



MAR 05 2014

The Honorable Jack Kingston  
Chairman  
Committee on Appropriations Subcommittee  
on Labor, Health and Human Services,  
Education and Related Agencies  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Kingston:

This is in response to your January 10, 2014, inquiry to Secretary of Labor Perez regarding three information requests concerning All Agency Memorandum No. 212, issued on March 22, 2013, regarding the applicability of Davis-Bacon labor standards to members of survey crews.

Enclosed are copies of letters sent in response to the information requests that are the subject of your inquiry:

December 4, 2013, letter from Brian V. Kennedy, Assistant Secretary, Office of Congressional and Intergovernmental Affairs to Congressmen John Kline, Sam Graves and Tim Walberg;

December 2, 2013, letter from Ms. Patricia Davidson, Deputy Administrator for Program Operations to Mr. Curtis W. Sumner, PLS, Executive Director, National Society of Professional Surveyors (NSPS); and

December 2, 2013, letter from Dan Daly, Chief, Wage and Hour Division Branch of Documents Management to Mr. Neil Sandler, editor and publisher, *Professional Surveyor Magazine*.

As expressed in the letter to Mr. Sumner, the WHD remains committed to an ongoing dialogue with interested parties concerning the ways that we can provide appropriate guidance regarding the extent to which the DBA applies to members of survey crews. We therefore invite and encourage interested parties to provide factual information or other materials that may assist in ensuring appropriate WHD determinations regarding this issue.

Sincerely,

A handwritten signature in black ink that reads "Laura A. Fortman".

Laura A. Fortman  
Principal Deputy Administrator

Enclosures

U.S. Department of Labor

Office of the Assistant Secretary for  
Congressional and Intergovernmental Affairs  
Washington, D.C. 20210



December 4, 2013

The Honorable John Kline  
Chairman  
Committee on Education and the Workforce  
U.S. House of Representatives  
2181 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Sam Graves  
Chairman  
Committee on Small Business  
U.S. House of Representatives  
2361 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Tim Walberg  
Chairman  
Subcommittee on Workforce Protections

Dear Chairman Kline, Chairman Graves, and Chairman Walberg:

I write in response to your letter to Wage and Hour Division (WHD) then Acting Deputy Administrator Mary Beth Maxwell concerning the WHID's All Agency Memorandum (AAM) No. 212. AAM No. 212 was issued in conjunction with a March 22, 2013, letter addressing the applicability of Davis-Bacon Act<sup>1</sup> (Davis-Bacon or the Act) labor standards to field surveyors performing on-site work that is functionally integrated with construction subject to Davis-Bacon labor standards.

As you are aware, Davis-Bacon Act prevailing wage requirements apply to "laborers and mechanics" employed on federal and federally assisted construction projects. The Act applies to each contract over \$2,000 "to which the Federal Government or the District of Columbia is a party for construction, alteration or repair, including painting and decorating, of public buildings and public works."<sup>2</sup> The Act requires the Secretary of Labor to determine prevailing wage rates for inclusion in covered contracts based on those paid to ". . . corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work . . ." in the area (usually a county) in which proposed contract work is to be performed.<sup>3</sup> In addition to the Davis-Bacon Act itself, Congress has added Davis-Bacon prevailing wage provisions to numerous laws, referred to as "related Acts," under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance.

Under the terms of contracts subject to the labor standards of the Davis Bacon and related Acts (DBRA), contractors and their subcontractors are required to pay each laborer or mechanic employed on the "site of the work" at least the locally prevailing wages listed in the

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<sup>1</sup> 40 U.S.C. §§ 3141 *et seq.*

<sup>2</sup> 40 U.S.C. § 3142(a).

<sup>3</sup> 40 U.S.C. § 3142(b).

applicable wage determination in the contract for the work performed.<sup>4</sup> Regulations governing the administration and enforcement of the DBRA are set forth in Title 29 of the Code of Federal Regulations and define the term "*laborer or mechanic*" as follows:

(m) The term *laborer or mechanic* includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term *laborer or mechanic* includes apprentices, trainees, helpers ... The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.<sup>5</sup>

WHD has long recognized that members of survey crews performing primarily physical and/or manual work on a Davis-Bacon covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers and mechanics subject to the Act.<sup>6</sup> After a review of the Wage and Hour Division's policies and procedures, as well as information indicating that the composition and work of survey crew members have evolved with new technology that survey crew members use in their work, WHD determined steps should be taken to ensure that the recognition of certain survey crew members as laborers or mechanics is implemented appropriately in the administration and enforcement of Davis-Bacon labor standards on covered projects.<sup>7</sup>

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<sup>4</sup> 40 U.S.C. § 3142(c).

<sup>5</sup> 29 C.F.R. § 5.2(m).

<sup>6</sup> See AAM No. 39 recognizing that the question of whether individuals employed as members of survey crews are covered is a question of fact, and stating, "where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such surveying would be deemed construction work within the meaning of this Act." (August 2, 1962). Available at <http://www.wdol.gov/aam.aspx>.

<sup>7</sup> See Letter from Elizabeth A. Nadeau, Associate General Counsel, International Union of Operating Engineers to Timothy J. Helm, Chief, Branch of Government Contracts Enforcement, Division of Enforcement Policy and Procedures, Wage and Hour Division, U.S. Department of Labor (August 4, 2011) (IUOE letter) requesting clarification with regard to field surveyors. See also Letter from Marybeth Maxwell, Acting Deputy Administrator, Wage and Hour Division, U.S. Department of Labor to Elizabeth A. Nadeau, Associate General Counsel, International Union of Operating Engineers (March 22, 2013). Both letters are enclosed with this response, along with the 65 pages of attachments to the IUOE letter regarding the applicability of Davis-Bacon labor standards to the members of survey crews. Additional documents related to AAM

AAM No. 212 makes clear that determinations as to whether certain members of survey crews are laborers or mechanics are questions of fact and that the “touchstone is whether the worker’s duties ‘are manual or physical in nature.’”<sup>8</sup> As such, AAM No. 212 reiterates WHD’s longstanding position that members of survey crews on covered projects who perform primarily physical and/or manual work may be laborers and mechanics subject to Davis Bacon labor standards and provides implementation guidance for contracting officers and other interested stakeholders on the application of the Davis-Bacon labor standards to those survey crew workers whose work meets regulatory requirements for coverage. AAM No. 212 notes that in determining whether a survey crew member performs primarily physical and/or manual duties (including those workers who use tools or who are performing the work of a trade), the principal, main, major or most important duty or duties that the individual performs are considered to be his or her “primary duty” and that the determination of a survey crew member’s primary duty is fact-based with the major emphasis on the character of the worker’s job as a whole.

Although survey crew classifications are not currently listed in Davis-Bacon wage determinations available for incorporation into covered contracts, a standard Davis-Bacon contract clause provides that “the contracting officer shall require that any class of laborers or mechanics... which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.” AAM No. 212 advises contracting agencies to accept requests for classifications to be added to applicable Davis-Bacon wage determinations for survey crew members whose duties are primarily physical and/or manual while employed by the contractor or subcontractor(s) on Davis-Bacon covered projects immediately prior to or during construction in direct support of construction crews. WHD will review contracting agency requests for the addition of survey crew classifications and wage rates to wage determinations in covered contracts in accordance with the “conformance” process specified at 29 CFR § 5.5(a)(1)(ii). Because it is necessary for WHD to consider the duties of proposed additional survey crew classifications when evaluating such conformance requests, AAM No. 212 notes that each request should include information describing the duties of the survey crew members employed on the project. While this will be an ongoing process on a project by project basis, over time, as new Davis-Bacon prevailing wage surveys are conducted across the country, data submitted in response to the new surveys can supplant the project by project consideration of conformance requests.

AAM No. 212 reiterates the principles governing when and whether DBA labor standards should apply to members of survey crews and is supported by the legal reasoning set forth in the WHD response letter dated March 22, 2013. It emphasizes that in the normal course of DBRA administration, factual information may substantiate a need for recognition of survey crew members as covered workers subject to the Davis-Bacon labor standards, and implementation of such applicability where appropriate.

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212 may be forthcoming, in whole or in part, upon completion of screening to prevent the inappropriate disclosure of confidential information.

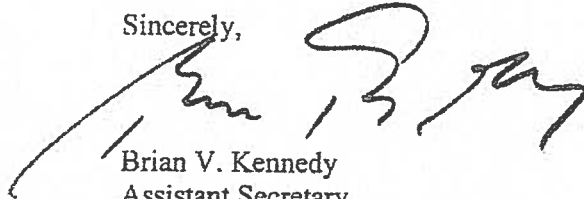
<sup>8</sup> Field Operations Handbook 15e20.

The Honorable John Kline, et al.  
December 4, 2013  
Page 4

The Department is committed to working with all interested stakeholders concerning the applicability of Davis-Bacon requirements in accordance with the applicable statutory and regulatory framework. In response to correspondence the WHD received from Mr. Curtis W. Sumner, Executive Director, National Society of Professional Surveyors (NSPS), WHD invited him to meet and provide factual information in relation to this subject.<sup>9</sup> In an August 16, 2013 meeting, Mr. Sumner described various important aspects of surveying work and the NSPS Survey Technician Certification Program. Interested parties continue to have an opportunity to provide information and evidence to the Wage and Hour Division regarding the application of Davis-Bacon labor standards to survey crew members.

If you or any member of your staff has questions, please contact Kate Garza in the Department's Office of Congressional and Intergovernmental Affairs. She may be reached at (202) 693-4600.

Sincerely,



Brian V. Kennedy  
Assistant Secretary  
Office of Congressional and Intergovernmental Affairs

Enclosure: One disc containing documents Bates stamped DOL\_House\_Survey Techs\_00001-00122 in PDF.

cc: The Honorable George Miller  
Senior Democratic Member  
Committee on Education and the Workforce

The Honorable Nydia M. Velázquez  
Ranking Member  
Committee on Small Business

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<sup>9</sup> Enclosed is correspondence with stakeholders regarding AAM 212.



DEC - 2 2013

Mr. Curtis W. Sumner, PLS  
Executive Director  
National Society of Professional Surveyors  
5119 Pegasus Court, Suite Q  
Frederick, Maryland 21704

Dear Mr. Sumner:

Agency Memorandum No. 212, dated March 22, 2013, and the applicability of Davis-Bacon Act (DBA) labor standards to members of survey crews. Thank you for meeting with us on August 16 to express your views regarding All Agency Memorandum No. 212. Also, thank you for your August 20 letter further discussing your concerns.

The DBA requires the Secretary of Labor to determine prevailing wage rates for inclusion in covered federal and federally assisted contracts based on the wages paid to "... corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work ..." in the area (usually a county) in which proposed contract work is to be performed. WHD has long held that members of survey crews performing primarily physical and/or manual work on a Davis-Bacon covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers and mechanics subject to the Davis-Bacon Act, and that whether individual members of survey crews are laborers or mechanics is a question of fact that must take into account the actual duties performed.

In determining whether a worker (including a member of a survey crew) is a "laborer or mechanic" as defined under the DBA at 29 CFR 5.2(m), the touchstone is whether the worker's duties "are manual or physical in nature (including those workers who use tools or who are performing the work of a trade)." As stated in the applicable regulatory definition at 29 CFR 5.2(m):

The term *laborer or mechanic* includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. ... The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.

After a review of WHD policies and procedures, as well as information indicating that the composition and work of survey crew members have evolved with new technology that survey crew members use in their work, WHD determined that steps should be taken to ensure that appropriate consideration will be given to survey crew members in the administration and enforcement of Davis-Bacon labor standards on covered projects.

As stated in AAM No. 212, the basis for a survey crew member to be considered a laborer or mechanic covered by the DBA requirements is that he or she:

- o performs primarily physical and/or manual duties,
- o while employed by a contractor or subcontractor,
- o in work performed immediately prior to or during actual construction,
- o in direct support of construction crew(s),
- o on the “site of the work.”

Currently, survey crew worker classifications are not listed on the DBA general wage determinations, which are available at [www.wdol.gov](http://www.wdol.gov) for incorporation into covered contracts. However, as specified in the DBA contract clause set forth at 29 CFR 5.5(a)(1)(ii), “the contracting officer shall require that any class of laborers or mechanics...which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.” As additional laborer and mechanic classifications may be added to the contract wage determination for a project if needed, AAM No. 212 advises contracting agencies to accept requests for classifications to be added to applicable Davis-Bacon wage determinations for survey crew members whose duties are primarily physical and/or manual while employed by the contractor or subcontractor(s) on Davis-Bacon covered projects immediately prior to or during construction in direct support of construction crews. WHD will review contracting agency requests for the addition of survey crew classifications and wage rates to wage determinations in covered contracts in accordance with the “conformance” process specified at 29 CFR 5.5(a)(1)(ii). Because it is necessary for WHD to consider the duties of proposed additional survey crew classifications when evaluating such conformance requests, AAM No. 212 notes that each request should include information describing the duties of the survey crew members employed on the project.

As new Davis-Bacon prevailing wage surveys are conducted across the country, relevant information concerning the wages paid and the duties performed by crew classifications in the areas surveyed can be reported and new Davis-Bacon wage determination(s) in each area surveyed can include survey crew classifications and rates if and when the

encourage you and your members to provide any factual information or materials that would be relevant to ensuring appropriate WHD determinations concerning the applicability of Davis-Bacon requirements in accordance with the applicable statutory and regulatory framework. Although we do not intend to stay implementation of the AAM, we will carefully consider such information as we work to ensure appropriate application of the DBA to members of survey crews.

I have asked Mr. Timothy Helm, Chief of Government Contracts Enforcement, to contact you directly to continue the dialogue on ways that we can provide the appropriate guidance to the contracting community regarding the applicability of the DBA to survey crews.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia Davidson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Patricia Davidson  
Deputy Administrator for Program Operations



U.S. Department of Labor

Wage and Hour Division  
Washington, D.C. 20210



December 2, 2013

Neil Sandler  
Professional Surveyor Magazine  
20 West Third Street  
Frederick, MD 21701

Dear Mr. Sandler,

This letter is an interim response to your request for information (tracking number 721424) dated June 11, 2013, made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Specifically, you requested “a copy of all documents related to the application of the Davis-Bacon Act . . . to members of survey crews, including all documents relating to All Agency Memorandum (AAM) 212, issued by the Wage and Hour Division on March 23, 2013.”

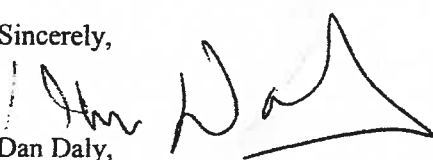
Today, we are providing you with a complete copy of a 26-page letter we received from the International Union of Operating Engineers (IUOE) on August 4, 2011, along with 67 pages of attachments to the letter that we received on the same date, regarding the applicability of Davis-Bacon labor standards to the members of survey crews. We are also providing you with an 8-page letter Acting Deputy Administrator Mary Beth Maxwell sent on March 22, 2013 in response to the IUOE’s letter from August 4, 2011. We have not withheld or redacted any information from those 101 pages.

We have gathered additional records from the IUOE which may be responsive to your request. Unlike the records we are releasing to you today, however, some of these additional records may constitute confidential “commercial or financial information” protected from disclosure under Exemption 4 of FOIA. § 552(b)(4).

With respect to these additional records, we intend to perform the pre-disclosure notification process described in Executive Order 12600 and 29 C.F.R. § 70.26(c), where we will contact the IUOE and solicit their views regarding the confidentiality of the records they supplied to us. On the basis of their feedback, we will then make a determination regarding whether any of those additional records should be withheld under Exemption 4 of FOIA.

Please note that the pre-disclosure notification process described above may take some time. Because we failed to notify you of our need for an extension to process your FOIA request within the statute’s 20-day requirement, we are waiving all applicable FOIA processing costs. Please feel free to call FOIA specialist Stephen Davis at 202-693-0147 if you have any further questions.

Sincerely,

  
Dan Daly,

Chief, Branch of Documents Management  
Wage and Hour Division