



VIA FAX AND EMAIL

July 12, 2006

Ms. Lorraine Hunt
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Room 10202
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RE: Draft 2006 Report to Congress on the Costs and Benefits of
Federal Regulations (*Federal Register* Vol. 71, No. 71, page
19213-14)

Dear Ms. Hunt:

Associated Builders and Contractors, Inc. (ABC) respectfully submits these comments on the *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations*. ABC is a national trade association representing more than 23,000 construction contractors and related firms in the United States.

The construction industry is a vital part of the American economy. Construction growth significantly outpaced national gross domestic productivity growth over the last 12 years, increasing 137 percent while the GDP increased about 88 percent in the same period.ⁱ Today, the annual value of construction is worth more than \$1.16 trillion, representing more than 9 percent of the national GDP.

Of the nation's 5.6 million employer firms, more than 12 percent are construction firms.ⁱⁱ Construction continues to outpace other industry sectors in employment growth over the last 12 years in the United States. In 1993, construction firms employed 4,779,000 people. Today, there are 7,227,000 employees in the industry. The growth of 2,498,000 represents a 52.27 percent increase.ⁱⁱⁱ The construction employment increase far outpaces overall U.S. employment growth in the same period of only 20 percent.^{iv}

In addition, the construction industry included 2,239,310 self-employed individuals in 2003, which is 12 percent of all self-employed individuals.^v

But construction growth isn't stopping. The Bureau of Labor Statistics reports that another 792,000 new construction jobs will be created between 2004 and 2014. Construction is expected to add 792,000 new jobs between 2004 and 2014.^{vi} The BLS also estimates that construction and extraction occupations will have a net replacement rate of 19.9 in the same time period where new workers must be brought into the construction occupations.^{vii}

These growth trends not only demonstrate the tremendous value of the industry to the U.S. economy and American workers but it also indicates that any government regulatory reforms that allow construction to attract, train and retain workers will advance benefits and reduce costs to the United States in its purchase of construction.

As noted in the *Federal Register*, the Regulatory Right to Know Act requires the Office of Management and Budget (OMB) to submit an annual report to Congress on the cost and benefits of Federal regulations together with *recommendations for reform*. In past years, OMB has requested as part of the draft report comment process that the public nominate regulations OMB should recommend for reform.

While OMB did not request nominations this year, ABC strongly recommends the inclusion of two critical regulatory employment issues for the construction industry. Both regulations are implemented and enforced by the U.S. Department of Labor (DOL). The first is the costly, flawed wage determinations under the regulations implementing the Davis-Bacon Act and the second is the outdated and restrictive regulations implementing the National Apprenticeship Act.

Davis-Bacon Act Regulations

Many ABC members are federal contractors subject to the flawed wage determinations completed under the regulations implementing the Davis-Bacon Act of 1931 (DBA) (40 U.S.C. §3141 *et seq.*). ABC is concerned with the quality of the wage determinations and legislation Congress is seriously considering that would greatly expand the use of those determinations.

Specifically, we request that OMB recommend in the report that the DOL reform the regulations at 29 CFR Parts 1, 2, 5 and 7. These regulations govern the prevailing wage determinations under the Davis-Bacon Act.

The DBA requires federal contractors and their subcontractors working on contracts for construction, alteration, and/or repair in excess of \$2000 to pay employees the local prevailing wage rates and benefits for each class of worker. Over the years, the DBA requirements have been extended to other laws which provide federal assistance for construction through grants, loans, loan guarantees and insurance. These are known as Davis-Bacon Related Acts (DBRAs). By some estimates the DBA and DBRAs covers as much as 25 percent of construction work nation-wide.^{viii}

The DBA requires the Secretary of Labor to determine the prevailing wage rate for each locality. Under current regulations, DOL's Wage and Hour Division sets the wage for each class of worker in each locality by conducting its own voluntary wage surveys of contractors and other interested parties.

By the Wage and Hour Division's own admission, the accuracy of its wage determinations is completely dependent upon identifying the correct interested party and successfully securing their participation.^{ix} Not surprisingly, there have been consistent problems with the accuracy of the DBA wage determinations.

In fact, a series of audits by outside agencies as well as the DOL's own Office of Inspector General (OIG) have revealed substantial inaccuracies in Davis-Bacon wage determinations and suggested that they are vulnerable to fraud. The Government Accountability Office (GAO, formerly the General Accounting Office) has issued multiple reports dating from the late 1970s to the late 1990s detailing problems with the determinations.^x In addition, DOL's OIG released three reports highly critical of the wage determination program.^{xi}

In an effort to address these concerns, the Wage and Hour Division made some modifications to the wage determination program in the late 1990s and early this century. These modifications, however, have resulted in little improvement. In 2004, the OIG released a report stating that the \$22 million the Wage and Hour Division spent to modify the program had yielded limited improvement and that the problems with inaccuracies identified in past reports remain.^{xii} In fact, the OIG found one or more errors in 100 percent of the wage surveys they reviewed. It also concluded that because response to the survey is voluntary, employers and third parties with a stake in the outcome of wage determinations are more likely to participate.

As a result of GAO and OIG audits and its own research, OMB concluded in a 2003 assessment that the DB wage determination program is not performing.^{xiii}

Despite this wide spread criticism of DBA wage determinations, the U.S. Senate recently passed and the U.S. House of Representatives is considering S.2611, immigration legislation that would greatly expand the use of DBA prevailing wage rates. S.2611 contains a provision in Title IV at Subtitle A Section 404 that would require companies pay temporary guest workers working on private construction projects prevailing wages under Davis-Bacon Act. The vast major of construction work in the United States is done privately and includes most homebuilding.^{xiv} Thus, the bill would greatly expand reliance on the flawed Davis-Bacon wage surveys.

In light of the independent audits showing consistent problems with the Davis-Bacon wage determinations, OMB's own assessment that the Davis-Bacon prevailing wage program is not performing, and Congress' serious consideration of legislation greatly

expanding Davis-Bacon, the 2006 report should recommend that DOL reform the regulations governing DBA wage determinations.

National Apprenticeship Act Regulations

The regulations and practices implementing the National Apprenticeship Act in the modern era work against the intent of the statute and retards the creation of more training and career opportunities for Americans. Passed in 1937, the National Apprenticeship Act championed by Congressman William Fitzgerald of Connecticut, is intended to set labor standards that safeguard the welfare of apprentices.^{xv} On the floor of the U.S. House of Representatives he told of his own experience of quickly advancing his skills as an unprotected apprentice but being forced to stay with his employer for a set number of years without being given the opportunity to advance to journeymen when his skills were adequate.^{xvi} Ironically, today's practices under the current regulations create the very restraints that Congressman Fitzgerald experienced as a young worker.

The U.S. Department of Labor has become shackled by a system that prevents national programs that are apprentice-centered. Instead, the regulations at 29 CFR Part 29 have hampered the Department's ability to allow performance-based advancement for apprentices and modern technologies to attract new apprentices. Moreover, the regulations permit the recognition of state apprenticeship councils but limit the ability of the Department to reign in poor performance by those systems. State apprenticeship councils have created a plethora of barriers to the establishment or expansion of new programs, to the development and use of new technologies, and to the participation of a greater range of apprentices in new fields. For instance, the state of California adopted statutes in 1999 that prevent any competitor programs from operating in a region and thus squelching innovations or expanded training opportunities.^{xvii} Seven years after initiating objections the U.S. Department of Labor still awaits a decision from the Administrative Review Board.^{xviii} In addition, state apprenticeship councils are increasingly refusing to recognize apprentices under other state systems – further hindering apprentices' opportunities for work. Control over renegade states is failing because of the complexity of the current regulatory scheme minimizes the Department's ability to advance a truly national apprenticeship system.

On June 27, 2006, the Advisory Committee on Apprenticeship voted to support recommended changes to the regulations. These reforms would be a step toward reforming the process. The Committee supported inclusion of new forms of electronic media and self-study in training and the use of interim credentials that would allow earlier success by performing apprentices. ABC supports the majority of these reforms but we strongly believe that it does not go far enough to transform apprenticeship to a national program in a modern economy with the needs of commerce among the state markets. The standards recommended by the Committee fall far short by the omission of reform of the Department's authority over state apprenticeship councils. If the Department's regulations go unreformed, apprenticeship may continue to be hampered in

growth industries, such as construction, technology, and transportation, that could maximize an effective national system of apprentice training and registration.

Congressman Fitzgerald's words in 1937 show his foresight. "There is a constant need for some federal agency to bring employers and employees together in the formulation of *national programs of apprenticeship* and to attempt to adjust the supply of skilled workers to the demands of industry. This is a logical function of the United States Department of Labor."^{xix} He emphasized that voting for this legislation would enable the Department to formulate and promote standards necessary to safeguard the welfare of apprentices and give the youth of our society an opportunity for a "new lease of life."^{xx}

Unfortunately, the regulations prevent the expansion of this program to provide opportunities to more American workers. In construction, registered apprenticeship is not the sole or even the primary method of training that serves the construction industry. Only a small portion of today's construction workforce is the product of or is currently enrolled as a registered apprentice due to the drastic restrictions. Registered apprentices make up no more than 4 percent of the construction workforce nationwide.^{xxi} ABC strongly supports reforms that create new opportunities for America's workforce and vastly expand the registered apprentice enrollment.

Conclusion

Associated Builders and Contractors, Inc. appreciates the opportunity to recommend regulatory reforms to reduce costs and increase benefits.

Regards,

Anita Drummond, Esq.
Director of Legal and Regulatory Affairs

cc: Honorable Thomas Sullivan,
Chief Counsel for Advocacy, U.S. Small Business Administration

ⁱ As of January 2006, construction spending for the prior 12 months was \$1,163,427,000,000. U.S. Census Bureau, Construction Spending <http://www.census.gov/const/C30/total.pdf> In 1993, the value was \$491,033,000,000. U.S. Census Bureau, Annual Value of Construction Put in Place <http://www.census.gov/const/www/c30index.html> The 1993 4th quarter reported GDP was \$6,800,200,000,000. The 2005 4th quarter reported GDP was \$12,760,400,000,000. Bureau of Economic Analysis, U.S. Department of Commerce. Current-dollar and Real Gross Domestic Product <http://www.bea.gov/bea/dn/gdplev.xls>

ⁱⁱ Major Industries by NAICs Codes: Private Employer Firms, Establishments, Employment, and Annual Payroll by Firm Size, 1998-2001, U.S. Small Business Administration based on data provided by U.S. Census Bureau, Statistics of U.S. Businesses. http://www.sba.gov/advo/research/us_tot_mi_n.pdf

ⁱⁱⁱ Bureau of Labor Statistics, U.S. Department of Labor, Employees on nonfarm payrolls by major industry sector historical. <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt>

^{iv} According to the Bureau of Labor Statistics, in 1993, employment in the United States was 110,844. In 2005, employment was projected to be 133,463,000. *Ibid.*

^v U.S. Small Business Administration, Office of Advocacy, from data provided by U.S. Census Bureau, Nonemployer Statistics, Nonemployers Firms and Receipts by Industry, 2002, 2003 <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt>

^{vi} “Employment by major industry division, 1994, 2004, and projected 2014” U.S. Department of Labor, Bureau of Labor Statistics, Office of Occupational Statistics and Employment Projections. <http://www.bls.gov/emp/empmajorindustry.pdf>

^{vii} Occupational Projections and Training Data, 2004-05 Edition, U.S. Department of Labor, Bureau of Labor Statistics. <http://www.bls.gov/emp/optd/home.htm> Net replacement rate for construction is specifically referenced on page 179. Note that individuals who change jobs but remain in the same occupation –often referred to as turnover – are not included in the count of net replacements (see page 161).<http://www.bls.gov/emp/optd/optd005.pdf> . Note: This demand is in addition to the stress of turnover where employees are changing jobs but remain in the same occupation. In construction, worker turnover can vary between 6.9 percent and 4.2 percent a month, according to the Bureau of Labor Statistics. Source U.S. Department of Labor’s Bureau of Labor Statistics Job Openings and Labor Turnover Survey. Obtain data from 2001 to 2005 by selection “Total separations rate, construction JTS230000000TSR” on <http://data.bls.gov/cgi-bin/surveymost?jt>

^{viii} See OMB, Prevailing Wage Determination Program Assessment at <http://www.whitehouse.gov/omb/expectmore/summary.10001099.2005.html> and <http://www.whitehouse.gov/omb/expectmore/detail.10001099.2005.html>.

^{ix} See U.S. Department of Labor Prevailing Wage Resource Book, November, 2002, page 3 of Section 15 “Davis-Bacon Surveys.”

^x See GAO Reports HRD-79-18 4/27/79, HEHS-96-177R, available at <http://archive.gao.gov/paprpdf1/157164.pdf>, HEHS-99-21 1/11/99, available at <http://www.gao.gov/archive/1999/he99021.pdf>, and HEHS-99-97 5/12/99, available at <http://www.gao.gov/archive/1999/he99097.pdf>.

^{xi} See *Inaccurate data were Frequently Used in Wage Determinations made under the Davis-Bacon Act* Report No. 04-97-013-04-420 (March 10, 1997) available at http://www.oig.dol.gov/public/reports/oa/pre_1998/04-97-013-04-420.pdf; *Review of Davis-Bacon Modernization Funding* Report No. 04-98-003-04-420 (February 19, 1998) <http://www.oig.dol.gov/public/reports/oa/1998/04-98-003-04-420r.htm>; and *Concerns Persist With the Integrity of Davis-Bacon Prevailing Wage Determination* Report No. 04-04-003-04-420 (March 30, 2004) <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

^{xii} See *Concerns Persist With the Integrity of Davis-Bacon Prevailing Wage Determination* Report No. 04-04-003-04-420 (March 30, 2004) <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

^{xiii} See OMB, *Prevailing Wage Determination Program Assessment* at <http://www.whitehouse.gov/omb/expectmore/summary.10001099.2005.html> and <http://www.whitehouse.gov/omb/expectmore/detail.10001099.2005.html>.

^{xiv} U.S. Census Bureau, *Construction Spending* <http://www.census.gov/const/C30/total.pdf>

^{xv} National Apprenticeship Act, 50 Stat.664, passed August 16, 1937, 29 USC §50.

^{xvi} U.S. House of Representatives, *Congressional Record*, March 22, 1937, page 2600.

^{xvii} See Cal. Lab. Code § 3075(b).

^{xviii} See *U.S. Department of Labor v. California Department of Industrial Relations and California Apprenticeship Council*, ALJ Case No. 2002-CCP-1-2003-CCP-1, Recommended Order April 22, 2005

^{xix} U.S. House of Representatives, Committee on Labor Report on H.R. 7274 (No. 945), 1937 [emphasis added].

^{xx} U.S. House of Representatives, *Congressional Record*, July 1, 1937, Appendix page 1674.

^{xxi} According to the U.S. Department of Labor, there were 145,497 construction registered apprentices in the states reporting, which represents more than 50 percent of the programs. http://www.doleta.gov/atels_bat/pdf/OA_Statistics_FY_2001-2005t.pdf Assuming 290,994 construction apprentices in the United States, they represent about 4 percent of all construction employment (see Endnote iii for total employment source).