U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

May 17, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Jessica Looman
Acting Administrator
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15698 (March 18, 2022).

Dear Secretary Walsh and Acting Administrator Looman:

On March 18, 2022, the Department of Labor's (DOL) Wage and Hour Division published a proposed rule titled Updating the Davis-Bacon and Related Acts Regulations (DBRA).[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

Advocacy is concerned that the added costs and complexities in this proposed rule will make it more difficult for small contractors and subcontractors to comply with the DBRA. This may have the unintended consequence of discouraging small businesses from participating in federal construction contracts. Advocacy is concerned that DOL's Initial Regulatory Flexibility Analysis is deficient. DOL needs to publish a more accurate analysis of the expanded number of new

[1] Updating the Davis-Bacon and Related Act Regulations, 87 Fed. Reg. 15698 (Mar. 18, 2022). (hereinafter "2022 Proposed Rule").

small businesses that may now be covered and subject to compliance costs under the DBRA. DOL severely underestimates these compliance costs at under $100 per small business annually. Due to the problems with this IRFA, DOL cannot meaningfully consider significant and less burdensome alternatives to the proposed rule that would meet the agency's objectives. Advocacy recommends that DOL reassess the number of small businesses covered and the compliance costs from this regulation in a new Initial Regulatory Flexibility Analysis. Additionally, DOL should consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[4] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[5]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[6]

B. The Proposed Rule

The Davis-Bacon Act and the 71 Related Acts (collectively "DBRA") apply to contracts entered into by Federal agencies and the District of Columbia that are in excess of $2,000 for the construction, alteration, or repair of public buildings or public works. Under the DBRA, DOL determines wage rates that are "prevailing" for each classification of covered laborers and mechanics, as determined by voluntary wage surveys of contractors. Covered contractors and

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[2] 5 U.S.C. §601 et seq.
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[4] Small Business Jobs Act of 2010 (PL. 111-240) §1601.
[5] *Id*.
[6] *Id.*

subcontractors are required to provide weekly certified payrolls to the contracting agency to demonstrate their compliance with the incorporated wage. Prime contractors have the responsibility for the compliance of all subcontractors on a covered prime contract.[7]

On March 18, 2022, DOL published a proposed rule modifying the DBRA implementing regulations. This is DOL's first comprehensive review of federal construction regulations in over 40 years.

The proposed rule provides definitions that may add small businesses to DBRA coverage including:

1) Prefabrication businesses where a "significant portion" of the building or work is constructed.[8]
2) Material suppliers, truck drivers, demolition companies, and flaggers.[9]
3) Surveyors who perform physical and manual work.[10]
4) Businesses completing work with green technology such as solar panels, wind turbines, broadband installation, or electric car charger installation.[11]

The proposed rule incorporates many changes in the calculation of prevailing wages under the DBRA, including:

1) Adopting the "30 percent rule," a three-step process where the wage rate paid to 30 percent of the workforce could qualify as a prevailing wage.[12]
2) Updating outdated non- collectively bargaining prevailing wage every three years using U.S. Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) data.[13]
3) Allowing additional data into calculation of the wage rate in various circumstances including variable rates, multiple county rates, state transportation divisions, federal project data, state prevailing wages, rural and urban rates considered together, and surrounding county information.[14]

The proposed rule also makes changes to other requirements to contractor liabilities and enforcement, including:

1) Incorporating Davis-Bacon Act requirements by operation of law, whether they are included or incorporated by reference into such contract.[15]
2) Increasing the liability of subcontractors.[16]

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[7] 2022 Proposed Rule, page 15699.
[8] *See* 2022 Proposed Rule, page 15731 and 15793, Proposed 29 CFR Part 5.2, Definitions, Site of Work (1)(i)-(iii).
[9] *See* 2022 Proposed Rule, page 15726-15734, Proposed 29 CFR Part 5.2, Definitions, Construction, Prosecution, Completion, or Repair (Truck Drivers, Demolition), Material Supplier, Site of Work (Flaggers).
[10] *See* 2022 Proposed Rule, page 15729 (Footnote 80), and 15792-Proposed 5.2, Definitions, Labor or Mechanic.
[11] *See* 2022 Proposed Rule, page 15724 and 15789, Proposed 29 CFR Part 5.2, Definitions, Building or Work.
[12] *See* 2022 Proposed Rule, page 15703, and 15783, Proposed 29 CFR Part 1.2 Definitions, Prevailing wage.
[13] *See* 2022 Proposed Rule, page 15716, and 15786, Proposed 29 CFR Part 1.6(c)(1) Periodic Adjustments.
[14] *See* 2022 Proposed Rule, page 15703-15720.
[15] *See* 2022 Proposed Rule, page 15793, Proposed 29 CFR Part 5.5(e) Incorporation by operation of law.
[16] *See* 2022 Proposed Rule, page 15793, Proposed 29 CFR Part 5.5(a)(6) and (b)(4).

3) Expanding powers for DOL to withhold and cross-hold funds from other contracts.[17]

Advocacy has reached out to small business stakeholders to discuss concerns with this proposed rule. On April 25, 2022, Advocacy held a Small Business Roundtable with the officials from the Department of Labor and over 100 small businesses and their representatives on this proposed rule. The provisions of most interest to the small businesses in attendance included the provisions expanding industry coverage, changes to the calculation of the prevailing wage, and updated enforcement provisions.

II. The Rule's IRFA Does Not Meet the Requirements of Section 603(b) Because It Undercounts the Number of Small Businesses, Underestimates the Compliance Costs of the Proposed Rule and Does Not Examine Less Burdensome Alternatives.

Under the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) must contain:

1) A description of the reasons why the regulatory action is being taken;
2) The objectives and legal basis for the proposed regulation;
3) A description and estimated number of regulated small entities (by affected industry based on the North American Industry Classification System (NAICS));
4) A description and estimate of compliance requirements, including any differential for different categories of small entities;
5) Identification of duplication, overlap, and conflict with other rules and regulations; and
6) A description of significant alternatives to the rule.[18]

DOL's Initial Regulatory Flexibility Analysis is deficient and does not properly inform the public about the impact of this rule on small entities. This proposed rule inadequately quantifies newly affected industries. DOL has also underestimated the administrative burdens and compliance costs of this complicated regulation, with the very unlikely low average cost of $78 per small business in first year costs. DOL should have estimated the compliance costs of expanding DBRA coverage to new industries, the increase in the prevailing wage costs, and changes in the enforcement requirements on small businesses.

Without the information required by Section 603(b), DOL cannot fully consider significant and less burdensome alternatives to the proposed rule that would meet the agency's objectives. DOL must produce a new Initial Regulatory Flexibility Analysis that estimates the numbers of small businesses and compliance costs of this rule, especially including the administrative burdens and compliance costs of this rulemaking on small businesses. Finally, DOL must consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

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[17] *Id.*
[18] 5 U.S.C. § 603.

A. DOL Has Not Adequately Analyzed the New Small Businesses Covered under the DBRA

DOL does not properly analyze the number of small businesses and the industries affected by this proposed rule as required by the Regulatory Flexibility Act. The construction industry is composed primarily of small businesses, with 99.8 percent of businesses with less than 500 employees, and 91.6 percent of businesses with less than 20 employees.[19] DOL's analysis estimates that there are 103,600 to 135,200 potentially affected small businesses that are prime contractors and subcontractors through USA Spending and System for Award Management data (SAM).[20] DOL has expanded coverage to new industries such as prefabrication companies, material suppliers, truck drivers, survey crews and green infrastructure. However, the agency has not analyzed the numbers of small businesses affected and the economic impact of this rule on these entities.

Proposed Rule Expands Coverage to Prefabrication Companies

Advocacy is concerned that DOL is expanding the scope of the Davis-Bacon Act from construction work performed at the "site of the work" to prefabrication work completed at remote off-site locations.[21] Under this proposed rule, off-site coverage can include any secondary construction site, defined as a site "where a *significant portion* of the building or work is constructed."[22] Small businesses at Advocacy's roundtable pointed out that the DBRA by its own terms applies to wages "at the site of the work"[23] at a specific building worksite in the contract, and has limited application at nearby sites created solely for purposes of the project.[24] As proposed, this rule creates an additional area of coverage by applying it to any remote location that manufactures or builds "significant" components for a contract, regardless of whether that site is in proximity to the site of the work or whether it was established specifically for the project. Such businesses are not now covered by DBRA. In order to comply with Section 603(b) of the RFA, DOL must identify which types of manufacturers will now be potentially covered by the DBRA by NAICS code and clarify what types of building components would trigger this coverage.

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[19] U.S. Small Business Administration, Table of Size Standards Matched to North American Industry Classification System Codes (NAICS), 13 CFR § 121.201 (May 2022), https://www.sba.gov/sites/default/files/2022-05/Table%20of%20Size%20Standards_Effective%20May%202%202022_Final.pdf.

[20] *See* 2022 Proposed Rule, Regulatory Flexibility Analysis, page 15779.

[21] *See* 2022 Proposed Rule, page 15731 and 15793, Site of the Work.

[22] *Id.* "A "significant portion" of a building or work means "one or more portion(s) or module(s) of a building or work, as opposed to smaller prefabricated components, with minimal construction work remaining other than the installation and/or assembly of the portions or modules at the place where the building will remain."

[23] 29 CFR 5.2(l)(1) Site of the work. The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.

[24] Courts have found that off-site plants are not subject to the DBRA when the facilities were located three miles from site, batch pits two miles from construction site, or transportation of materials from a dedicated borrow pit. *See Building & Construction Trades Dep't. AFL-CIO v. U.S. Dep't of Labor Wage Appeals Bd.*, 932 F.2d 985 (D.C. Cir. 1991); *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994): *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996); *Les Calkins Trucking*, 1990-DBA-65 (ALJ July 13, 1995).

It is not clear from the regulation what constitutes a "significant portion" of work that would trigger DBRA coverage. For example, at the roundtable a representative from the Modular Building Institute (MBI) pointed out that MBI members produce modular components for buildings such as dorms, administrative buildings, and multi-family housing. These items may now be covered under the DBRA. A representative from the National Association of Home Builders (NAHB), most of whose members are small businesses, stated that modular construction has become a cost-effective way to address rising housing costs in the industry because costs are predictable when houses are produced in a controlled environment. Small builders described many building components of all sizes manufactured off-site that may fit this new definition for DBRA coverage including pre-cast concrete, tilt-up concrete, roofs, roof trusses, floor trusses, carpentry, wall panels, air conditioners, elevators, generators, and windows. It would be impractical, if not impossible, to isolate specific orders on off-site assembly lines to ensure wages compliance with DBRA rates.

Small businesses that produce prefabricated work are concerned that DBRA coverage would result in a steep increase in wages and administrative and end-product costs, making this option less affordable and desirable. For example, a small business making modular elevators commented that the skill set of the factory workers assembling a product has a fraction of the skillset of a craftsman at the worksite that installs, programs, and troubleshoots an installation. A small business owner commented that the logistics of paying different labor rates at an assembly line is a management and employee relations nightmare, as it would affect scheduling, payroll structure, and employee morale if some employees with the same position receive higher wages depending upon who the customer is.

A home builder making multi-family rental housing noted that their business has identical projects half an hour apart, one subject to Davis-Bacon requirements and the other not. The cost of the project subject to the DBRA was 30 percent higher than the cost of the other project. This builder noted that the current DBRA wage costs and regulatory burdens already dissuade many subcontractors from bidding on federal projects, and this rule may also make producers of prefabricated and modular components reject participation in these projects. Another roundtable participant was very concerned that this provision would undermine the affordable housing goals of the Administration, which touts the use of modular off-site construction in the development of this housing supply.[25]

Proposed Rule May Expand Coverage to Some Material Suppliers and Truck Drivers

Small businesses at Advocacy's roundtable commented that material suppliers and the trucks that deliver material to construction sites traditionally have been exempt from the requirements of the Davis-Bacon Act. The proposed extension of DBRA to these businesses will increase their costs and create confusion for the construction industry. Advocacy is also concerned that these small

[25] The White House, Fact Sheet: President Biden Announces Actions to Ease the Burden of Housing Costs (May 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/.

businesses are not counted in the assessment of the rule's impact. DOL must identify the potential industries newly covered by the DBRA and quantify the numbers of small businesses in a new IRFA.

Under the proposed rule, the exemption will require that the material supplier also provide items to the public. Currently some suppliers may only produce items for the federal government. The exemption would also require that the facility manufacturing the goods be neither established specifically for the project nor located at the site of the work. However, there is caselaw that allows some off-site plants to be exempt from the DBRA. Under this rule, any business that "also engages in other construction, prosecution, completion, or repair work is not a material supplier."[26]

A representative from the National Stone, Sand and Gravel Association stated that some of its members who are currently labeled as material suppliers may be considered subcontractors and subject to the DBRA because of this rulemaking. For example, some suppliers recycle concrete using a portable crusher onsite because on-site recycling is cheaper and more ecologically friendly than trucking used concrete offsite.

Application of the DBRA to material delivery truck drivers would be a significant change in practice for the construction industry.[27] The proposed rule may expand coverage to truck drivers delivering materials to a job site, "such as loading, unloading, or waiting for materials to be loaded or unloaded—where the driver or driver assistant's time spent on the site of the work is not so insubstantial or insignificant that it cannot be as a practical matter be precisely recorded."[28] Participants at Advocacy's roundtable expressed concern that it would be burdensome and unrealistic to require truck drivers dropping off materials to track their time under the DBRA.[29]

The delivery of materials at a jobsite is unpredictable and requires safety measures. It can take more than a few minutes to drop off items like wall panels at a curb. It may take a more significant amount of time to safely unload heavy roofing materials utilizing a crane. A small retailer or supplier may drop off construction materials at many different sites and jurisdictions, with both federal and private jobsites. Small businesses were also concerned that this rule would

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[26] *See* 2022 Proposed Rule, page 15793, Proposed 29 CFR 5.2 Definitions, Material Supplier. " (1) A material supplier is an entity meeting all of the following criteria: (i) Its only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup of the same in addition to, but not exclusive of, delivery; (ii) It also supplies materials, articles, supplies, or equipment to the general public; and (iii) Its facility manufacturing the materials, articles, supplies, or equipment, if any, is neither established specifically for the contract or project nor located at the site of the work. (2) If an entity, in addition to being engaged in the activities specified in paragraph (1)(i) of this definition, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier."

[27] *Building & Constr. Trades Dept., etc. v. United States Dep't of Labor Wage Appeals Bd*., 932 F.2d 985 (1991). (Material delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Act's coverage even if they are employed by the government contractor.)

[28] *See* 2022 Proposed Rule, page 15793, Proposed 29 CFR 5.2 Definitions, Covered Transportation.

[29] *See* 2022 Proposed Rule, page 15733.

discourage small business material suppliers and their truck drivers from providing construction products to worksites, exacerbating current supply chain issues for the construction industry.

Proposed Rule May Expand Coverage to Professional Surveyors

While surveyors are generally not subject to DBRA requirements, DOL's proposed rule provides guidance that "survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics."[30] Professional surveyors and their representatives in attendance at Advocacy's roundtable were concerned that this is a broad expansion of the DBRA.

Proposed Rule May Expand Coverage to Additional Small Businesses

DOL's Proposed Rule also contains multiple provisions clarifying definitions which may extend DBRA coverage to additional small businesses. The proposed rule adds installation of green infrastructure to coverage under a covered "building or work," which includes "solar panels, wind turbines, broadband installation and installation of electric car chargers."[31] The proposed rule also clarifies situations where demolition crews and flaggers could be subject to DBRA coverage. [32] Advocacy recommends that DOL quantify the numbers of small businesses and identify these potentially affected industries in a new IRFA.

B. DOL Has Not Adequately Analyzed the Administrative Burdens and Compliance Costs of Proposed Rule

DOL has also severely underestimated the administrative burdens and compliance costs of this rule for small businesses. In the IRFA, the agency only estimates one hour of time of human resources time or $52 for regulatory familiarization, or "to review the regulations to understand how the prevailing wage methodology will change." DOL also estimates 0.5 hours of staff time or $26 to implement this regulation, to update non-collectively bargained rates every three years.[33] However, this proposed rule is DOL's first comprehensive regulatory review of the DBRA in over 40 years, and it is over 400 pages long with 50 regulatory provisions. Small businesses attending an Advocacy's roundtable on this rulemaking disagreed with DOL's low estimate.

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[30] *See* 2022 Proposed Rule, page 15729, Footnote 80. U.S. Dep't of Labor, Office of the Solicitor, Memorandum on the Application of the Davis-Bacon and related Acts, https://cdn.ymaws.com/www.nsps.us.com/resource/resmgr/Davis-Bacon/Goldberg_letter.pdf. (A representative from the National Society of Professional Surveyors cites to this DOL letter for the proposition that survey crews are exempt except for rare instances when they are performing duties that are physical in nature).

[31] *See* 2022 Proposed Rule, Page 15789, Proposed 29 CFR 5.2 Definitions, Building or Work.

[32] *See* 2022 Proposed Rule, Page 15791, Proposed 29 CFR 5.2 Definitions, Construction, Prosecution, Completion or Repair.

[33] *See* 2022 Proposed Rule, Page 15780.

Proposed Rule Adds Administrative Burdens

Small businesses newly covered by the DBRA may have the highest compliance costs under this proposed rule, as they have no experience working in this bureaucratic regulatory regime. Many small businesses spend a disproportionately higher amount of time and money on regulatory compliance because they have more limited human resources and legal staff and often must hire experts to perform compliance work or train internal staff. The DBRA requires covered contractors and subcontractors to complete human resources tasks, such as submitting weekly certified payrolls, evaluating prevailing wage and work rules, and paying and providing fringe benefits. Small businesses must update their payroll systems. Small businesses also commented that they will incur management costs to manage DBRA contracts, and assign covered and uncovered work. A small construction contractor commented that working on a DBRA-covered contract involves a lot of risk and uncertainty, as incorrect certified payroll or other paperwork could result in hundreds of thousands of dollars in penalties and back wages. Small businesses have told Advocacy that they do not have the workforce to administer the DBRA and would be less able to compete with larger, better-staffed companies for contracts.

Proposed Rule's Prevailing Wage Changes Adds Increased Costs and Burdens

At Advocacy's roundtable, some small business representatives expressed disappointment that the proposed rule did not reform the problems with the current prevailing wage system under Davis-Bacon, which they said discourages small business participation in federal construction projects. Others commented that DOL's current prevailing wage system does not reflect the wages in the local area, and the proposed revisions would mean that the prevailing wages under DBRA reflect the wages of fewer businesses. The proposed rule changes the prevailing wage methodology from a two-step process to a three-step process, which would re-establish as prevailing wages paid to 30 percent of the workers in a particular classification.[34] The Department determines prevailing wages from survey information that responding contractors and other interested parties voluntarily provide. However, a 2019 DOL OIG report found that 48 percent of all Davis-Bacon rates are union rates, even though less than 12.6 percent of the construction workforce was unionized during the time the study was conducted.[35] A recent survey of Associated Builders and Contractors members found that more than 70 percent of its members had not participated in federal government surveys used to determine Davis-Bacon Act rates, and that most of these members were not aware of these wage surveys.[36]

Small businesses at Advocacy's roundtable commented that prevailing wages under the DBRA can be significantly higher than similar private sector jobs, adding costs and burdens on covered

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[34] *See* 2022 Proposed Rule, Page 15783, Proposed 29 CFR 1.2 Definitions, Prevailing Wage.

[35] U.S. Dep't of Labor, Office of Inspector General-Office of Audit, Report to the Wage and Hour Division, Better Strategies are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates (Mar. 29, 2019); U.S. Bureau of Labor Statistics, Current Population Survey Data, Construction Union Membership 2019 (Modified Jan. 20, 2022). In this study, union rates prevailed for 48 percent of the 134,738 rates in the Wage and Hour Division's system.

[36] Associated Builders and Contractors (ABC), News Release, available at: https://www.abc.org/News-Media/Newsline/entryid/19424 (last accessed May 17, 2022).

contractors and subcontractors and increasing the price for federal construction projects.[37] DOL has proposed many new changes to the calculation of prevailing wages under the DBRA that may also increase the wages for covered federal contractors, but the agency has not estimated any compliance costs from these changes. The proposed rule also updates the non-collectively bargaining prevailing wage survey every three years using the U.S. Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) data. DOL is also allowing the use of previously prohibited wage data into the calculation of the wage rate under various circumstances, including variable rates, multiple county rates, state transportation divisions, federal project data, state prevailing wages, rural and urban rates considered together, and surrounding county information.[38]

DOL's Executive Order 12866 cost-benefit analysis does calculate potential increased wage costs from the 30 percent rule and 3-year updates, but none of these increases are counted as costs in the RFA section.[39] DOL also notes that firms could incur costs due to the updated rates, from adjusting payrolls, adjusting contracts, and communicating this information to employees. DOL also acknowledges that there could be increases in payroll costs for small firms in its IRFA but does not calculate these costs due to data limitations and uncertainty.[40] Advocacy recommends that DOL complete more analysis on the potential compliance costs of these prevailing wage changes.

Although small prime contractors should be reimbursed by the government for increased wages, Advocacy is concerned that financial risks may still remain for subcontractors when complying with DBRA such as delay in reimbursement, increased compliance costs, increased paperwork, and other risks. This risk should be reflected in the economic analysis through an increased estimate of the cost to comply with the rule. Small businesses told Advocacy that increased wages adversely impact small businesses with fewer administrative and financial resources, especially when the small business performs other work not subject to DBRA requirements. Small businesses will be required to spend hours of administrative work to adjust pay scales, record hours worked, and adjust fringe benefits.

Small businesses commented that these increased wages will likely result in many costly mistakes for contractors and subcontractors. Wage determinations have been known to be out of date or inaccurate for other reasons, yet the contractor and subcontractor remain subject to penalties if they are found to be paying an incorrect wage, even if the mistake is made by the contracting agency. Small businesses also mentioned that exact job classifications are often not

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[37] Sarah Glassman, MSEP, Michael Head, MSEP, David Tuerck, PhD, and Paul Bachman, MSIE, The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages, Beacon Hill Institute at Suffolk University (Feb. 2008), http: https://www.beaconhill.org/BHIStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf.

[38] *See* 2022 Proposed Rule, page 15703-15720.

[39] *See* 2022 Proposed Rule, page 15774-15775, Executive Order 12866 Section, Table 7, Changes in Rates Attributable to Change in Definition of Prevailing and Table 8- Distribution of Potential Per-Hour Transfers Due to Updated Rates. For example, Table 7 shows the differences in wages due to the 30 percent rule; rates for laborers could be increased by $7.80 per hour or decreased by $3.93 per hour depending on location. For example, Table 8 shows that the updates to non-competitively bargained contracts may result in 60,434 wage rate updates.

[40] *See* 2022 Proposed Rule, page 15780.

available, and they may bid at a lower price that is later found to be incorrect. Small businesses are less likely to be able to absorb such losses and are less well-equipped to defend against citations that lead to penalties and even debarment. Small contractors report that failure to pay the correct wage, failure to report certified payroll, paperwork mistakes, or even typographical errors in recordkeeping can result in penalties or withholding of payment under the contract.

Advocacy believes that if these costs are imposed on previously uncovered small businesses, these companies will decline to provide materials or services to DBRA projects, reducing the availability of those materials and services. This list of costs for contractors is not exhaustive, and Advocacy encourages DOL to review the experience of contractors who have encountered these and other issues in the performance of DBRA work.

Proposed Rule's Other Provisions Add Liability Costs

Participants at Advocacy's roundtable raised multiple provisions that create extra risk and liability for small businesses who participate in DBRA contracts, increase contractor costs, and discourage small businesses from taking part in federal construction projects.

The proposed rule allows incorporation of Davis-Bacon Act regulations by operation of law and allows contract clauses to be required even if they are not included or incorporated by reference into the contract.[41] For prime contractors, this provision increases the risk of violation without any notice that they were required to pay the DBRA wage. Another provision allows DOL to withhold funds from contractors who may hold multiple contracts during a wage investigation.[42] These provisions could result in significant harm to small subcontractors, who, as noted above, are less equipped to absorb the withholding of payments under the contract. The proposed rule also creates liability for subcontractors whose lower tier subcontractors are cited for violations. Small businesses commented it would be especially difficult under the proposed rule for subcontractors to keep track of their lower tiered subcontractors and material suppliers because of the lack of clarity and vague definitions in this rulemaking.[43] This liability risk needs to be reflected in the cost estimate of the RFA section.

C. DOL Does Not Examine Less Burdensome Alternatives in its IRFA

Under 603(c) of the RFA, an agency must provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the proposed rule on small entities.[44] In DOL's IRFA, the proposed alternatives provided do not minimize the significant impacts of this rule.[45] DOL should review the public comments from the small business community to develop and

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[41] *See* 2022 Proposed Rule, page 15798- Proposed 29 CFR Part 5.5(e) Incorporation by operation of law.
[42] *See* 2022 Proposed Rule, page 15793- Proposed 29 CFR Part 5.5(a)(6) and (b)(4).
[43] *Id.*
[44] 5 U.S.C. § 603.
[45] *See* 2022 Proposed Rule, Page 15780. In the IRFA, DOL suggests all contracting agencies submit reports, these entities are not small businesses. DOL also suggests using another index for updating non-collectively bargained wage rates, but that index would not accomplish the agency's goals because it does not track changes in wages or benefits.

adopt alternatives that will provide regulatory relief to small entities.

Recommendations

1. DOL Should Complete New IRFA

DOL must produce a new Initial Regulatory Flexibility Analysis that estimates the numbers of small businesses and compliance costs of this rule, especially including the administrative burdens and compliance costs of this rulemaking on newly covered small businesses. Without the information required by Section 603(b), DOL cannot meaningfully consider significant and less burdensome alternatives to the proposed rule that would meet the agency's objectives.

2. DOL Should Reconsider or Clarify Coverage of Newly Covered Small Businesses

DOL should reexamine whether to expand DBRA coverage to the new small businesses listed in this comment letter based on the estimated economic impacts in a new analysis. In the alternative, DOL should also clarify vague definitions like "significant portion" of work in this proposed rule that, left unclarified, will create confusion and uncertainty for the covered small entities. Requirements imposed on small businesses must be measurable and enforceable.

3. DOL Should Reconsider Changes to Prevailing Wage Methodology

DOL has proposed changes to the prevailing wage methodology such as a change from the 50 percent rule to the 30 percent rule, regular updates to non-collectively bargained rates, and the adoption of other alternate data. DOL should measure the potential compliance costs and burdens of these proposals before adopting them in a final rule.

4. DOL Must Publish a Small Business Compliance Guide

For each rule requiring a final regulatory flexibility analysis, section 212 of SBREFA requires the agency to publish one or more small entity compliance guides.[46] Agencies are required to publish the guides with publication of the final rule, post them to websites, distribute them to industry contacts, and report annually to Congress.[47] Advocacy is available to help DOL in the writing and dissemination of this guide.

Conclusion

Advocacy is concerned that the added costs and complexities in this proposed rule will make it more difficult for small contractors and subcontractors to comply with the DBRA and may have the unintended consequence of discouraging small businesses from participating in federal construction contracts. Advocacy recommends that DOL reassess the numbers of small businesses that will be covered and the compliance costs from this regulation in a new Initial Regulatory Flexibility Analysis. Additionally, DOL should consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

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[46] Small Business Regulatory Enforcement Fairness Act, Pub. Law 104-121 § 212.

[47] The Small Business and Work Opportunity Act of 2007 added these additional requirements for agency compliance to SBREFA.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at (202) 798-5798 or by email at Janis.Reyes@sba.gov.

Sincerely,

/s/
Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/
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Copy to: Dominic Mancini, Deputy Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget