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# Part IV

# Department of Labor

## Office of the Secretary

**29 CFR Part 5**

**Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction; Proposed Rule**

**DEPARTMENT OF LABOR**

**Office of the Secretary**

**29 CFR Part 5**

**RIN 1215–AB21**

## Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Labor proposes to amend two related definitions in the regulations issued under the Davis-Bacon and related Acts that set forth rules for administration and enforcement of the Davis-Bacon prevailing wage requirements that apply to federal and federally-assisted construction projects. These regulations define the Davis-Bacon Act language *construction, prosecution, completion, repair* and *site of the work*. The Department believes that revisions to these definitions are needed to clarify the regulatory requirements in view of three appellate court decisions, which concluded that the Department's application of these regulatory definitions was at odds with the language of the Davis-Bacon Act that limits coverage to workers employed ''directly upon the site of the work,'' and to address situations that were not contemplated when the current regulations were promulgated. The Department, therefore, seeks public comment on proposed revisions to the regulatory definitions of *construction* and *site of the work*.

**DATES:** Comments are due on or before October 23, 2000.

**ADDRESSES:** Submit written comments to T. Michael Kerr, Administrator, Wage and Hour Division (Attention: Goverment Contracts Team), Employment Standards Administration, U.S. Department of Labor, Room S–3018, 200 Constitution Avenue, NW, Washington, D.C. 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

As a convenience to commenters, comments may be transmitted by facsimile (''FAX'') machine to (202) 693–1432. This is not a toll-free number.

**FOR FURTHER INFORMATION CONTACT:** Timothy Helm, Office of Enforcement Policy, Government Contracts Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3018, 200 Constitution Avenue, NW, Washington, D.C. 20210. Telephone (202) 693–0574. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

### I. Paperwork Reduction Act

This regulation does not contain any new information collection requirements and does not modify any existing requirements. Thus, this regulation is not subject to the Paperwork Reduction Act.

### II. Background

*A. Statutory and Regulatory Framework*

Section 1 of the Davis-Bacon Act (''DBA'' or ''Act'') requires that ''the advertised specifications for contracts * * * for construction, alteration and/or repair, including painting and decorating, of public buildings or public works * * * shall contain a provision stating the minimum wages to be paid to various classes of laborers and mechanics * * * and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers *employed directly upon the site of the work* * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, * * * and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. * * * '' 40 U.S.C. 276a (emphasis added).

Section 2 of the Act requires that every covered contract provide that in the event the contracting officer finds that ''any laborer or mechanic employed by the contractor or any subcontractor *directly on the site of the work covered by the contract* has been or is being paid less than required wages, the government ''may terminate the contractor's right to proceed with the work or such part of the work as to which there has been a failure to pay the required wages'' and to hold the contractor liable for the costs for completion of the work. 40 U.S.C. 276a–1 (emphasis added).

The Congress directed the Department of Labor, through Reorganization Plan No. 14 of 1950 (5 U.S.C. App., effective May 24, 1950, 15 FR 3176, 64 Stat. 1267), to ''prescribe appropriate standards, regulations and procedures'' to be observed by federal agencies responsible for the administration of the Davis-Bacon and related Acts ''[i]n order to assure coordination of the administration and consistency of enforcement.'' 64 Stat. 1267.

On April 29, 1983, the Department promulgated a regulation (29 CFR 5.2(l)) defining the term *site of the work* within the meaning of the Davis-Bacon Act (see 48 FR 19540). This regulation reflected the Department's longstanding, consistent interpretation of the Act's *site of the work* requirement. See, *e.g., United Construction Company,* Wage Appeals Board (WAB) Case No. 82–10 (January 14, 1983); *Sweet Home Stone,* WAB Case Nos. 75–1 & 75–2 (August 14, 1975); *Big Six, Inc.,* WAB Case No. 75–3 (July 21, 1975); *T.L. James & Co.,* WAB Case No. 69–2 (August 13, 1969); CCH Wage-Hour Rulings ¶ 26,901.382, Solicitor of Labor letter (July 29, 1942).

The Department's regulations provide a three-part definition of *site of the work*. The first part at 29 CFR 5.2(l)(1) provides that ''the *site of the work* is the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site.''

The second part at 29 CFR 5.2(l)(2) provides that ''fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc.'' are part of the *site of the work* provided they meet two tests—a geographic test of being ''so located in proximity to the actual construction location that it would be reasonable to include them,'' and a functional test of being ''dedicated exclusively, or nearly so, to performance of the contract or project.''

The third part at 29 CFR 5.2(l)(3) states that fabrication plants, batch plants, borrow pits, tool yards, job headquarters, etc., ''of a commercial supplier or materialman which are established by a supplier of materials for the project before the opening of bids and not on the project site, are not included in the *site of the work*.'' In other words, facilities such as batch plants and borrow pits are not covered if they are ongoing businesses apart from the federal contract work.

The regulatory definition of the statutory terms *construction, prosecution, completion,* or *repair* in section 5.2(j)(1) applies the *site of the work* concept. It defines these statutory terms as including the following:

> [a]ll types of work done on a particular building or work *at the site thereof*, including work at a facility which is dedicated to and deemed a part of the *site of the work within the meaning of § 5.2(l)*—including without

limitation (i) [a]lteration, remodeling, installation (where appropriate) on the *site of the work* of items fabricated off-site; (ii) [p]ainting and decorating; (iii) [m]anufacturing or furnishing of materials, articles, supplies or equipment *on the site of the building or work* * * *; and (iv) [t]ransportation between the actual construction location and a facility which is dedicated to such construction and deemed a part of the *site of the work within the meaning of § 5.2(l).*

(Emphasis added.)

*B. The Department of Labor's Longstanding Interpretation of the Regulatory Site of the Work Definition*

Prior to the recent appellate court rulings, the Department's longstanding, consistent application of the regulatory definition of *site of the work*—the area where laborers and mechanics are to be paid at least the prevailing wage rates, as determined by the Secretary of Labor—included both the location where a public building or work would remain after work on it had been completed, and nearby locations used for activities directly related to the covered construction project, provided such locations were dedicated exclusively (or nearly so) to meeting the needs of the covered project.

The Wage Appeals Board, which acted with full and final authority for the Secretary of Labor on matters concerning the labor standards provisions of the Davis-Bacon and related Acts (see 29 CFR 5.1 and 7.1 (c)),[1] consistently interpreted 29 CFR 5.2(l) to include as part of the *site of the work*, for purposes of Davis-Bacon coverage, support facilities dedicated exclusively to the covered project and located within a reasonable distance from the actual construction site. Consistent with the regulations, the Board also treated the transportation of materials and supplies between the covered locations and transportation of materials or supplies to or from a covered location by employees of the construction contractor or subcontractor as covered Davis-Bacon work. *See, e.g., Patton-Tully Transportation Co.,* WAB No. 90–27 (March 12, 1993) (5.4 to 14 miles, and 16 to 60 miles); *Winzler Excavating Co.,* WAB No. 88–10 (October 30 1992) (12½ miles); *ABC Paving Co.,* WAB Case No. 85–14 (September 27, 1985) (3 miles).

[1] On April 17, 1996, the Secretary redelegated jurisdiction to issue final agency decisions under, *inter alia,* the Davis-Bacon and related Acts and their implementing regulations, to the newly created Administrative Review Board (ARB or the Board).

*C. Federal Appellate Decisions and Subsequent Decision of the Administrative Review Board (ARB)*

The D.C. Circuit first discussed the Department's *site of the work* definition in *Building and Construction Trades Department, AFL–CIO* v. *United States Department of Labor Wage Appeals Board,* 932 F.2d 985 (D.C. Cir. 1991) (*Midway*). That case involved truck driver employees of the prime contractor's wholly owned subsidiary, who were delivering materials from a commercial supplier to the construction site. The material delivery truck drivers spent ninety percent of their workday on the highway driving to and from the commercial supply sources, ranging up to 50 miles round trip and stayed on the *site of the work* only long enough to drop off their loads, usually for not more than ten minutes at a time.

At issue before the D.C. Circuit was whether the ''material delivery truckdrivers'' were within the scope of *construction* as defined by the regulatory provision then in effect at section 5.2(j), which defined the statutory terms *construction, prosecution, completion,* or *repair* to include, among other things, ''the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor.'' The court held that ''the phrase 'mechanics and laborers employed directly upon the site of the work' restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed.'' 932 F.2d at 992. The court further stated that ''[m]aterial delivery truckdrivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor,'' and consequently held that ''29 C.F.R. § 5.2(j), insofar as it includes off-site material delivery truck drivers in the Act's coverage, is invalid.'' *Id.*

The court expressly declined to rule on the validity of the regulation defining the *site of the work* at 29 CFR 5.2(l). 932 F.2d at 989 n.6, 991 n.12. However, it expressed the view that Congress intended to limit Davis-Bacon coverage to ''employees working directly on the physical site of the public building or public work under construction.'' 932 F.2d at 990 n.9, 991.

On May 4, 1992, the Department promulgated a revised section 5.2(j) to accommodate the holding in *Midway.* 57 FR 19204. The revised regulation limits coverage of offsite transportation to ''[t]ransportation between the actual construction location and a facility which is dedicated to such construction and deemed a part of the site of the work within the meaning of § 5.2(l).'' 29 CFR 5.2(j)(1)(iv) (1993).

In the two more recent rulings, *Ball, Ball and Brosamer* v. *Reich,* 24 F. 3d 1447 (D.C. Cir. 1994) (*Ball*) and *L.P. Cavett Company* v. *U.S. Department of Labor,* 101 F.3d 1111 (6th Cir. 1996) (*Cavett*), the D.C. Circuit and Sixth Circuit, respectively, focused on the proper geographic scope of the statutory phrase *site of the work* in relation to borrow pits and batch plants established specifically to serve the needs of covered construction projects. In *Ball,* the D.C. Circuit ruled that the Department's application of section 5.2(l)(2) was inconsistent with the Act to the extent it covers sites that are at a distance from the actual construction location. The case involved workers at the borrow pit and batch plant of a subcontractor who obtained raw materials from a local sand and gravel pit and set up a portable batch plant for mixing concrete. The pit and batch plant were dedicated exclusively to supplying material for the completion of the 13-mile stretch of aqueduct that the prime contractor had contracted to construct. As described by the court, ''the borrow pit and batch plant were located about two miles from the construction site at its nearest point.'' 24 F.3d at 1449.

In holding that the Davis-Bacon prevailing wage requirements do not apply to the borrow pit and batch plant workers, the court cited *Midway,* in which it had found ''no ambiguity in the text [of the Davis-Bacon Act]'' and thought it clear that ''the ordinary meaning of the statutory language is that the Act applies only to employees working directly on the physical site of the public building or public work under construction.'' 24 F.3d at 1452. The court added that ''the reasoning in *Midway* obviously bears on the validity of § 5.2(l)(2) to the extent that the regulation purports to extend the coverage of the Davis-Bacon Act beyond the actual physical site of the public building or public work under construction,'' (*id.*), and accordingly ruled that ''the Secretary's regulations under which Ball was held liable are inconsistent with the Davis-Bacon Act. *See* 29 CFR § 5.2(l)(1).'' 24 F.3d at 1453. The court nevertheless indicated that the regulations at section 5.2(l)(2) might satisfy the geographic limiting principle of the Davis-Bacon Act and *Midway* if the regulatory phrase in section 5.2(l)(2) ''so located in proximity to the actual construction location that it would be reasonable to include them'' were

applied ''only to cover batch plants and gravel pits located in actual or virtual adjacency to the construction site.'' 24 F.3d at 1452.

In *Cavett* (arising under the Federal-Aid Highway Act, a Davis-Bacon related Act), the Sixth Circuit held that truck drivers hauling asphalt from a temporary batch plant to the highway under construction three miles away were not due prevailing wages. The contract involved resurfacing of an Indiana state road, and as characterized by the court, ''the Department of Labor included in the site of the work both a batch plant located at a quarry more than three miles away from the highway construction project and the Indiana highway system that was used to transport materials from the batch plant to the construction project.'' 101 F.3d at 1113–1114.

Relying on the D.C. Circuit's reasoning in *Midway* and *Ball,* the Sixth Circuit disagreed with the views of the lower court that the statutory language was ambiguous and that the *Ball* decision recognized ambiguity in the statutory text when it declined to decide whether coverage could extend to batch plants adjacent to or virtually adjacent to the boundaries of the completed project. The Sixth Circuit reasoned that it was not inconsistent for the *Ball* court to ''conclude that while a facility in virtual adjacency to a public work site might be considered part of that site, a facility located two (or in this case three) miles away from the site would not.'' 101 F.3d at 1115. Thus, agreeing with *Ball*, the Sixth Circuit concluded that the statutory language means that ''only employees working directly on the physical site of the work of the public work under construction have to be paid prevailing wage rates.'' *Id.*

Subsequent to the rulings in *Midway, Ball*, and *Cavett*, the Department's Administrative Review Board (ARB) addressed the Davis-Bacon Act's *site of the work* provision in *Bechtel Contractors Corporation (Prime Contractor), Rogers Construction Company (Prime Contractor), Ball, Ball and Brosamer, Inc., (Prime Contractor), and the Tanner Companies, Subcontractor,* ARB Case No. 97–149, March 25, 1998, reaffirming ARB Case No. 95–045A, July 15, 1996.

This case involved a dispute over whether the Davis-Bacon provisions applied to work performed at three batch plants established and operated in connection with construction work on the Central Arizona Project (CAP), a massive Bureau of Reclamation construction project consisting of 330 miles of aqueduct and pumping plants. The batch plants were located less than one-half mile from various pumping stations that were being constructed as part of the project. The Board initially ruled on the case on July 15, 1996 (*Bechtel I*) and later reaffirmed that decision on March 25, 1998 (*Bechtel II*).

The Board observed that the D.C. Circuit's recent decision in *Ball* had ''created a good deal of confusion with respect to the coverage of the DBA.'' *Bechtel I*, slip op. at 6. The Board declined to read *Ball* or *Cavett* to mean that the statutory phrase ''directly upon the site of the work'' limits the wage standards of the DBA to ''the physical space defined by contours of the permanent structures that will remain at the close of work.'' *Id.* Rather, the Board read *Ball* and *Cavett* as only precluding the Secretary from enforcing section 5.2(l)(2) of the regulations in a manner that did not respect the geographic limiting principle of the statute, while reserving ruling on section 5.2(l)(1), since that provision was not at issue in those cases. *Bechtel II*, slip op. at 5; *Bechtel I*, slip op. at 6. The Board stated that interpretation of section 5.2(l)(1) requires examination of the question of whether the temporary facilities are so ''located in virtual adjacency'' to the site of the work that it would be reasonable to include them. *Id.*

The Board found that the work performed at the plants satisfied the test set out in section 5.2(l)(1), since aerial photographs of the construction sites showed the temporary batch plants to be located on land integrated into the work area adjacent to the pumping stations. The Board believed there was no principled basis for excluding the batch plant workers since they were employed on sites of the work to the same extent as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property. The Board also observed that

> it is the nature of such construction, *e.g.,* highway, airport and aqueduct construction, that the work may be long, narrow and stretch over many miles. Where to locate a storage area or a batch plant along such a project is a matter of the contractor's convenience and is not a basis for excluding the work from the DBA. The map of the project introduced at hearing * * * abundantly illustrates that the project consisted of miles of narrow aqueduct connected by pumping stations. The only feasible way to meet the needs of the aqueduct construction was to have the concrete prepared at a convenient site and transported to the precise area of need. This equally holds true for the storage and distribution of other materials and equipment. Faced with such a project, the Board finds that work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project.

*Bechtel I*, slip op. at 6.

**III. Discussion of the Proposed Rule**

Issuance of this NPRM is needed to clarify the effects of *Midway, Ball,* and *Cavett,* particularly in view of confusion they may have generated (as suggested by the ARB in *Bechtel I*), and also to address situations not contemplated by the current regulations.

The Department has also reviewed the NPRM published in 1992 (57 FR 19208 (May 4, 1992)) in conjunction with the rule promulgated to conform with the *Midway* decision; the NPRM would have further defined and limited the circumstances in which on-site work by laborers and mechanics primarily engaged in offsite transportation would be subject to Davis-Bacon requirements. After a review of the comments and the subsequent developments in the court cases, the Department has concluded that no further rulemaking on this issue is necessary or appropriate. As stated in the preamble to the companion rule: ''Those truck drivers who transport materials to or from the 'site of the work' would not be covered for any time spent off-site, but would remain covered for any time spent directly on the 'site of the work.' '' 57 FR 19205. It remains the Department's view that truck drivers employed by construction contractors and subcontractors must be paid at least the rate required by the Davis-Bacon Act for any time spent on-site which is more than *de minimis.* In this connection, the Department notes that in the *Midway* case, the drivers stayed on-site only long enough to drop off their loads, which was usually not more than ten minutes at a time. 932 F.2d at 987.

*1. Site of the Work—Section 5.2(l)*

While neither *Ball* nor *Cavett* enjoined the Department from enforcing the regulatory *site of the work* definition as set forth at 29 CFR 5.2(l)(2), these courts found the Department's application of the regulation to be contrary to the plain meaning of the language of the Davis-Bacon Act. In view of the appeals courts' rulings, the Department no longer believes that it can assert Davis-Bacon prevailing wage coverage with respect to material or supply sources, tool yards, job headquarters, etc., which are dedicated to the covered construction project unless they are adjacent or virtually adjacent to a location where the

building or work, or a significant portion thereof, is being constructed.

Therefore, a revision to section 5.2(l)(2) is proposed to so limit coverage. The Department does not believe it would be appropriate to propose to define the terminology ''adjacent or virtually adjacent'' because the actual distance may vary depending upon the size and nature of the project. See *Bechtel II,* slip op. at 6 (''The question of whether a temporary facility is virtually adjacent to the 'site of the work' is one to be examined on a case-by-case basis.'') However, the Department invites comments on whether this terminology should be defined, and if so, in what manner.

In addition, the current *site of the work* definition at section 5.2(l) does not adequately address certain situations which the Department believes warrant coverage. For example, new construction technologies have been developed that make it practical and economically advantageous to build major segments of complex public works, such as lock and dam projects and bridges, at locations some distance up-river from the locations where the permanent structures will remain when their construction is completed.

Innovative construction methods exist which take advantage of recently developed underwater concrete construction technologies, making it feasible for whole sections of such structures to be constructed up-river and floated down-river to be put in place to form the structure being built. In such situations, much of the construction of the public work is performed at a secondary site other than where it will remain after construction is completed.

The regulatory definition in section 5.2(l)(1) states that coverage ''is limited to the physical place or places where construction called for in the contract will remain * * * and other adjacent or nearby property.'' Literal application of the regulatory language would appear to exclude from coverage, construction at a location some distance from the final resting place of a project, even if a significant portion of the project is actually constructed at that location. At its most extreme, it is possible that a project may be built in its entirety at one location and then moved to its final resting place. The Department does not believe such a result is consistent with either the language or intent of the Davis-Bacon Act. Rather, it is the Department's view that a location established specifically for the purpose of constructing a significant portion of a ''public building or public work'' is reasonably viewed as construction performed directly upon the site of the public building or public work within the meaning of the Davis-Bacon Act. The Department notes that to the best of its information, projects which are built in such a manner are currently rare, although they may become more common with advances in technology. It is *not* our intention that the proposed amendment to the definition of *site of the work* would create a major exception to the normal rule limiting the *site of the work* to the place where the building or work will remain when the construction is completed.

The Department considers that the previously discussed court decisions, which involved material supply locations and the transportation between such locations and the construction site of the project, do not preclude Davis-Bacon coverage where significant portions of projects, such as bridges and dams, are actually being constructed at secondary locations.

Just as we believe this situation was not contemplated when the Department's regulations were drafted, we believe that it was not contemplated by the various court decisions. *See Ball,* 24 F.3d at 1452 (''the reasoning of *Midway* obviously bears on the validity of § 5.2(l)(2) to the extent that the regulation purports to extend the coverage of the Davis-Bacon Act beyond the actual physical site of the building or public work under construction''). As pointed out by the Board in *Bechtel,* the courts' statements limiting coverage to work ''on the physical site of the public building or public work under construction,'' should not be interpreted as restricting coverage ''to the physical space defined by contours of the permanent structures that will remain at the close of work.''

The Department, therefore, proposes a revision to section 5.2(l)(1) to include within the *site of the work,* secondary sites, other than the project's final resting place, which have been established specifically for the performance of the Davis-Bacon covered contract and at which a significant portion of the public building or work called for by the contract is constructed.

*2. Coverage of Transportation—Section 5.2(j)*

Concerning transportation, section 5.2(j)(1)(iv) currently covers all transportation between the actual construction location and other locations dedicated to the project and considered a part of the site of the work within the meaning of section 5.2(l). The Department is proposing to amend section 5.2(j)(l) in two respects:

First, the Department is proposing to amend section 5.2(j)(1)(iv) to conform to the appellate decisions, which held as a general matter that transportation of materials occurring off the actual construction site was not ''directly upon the site of the work,'' and thus not covered by Davis-Bacon provisions. Therefore, under this proposal, off-site transportation of materials, supplies, tools, etc., ordinarily would not be covered. Such transportation would be covered only if the transportation is between the construction work site and a site located ''adjacent or virtually adjacent'' to the construction site.

In addition, in conjunction with the proposed amendment to section 5.2(l)(1), discussed above, a new section 5.2(j)(1)(iv)(B) would provide that transportation of portion(s) of the building or work between a secondary covered construction site and the site where the building or work will remain when it is completed is subject to Davis-Bacon requirements. It is the Department's view that under these circumstances the *site of the work* is literally moving between the two work sites, and therefore the laborers or mechanics who transport these portions or segments of the project are reasonably viewed as ''employed directly upon the site of the work.''

The Department seek comments on these proposed regulatory changes to section 5.2(l) and section 5.2(j)(1), as set forth below.

**IV. Executive Order 12866; Small Business Regulatory Enforcement Fairness Act; Unfunded Mandates Reform Act**

This proposed rule is not a ''significant regulatory action'' within the meaning of section 3(f) of Executive Order 12866. The rule is not expected to (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a section of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order. The modifications to regulatory language as proposed in this NPRM would limit coverage of off-site material and supply work from

Davis-Bacon prevailing wage requirements as a result of appellate court rulings. In addition, the proposed regulation would make a limited amendment to the *site of the work* definition to address an issue not contemplated under the current regulatory language—those instances where significant portions of buildings or works may be constructed at secondary sites which are not in the vicinity of the project's final resting place. It is believed that such instances will be rare, and that any increased costs which may arise on such projects would be offset by the savings due to the proposed limitations on coverage.

The Department has similarly concluded that this proposed rule is not a ''major rule'' requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). It will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local and tribal governments in the aggregate, or by the private sector. Furthermore, the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1532, do not apply here because the proposed rule does not include a Federal mandate. The term *Federal mandate* is defined to include either a Federal intergovernmental mandate or a Federal private sector mandate. 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do not include an enforceable duty which is a duty arising from participation in a voluntary program. 2 U.S.C. 658(7)(A). A decision by a contractor to bid on Federal and federally assisted construction contracts is purely voluntary in nature, and the contractor's duty to meet Davis-Bacon Act requirements arises from participation in a voluntary Federal program.

**V. Executive Order 13132 (Federalism)**

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have federalism implications. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**VI. Regulatory Flexibility Analysis**

The Department has determined that the proposed regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The proposal would implement modifications resulting from court decisions interpreting statutory language, which would reduce the coverage of Davis-Bacon prevailing wage requirements as applied to construction contractors and subcontractors, both large and small, on DBRA covered contracts. In addition, the proposed regulation would make a limited amendment to the *site of the work* definition to address an issue not contemplated under the current regulatory language—those instances where significant portions of buildings or works may be constructed at secondary sites which are not in the vicinity of the project's final resting place. It is believed that such instances will be rare, and that any increased costs which may arise on such projects would be offset by the savings due to the proposed limitations on coverage. The Department of Labor has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Notwithstanding the above, the Department has prepared the following Regulatory Flexibility Analysis:

*(1) Reasons Why Action Is Being Considered*

The Department is issuing this NPRM to clarify the regulatory requirements concerning the Davis-Bacon Act's *site of the work* language in view of three appellate court decisions. These decisions concluded that the Department's application of its regulations to cover certain activities related to off-site facilities dedicated to the project was at odds with the Davis-Bacon Act language that limits coverage to workers employed ''directly upon the site of the work.'' This NPRM is therefore necessary to bring the Department's regulatory definitions of the statutory terms *construction, prosecution, completion,* and *repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l) into conformity with these court decisions.

The Department is also issuing this NPRM in order to address situations that were not contemplated when the current regulations concerning *site of the work* were promulgated. This NPRM proposes to make clear under the Department's regulations that the Davis-Bacon Act's scope of coverage includes work performed at locations established specifically for the purpose of constructing a significant portion of a building or work, as well as transportation of portions of the building or work to and from the project's final resting place. These regulatory changes are necessitated by the development of new construction technologies, whereby major segments of a project can be constructed at locations some distance from where the permanent structure(s) will remain after construction is completed.

*(2) Objectives of and Legal Basis for Rule*

These regulations are issued under the authority of the Davis-Bacon Act, 40 U.S.C. 276a, *et seq.*, Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix, and the Copeland Act, 40 U.S.C. 276c. The objectives of these regulations are to clarify the effects of three appellate court decisions (*Midway, Ball,* and *Cavett*) and eliminate any confusion they may have engendered in the Federal construction community, and to address a coverage issue not contemplated by the current regulations.

*(3) Number of Small Entities Covered Under the Rule*

Size standards for the construction industry are established by the Small Business Administration (SBA), and are expressed in millions of dollars of annual receipts for affected entities, *i.e.,* Major Group 15, Building Construction—General Contractors and Operative Builders, $17 million; Major Group 16, Heavy Construction (non-building), $17 million; and Major Group 17, Special Trade Contractors, $7 million. The overwhelming majority of construction establishments would have annual receipts under these levels. According to the Census, 98.7 percent of these establishments have annual receipts under $10 million. Therefore, for the purpose of this analysis, it is assumed that virtually all establishments potentially affected by this rule would meet the applicable criteria used by the SBA to define small businesses in the construction industry.

*(4) Reporting, Recordkeeping, and Other Compliance Requirements of the Rule*

There are no additional reporting or recording requirements for contractors under the proposed rule. There may be rare instances where, pursuant to the NPRM, contractors, including small

entities, engaged in the construction of a major portion of a Davis-Bacon project at a secondary site specifically established for such purpose would be required to comply with Davis-Bacon wage and recordkeeping requirements with respect to certain laborers and mechanics in circumstances where they currently are not covered by regulations issued under the Act.

*(5) Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Rule*

There are currently no Federal rules that duplicate, overlap, or conflict with this proposed rule.

*(6) Differing Compliance or Reporting Requirements for Small Entities*

The proposed rule contains no reporting, recordkeeping, or other compliance requirements specifically applicable to small businesses or that differ from such requirements applicable to the Davis-Bacon contracting industry as a whole. Such different treatment would not seem feasible since virtually all employers in the industry are small businesses.

*(7) Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements*

The primary purpose of the proposed rule is to clarify the application of Davis-Bacon requirements as a result of various appellate court decisions.

*(8) Use of Other Standards*

The proposed regulation addresses only statutory coverage. It does not prescribe performance or design standards.

*(9) Exemption From Coverage for Small Entities*

Exemption from coverage under this rule for small entities would not be appropriate given the statutory mandate of the Davis-Bacon Act that all contractors (large and small) performing on DBRA-covered contracts pay their workers prevailing wages and fringe benefits as determined by the Secretary of Labor.

**VII. Document Preparation**

This document was prepared under the direction of John R. Fraser, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

**List of Subjects in 29 CFR Part 5**

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

For the reasons set out in the preamble, Title 29, Part 5, is proposed to be amended as follows:

## PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

1. The authority citation for part 5 is revised to read as follows:

**Authority:** 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part.

2. Section 5.2 is amended by revising paragraphs (j) and (l) to read as follows:

**§ 5.2 Definitions.**

* * * * *

(j) The terms *construction, prosecution, completion, or repair* mean the following:

(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of § 5.2(l) by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project), including without limitation—

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;

(ii) Painting and decorating;

(iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, in the construction or development of the project);

(iv)(A) Transportation between the site of the work within the meaning of § 5.2(l)(1) and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (l)(2) of this section; and

(B) Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the site of the work within the meaning of paragraph (l)(1) of this section, and the physical place or places where the building or work will remain.

(2) Except for laborers and mechanics employed in the construction or development of the project under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, and except as provided in paragraph (j)(1)(iv)(A) of this section, the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not ''construction'' (etc.) (see *Building and Construction Trades Department, AFL–CIO* v. *United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.),* 932 F.2d 985 (D.C. Cir. 1991)).

* * * * *

(l) The term *site of the work* is defined as follows:

(1) 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;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the *site of the work,* provided they are dedicated exclusively, or nearly so, to performance of the contract or project, *and provided* they are adjacent or virtually adjacent to the *site of the work* as defined in paragraph (l)(1) of this section;

(3) Not included in the *site of the work* are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the *site of the work.* Such permanent, previously established facilities are not part of the *site of the work,* even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

* * * * *

Signed in Washington, D.C., on this 18th day of September, 2000.

**T. Michael Kerr,**

*Administrator.*

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