

October 27, 2023

The Honorable Lloyd Smucker
U.S. House of Representatives
302 Cannon House Office Building
Washington, DC 20515

Dear Congressman Smucker:

The undersigned diverse group of construction and business associations respectfully express our support for your Congressional Review Act resolution to repeal the U.S. Department of Labor final rule, Updating the Davis-Bacon and Related Acts Regulations,¹ which will make drastic revisions to the regulations implementing the Davis-Bacon Act and Related Acts that apply to federal and federally assisted construction projects funded by taxpayers.

The members of the undersigned organizations are often required to follow Davis-Bacon Act regulations on critical construction projects or would more frequently be subject to the Act under the new regulations. The new DOL rule and ongoing use of this flawed policy on federal and federally funded projects will increase the burden to contractors and taxpayers with anti-competitive red tape and inflated construction costs.² We appreciate your efforts to raise awareness of the Biden administration's controversial new Davis-Bacon rule and urge all U.S. Representatives to co-sponsor this important CRA.

Construction industry and taxpayer-advocate stakeholders have long sought to rectify concerns with unclear prevailing wage regulations and the DOL's flawed wage determination process under the Davis-Bacon Act.³ For decades, the Government Accountability Office⁴ and the DOL Office of Inspector General⁵ have been critical of the unscientific and unrepresentative survey process that results in a government-set prevailing wage that consistently does not reflect a local prevailing rate in many markets.

Unfortunately, the DOL failed to address regulatory uncertainty or correct its flawed wage determination process in its August 23, 2023, final rule implementing radical changes to Davis-Bacon Act regulations, which will further distort prevailing wage rates and discourage small business participation on future federally funded construction projects after it takes effect on Oct 23.

In short, the new rule increases regulatory burdens on small businesses, new industries and additional public works projects and rescinds modest pro-taxpayer reforms that have been in place for nearly 40 years. Most notably, the new rule implements more than 50 significant changes to DBA regulations, including:

¹ <https://www.federalregister.gov/documents/2023/08/23/2023-17221/updating-the-davis-bacon-and-related-acts-regulations>

² The Congressional Budget Office modestly estimates that repealing the 1930s-era Davis-Bacon Act would save the federal government \$24.3 billion in spending between 2023 and 2032. See <https://www.cbo.gov/budget-options/58674>

³ <https://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more>

⁴ U.S. GAO, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, GAO-11-152, March 2011, <http://www.gao.gov/new.items/d11152.pdf> and U.S. GAO, *Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement*, HEHS-99-21, January 1999, <http://www.gao.gov/archive/1999/he99021.pdf>

⁵ U.S. DOL, Office of Inspector General, *Better Strategies are Needed to Improve The Timeliness And Accuracy of Davis-Bacon Act Prevailing Wage Rates*, Report Number 04-19-001-15-001m March 29, 2019, <https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf>; U.S. DOL OIG, *Concerns Persist with the Integrity of Davis-Bacon Act Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, March 30, 2004, pp. 12-13, <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>; and U.S. DOL OIG, *Inaccurate Data Were Frequently Used in Wage Determinations Made Under the Davis-Bacon Act*, Audit Report No. 04-97-013-04-420, March 10, 1997, http://www.oig.dol.gov/public/reports/oa/pre_1998/04-97-013-04-420s.htm.

- Weakening the definition of “prevailing wage” to a wage paid to at least 30% of workers in a locality, down from 50%.⁶
- Revoking a Reagan-era rule separating metropolitan and rural wage data, ensuring any future wage calculation will overcount inflated urban wages as prevailing in smaller rural areas.⁷
- Undermining the procedural due process rights of contractors and increasing administrative costs by expanding the DOL’s debarment powers.⁸
- Imposing Davis-Bacon Act obligations through “operation of law,” regardless of contract language, deterring many small and minority-owned construction firms without administrative resources from bidding on contracts.⁹
- Expanding the term “site of work” to include material suppliers and off-site construction in certain fact-based circumstances.¹⁰ This contradicts the plain language of Davis-Bacon Act and legally binding D.C. Circuit Court precedent.
- Arbitrarily increasing non-collectively bargaining wage determinations via the U.S. Bureau of Labor Statistics’ Employment Cost Index.¹¹
- Expanding Davis-Bacon Act coverage beyond activities authorized by Congress in statute, particularly with regard to the services of land survey crews.¹²

Unfortunately, the final rule missed an opportunity to fix the DOL’s voluntary, unscientific and inefficient wage survey and wage determination process that has so often led to anomalous results and criticism by government watchdogs. For example, the DOL rejected common-sense stakeholder recommendations to utilize data already collected by the U.S. BLS that would help determine accurate and timely market wages. A May 2022 study¹³ found that the Davis-Bacon Act costs taxpayers an extra \$21 billion a year, increases the price tag of construction projects by at least 7.2% and inflates construction workforce wages by 20.2% compared to local market averages if the DOL calculated prevailing wages using modern and scientific methodology via the BLS data. Remarkably, the DOL final rule enigmatically and arbitrarily permits the use of BLS ECI data to uniformly inflate non-collectively bargained wage rates but fails to use other BLS data to fix its flawed survey and wage determination methodology.

Finally, the rule makes it much more likely that the government will adopt collectively bargained wages and benefits as the government-set prevailing wage at a greater frequency than in current practice, which already adopts union wage scales at improbable rates, considering a record-low 11.7% of the U.S. construction industry workforce is unionized.¹⁴ The expansion of this inflationary and anti-competitive policy favors special interests by disrupting free markets and helping unionized contractors be more competitive and more likely to win federal and federally funded contracts, thereby creating more jobs for union members.

The construction industry continues to face challenging economic conditions, including inflated materials costs that are more than 40% since the start of the COVID-19 pandemic, disrupted supply chains and a skilled labor shortage of more than half a million in 2023.¹⁵ The onerous new requirements

⁶ <https://www.federalregister.gov/d/2023-17221/p-101>

⁷ <https://www.federalregister.gov/d/2023-17221/p-225>

⁸ <https://www.federalregister.gov/d/2023-17221/p-994>

⁹ <https://www.federalregister.gov/d/2023-17221/p-1209>

¹⁰ <https://www.federalregister.gov/d/2023-17221/p-679>

¹¹ <https://www.federalregister.gov/d/2023-17221/p-467>

¹² The new DBA rule runs contrary to the standard established in 1962 by Secretary Arthur Goldberg during the administration of President John F. Kennedy and followed for more than 60 years.

¹³ <https://www.beaconhill.org/BHStudies/2022/FINAL-BHI-DBA-2022-05-16.pdf>

¹⁴ <https://www.bls.gov/news.release/union2.t03.htm>

¹⁵ <https://www.abc.org/News-Media/News-Releases/construction-workforce-shortage-tops-half-a-million-in-2023-says-abc>

and artificial inflation of construction costs imposed by this new Davis-Bacon Act rule will only exacerbate these headwinds and undermine taxpayer investments in much-needed infrastructure.

Sincerely,

American Concrete Pumping Association
American Fire Sprinkler Association
American Pipeline Contractors Association
Associated Builders and Contractors
Construction Industry Round Table
Construction Leadership Council
Independent Electrical Contractors
National Federation of Independent Business (NFIB)
National Society of Professional Surveyors
National Precast Concrete Association
Power and Communication Contractors Association
Precast/Prestressed Concrete Association
Small Business & Entrepreneurship Council
U.S. Geospatial Executives Organization