



VIA ELECTRONIC SUBMISSION

July 28, 2014

Ms. Mary Ziegler
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
Room S-3510
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: RIN 1235-AA10, Comments on WHD's Proposed Rulemaking on Establishing a Minimum Wage for Contractors

Dear Ms. Ziegler:

Associated Builders and Contractors, Inc. (ABC) hereby submits the following comments to the Department of Labor's Wage and Hour Division (the Department or DOL) in response to the above-referenced notice of proposed rulemaking (NPRM or the proposed Rule), published in the *Federal Register* on June 17, 2014, at 79 Fed. Reg. 34568. The NPRM proposes to implement the President's Executive Order No. 13658, published at 79 Fed. Reg., at 9851.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process ensures taxpayers and consumers receive the most value for their construction dollars.

Many of ABC's members are government contractors, and as such they will be directly affected by the proposed rule. As you are aware, most government construction contracts are covered by the Davis-Bacon Act, 40 U.S.C. § 3142 (the "DBA"). Therefore, many of ABC's members are

required to comply with the DBA's minimum wage provisions when they perform government contracts. Other contractor members of ABC perform work under government contracts that are covered by the minimum wage provisions of the Service Contract Act (SCA), 41 U.S.C. § 6702. And of course, all government contractors that are large enough to be engaged in commerce are covered by the minimum wage provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206.

It should be noted that most of ABC's government contractor members already pay the substantial majority of their employees at wage rates higher than the newly proposed minimum wage of \$10.10 per hour, under the requirements of the DBA and to a lesser extent the SCA. The primary concern in these comments is not the wage rate itself, but rather the unlawful and unprecedented arrogation of power by the Executive Branch to set a new minimum wage in direct contravention of the above-referenced acts of Congress. The Department's proposed Rule will cause great confusion among government contractors and will needlessly increase the regulatory burden on contractors in the construction industry. For these reasons, the NPRM should be withdrawn or substantially modified, as further explained below.

The Proposed Rule Exceeds the Executive Branch's Constitutional and Statutory Authority.

Federal minimum wages on government contracts in the construction industry have long been established by acts of Congress. The DBA, 40 U.S.C. § 3142 (b), states: "The minimum wages shall be based on 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, or in the District of Columbia if the work is to be performed there." Pursuant to this statute, the Department has created an elaborate regulatory scheme for determining prevailing wage rates in the construction industry.¹

Congress also has established a regime for the calculation of minimum wages on non-construction service contracts covered by the SCA. That law states at 41 U.S. § 6703: "The contract and bid specification shall contain a provision specifying the minimum wage to be paid to each class of service employee engaged in the performance of the contract or any subcontract, as determined by the Secretary or the Secretary's authorized representative, in accordance with prevailing rates in the locality, or, where a collective-bargaining agreement covers the service employees, in accordance with the rates provided for in the agreement, including prospective

¹ See U.S. Department of Labor Prevailing Wage Resource Book, available at www.dol.gov. See also Glassman, et al, *The Federal Davis-Bacon Act: The Prevailing Measure of Wages* (Beacon Hill Institute 2008), available at www.beaconhill.org (describing the four steps of the Department's wage setting procedure under the DBA as follows: "(1) planning and scheduling of surveys, (2) conducting the surveys, (3) clarifying and analyzing the respondents' data and (4) issuing the wage determinations.")

wage increases provided for in the agreement as a result of arm's length negotiations." Section 6704 of the SCA further incorporates by reference the minimum wage provision of the FLSA, 29 U.S.C. § 206, which specifies that the minimum wage currently shall be \$7.25 per hour for every employee engaged in commerce.

By the plain language of these statutes, Congress has established as a matter of law the minimum wages that must be paid by federal contractors. The NPRM nevertheless asserts that the minimum wage requirements of the Executive Order are "separate and distinct legal obligations from the prevailing wage requirements of the SCA and the DBA."² This assertion confirms that the President and the Department are creating a new minimum wage requirement in derogation of Congressional intent. As a result, in a limited but significant number of instances under the DBA and SCA, wage rates that the Department has previously found to be the minimum wages "prevailing" in local jurisdictions according to the dictates of Congress will under the proposed Rule no longer be deemed to be the minimum wage.³

Neither the President nor the Department has any authority to override acts of Congress by setting a new minimum wage that contractors must pay, in a manner that is plainly inconsistent with the statutes that already govern this issue. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson concurring) ("In instances where presidential action is incompatible with the express or implied will of Congress, the power of the President is at its minimum...."); *Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996) (striking down executive order conflicting with provisions of the National Labor Relations Act).⁴

The sole authority for the executive order or the proposed rule cited by either the President or the NPRM is the Federal Property and Administrative Services Act of 1949 (FPASA, or the Procurement Act), 40 U.S.C. §§ 101, 121(a), cited by the President at 79 Fed. Reg. 9851 and in the NPRM at 79 Fed. Reg. 34570. The FPASA authorizes the President to "prescribe policies and directives" that [he] considers necessary to carry out the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. ***In the 65-year history of the FPASA, no President has ever before attempted to use this law as authority to establish a minimum wage for government contractors***, and certainly no President has ever done so in direct violation of acts of Congress. In any event, the Procurement Act's

² 79 Fed. Reg., at 34582-83.

³ The Department has yet to publish any information regarding the number of wage determinations around the country that will become inoperative as a result of the proposed Rule. ABC has uncovered numerous examples of wage determinations under the DBA that will be immediately superseded by the new Rule if it takes effect in January 2015 in its present form. Even more ominously, the Executive Order and proposed Rule give the Department new authority to raise the minimum wage in subsequent years without complying with the Congressionally mandated process for determining prevailing wages under either the DBA or SCA. See 79 Fed. Reg., at 34568.

⁴ See also Congressional Research Service Report for Congress, *Presidential Authority to Impose Requirements On Federal Contractors* (CRS Jan. 10, 2012), available at www.crs.gov.

authorization to achieve greater economy or efficiency cannot truthfully be said to authorize the President or the Department to increase the government's costs, as will be the most likely result of increasing the minimum wages that government contractors must pay their employees.

The D.C. Circuit considered and rejected a similar claim of Presidential authority to impose new obligations on government contractors under the FPASA in *Chamber of Commerce v. Reich*, 74 F. 3d at 1333. The court observed that the authority vested in the President under the FPASA is limited:

The Procurement Act was designed to address broad concerns quite different from the more focused question of the [issue before the court]. The text of the Procurement Act and its legislative history indicate that Congress was troubled by the absence of central management that could coordinate the entire government's procurement activities in an efficient and economical manner. The legislative history is replete with references for the need to have an "efficient, businesslike system of property management." S.REP. No. 475, 81st Cong., 1st Sess. 1 (1949); *see also* H.R.REP. No. 670, 81st Cong. 1st Sess. 2 (1949).

As a result, the *Reich* court found that the FPASA provided no authority for the President to dictate to government contractors as to matters on which Congress has already spoken.⁵

In the present circumstance, as in *Reich*, Congress has already made the judgment that the government will achieve its greatest economy and efficiency by requiring government contractors to pay only the minimum wages specified by the DBA, SCA and FLSA. Reasonable minds may differ as to whether Congress has set the minimum wage at the most economical or efficient levels for government contractors, but once Congress has made the political judgment necessary to set the minimum wage and has acted upon it in the form of legislation, the President and the Department are required by the Constitution to faithfully execute the laws so enacted by Congress.⁶

⁵ The *Reich* court specifically held that the FPASA did not authorize the President to prohibit government contractors from hiring strike replacements in the face of legislation (the National Labor Relations Act) that left such an option to private decision-making. *Id.* at 1333. The D.C. Circuit opinion in *Reich* distinguished the only previous case where the Procurement Act had been found to grant authority for an executive order dealing at all with government contractors' wages: *AFL-CIO v. Kahn*, 618 F. 2d 784 (1979). The *Reich* court found that the executive order in *Kahn* was not inconsistent with any federal statute, where the President acted only to restrict employer wage increases as an emergency anti-inflation measure. *Id.* As noted above, no President has ever attempted to dictate minimum wages for construction workers under the authority of the Procurement Act.

⁶ Neither the President nor the Secretary can claim a right to "supplement" the Congressional minimum wage mandates with their own independent scheme, as has been permitted for state governments under the DBA, SCA and FLSA. *See Frank Bros., Inc. v. Wisconsin Dept. of Transp.*, 409 F. 3d 880 (7th Cir. 2005) (holding that Davis-Bacon sets a "floor" that state governments are entitled to supplement because

Finally, whereas the Department has sometimes (though not always) declared that legal challenges to the President’s authority to issue an Executive Order are “beyond its purview,”⁷ such a response is inappropriate here. Section 4 of the Executive Order 13658 specifically instructs the Department to issue regulations implementing the Order only “to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act” ... “including providing exclusions from the requirements set forth in this order where appropriate.” Section 4 of the Order further instructs the Department to “incorporate existing definitions, procedures, remedies, and enforcement processes” under the FLSA, SCA and DBA. These instructions confer upon the Department all the discretion necessary to decline to enforce the Executive Order in a manner that is inconsistent with Congressional authority (i.e., by declining to set a new minimum wage for any employee covered by the DBA, SCA or FLSA that differs from the Congressionally mandated minimum wages under the foregoing statutes).

For each of these reasons, the NPRM should be withdrawn or substantially modified to avoid imposing any new minimum wage that is different from the minimum wages dictated by Congress.

At a Minimum, the Department Should Conform the Proposed New Minimum Wage to the Existing Requirements of the DBA and SCA in Order to Avoid Confusion and Unnecessary Burdens on Government Contractors

Aside from the questions surrounding the Department’s legal authority to implement the proposed Rule, it would be administratively prudent for the Department, and entirely consistent with Section 4 of the Executive Order, to modify the proposal to achieve greater conformity with the DBA and SCA. As written, the Department’s proposed new minimum wage overlaps with, but differs significantly from, the extensive regulations implementing the DBA and SCA in ways that will cause considerable confusion among government contractors. Issues likely to cause particular confusion to contractors are highlighted below.

Type And Location of Covered Employee Classifications

The NPRM interprets the Executive Order as extending to laborers and mechanics on DBA-covered contracts. However, the NPRM also interprets the Executive Order “as extending coverage to workers performing on DBA-covered contracts for construction who are not laborers

the state minimum wage acts are not preempted by the federal laws). Here, both Congress and the Executive Branch are part of the same (federal) “scheme,” and it is Congress alone that is entitled to make the decision on behalf of the federal government as to the level of the minimum wage, once it has enacted legislation for this explicit purpose.

⁷ Compare the Department’s final rules implementing Executive Orders 13495 (declining to address the issue) and 13496 (extensively discussing the issue).

or mechanics but whose wages are governed by the FLSA.”⁸ Furthermore, according to the NPRM, FLSA-covered employees working on DBA-covered contracts are not required to be physically present on the DBA-covered worksite to be covered by the minimum wage requirements of the Executive Order.⁹

Construction contractors that have spent decades complying with the Department’s regulations implementing the DBA have long become accustomed to looking at the Department’s published wage determinations to determine what their laborers and mechanics will be paid at the site of the work. The Department’s own regulations make clear that prevailing wages must only be paid for such laborers and mechanics and only for those who perform at the site of the construction work.¹⁰

The NPRM creates unnecessary confusion and imposes administrative burdens on contractors by declaring for the first time that they must pay laborers and mechanics on DBA-covered jobsites at rates that in some instances may exceed those in the published wage determinations. At the same time, the NPRM changes the long established DBA-mandated “site of the work” rule for purposes of the new minimum wage and expands the covered types of workers beyond the categories of laborers and mechanics.¹¹

By way of example, DOL would apparently view an administrative employee working at the home office of a contractor on plans for a DBA-covered contract or a security guard patrolling a construction worksite where DBA-covered work is being performed as covered workers entitled to the new minimum wage established by the Executive Order. On the other hand, if a contractor working on a DBA-covered contract hires a FLSA-covered technician to repair its electronic time system, the technician would not be entitled to the minimum wage established by the Executive Order because he/she is not engaged in working on or in connection with the contract.¹² Contractors will inevitably be confused by this new regulatory regime.¹³

⁸ 79 Fed. Reg., at 34577.

⁹ 79 Fed. Reg., at 34577.

¹⁰ See 29 C.F.R. Part 5.

¹¹ 79 Fed. Reg., at 34577.

¹² 79 Fed. Reg., at 34577.

¹³ Similarly, “the Department’s proposed rule specifically notes that the Executive Order’s new minimum wage requirements will apply to FLSA-covered employees who provide support on a service contract that is necessary for the performance of the contract but who are not “service employees” under the contract for purposes of the SCA. For example, a non-exempt payroll clerk who is covered by the FLSA and is responsible for maintaining payroll records for service employees employed on an SCA-covered contract for janitorial services would be covered by the Executive Order for the hours spent performing work in support of the covered contract even though the non-exempt payroll clerk may not qualify as a “service employee” for purposes of the SCA.” See Executive Order 13658 Frequently Asked Questions (FAQs) at <http://www.dol.gov/whd/flsa/nprm-eo13658/faq.htm>.

In order to avoid such unnecessary confusion, in order to preserve comity with both the governing statutes and the Department's own DBA and SCA rules, the Department should at a minimum preserve all current wage requirements under those rules and restrict the proposed Rule's coverage to employees who are not performing work covered by the DBA or SCA. This would at least allow contractors to continue their compliance with DBA and SCA requirements in the same manner that they always have and would confine the changes imposed by the new Rule to separate categories of workers. ABC reiterates that this would not resolve the statutory/constitutional lack of authority for the new Rule, but would at least mitigate some of the most serious problems with burdensome proposed regulations.

Fringe Benefits

A similar form of mitigation is needed to address the confusing proposal requiring contractors to change their treatment of fringe benefits for many (though not all) workers covered by the DBA. The Department has consistently ruled over many decades that contractors can satisfy their minimum wage obligations under the DBA by paying any combination of wages and bona fide fringe benefits, so long as the wage component matches or exceeds the statutorily required minimum wage of the FLSA. The NPRM acknowledges that this principle is statutorily mandated by Congress in the DBA, 40 U.S.C. 3141(2), but the NPRM nevertheless declares that DBA-covered contractors would be precluded from discharging their minimum wage obligations by furnishing fringe benefits.¹⁴ Again, this unnecessary and unwarranted change in contractors' minimum wage requirements will be confusing to administer and will lead to needless burdens on contractors. This proposal should be modified, both on the statutory grounds discussed above, but also in order to reconcile the new Rule with the existing regulation of the DBA wherever possible in accordance with Section 4 of the Executive Order.

Apprentices

The NPRM's treatment of apprentice wages is particularly confusing and impactful on contractors. Under current regulations, apprentices in a registered DOL apprenticeship program can be paid a percentage of the wage for the skill they are acquiring, in recognition of the fact that they are trainees.¹⁵ The NPRM states that the new minimum wage will apply to "any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship."¹⁶ However, under coverage exclusions, the rule states, "this part does not apply to learners, apprentices, or messengers whose wages are calculated pursuant to

¹⁴ 79 Fed. Reg., at 34591.

¹⁵ See 29 C.F.R. part 5 and part 29.

¹⁶ 79 Fed. Reg., at 34577.

special certificates issued under 29 U.S.C. 214(a).”¹⁷ Apprentices performing work on DBA or SCA contracts should be excluded from the new Rule in any event. Their wages are tied to the journeyman rate on government contracts and there is no need for their wages to be affected by a new minimum wage.

Multi-Year Contracts

It is well settled under the DBA wage determinations in effect at the time of contract award generally remain in effect for the duration of the contract, regardless of whether new wage determinations are issued while the contract is being performed. The same principle should apply with regard to any minimum wage increases imposed by the Executive Order and the NPRM. Unfortunately, the wording of the NPRM on this point is not at all clear.¹⁸ The Department should clarify this aspect of the NPRM to adopt the existing DBA regulations on multi-year contracts.

Coverage of Suppliers

The NPRM states that contracts for suppliers that are covered by the Public Contracts Act are not covered by the proposed Rule.¹⁹ However, another section of the NPRM indicates that the proposed Rule does apply to subcontractors performing work for a prime contractor covered by the DBA or SCA, at whatever tier.²⁰ Additional clarification of these potentially conflicting requirements is called for.

Safe Harbor Provision or Grace Period

As discussed above, the proposed Rule would fundamentally alter decades of understandings and regulatory policies implementing multiple laws. The result will be a confusing morass of overlapping and conflicting regulations that will require considerable time for absorption and implementation by government contractors of all types and sizes. The Department should therefore act within the discretion allowed to it under the Executive Order to exempt, delay or otherwise mitigate the draconian effects of the proposed Rule on contractors in one or more of the following ways:

- Rather than threatening contractors with debarment for actions taken by them in good-faith compliance with decades of existing laws such as the DBA, SCA and FLSA, the

¹⁷ 79 Fed. Reg., at 34612.

¹⁸ See Executive Order 13658 Frequently Asked Questions (FAQs) at <http://www.dol.gov/whd/flsa/nprm-eo13658/faq.htm>.

¹⁹ 79 Fed. Reg., at 34575.

²⁰ 79 Fed. Reg., at 34611.

Department should provide a safe harbor for those contractors that can demonstrate their wages are in compliance with those statutes.

- Alternatively, the Department should allow a multi-year grace period prior to implementation of the new Rule, particularly since it is entirely possible that the Executive Order and the Final Rule will be subject to a valid legal challenge.

Regulatory Impact

The Department's Initial Regulatory Flexibility Analysis wrongly states that the Department lacks authority to consider alternatives to the proposed Rule under the Executive Order 13658.²¹ To the contrary, as discussed above, section 4 of the Executive Order vests full discretion of the Department to "provide exclusions from the requirements set forth in this order where appropriate."

The Regulatory Impact statements contained in the NPRM do not reference any Departmental analysis of the number of wage determinations under the DBA and SCA that will be superseded by the new minimum wage rate established by the new Rule. Until that analysis is performed, it is not possible to accurately estimate the adverse impact of the Final Rule on small businesses. ABC submits that the current regulatory impact analysis in the NPRM does not fully comply with the requirements of Small Business Regulatory Enforcement Fairness Act, for reasons more fully stated by the Office of Advocacy of the Small Business Administration.

Conclusion

For each of the reasons set forth above, the NPRM should be withdrawn or substantially modified.

Respectfully submitted,



Geoffrey Burr
Vice President, Government Affairs

Of Counsel: Maurice Baskin, Esq.
Littler Mendelson, P.C.
1150 17th Street, NW, Suite 900
Washington, D.C. 20036

²¹ 79 Fed. Reg., at 34604.