May 17, 2022

VIA ELECTRONIC SUBMISSION

Jessica Looman
Acting Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Public Comments on RIN 1235-AA40 – Updating the Davis-Bacon and Related Acts Regulations Notice of Proposed Rulemaking

Dear Ms. Looman:

The National Electrical Contractors Association (NECA) is a National Trade Association and the leading voice of the $202 billion electrical contracting industry that brings power, light, and communication technology to buildings and communities across the U.S. NECA collectively represents over 4,000 electrical contractor members served by 118 local Chapters across the country. NECA employs a unionized workforce with contracts collectively bargained with the International Brotherhood of Electrical Workers (IBEW).

NECA contractors and our partners with the IBEW recognize that our collective success is with our highly skilled union workforce. NECA has long advocated for many of the proposed regulatory reforms endorsed in our comments for a more comprehensive implementation of Davis-Bacon and Related Acts, as well as for widespread prevailing wage laws across the nation. NECA has also advocated for Congress to sufficiently support budgetary increases to support the mission of the Department of Labor's survey, wage calculation, and enforcement role in the fullest extended under the statutory law within the Davis-Bacon and Related Acts.

NECA provides these comments in support of the Departments Notice of Proposed Rulemaking, Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15698 (March 18, 2022) (hereafter "Proposed DBA Rule"). As outlined in detail below, NECA enthusiastically supports many of the revisions included in the Proposed DBA Rule.

1. DEFINITION OF "PREVAILING WAGE" – RETURNING TO THE 30-PERCENT RULE IS CONSISTENT WITH THE LEGISLATIVE TEXT AND THE DOL'S LONGSTANDING INTERPRETATION OF "PREVAILING WAGE."

NECA fully supports the Proposed DBA Rule's return to the original definition of "prevailing wage" – including the 30 percent rule – that was in effect from 1935 to 1982. NECA believes that

the original definition is in accordance with the plain meaning of the legislative text and better effectuates the purpose of the Davis-Bacon Act.

The Davis-Bacon Act was enacted in 1931 was designed to establish ""a minimum wage law designed for the benefit of construction workers." United States v. Binghamton Constr. Co., 347 U.S. 171, 178 (1954). Its purpose was "to give local labor and the local contractor a fair opportunity to participate in [ ] building program[s]." Univs. Res. Ass'n v. Coutu, 450 U.S. 754, 773–74 (1981) (quotation omitted); see also S.R. Rep. No. 88-963 (1964) (noting that the Davis-Bacon Act was designed to protect local contractors who were losing bids on federal projects to "outside contractors . . . who recruited labor from distant cheap labor areas.").

As designed, the Davis-Bacon Act requires contractors on most federally funded infrastructure projects to pay employees and specifically all laborers and mechanics, at a minimum, "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 civils subdivision of the State in which the work is to be performed…." 40 U.S.C. § 3142(b). In the plain text of the law, the Davis-Bacon Act does not define the term "prevailing" or "prevailing wage," but instead gives the authority to the Secretary of Labor. During the House floor debate of the Davis-Bacon Act, Rep. William Kopp (R-IA) clearly stated that although "the term 'prevailing rate' has a vague and indefinite meaning… the power will be given... to the Secretary of Labor to determine what the prevailing rates are." This clearly shows Congress's intent was that the Secretary of Labor was given the authority to determine this to best ensure the prevailing rate was representative of the employees and all laborers and mechanics that will perform the work.

For the first 50 years of the enactment of the Davis-Bacon Act, "prevailing rate" was defined by the Department of Labor to mean "the wage (hourly rate of pay and fringe benefits) paid to the greatest number of laborers or mechanics in the classification on similar projects in the area during the period in question, provided that the wage is paid to at least 30 percent of those employed in the classification." 29 C.F.R. § 1.2(a) (1935). As the DOL notes, determining the prevailing wage required a three-step process: (1) Any wage rate paid to a majority of workers; and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then (3) the weighted average rate. The second step is referred to as the "30-percent rule."

In 1982, the Department of Labor abruptly removed the second step in the three-step process or known as the '30-percent rule'. See 47 Fed. Reg. 23644, 23645 (May 28, 1982). The new process required only two steps: (1) identifying if there was a single wage rate paid to more than 50 percent of workers, and then (2) if no wage rate is greater than 50 percent of workers, relying on a weighted average of all the wage rates paid. Id. at 23645; see also 29 C.F.R. § 1.2(a)(1) (1982) ("The 'prevailing wage' shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the 'prevailing wage' shall be the average of the wages paid, weighted by the total employed in the classification.").

The DOL's elimination of the long-standing 30-percent rule was first and foremost inconsistent with the text and purpose of the Davis-Bacon Act and contrary to the Congress intent. For a wage to be "commonly accepted" or "predominant," there is no requirement that the rate be received by a "majority" (i.e more than 50 percent) of workers. The Department of Labor incorrectly determined the "prevailing rate" to be the "majority" wage, and if Congress had intended to have this specific interpretation it would have explicitly stated that in the legislative text of the Davis-Bacon Act.

NECA strongly supports the Department of Labor's proposed return of the original three-step model and reflects more consistent with the plain meaning of the term "prevailing." Under the three-step process the Department first looks to the majority (i.e 50-percent) of the employee laborers and mechanics in the appropriate trade classification. If there is no majority that is met, the rate paid to the greatest number becomes the standard, which is the next logical step in the search for the "commonly accepted" or "predominant" wage. If this greater number does not represent a substantial portion of the wage pattern of the community – and 30 percent has been selected as a reasonable measure of substantiality – the Department of Labor then averages all of the wage rates paid in the area.

The Department's current two-step analysis – which uses an averaging method in all cases where a single wage is not paid to a majority (i.e., more than 50 percent) of workers – does not result in a wage that is "commonly accepted" or "predominant." Indeed, the average rate is an artificial rate that likely is not, in fact, paid to any workers in the locality. What is more, the difference in meaning between "average" and "prevailing" is clear and application of the latter method where one wage is frequently paid would be inconsistent with the statutory language of the Davis-Bacon Act.

The Davis-Bacon Act was designed to protect local wage standards – even if they were enjoyed by a minority (i.e., less than 50 percent) of workers. The designers of the Davis-Bacon Act obviously recognized the futility of a statute that would protect a rate only if it was being received by a majority of workers or that was the product of an "averaging" process. Congress has visited this issue through Congressional hearings and have supported the use of the 30-percent rule in-depth by the House Special Subcommittee on Labor in oversight hearings. In its 1963 report, the House Subcommittee supported use of the 30 percent rule:

> The subcommittee believes that the Department of Labor exercised its best judgment in attempting to define prevailing wages. It must be remembered that no legislative guideposts were given in the Davis-Bacon Act or the legislative history which would assist the Department. It was learned that the so-called 30 percent rule goes back some 25 years, and the Department has followed this rule consistently.

It should be kept in mind that "prevailing" means only a greater number. It need not be a majority. Therefore, the subcommittee believes that the 30 percent rule should be established legislatively.

The subcommittee strongly opposes using an average unless at least 30 percent of those employed in a given classification do not receive the same rate. As was indicated previously an average rate is per se going to be an artificial rate in that it will not mirror any of the actual wages paid in a community. To that extent it would disrupt such local wages.[1]

In summary, NECA believes that returning to the three-step process for determining the prevailing wage – including the 30 percent rule – is necessary to effectuate the text and purpose of the Davis-Bacon Act. Thus, the definition of "prevailing wage" in Section 1.2(a) of the Proposed DBA Rule should be adopted without amendment. It is only by returning to the DOL's long-standing construction of "prevailing wage" that Congress' intent will be effectuated

2. <u>DEFINITION AND SCOPE OF PROJECT REFORMS</u> – MODERNIZED DEFINITIONS WILL CLARIFY APPLICABILITY OF THE DAVIS-BACON ACT.

NECA also endorses the Department's proposal to modernize the definition of "building or work" (as used to delineate contracts for covered construction activities) by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of covered activities. These relatively new industries have been traditionally less unionized and pay lesser than prevailing wages to those of traditional construction projects. By including these lower wage and unorganized work specializations into the "building work" definition with Davis-Bacon coverage, the result will help contractors and workers alike receive better, prevailing wages. It is appropriate this definitional revision occurs at the same time the Federal government has committed to an historic infrastructure investment benefitting these exact activities following clear prevailing wage guidance from both the Congress and Executive branch. While these building work activity categories have suffered skilled labor shortages, contractors would benefit from a growing labor force if Davis-Bacon Act coverage boosts registered apprenticeship, career opportunities, and quality wages.

Separately, the DOL proposes to add a new sub-definition to the term "construction, prosecution, completion, or repair" to clarify when demolition and similar activities are covered by the Davis-Bacon labor standards. Accordingly, the DOL proposes to clarify in its regulations that demolition work is covered under any of three circumstances: (1) where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing public building

[1] United States. Congress. House. Committee on Education and Labor. Administration of the Davis-Bacon Act. Washington: G.P.O., 1962.

or work; (2) where subsequent construction covered in whole or in part by the Davis-Bacon labor standards is planned or contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract; or (3) where otherwise required by statute.

Of special importance to contractors represented by NECA is a definitional revision to the Act's use of the term "journeyman", which has been long ago replaced within the industry CBAs with the term "journeyperson or journeyworker". This important definitional updating of an outdated and objectionable term is just one example of the countless changes made for a more inclusive and diverse skilled workforce from apprenticeship to journeyperson or journeyworker level. Further, NECA objects to any suggestion that use of the term "working supervisor" is interchangeable with the skill attainment or definitional responsibilities of "journeyperson or journeyworker" or that it is appropriate or acceptable for the DBA to confuse the two terms in any way. The Department should take into careful consideration the legal language of NECA-IBEW Collective Bargaining Agreements (CBAs) to best conform the Definitions proposes. This would provide harmony and strengthen the legal case going forward.

NECA supports the Proposed DBA Rule's clarification amendments to Section 5.2 because they further the remedial purpose of the Davis-Bacon Act by ensuring that the Act's protections apply to contracts for construction activity for which the government is responsible.

3. <u>USE AND EFFECTIVENESS OF WAGE DETERMINATIONS</u> – INCORPORATING MOST-RECENT WAGE DETERMINATIONS INTO ANY CONTRACT ENSURES THAT THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT IS EFFECTUATED.

NECA supports the Proposed Davis-Bacon Act Rule's amendments to Section 1.6, which requires the most-recent version of any applicable wage determination must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order. Specifically, the Proposed Davis-Bacon Act Rule amends Section 1.6 to clarify that "archived" wage determinations that are no longer current may only be used when the contracting agency initially failed to incorporate the correct wage determination into the contract and subsequently must incorporate the correct wage determination after contract award or the start of construction. In that circumstance, even if the wage determination that should have been incorporated at the time of the contract award has since become inactive, it is still the correct wage determination to incorporate into the contract. The Department proposes to rename "archived" wage determinations to be "inactive" wage determinations.

In addition, the Department notes that its "longstanding position" has been to require that contracts and bid solicitations contain the most recently issued revision to a wage determination to be applied to construction work to the extent that such a requirement does not cause undue disruption to the contracting process. The Department is proposing to include language at Section 1.6 to reflect this principle. First, Department proposes to explain that the most recent version of any applicable wage determination(s) must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of

the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract. Under these circumstances, the most recent version of any wage determination(s) must be incorporated as of the date of the change or, where applicable, the date the agency exercises its option to extend the contract's term.

In the Proposed Davis-Bacon Rule, the Department also observes that modern contracting methods frequently involve a contractor agreeing to perform construction as the need arises over an extended period, with the quantity and timing of the construction not known when the contract is awarded—often referred to as Indefinite Delivery Indefinite Quantity (IDIQ) contracting. For these types of contracts, the Department proposes to require that contracting agencies incorporate the most up-to-date applicable wage determination(s) annually on each anniversary date of a contract award or, where there is no contract, on each anniversary date of the start of construction, or another similar anniversary date where the agency has sought and received prior approval from the Department for the alternative date.

4. <u>PERIODIC ADJUSTMENTS TO NON-COLLECTIVELY BARGAINED PREVAILING WAGE RATES</u> – PROPOSED RULE WOULD ENSURE THAT NON-COLLECTIVELY BARGAINED RATES ARE REGULARLY UPDATED.

NECA supports the Proposed Davis-Bacon Rule's amendments to Section 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates. The proposed rule expands the Department's practice of updating prevailing rates between surveys to include updating non-collectively bargained rates.

The Department generally publishes two types of prevailing wage rates on the Davis-Bacon wage determinations that it issues: (1) modal rates (under the current rule, wage rates that are paid to a majority of workers in a particular classification); and (2) weighted average rates, which are published whenever the wage data received by the Department reflects that no single wage rate was paid to a majority of workers in the classification.

The Proposed Davis-Bacon Rule expands the Department's practice of updating prevailing rates between surveys to include updating non-collectively bargained rates. The Department's proposes to permit adjustments to non-collectively bargained rates on general wage determinations based on Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data. Under the Proposed Davis-Bacon Rule, non-collectively bargained rates may be adjusted based on ECI data no more frequently than once every three years, and no sooner than three years after the date of the rate's publication, continuing until the next survey results in a new general wage determination. Non-collectively bargained rates (wages and fringe benefits) would be adjusted from the date the rate was originally published and brought up to their present value. Going forward under the proposed 30 percent rule, any non-collectively bargained prevailing or weighted average rates published after this rule becomes effective would be updated if they were not re-surveyed within three years after publication

NECA agrees that Section 1.6(c)(1) is necessary to "keep [non-collectively bargained] rates more current between surveys so that they do not become out-of-date and fall behind prevailing rates in the area." 87 Fed. Reg. at 15764.

5. "FLOW-DOWN" REQUIREMENTS AND RESPONSIBILITY FOR COMPLIANCE – THE MANDATORY "FLOW-DOWN" REQUIREMENT EFFECTUATES THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT.

NECA supports the Proposed Davis-Bacon Rule's amendments to Sections (a)(6) and (b)(4), which provide those prime contractors are responsible for the compliance by any subcontractor or lower tier subcontractor adding new language underscoring that being "responsible for compliance" means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of contracts.

Further, NECA asks that the proposal specifically include compliance language, including timetables, directing the prime contractor to expedite any new wage changes and contract modifications so they quickly and appropriately reach the lower tier subcontractors and their workforce entitled to the Davis-Bacon Act revisions.

The Proposed Davis-Bacon Rule includes new language underscoring that being "responsible for compliance" means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. See § 5.5(a)(6) (stating that the prime contractor "or subcontractor" must insert the required clauses in "any subcontracts"). The Proposed Rule also clarifies that underpayments of a subcontractor's workers may in certain circumstances subject the prime contractor itself to debarment for violating the responsibility for compliance provision. See § 5.5(b)(4) (stating that the flow-down clause must "requir[e] the subcontractors to include these clauses in any lower tier subcontracts").

NECA supports the changes to §§ 5.5(a)(6) and (b)(4) because the changes are simply a clarification and because the amendments are designed to ensure that contractors cannot practically shirk their responsibilities through subcontracting arrangements. This will further ensure the entirety of the construction process is being properly vetted to ensure the payment of prevailing wages and thwarting of irresponsible contractors. This will also add the responsibility to the prime contractor to ensure the subcontractors (at any tier) meet the contractual obligations of the Department.

6. REDEFINING "SITE OF WORK"

While we acknowledge the Department's intentions of ensuring the Davis-Bacon Act is being properly followed and not subverted through prefabrication, solely dedicated prefabrication shops, and/or modular construction. NECA acknowledges that the use of large prefabrication materials and modular construction has significantly grown since the first implementation of Davis-Bacon in 1935.

NECA would like the Department to give extensive review and consideration of the definition of 'significant portions' not to unintendedly include smaller prefabricated components such as but not limited to:

- Electrical Duct Bank (Underground raceways) Sections
- Electrical Room Stub-ups for Panel Connections
- Pre-wired Electrical Devices such as receptacles and switches with pre-determine lengths of electrical wires
- Electrical Racks for overhead electrical raceway installations.
- Electrical Switchgear and control rooms for pad mounted installations.
- Temporary Power Distribution Centers
- Feeder Cables cut to length for individual cable pulls
- Modular/prefabricated substations and control houses
- Prefabricated busbar systems or cables
- Prefabricated transmission and substation steel lattice structures
- Prefabricated/precast cable duct-banks

NECA would also like the Department to consider when determining 'significant portion' that the prefabrication materials are specific and/or unique to the project itself and are not readily available to the general public or commercial market.

7. <u>MISCLASSIFYING CONSTRUCTION WORKERS AS INDEPENDENT CONTRACTORS</u> – THE PROPOSED DBA RULE MAKES CLEAR THAT AN EMPLOYMENT RELATIONSHIP IS NOT REQUIRED.

PNECA supports the Proposed Rule's amendments to reinforce the "well established" principle that Davis-Bacon labor standards apply even when there is no employment relationship between a contractor and worker. To this end, to the extent that the words "employee," "employed," or "employment" are used in the regulations, the DOL is revising them to be interpreted expansively to not limit coverage to workers in an employment relationship.

Employee misclassification is a pervasive and growing problem in the construction industry. Unscrupulous contractors regularly use these arrangements to avoid and evade their legal obligations in the areas of payroll taxes, insurance premiums, overtime, and other legal obligations. The following recent examples – a select few among many - make clear the significance of this issue in the industry:

- In 2021, a North Carolina cabinet remodeling contractor was ordered to pay $100,504 in back wages for eight employees who had been misclassified as independent contractors and were denied overtime pay.2 The Department of Labor stated, "Misclassifying employees as independent contractors is a serious and costly problem. This practice denies workers the wages – including proper overtime compensation – that they rightfully earned under the law."3

- In 2021, a New Hampshire carpentry contractor was ordered to pay $53,839 in back wages and $53,839 in liquidated damages after misclassifying 52 employees as independent contractors and failing to pay them overtime.4

- In 2021, a Massachusetts construction contractor was ordered to pay $438,000 in back wages to 250 employees for violation of the FLSA. The Department of Labor found that, between August 2017 and November 2020, the employees were misclassified as independent contractors and were not paid overtime. The contractor was also ordered to pay civil penalties in the amount of $64,750 for willful violations of the FLSA.5

The proposed amendment confirms and makes clear that contractors cannot use employee misclassification schemes to avoid their obligations under the Davis-Bacon Act and will aid enforcement efforts on this critical issue in the industry.

8. ENHANCED RECORDKEEPING REQUIREMENTS – RECORDKEEPING AMENDMENTS REINFORCE THE DAVIS-BACON ACT'S REQUIREMENTS.

NECA supports the Proposed Rule's amendments to reinforce Davis-Bacon recordkeeping requirements but would suggest amending the proposed rule to ensure not to overburden or require significant record keeping.

Specifically, the Proposed Rule clarifies the Department's "longstanding" approach to require contractors to maintain and preserve basic records and information, as well as certified payrolls. The required basic records include (but are not limited to) regular payroll and additional records relating to fringe benefits and apprenticeship and training. The Proposed Rule would require all contractors, subcontractors, and recipients of federal assistance to maintain and preserve Davis-

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[2] U.S. Department of Labor News Release dated Sept. 21, 2021, available at https://www.dol.gov/newsroom/releases/whd/whd20210921.

[2] U.S. Department of Labor News Release dated Dec. 20, 2021, available at https://www.dol.gov/newsroom/releases/whd/whd20211220.

[3] *Id.*

[4] U.S. Department of Labor News Release dated Dec. 2, 2021, available at https://www.dol.gov/newsroom/releases/whd/whd20211202.

Bacon and Davis-Bacon Related Acts (collectively, the DBRA) contracts, subcontracts, and related documents for three years after all the work on the prime contract is completed. Due to the nature of some construction projects, some projects may expand over the course of decades. The Department should consider a statute of limitations of when a subcontractor can be released from record keeping measures.

9. REQUIRING FEDERAL AGENCIES TO REPORT PLANNED CONSTRUCTION – REQUIRING FEDERAL AGENCIES TO REPORT PLANNED CONSTRUCTION ALLOWS THE DOL TO PLAN FOR APPROPRIATE WAGE DETERMINATIONS.

NECA supports the Proposed Davis-Bacon Rule's amendments to Section 1.4 requiring federal agencies to include in their reports proposed construction programs for an additional two fiscal years beyond the upcoming year, including notification of any options to extend the terms of current construction contracts or any significant changes to previously reported construction programs.

Currently, Section 1.4 provides that, "to the extent practicable," agencies that use wage determinations must submit an annual report to the DOL outlining proposed types and locations of construction for the coming year. The Department of Labor has found that these reports are an effective way for the agency to know where federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use. Unfortunately, contracting agencies have not regularly provided these reports to the Department of Labor.

To ensure these reports are submitted, the Proposed Rule removes the "to the extent practicable" language in the regulation that makes the reports discretionary instead of mandatory and expressly requires federal agencies to submit the construction reports. The proposed rule would also: (1) require agencies to include in their reports proposed construction programs for an additional two fiscal years beyond the upcoming year; (2) include new language requiring federal agencies to include notification of any expected options to extend the terms of current construction contracts; (3) require that federal agencies include in the annual report a notification of any significant changes to previously reported construction programs; and (4) eliminate the current directive that agencies provide notice mid-year of any significant changes in their proposed construction programs.

NECA believes the proposed changes to Section 1.4 are necessary to ensure that the DOL is informed of "where Federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use." 87 Fed. Reg. at 15712.

10. ADOPTION OF STATE/LOCAL PREVAILING WAGE DETERMINATIONS FOR FEDERAL PREVAILING WAGE

The Proposed Rule would expressly permit, under specified circumstances, the determination of Davis-Bacon wage rates by adopting prevailing wage rates set by state and local governments for all types of construction even where the state or locality's definition of prevailing wage differs

from the Department of Labor's. Although the existing regulations permit the Department to "consider" state and local wage determinations and to give "due regard" to state rates for highway construction, the regulations do not specifically address whether the agency may adopt state or local rates derived using methods and requirements that differ from those used by the Department of Labor. To fill this gap, the proposal would permit the adoption of such wage rates following a determination that they meet specified criteria.

These criteria are that: (1) the state or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties; (2) the state or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, each of which can be calculated separately; (3) the state or local government must classify laborers and mechanics in a manner that is recognized within the field of construction; and (4) the state or local government's criteria for setting prevailing wage rates must be "substantially similar" to those that the DOL uses in making wage determinations (based on such factors as the state or local government's definition of prevailing wage, the types of fringe benefits it accepts, its classification of construction projects, etc.) These criteria are intended to facilitate the adoption of state and local prevailing wage rates while ensuring adoption of such rates is consistent with the statutory requirements of Davis-Bacon and does not create arbitrary distinctions between jurisdictions where the DOL makes wage determinations by using its own surveys and jurisdictions where the DOL makes wage determinations by adopting state or local rates.

11. APPRENTICES

To harmonize the Davis-Bacon regulations and the Employment and Training Administration's (ETA) apprenticeship regulations, NECA supports the Proposed Rule to reflect that contractors employing apprentices to work on a DBRA project in a locality other than the one in which an apprenticeship program was originally registered must adhere to the apprentice wage rate and ratio standards of the locality in which the project is situated. NECA supports the Department reasons that requiring contractors to apply the ratio and wage rate requirements from the relevant apprenticeship program for the locality where the laborers and mechanics are actually working better aligns with the ETA's regulations on recognition of SAAs and is meant to eliminate potential confusion.

12. SCOPE OF GEOGRAPHIC CONSIDERATION IN MAKING WAGE DETERMINATIONS – ELIMINATING THE ANTIQUATED DISTINCTIONS ARE NECESSARY TO ENSURE THAT THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT ARE EFFECTUATED.

NECA supports the Proposed Rule's amendments to Section 1.7, which would eliminate the binary "rural" and "metropolitan" designations. NECA agrees that the change is appropriate because it is consistent with the Department's historical practice and better effectuates the text and purpose of the Davis-Bacon Act.

Under the current regulations, Section 1.7 addresses two related concepts. The first is the level of geographic aggregation of wage data that should be the default for making a wage determination. The second is how Department of Labor should expand that level of geographic aggregation when it does not have sufficient wage survey data to make a wage determination at the default level.

With respect to the first concept, Davis-Bacon specifies that the relevant geographic area for determining the prevailing wage is the "civil subdivision of the state" where the contract is performed. 29 U.S.C. § 3142(b). The Department has historically used the county as the default civil subdivision for making a wage determination. Under the second concept, if there is insufficient data to determine a prevailing wage rate for a classification of workers in a given county, the DOL will determine that county's wage-rate for that classification by progressively expanding the geographic scope of data (still for the same classification of workers) that it uses to make the determination. The Department initially expands to include a group of surrounding counties at a "group" level. If there is still not sufficient data at the group level, the DOL considers a larger grouping of counties in the state called a "supergroup," and thereafter uses data at a statewide level. Although the current regulations do not define the term "surrounding counties" that delineates the initial county grouping level, the provision that describes "surrounding counties" limits the counties that may be used in this grouping by excluding the use of any data from a "metropolitan" county in any wage determination for a "rural" county, and vice versa. The DOL's current procedures do not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

NECA believes is to more precisely define "surrounding counties" to include counties in a group as long as they are all a part of the same contiguous area of either metropolitan or rural counties, even though each county included may not be directly adjacent to every other county in the group. An additional option would be to include language defining the "surrounding counties" grouping as a grouping of counties that are all a part of the same "contiguous local construction labor market" or some comparable definition.

13. CONCLUSION

NECA enthusiastically supports the Department of Labor's effort to include many long overdue but extremely important program simplification enhancements to reflect technological changes in work processes in the nine decades since the Davis-Bacon Act was enacted. The proposed rule would greatly improve the overall efficiency of the Act, its enforcement, and ensure that project wage rates do not become "stale" or unfairly outdated. These valued changes advance the goal of the Act, which was initially enacted to prevent contractors and the federal government from undermining local labor standards. Submitting bid packages on federal construction with substandard wages only drives down the quality of bidding firms often unable to perform on complex, high-value federal projects and service work.

NECA calls on the Department of Labor for quick implementation of these changes to the Davis-Bacon Act outlined above before the issuance of large infrastructure projects are released. NECA also calls upon the when the Department implements this rule the federal government amends all

contracts out for bid to be updated with the new regulations. The positive impacts of the proposed rule changes for NECA and its contractors would be significant. These very important regulatory changes have been long overdue and restore the Davis-Bacon and Related Act back to the original Congressional intent while modernizing the system to better serve in the 21st century. Finally, vigorously enforced and supported prevailing wage standards will benefit the federal government as well as play a central role in expanding a well-trained, highly skilled, and productive construction workforce needed now more than ever during a time of widespread skilled labor shortages.

Sincerely,

Marco A. Giamberardino, MPA
Vice President, Government and Public Affairs