

**Congress of the United States**  
**Washington, DC 20515**

July 11, 2013

Ms. Mary Beth Maxwell  
Acting Deputy Administrator  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Dear Ms. Maxwell:

We are concerned by your March 22, 2013, Wage and Hour Division (WHD) guidance letter and All Agency Memorandum (AAM) No. 212 changing the applicability of the Davis-Bacon Act (the Act) to survey technicians. As noted in your March correspondence to the International Union of Operating Engineers (IUOE), this change reverses longstanding Department of Labor (DOL) policy with respect to the application of Davis-Bacon to survey crews.

As you well know, DOL's policy regarding the application of Davis-Bacon to survey crews dates back to 1955, when then-acting Assistant Solicitor James Baird opined that survey work was often a preconstruction activity, and therefore not covered by the Davis-Bacon Act.<sup>1</sup> In 1960, then-Secretary Arthur Goldberg expanded upon this view by stating members of survey crews are exempt from the Davis-Bacon Act except when they "perform manual work, such as clearing brush and sharpening stakes."<sup>2</sup> There has been no material change in DOL's policy in this area in the interim.

Despite DOL's longstanding policy, and in response to the March 22, 2013, guidance from WHD, government contracting officers began to inform contractors that effective April 1, 2013, surveyors would be reclassified as laborers and mechanics under the Act. However, it is our understanding there is currently no wage rate available for survey technicians, and contractors are being encouraged to submit a conformance request<sup>3</sup> to WHD to comply with the new interpretation. Furthermore, it appears WHD provided little advance notice to contractors regarding the changes set forth by the WHD guidance letter and AAM No. 212. In testimony before the Education and the Workforce's Subcommittee on Workforce Protections, the National Society of Professional Surveyors stated WHD engaged in no outreach with affected stakeholders prior to issuing the guidance.<sup>4</sup>

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<sup>1</sup>September 14, 1955, Letter of Interpretation concerning survey crews.

<sup>2</sup>August 2, 1962, letter from Secretary of Labor Arthur Goldberg attached to AAM No. 39.

<sup>3</sup>As explained on DOL's website Davis-Bacon Conformance occurs when "the data does not contain sufficient information to issue rates for a particular classification of worker needed in the performance of the contract. Because of this, Davis-Bacon provisions contain a conformance procedure for the purpose of establishing an enforceable wage and benefit rate for the missing classification."

<sup>4</sup>"Promoting the Accuracy and Accountability of the Davis-Bacon Act." Subcommittee on Workforce Protections, June 18, 2013.

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In its March 22, 2013, guidance letter, WHD stated: "As we have not closely examined survey crew classifications and duties in detail in recent years, we believe it is appropriate to identify and evaluate the extent of physical and manual work performed by various survey crew classifications in use today." We are concerned the letter does not explain the basis upon which WHD made the determination survey crews should be covered by the Act. Without explanation or justification, WHD overturned almost 60 years of precedent.

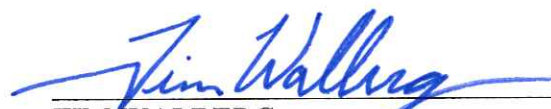
Given the scope of this change regarding the application of Davis-Bacon, its implications for stakeholders, and to better understand the process by which WHD arrived at this change, we ask you to provide the following no later than July 25, 2013:

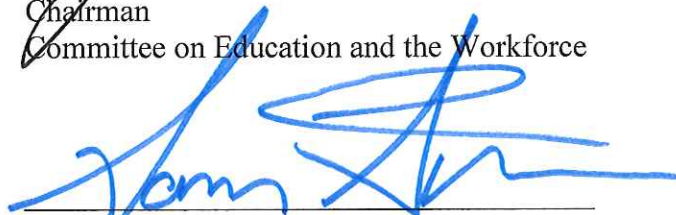
1. All communications related to the promulgation of this policy change, including the IUOE's August 4, 2011, request;
2. All legal memorandum or other supportive material related to the policy change;
3. All public outreach and notices advising this change was under consideration;
4. The date DOL posted AAM No. 212 on its website;
5. A timeline for completing a wage determination for this new classification;
6. Implementation guidance for contracting officers; and
7. All economic analysis conducted regarding this change to federal contracts.

If you have any questions regarding this request, please contact Loren Sweatt, with the House Committee on Education and the Workforce, at (202) 225-7101 or Viktoria Ziebarth at (202) 225-5821 with the House Committee on Small Business.

Sincerely,

  
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JOHN KLINE  
Chairman  
Committee on Education and the Workforce

  
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TIM WALBERG  
Chairman  
Subcommittee on Workforce Protections

  
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SAM GRAVES  
Chairman  
Committee on Small Business

Enclosure

## Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be date-stamped sequentially and produced sequentially.
18. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

## Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.