Statement for the Record for Associated Builders and Contractors

Testimony of
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Before the
House Education and the Workforce Committee
Subcommittee on Workforce Protections

On
"Examining the Department of Labor's Implementation of the Davis-Bacon Act"

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The Voice of the Merit Shop®

Chairman Walberg, Ranking Member Woolsey and members of the Subcommittee on Workforce Protections:

Good morning and thank you for the opportunity to testify before you today on "Examining the Department of Labor's Implementation of the Davis-Bacon Act."

My name is Tom Mistick. I am the owner of Church Restoration Group, based in Pittsburgh, Pennsylvania. My company restores historic and sacred spaces across the United States, and offers a broad range of emergency and consulting services. For 35 years, I have directed the activities of two general contracting companies, a disaster recovery firm, a real estate management office and a millwork company. Much of the work performed by my companies has been performed under the Davis-Bacon Act.

I also appear before you today on behalf of Associated Builders and Contractors (ABC). ABC is a national trade association representing 23,000 merit shop contractors, employing nearly 2 million workers, whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. ABC's membership is bound by a shared commitment to the *merit shop philosophy.* This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through competitive bidding based on safety, quality and value.

The Davis-Bacon Act

The Davis-Bacon Act is an 80-year-old wage subsidy law administered by the U.S. Department of Labor (DOL) that mandates so-called "prevailing" wages for employees of contractors and subcontractors performing work on federally financed construction projects. ABC has long advocated for the full repeal of the Davis-Bacon Act, though we also have recommended numerous reforms over the years that could have mitigated some of the Act's damage to our economy through fairer implementation of its provisions by DOL. However, despite repeated criticisms from the Government Accountability Office

(GAO) and DOL's own Office of Inspector General (OIG),[1] the agency has implemented few if any meaningful reforms in its administration of the Act since the early years of the Reagan administration. The latest GAO report published last week[2] makes clear that DOL is simply incapable of implementing the Davis-Bacon Act's provisions in a fair and common-sense manner. Therefore, ABC sees no alternative to repealing the Act entirely.

The Davis-Bacon Act, as administered by DOL, unnecessarily hinders economic growth, increases the federal deficit, and imposes an enormous paperwork burden on both contractors and the federal government. It stifles contractor productivity by raising costs, ignores skill differences for different jobs, and imposes rigid craft work rules. In addition, Davis-Bacon fails to provide equal access to work opportunities because the complexities and inefficiencies in the Act's implementation make it nearly impossible for many qualified, small merit shop firms to competitively bid on publicly funded projects. These businesses—and the construction industry in general—are at an even greater disadvantage due to our current unemployment rate of 20 percent,[3] and the traditionally low net profit margins on which we operate.[4]

From a fiscal standpoint, a recent Congressional Budget Office (CBO) estimate found the Davis-Bacon Act raises federal construction costs by $15.7 billion annually, which ABC believes may be a conservative estimate.[5] Numerous academic studies have shown that repeal of the Act would create real and substantial savings to the government without affecting workplace productivity, safety or market wages.

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[1] U.S. Department of Labor, Office of the Inspector General, *Concerns Persist with the Integrity of Davis-Bacon Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, 2004, at http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf. *See also*, Government Accountability Office, *Davis-Bacon Act: Process Changes Could Raise Confidence That Wage Rates Are Based on Accurate Data*, May 1996, at http://www.gao.gov/archive/1996/he96130.pdf

[2] Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at http://www.gao.gov/new.items/d11152.pdf

[3] Bureau of Labor Statistics, *Construction Sector at a Glance: Employment, Unemployment, Layoffs, and Openings, Hires, and Separations*, March 2011. See http://www.bls.gov/iag/tgs/iag23.htm.

[4] Construction firms often operate on extremely low net margins. According to the 2009 *Construction Industry Annual Financial Survey*, published by the Construction Financial Management Association (CFMA), an average construction firm's operating margin was only 3.4 percent, with many firms operating at even lower margins. Contract retainage further exacerbates this cash flow issue.

[5] Office of Rep. Steve King, *King's Davis-Bacon Repeal Bill Saves Taxpayers $15.7 Billion*, April 4, 2011, at http://1.usa.gov/f0ioXw.

The main reason the Davis-Bacon Act causes so many problems is that DOL has failed to achieve the Act's stated objective of determining true "prevailing" wages and instead has repeatedly issued wage determinations that are vastly inflated above the true market rates seen on private sector construction projects. The evidence of DOL's failed wage survey method is easily shown by comparing two numbers: According to the Bureau of Labor Statistics (BLS), only 13 percent of construction workers in the United States are covered by any union agreement;[6] yet, according to the latest GAO Report, 63 percent of all DOL wage determinations report that wages set by union agreements are "prevailing."[7]

Despite these facts and findings, Davis-Bacon remains in effect and continues to inflate the cost of federal construction by as much as 22 percent.[8] For years, economists, legal and policy experts, and merit shop contractors across the country have voiced serious concerns about the waste and abuse of taxpayer dollars associated with Davis-Bacon—yet nothing has been done to fix the obvious defects in the law.

DOL's unwillingness to engage in meaningful corrective actions and reforms, along with the process' continuing burden on taxpayers and contractors, illustrate that the Act cannot be fixed, and must instead be repealed. In the remainder of my testimony, I would like to highlight some of the specific ways in which DOL is failing to properly carry out its statutory mandate, leading us to conclude that the Act must be repealed.

Wage Rates and Surveys

The methodology by which DOL determines Davis-Bacon Act wage rates is inaccurate and unscientific. It relies on voluntary wage surveys—often with an extremely low response rate—instead of using sound statistical samples already made available through other government data collections. The resulting wage rates are usually poor reflections of actual local wages. The problems associated with Davis-Bacon wage calculations have been well documented in previous Congressional testimony from ABC and, more

[6] U.S. Department of Labor, Bureau of Labor Statistics, *Economic News Release: Union Members Summary*, January 2011, at http://www.bls.gov/news.release/union2.nr0.htm

[7] Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at http://www.gao.gov/new.items/d11152.pdf.

[8] The Beacon Hill Institute at Suffolk University, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, February 2008, at http://www.beaconhill.org/bhistudies/prevwage08/davisbaconprevwage080207final.pdf.

importantly, reports by GAO and OIG.[9]

In addition, due to the systematic delays associated with the final publication of many Davis-Bacon rates, ABC is concerned that wage determinations made during an economic "boom" in construction are now being applied to a "bust" economy. In the case of government-backed loans and other projects that are subsidized by the government, these inaccurate determinations have resulted in projects being scrapped because of cost.

The new GAO report shows that the current Davis-Bacon wage survey process lacks transparency and does not reflect true prevailing wages. The report concludes that efforts to improve the Davis-Bacon wage survey process—both with respect to data collection and internal processing—have not addressed key issues with wage rate accuracy, timeliness and overall quality.[10]

GAO identifies "persisting shortcomings in the representativeness of survey results and the sufficiency of data gathered for Labor's county-focused wage determinations," notwithstanding cosmetic changes in DOL's survey collection and processing procedures. In addition, GAO points out that many of the agency's surveys are still years behind schedule.

The GAO report also finds that DOL "cannot determine whether its wage determinations accurately reflect prevailing wages," and "does not currently have a program to systematically follow up with or analyze all non-respondents." DOL procedure identifies nonresponse as a "potential source of survey bias and indicates there is a higher risk non-respondents will be nonunion contractors because they may have greater difficulty in compiling wage information or be more cautious about reporting wage data."

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[9] U.S. Department of Labor, Office of the Inspector General, *Concerns Persist with the Integrity of Davis-Bacon Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, 2004, at http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf. *See also*, Government Accountability Office, *Davis-Bacon Act: Process Changes Could Raise Confidence That Wage Rates Are Based on Accurate Data*, May 1996, at http://www.gao.gov/archive/1996/he96130.pdf.

[10] Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at http://www.gao.gov/new.items/d11152.pdf.

Just as the 2004 DOL-OIG report revealed that nearly 100 percent of published wage determinations contained errors, the GAO report found that "most survey forms verified against payroll data had errors." In addition, the report stated that more than "one-quarter of the final wage rates for key job classifications were based on wages reported for six or fewer workers."

Reaffirming yet another longtime ABC concern, GAO found that "contractors have little or no incentive to participate in the Davis-Bacon wage survey" as it is currently administered. The report cited insufficient resources with which to complete the surveys, the inability to provide all information requested and a justifiable lack of confidence in DOL's process as contributing factors.

GAO also recommended "technical guidance from experts is considered critical to ensure the validity and reliability of survey results," remarking that better survey response prediction models "such as statistical sampling rather than the current census survey" could be aided by collaboration with survey experts. However, instead of obtaining an evaluation of its wage survey process from experts in survey design and methodology, DOL informed GAO that it prefers to institute such changes based mainly on staff experience.[11]

I have personal knowledge of the dysfunctional DOL wage survey process, having witnessed and challenged the 2000 wage survey in Western Pennsylvania, which dramatically increased Davis-Bacon wage rates on residential construction in the Pittsburgh metropolitan area when its results were published in 2003.[12] Keep in mind that during this time, the union market share of residential construction in Western

[11] ABC takes issue with only one aspect of the GAO report, namely the report's recommendation that the Act be amended to allow DOL to expand the geographic scope of wage surveys beyond the civil subdivision of the state in which the work is to be performed. *See*, General Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey, April 6, 2011*, at http://www.gao.gov/new.items/d11152.pdf (page 35). Such an amendment would not "improve the quality" of DOL's wage determinations but would instead encourage DOL to combine wage data from totally separate wage markets, thereby undermining any prospect of determining the true prevailing wage in the smaller market. Indeed, as GAO confirmed, DOL is already conducting statewide surveys that violate the plain language of the Act, because such surveys do not determine the prevailing wage for a "civil subdivision of the state." A legal challenge is pending against DOL's unlawful wage survey practice.

[12] A more detailed summary of this case is contained in the decision of DOL's Administrative Review Board, which considered ABC's challenge to DOL's wage determination and overturned it after three years of litigation. *See Mistick Construction, Inc*., No. 04-051 (ARB 2006) (attached hereto)

Pennsylvania was (and still is) in the single digits. Yet as a result of the wage survey, DOL found that union wage rates "prevailed" in a great majority of the wage classifications for which survey results could be determined, while many of the most common classifications had no determined wage rates at all. After reviewing the data DOL collected to issue its new wage determination, and checking the math, it was clear to me that the results occurred because DOL relied on a totally inadequate number of responses (as few as a half-dozen wage reports setting the wage rates for thousands of workers), and that DOL had violated its own rules for calculating which rates prevailed in the region. One obvious reason why the responses were inadequate was because DOL failed to properly notify the largest nonunion construction trade groups.[13] The calculations were also wrong because DOL improperly counted union workers who were paid different wage rates as if they were all paid the same wages. There were many other flaws in the survey process as well.[14]

Along with ABC's Western Pennsylvania Chapter, I filed a legal challenge at DOL against the results of the flawed wage survey. Three years later, and at considerable cost, we received a favorable ruling from DOL's own Administrative Review Board, which found that the Wage and Hour Division (WHD) had indeed violated DOL's rules on conducting wage surveys. But the Board did not order a new survey with instructions to obtain more meaningful responses from the nonunion contractors that comprised the vast majority of the residential contractors. Instead, the Board simply told the WHD Administrator to recalculate the wages that we had shown to be in error, leaving in place all of the other systemic failures of the wage survey process.

More recently, ABC learned DOL issued wage determinations that repeat the same errors identified in 2003. In addition, DOL has committed new errors, leading to newly inflated wage determinations in other parts of the country. One of the errors, confirmed by the GAO report, is that DOL has greatly expanded its issuance of "statewide" wage determinations which combine wage surveys from large and small metropolitan areas

[13] DOL later admitted it had obsolete addresses for the two largest residential construction trade associations in Western Pennsylvania. *Mistick Construction, supra*, at p. 6

[14] An independent study of DOL's Western Pennsylvania wage determination found more than a dozen systemic flaws in the wage survey process, which virtually guaranteed an inflated and inaccurate result. *See* Thieblot, Armand, *The Twenty-Percent Majority: Pro-Union Bias in Prevailing Rate Determinations*, 26 J. Lab. Research 99 (2005).

hundreds of miles apart into single wage determination rates. This practice plainly violates the language of the Act, and is currently the subject of a legal challenge.

At a time of shrinking public construction budgets, these inflated wage determinations arbitrarily limit the amount of construction that can be built by increasing the projected costs. Jobs have been lost and businesses have closed because of DOL's bizarre implementation of the wage survey process, and because of the Davis-Bacon Act itself.

For years, ABC and other government studies and reports have pointed out these problems. We believe the GAO report illustrates a long-term systematic failure to achieve true reform of the survey process across several administrations. It is clear to us that DOL will never accept meaningful reform, and that repeal is now the only solution.

Job Classifications

Another key concern pertaining to Davis-Bacon is DOL's lack of clarity regarding the job duties that apply to a particular job classification, which are determined by local practice. When DOL determines the prevailing wage rate for a classification is based on a union collective bargaining agreement, the job duties for that classification also likely will be governed by the union's work rules in that agreement. Generally, union work rules require that only a certain job classification perform certain work. For example, the work rules may require a carpenter to perform a certain task in one location, but sheet rock hangers or perhaps even laborers are the only workers allowed to perform that work in another jurisdiction.

While each DOL wage determination lists several different classifications of workers (painters, carpenters, laborers, etc.), limited information is available on the actual job duties that apply to the classifications. Although the published wage determinations may identify the relevant local union for each of the listed job classifications (where the rate is based on the union's collective bargaining agreement), DOL does not provide detailed information as to whether there are any work rule restrictions attached to those wage rates and, if so, what those restrictions are. DOL's failure to provide such information makes it almost impossible for merit shop contractors to figure out the correct wage rate for

many construction-related jobs. Not surprisingly, GAO's report agreed, finding DOL's current method of handling job classifications "confusing" and "challenging" for contractors.

Certified Payrolls and Fringe Benefits

Another burden on small business compliance with the Davis-Bacon Act—and also the Copeland Act—is the requirement that contractors submit weekly certified payroll reports to the government. This is a paperwork nightmare for many contractors and a significant administrative cost factor for every contractor. Recent upgrades of the system by DOL to include electronic filing are a small step in the right direction, but do nothing to solve the complexities of the certified payroll form itself, and in particular the confusion surrounding the proper credits allowed to nonunion contractors for their bona fide fringe benefit costs.

Repeated Failure to Implement Reforms

ABC has repeatedly called on DOL to follow the findings of past independent government studies, some dating back more than 10 years, to explore using alternative data to determine wage rates—such as data collected through the BLS Occupational Employment Statistics (OES) program. To date, DOL has not given serious consideration to utilizing these, or any other alternatives to its traditional survey method. ABC also has requested that DOL provide better clarity about job duties that correspond to each wage rate. Many states that have adopted prevailing wage laws similar to Davis-Bacon have at least published the job duties that are to be performed by each wage classification. DOL, however, has repeatedly refused to give contractors fair notice of what the job assignment rules are on the published wage determinations. A 2009 WHD All Agency Memorandum offered no relief to contractors lacking access to unpublished union work rules.[15] ABC has received reports from its members that the current DOL is misdirecting contractors seeking guidance on the job classification issue. For example, DOL has told some contractors to contact a project contracting officer, even though the law is clear that only DOL officials are authorized to make final rulings on worker

[15] U.S. Department of Labor, *Job Duties of Employee Classifications in Davis-Bacon Wage Determinations (All Agency Memorandum 205)*, January 16, 2009. The current administration has failed even to make public the limited guidance contained in this AAM.

classification issues. Instead of fixing these problems with Davis-Bacon, the last Congress and this administration only made matters worse by expanding the Act's coverage in unprecedented ways under last term's stimulus bill.[16]

Conclusion

The clear answer to the problems created by the present system is to let the market set the acceptable wage rate through open and competitive bidding, as we see in the private sector. Multiple bills to repeal the Davis-Bacon Act have been introduced during this Congressional session alone, indicating that the time is right for Members of Congress to act.

ABC is pleased to see the Education and the Workforce Committee take a renewed interest in the problems associated with Davis-Bacon Act. We look forward to working with the Subcommittee on Workforce Protections on this issue. Mr. Chairman, this concludes my formal remarks—I am prepared to answer any questions that you may have.

[16] Under the American Recovery and Reinvestment Act (ARRA), 40 federal programs (33 existing, seven newly created) became subject to Davis-Bacon, several of which found the wage requirements to have a "moderate to large" negative impact on program costs and efficiency. *See*, Government Accountability Office, *Recovery Act: Views Vary on Impacts of Davis-Bacon Act Prevailing Wage Provision*, February 2010, at http://www.gao.gov/new.items/d10421.pdf. One such program, the U.S. Department of Energy's (DOE) Weatherization Assistance Program, received $5 billion under ARRA. However, delays stemming from the Davis-Bacon wage survey process resulted in fewer projects undertaken (including some "shovel-ready" projects) and fewer jobs created under this program. *See* DOE's *Progress in Implementing the Department of Energy's Weatherization Assistance Program under the American Recovery and Reinvestment Act*, February 2010, at http://ww.ig.energy.gov/documents/OAS-RA-10-04.pdf.