.) on federal projects subject to PLA mandates located in Washington, D.C., demonstrated that PLAs delivered worse local hiring outcomes than other large-scale federal projects not subject to a PLA. (See TheTruthAboutPLAs.com, [Data Busts Myth That Project Labor Agreements Result in Increased Local Hiring](#), March 11, 2013).

¹⁶ Rider Levett Bucknall report [The Applicability of Project Labor Agreements for Selected ARRA Construction Projects for the General Services Administration \(GSA\)](#), Tentative Draft Report Revision 3, Jan. 27, 2010.

¹⁷ See federal agency PLA surveys ABC has responded to and alerted members about at <http://thetruthaboutplas.com/tag/pla-survey/>.

¹⁸ For example, see [USACE Solicitation Number W9127820R0057](#), issued Feb. 24, 2020 for a project at Eglin AFB in Florida, where just 3.3% of the construction workforce belonged to a union in 2019.

¹⁹ See evidence of a total of \$428,000 worth of DOL-commissioned pro-PLA reports for a [Job Corps Center in Manchester, NH, \(\\$128,000\)](#) and a [study promoting PLAs across all federal agencies \(\\$300,000\)](#).

²⁰ Raw data extracted from USAspending.gov and cross-referenced with known contracts subjected to government-mandated PLAs or PLA preferences.

In addition to creating red tape and waste on direct federal construction contracts, Executive Order 13502 has led to PLA mandates on billions of dollars of federally assisted projects procured by state and local governments. While Executive Order 13502 does not require recipients of federal assistance to mandate PLAs, they are permitted and federal agencies, such as the U.S. Department of Housing and Urban Development²¹ and the U.S. Department of Transportation, have inappropriately encouraged state and local recipients of federal funding to mandate PLAs. It is unknown how many federally assisted contracts have been subjected to state and local government-mandated PLAs, but snapshots of data from federal agencies demonstrate it is significant. For example, according to DOT's Federal Highway Administration report of projects receiving FHWA funds from May 2010 to February 2019, state and local lawmakers mandated PLAs on 418 projects totaling an estimated \$10.12 billion.²² Eliminating PLA mandates on federally assisted projects would stretch federal investment in infrastructure further and allow all qualified contractors and employees to participate in rebuilding their communities and America's infrastructure.

U.S. Department of Labor Davis-Bacon Act Policies That Stifle Competition and Impose Enormous Burdens on Contractor Productivity

Many ABC members perform work on federal and federally financed construction projects, all of which are subject to prevailing wage and benefits rates set by the DOL's Wage and Hour Division for projects costing more than \$2,000.

Passed in 1931, the Davis-Bacon Act requires contractors to pay no less than the local prevailing wage to on-site workers on federal and federally funded construction projects costing more than \$2,000.²³

The Congressional Budget Office has estimated that the repeal of the Davis-Bacon Act would save \$12 billion in federal construction costs between 2019 and 2028.²⁴ We believe the CBO vastly underestimates the cost of the Davis-Bacon Act and this data only addresses construction costs on federal projects. It does not address federally assisted projects subject to the Davis-Bacon Act or other public works projects subject to state and local prevailing wage laws impacting state and local budgets.

For reasons discussed further in this letter, ABC advocates for full repeal of the Davis-Bacon Act and similar state and local prevailing wage laws.²⁵ However, in the absence of full repeal, we

²¹ See HUD Sec. Shaun Donovan's pro-PLA comments at the White House Jan. 18, 2011. <http://thetruthaboutplas.com/wp-content/uploads/2009/07/HUD-Secretary-Shaun-Donovan-on-Emerald-Cities-Collaborative-and-PLAs-11811.pdf>. ABC is aware of HUD pushing housing authorities procuring construction projects supported by HUD federal dollars to mandate PLAs on projects in [Boston](#), Chicago, [New Orleans](#), Oakland, [Philadelphia](#) and Portland during the Obama administration. It is unclear if HUD is promoting PLAs to local housing authorities under the Trump administration.

²² FHWA data available in pdf at https://thetruthaboutplas.com/wp-content/uploads/2019/04/FHWA-PLA_Summary_Tables_original-20190226.pdf and excel tables at https://thetruthaboutplas.com/wp-content/uploads/2019/03/FHWA-PLA_SummaryTables_022619-Created-032219.xlsx.

²³ <https://www.dol.gov/agencies/whd/government-contracts/construction>.

²⁴ <https://www.cbo.gov/budget-options/2018/54786>.

²⁵ See Testimony of ABC General Counsel Maurice Baskin at a hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce on "Promoting the Accuracy and Accountability of the Davis-Bacon Act," June 18, 2013, https://republicans-edlabor.house.gov/uploadedfiles/baskin_-_testimony.pdf.

also continue to recommend common-sense reforms to the law’s related onerous regulations in order to promote greater transparency and fairness.

1) The Wage Survey Process is Inherently Flawed

Currently, the DOL’s WHD determines and updates prevailing wage and benefits rates contractors are required to pay to construction workers on applicable construction projects subject to the Davis-Bacon Act. The WHD conducts surveys to collect and compile data about hourly rates contractors pay to employees in dozens of trades for four types of construction (building, highway, heavy and residential) for every single county in America.

Regulations implementing the WHD’s process to survey contractors and determine prevailing wage rates is inherently flawed and fails to produce accurate, prevailing or timely rates. For example, in recent years, union wage rates have been found prevailing in a substantial majority of classifications (based upon very small numbers of survey responses),²⁶ even though the percent of unionized workers in the U.S. construction industry measured by the BLS has fluctuated between 12.6% and 14.5% during the past decade.²⁷ That outcome is statistically improbable to say the least and does not reflect a locality’s true prevailing wage in many instances.

In addition, the DOL’s own inspector general audited a sample of the department’s WD-10s—the survey response forms contractors submit to the WHD that are used to determine rates—and “found errors in almost 100% of verified survey forms.”²⁸ The numerous errors occurred “even in the face of revised WD-10s, WD-10 instructions, and online WD-10s.”²⁹ Survey form errors included: reporting on incorrect peak weeks, wage rate misreporting and incorrectly reporting job classifications.³⁰

Further, a 2011 U.S. Government Accountability Office report found that “most survey forms verified against payroll data had errors.” The report further stated that more than “one-quarter of

²⁶ U.S. Government Accountability Office, *Davis–Bacon Act: Methodological Changes Needed to Improve Wage Survey*, GAO-11-152, March 2011, at <http://www.gao.gov/new.items/d11152.pdf>, testimony of D. Thomas Mistick before the House Education and the Workforce Committee Subcommittee on Workforce Protections on *Examining the Department of Labor’s Implementation of the Davis-Bacon Act*, April 14, 2011, at <https://edlabor.house.gov/imo/media/doc/documents/112/pdf/statements/Mistick04142011.pdf> and U.S. Department of Labor’s Office of Inspector General, *Better Strategies are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates*, Report Number: 04-19-001-15-001, March 29, 2019, at <https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf>.

²⁷ See U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey, Table 3. Union affiliation of employed wage and salary workers by occupation and industry*. Accessed Jan. 29, 2020. <https://www.bls.gov/webapps/legacy/cpslutab3.htm>.

²⁸ See page 6 of U.S. Government Accountability Office, *Davis–Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, <http://www.gao.gov/new.items/d11152.pdf>, see page 10 of U.S. Department of Labor, Office of Inspector General, *Concerns Persist with the Integrity of Davis–Bacon Act Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, March 30, 2004, <https://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

²⁹ See page 10 of U.S. Department of Labor, Office of Inspector General, *Concerns Persist with the Integrity of Davis–Bacon Act Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, March 30, 2004, <https://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

³⁰ *Id* at pages 10-12.

the final wage rates for key job classifications were based on wages reported for six or fewer workers.”³¹

ABC continues to find it problematic that the WHD’s survey process is not based on scientific statistical principles and relies on voluntary responses from private marketplace contractors, most of whom have no incentive to assist the department with its survey efforts.³² Under the DOL’s current rules, a survey can be used to determine rates if it has a minimum of two companies with three workers’ wages from each.³³ This rule rarely results in an accurate and informed prevailing rate, and invites determinations out of line with area standards. In contrast, BLS has long relied on scientifically based statistical sampling to determine workforce wage and employment data, which the department relies on for every purpose except Davis-Bacon. Currently, the department uses BLS data (specifically the Occupational Employment Statistics survey) for the Service Contract Act and the Foreign Labor Certification program, which are both prevailing wage requirements.³⁴

BLS already has in place two separate surveys that are done on an annual basis to estimate occupational wages: the Occupational Employment Statistics survey, which estimates local wage rates, and the National Compensation survey, which estimates benefits at the national level.³⁵ By combining the results from these two surveys and enhancing data collection sufficiently to capture more data points, DOL could effectively create more representative and accurate wage rates at the county and state level. Economists at BLS have already created a model to combine the two sets of wage data, and a similar methodology could be used to determine Davis-Bacon wage rates.³⁶

In addition, because of the cumbersome, time-consuming and flawed process used by DOL’s WHD to calculate prevailing wage rates, various rates are outdated and/or determined through data from areas that are not representative of local wages. For example, the DOL Office of Inspector General recently found 3% of WHD’s 134,738 unique published rates had not been updated in 21 to 40 years, raising questions about the reliability and usefulness of these rates in assisting contractors to pay area wage standards and submit competitive bids.³⁷ In addition, the OIG report also found 48% of the rates sampled in its audit were not determined from data for a single construction worker within the 31 counties that the published rates represented, meaning rates are not determined from local workers.

Research has shown the impact of relying on the outmoded WHD methodology to determine prevailing wages under the Davis-Bacon Act is to inflate the costs of constructing affordable

³¹ U.S. Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, <http://www.gao.gov/new.items/d11152.pdf>.

³² 29 C.F.R. §1.3(d) provides that “data from Federal or federally assisted projects subject to Davis-Bacon” will not be used for calculating wage determinations “unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.

³³ “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” James Sherk, Jan. 21, 2017, <http://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more>, page 4.

³⁴ Sherk, “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” page 16.

³⁵ Sherk, “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” page 14.

³⁶ Sherk, “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” page 16.

³⁷ U.S. Department of Labor, Office of Inspector General, *Better Strategies are Needed to Improve the Timelines and Accuracy of Davis-Bacon Prevailing Wage Rates*, March 29, 2019, <https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf>.

housing. For example, in 2008, researchers at the Beacon Hill Institute examined nine occupational categories in 80 metropolitan areas and concluded that the current WHD methodology unnecessarily inflates wages by a weighted average of 22% when compared to wages determined by BLS methodology.³⁸ Some of the problems found in the calculation of the prevailing wages under WHD included untimely wage reporting, poor survey design and the opportunity for unions to disproportionately dominate the survey process.

As outlined above, the responsibility for conducting Davis-Bacon wage determinations should be transferred to BLS.³⁹ The BLS has long relied on scientifically based statistical sampling to determine work force wage and employment data, which the department relies on for every purpose except Davis-Bacon. Further, there is no statutory obstacle to having BLS data serve as the source of prevailing wage rates and replace the antiquated, inefficient, inaccurate and costly Davis-Bacon wage survey process.⁴⁰

2) Providing Fair Notice of Prevailing Scope of Work in Classifications

The Davis-Bacon Act's regulatory and compliance costs to businesses have a chilling impact on competition from contractors. ABC members frequently cite onerous Davis-Bacon Act regulations as a reason why they do not pursue public works projects subject to federal, state or local prevailing wage laws.

For example, DOL's failure to provide detailed information about job duties that correspond to each published wage rate makes it difficult to determine the appropriate wage rate for many construction-related jobs. These wage determinations force federal contractors to use outdated and inefficient union job classifications that ignore the productive work practices successfully used in the merit shop construction industry. Further, DOL has failed to give contractors notice of many of its letter rulings and, with rare exceptions, has not posted such rulings on its website.

To provide fair notice to contractors of the scope of work to be performed by specific trades listed in wage determinations, DOL should post hyperlinks to union collective bargaining agreements "scope of work" sections in the public wage determination, whenever union wage rates are considered prevailing. Failure of the unions to provide such links to their scope of work provisions would bar any attempt by the DOL to claim the employer had misclassified its employees. Where more than one union claims to do the work in question according to their collective bargaining agreements, or where nonunion area practices otherwise prevail, then contractors should be able to classify their workers in accordance with either union's CBA or the nonunion area practice.

³⁸ Beacon Hill Institute, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, February 2008, <http://www.beaconhill.org/BHISStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf>.

³⁹ See discussion of calculating Davis-Bacon wage rates via the BLS in the Heritage Foundation report by James Sher: *Labor Department Can Create Jobs By Calculating Davis-Bacon Rates More Accurately*, Jan.21, 2017, at <https://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more>.

⁴⁰ See Testimony of Maurice Baskin at a hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce on "Promoting the Accuracy and Accountability of the Davis-Bacon Act," June 18, 2013, https://republicans-edlabor.house.gov/uploadedfiles/baskin_-_testimony.pdf.

To increase transparency and remove the unfair lack of notice to merit shop contractors on Davis-Bacon projects, we urge DOL to require a hyperlink to any union CBA scope-of-work provision found to be prevailing in a wage determination.

3) Davis-Bacon Multiple or “Split Wage” Rate Determinations on U.S. Department of Housing and Urban Development Residential Projects

Recently, items generally deemed by the U.S. Department of Housing and Urban Development as “incidental” to residential construction (four stories or less), i.e. swimming pools, community buildings, storage sheds, etc., have received Davis-Bacon multiple or “split wage” rate determinations, which has caused confusion and barriers for ABC contractors.

In order to alleviate confusion and mitigate barriers to constructing federal HUD-financed affordable housing projects, DOL should issue guidance to reinstate DOL’s past policy that only residential wage decisions shall be applied to housing projects (four stories or less), including all incidental items, unless there is an established area practice to the contrary.

Further, in cases where a quantitative guideline may be appropriate, the guideline should be a threshold of more than 20% of the total costs⁴¹ (not a threshold of \$1 million⁴²), and it should apply only to individual work components of a project (not to aggregations).

U.S. Department of Labor Policies That Serve as Barriers to Workforce Development

ABC appreciates that your administration and DOL have worked to expand apprenticeships and create new opportunities for U.S. workers.⁴³ We agree it is imperative that U.S. workers obtain the skills and knowledge necessary to acquire and succeed at the jobs of tomorrow. And the acknowledgement of the value of an industry-led apprenticeship system is a positive step in addressing the nation’s skilled workforce shortage.⁴⁴

However, to successfully expand apprenticeship opportunities and close the skills gap, all U.S. workers should have the opportunity to participate in DOL’s new industry-recognized apprenticeship program, particularly as federal registered apprenticeship programs supply only a small fraction of the construction industry’s workforce. Industry-recognized apprenticeship programs offer a solution to the current skills shortage in the construction industry, and there is no justification for excluding construction workers from access to such programs.

Unfortunately, while considering new industry programs in 2019,⁴⁵ the DOL erroneously determined that the construction industry is a sector that already has “significant” DOL-registered apprenticeship opportunities.⁴⁶ Additionally, DOL inaccurately considered construction industry apprenticeships as “well established” and/or “already effective and

⁴¹ All Agency Memorandum No. 130 and 131 at <https://www.dol.gov/whd/programs/dbra/docs/memo-131.pdf>.

⁴² Dec. 2, 1996 Letter No. LR-96-03, Application of Department of Labor guidance concerning “projects of a similar character.” at https://www.hud.gov/program_offices/davis_bacon_and_labor_standards/olr_9603.

⁴³ <https://www.whitehouse.gov/presidential-actions/3245/>.

⁴⁴ <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf>.

⁴⁵ 84 Fed. Reg. 29970.

⁴⁶ Id. at 29980-29981.

substantially widespread.”⁴⁷ In making these assertions, it appears the department did not take into consideration that the overwhelming majority of America’s 8.17 million U.S. construction industry professionals⁴⁸ never participated in any federal registered apprenticeship programs but are instead developed through industry-recognized and market-driven apprenticeships sponsored by companies large and small.⁴⁹

According to data cited in DOL’s 2019 proposed rule, “The construction industry has had approximately 48% of all federal registered apprentices [across all industries] on average over the prior five-year period, averaging approximately 144,000 federal registered apprentices per year.”⁵⁰ However, the 48% figure (and the arbitrary 25% minimum threshold)⁵¹ are misleading because they only count federal registered apprentices in construction against the paltry number of federal registered apprentices in all other industries. As ABC argued in its Aug. 26, 2019 comment letter⁵² to DOL, “The true measurement of whether federal registered apprenticeship is ‘widespread’ or ‘significant’ in the construction industry should be to compare the number of federal registered apprentices with the total number of construction industry professionals—a mere 144,000 federal registered apprentices in an industry that employs 8.17 million workers.”⁵³

In FY2018, DOL reported that 17,748 construction industry apprentices completed federal registered apprenticeship programs. If a similar number completed federal programs and all accepted jobs in the construction industry this year, it would supply just 3.2% of the estimated 550,000 additional construction workers that need to be hired in 2020,⁵⁴ in order to meet the existing backlog of projects under contract but not yet completed, which stood at 8.1 months in June 2020.⁵⁵ Thus, it would take more than 30 years for the federal registered apprenticeship program to supply the number of new construction workers the construction industry needs to hire in 2020.

While registered apprenticeship programs provide career opportunities, the data shows they cannot fill industry’s labor needs and skills gap on their own. America needs an all-hands-on-deck effort from all industries, including construction most of all, to meet industry workforce development needs in order to grow the U.S. economy and close the skills gap.

In 2019, ABC contractor members invested \$1.5 billion in workforce development initiatives, providing craft, leadership and safety education to 1.1 million course attendees to advance their careers in commercial and industrial construction.⁵⁶ The overwhelming majority of America’s construction industry professionals⁵⁷ were not educated in federal registered apprenticeship

⁴⁷ Id. at 29980.

⁴⁸ <https://www.bls.gov/cps/cpsaat42.pdf>.

⁴⁹ https://doleta.gov/oa/data_statistics.cfm.

⁵⁰ 84 Fed. Reg. 29981, footnote #19, <https://www.federalregister.gov/documents/2019/06/25/2019-13076/apprenticeship-programs-labor-standards-for-registration-amendment-of-regulations#footnote-19-p29981>.

⁵¹ 84 Fed. Reg. 29980.

⁵² <https://www.regulations.gov/document?D=ETA-2019-0005-61441>

⁵³ <https://www.bls.gov/cps/cpsaat42.pdf>.

⁵⁴ <https://abc.org/News-Media/Newsline/entryid/17036/the-construction-industry-needs-to-hire-an-additional-550-000-workers-in-2020>.

⁵⁵ <https://abc.org/News-Media/News-Releases/entryid/17892/abc-s-construction-backlog-indicator-up-in-june-contractor-optimism-grows>.

⁵⁶ abc.org/WFSurvey.

⁵⁷ <https://www.bls.gov/cps/cpsaat42.pdf>.

programs but are instead developed through industry-recognized and market-driven apprenticeships sponsored by companies large and small.⁵⁸ In fact, many employers elect to establish apprenticeship programs outside of registered apprenticeship programs due to the lack of flexibility, unnecessary paperwork and the bureaucracy involved in registering a program with the DOL, especially for employers with a national presence that need to work with both federal and state officials to gain program approval.⁵⁹

ABC and its 69 chapters are doing their part to educate craft, safety and management professionals using an all-of-the above strategy for workforce development, such as just-in-time task training, competency-based progression, work-based learning, industry-recognized apprenticeship programs and government-registered apprenticeships to build a safe, skilled and productive workforce.

Both industry-recognized and registered apprenticeship programs have been utilized by the merit shop construction industry for decades to educate and upskill the workforce. In partnership with NCCER, a not-for profit 501(c)(3) education foundation created by ABC in the 1990s, ABC is intensively engaged in building our workforce through more than 800 apprenticeship, craft, management and safety education programs at more than 1,400 locations across the United States.

ABC's commitment to creating a safe, skilled and productive workforce is evident from the practices contractor members have in place, from the utilization of both government-registered and industry-recognized apprenticeship programs to a world-class safety management system such as ABC's STEP safety management system.⁶⁰ STEP dramatically improves safety performance among participants regardless of company size or type of work and proves that world-class safety is achievable with a company-wide commitment to safety as a core value.

ABC's 2020 Safety Performance Report, which is based on 2019 data gathered from ABC STEP member companies recording nearly one billion hours of work in construction, heavy construction, civil engineering and specialty trades, documents the dramatic impact of using proactive safety practices to reduce recordable incidents by up to 88%, making the best-performing companies 827% safer than the BLS industry average.⁶¹

American industries have always been the leaders and incubators of transformation in the world, including in educating and upskilling the American workforce. And while the employment needs of the merit shop construction workforce are in flux as a result of the coronavirus pandemic, ABC members remain committed to recruiting, educating and upskilling craft and management professionals.

As stated above, there is a place for both government-registered and market-driven apprenticeships in an industry that is constantly evolving through technology and process improvements. ABC is committed to working with DOL to ensure that all U.S. workers in all

⁵⁸ https://doleta.gov/oa/data_statistics.cfm.

⁵⁹ <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf>.

⁶⁰ <http://www.abcstep.org/>.

⁶¹ abc.org/spr.

industries have the opportunity to participate in the agency's new industry-recognized apprenticeship program in order to effectively meet the needs of a 21st century workforce.

Conclusion

We applaud you and your administration's efforts to address federal polices and regulations harming America's job creation and economic growth. For the reasons stated above, we urge your administration and related agency's to support measures ensuring fair and open competition on federal and federally assisted construction projects, make common sense reforms to Davis-Bacon prevailing wage implementation on federal and federally assisted projects and ensure that all U.S. workers in all industries have the opportunity to participate in DOL's new industry-recognized apprenticeship program.

We look forward to working with your administration on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. Bellaman", with a long horizontal flourish extending to the right.

Michael D. Bellaman
President and Chief Executive Officer

cc:

Secretary Ben Carson, U.S. Department of Housing and Urban Development
Secretary Elaine Chao, U.S. Department of Transportation
Executive Director Jennifer LaTorre, Naval Facilities Engineering Command
Administrator Emily W. Murphy, U.S. General Services Administration
Secretary Eugene Scalia, U.S. Department of Labor
Lieutenant General Todd T. Semonite, Chief of Engineers and Commanding General,
U.S. Army Corps of Engineers
Secretary Robert Wilkie, U.S. Department of Veterans Affairs