Prevailing Rate of Wage Act (Davis-Bacon Act)

[American Federation of Labor and Congress of Industrial Organizations. Building and Construction Trades Dept.]

THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT'S RESPONSE TO THE GAO REPORT ON THE DAVIS-BACON ACT

Introduction

Recently, the General Accounting Office issued a report which stated that the Department of Labor does a poor job of administering the Davis-Bacon Act. In addition, the GAO report offered the opinion that the continuation of the Davis-Bacon Act is unnecessary because of significant changes in the economy and that the Act has an inflationary impact on the economy. The report concludes that the Davis-Bacon Act should, therefore, be repealed for each of these reasons.

The Building and Construction Trades Department represents over four million construction tradesmen. These workers are some of the persons who suffer most from the effects of inflation and, accordingly, are vitally interested in its control. The Building Trades Department is concerned, however, that protection of construction workers' wages will be sacrificed in the name of inflation fighting without any evidence that such action will have the desired effect. More importantly, the GAO report cavalierly disregards the continued need for the wage protection provided by the Davis-Bacon Act.

There Is A Continued Need for the Davis-Bacon Act.

The GAO report found that the Davis-Bacon Act is no longer needed because the economic conditions which stimilated its enactment no longer exist. The sole purpose for the Davis-Bacon Act, according to GAO, was "to slow the downward trend in

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in construction industry wages . . . and avoid destructive contractor competition." GAO's assessment of the origins of the Davis-Bacon Act are, of course, incomplete and misleading. The wage protection afforded by the Davis-Bacon Act is designed to protect prevailing living standards of construction workers, to provide equality of opportunity for all contractors, and to prevent the disruption of the local economy. These objectives are as valid today as they were 48 years ago.

The construction industry continues to be volatile and intermittent in its business volume and the employment opportunities it provides. The workers are employed in more than 30 crafts or trades by about one-half million businesses, most of which are very small. Typically, these are not long-term employment relationships, as in most other industries. Workers move among sites and contractors without forming permanent attachments to a single employer. Unemployment has consistently been twice as high in this industry than it has been in most others; recently it has been about 11 percent, while the national rate has averaged about 5.9 percent.

Moreover, the annual percentage increases in construction workers' hourly wage rates over the last seven years have been lagging behind the increases in most other industries. Between 1971 and 1977, the construction workers' increases were 5.9 percent per year, compared to the all-industry average of 7.3 percent. Between 1975 and 1977, the gap widened; the construction workers' increases were 5.5 percent per year, and the all-industry increases were 7.7 percent. The April 1977-78 wage rise for construction workers was the smallest 12-month increase since 1967.

Thus, the construction industry has all of the basic ingredients for cutthroat competition based on wage cutting. Because the contractors have little control over other major cost factors such as land, materials and interest rates, there is already a tendency to keep wage increases to a minimum. As anti-inflation measures begin to reduce demand for construction work, these pressures will intensify. Absent the restraining effect of the Davis-Bacon Act, many contractors will surely pursue pre-1931 wage cutting practices.

The GAO report also argues that the Davis-Bacon Act is no longer necessary because of the passage of a number of other labor standards statutes. These statutes do not, however, provide the wage protection guaranteed by the Davis-Bacon Act.[1/] On the contrary, these laws complement the Davis-Bacon Act by facilitating its enforcement and providing other valuable protections for construction workers. None of them are a substitute for the Davis-Bacon Act.

GAO's conclusion that the Davis-Bacon Act is unnecessary overlooks the fundamental principle which is the justification for all prevailing wage legislation, including the Davis-Bacon Act. The principle is that the price of labor should not become

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1/ Copeland Anti-Kickback Act, 40 U.S.C. §276c; Miller Act, 40 U.S.C. §270; Social Security Act, 42 U.S.C. §501; the Wagner-Peyser Act, 29 U.S.C. §49; Fair Labor Standards Act, 29 U.S.C. §201; and Contract Work Hours and Safety Standards Act, 40 U.S.C. §27.

an element in the competition for Government construction contracts. Regardless of the impact, if any, on construction wages and costs, it is this principle which must be addressed in any discussion of the continued need for the Davis-Bacon Act. The GAO report simply ignores this critical matter.

The Alleged Maladministration of the Davis-Bacon Act.

GAO, as further justification for its recommendation that the Davis-Bacon Act be repealed, examined its alleged maladministration by the Department of Labor. The Report concludes that "[a]fter nearly 50 years of administering the Davis-Bacon Act, the Department of Labor has not developed a system to plan, control, or manage the data collection, compilation, and wage determination issuance functions under the act."

GAO, in order to determine whether there were inadequacies and problems in the Department's wage data collection, reviewed 73 area and project determinations involving half of the Department's 10 regions. Fifty of these were project determinations, i.e., wage determinations which are applicable to a particular federally funded construction project. This represents about one-half of one percent of the 9,573 such project decisions issued by the Department between January 1 and June 30, 1976. GAO also reviewed 23 area determinations out of a total of 530, each of which vary in the number of counties covered and in the type of construction to which they were applied. Area determinations are issued in localities where a substantial amount of federally

assisted construction is underway at any particular time. These determinations, unlike project determinations, are published in the Federal Register and periodically updated.

For the limited purpose of discovering when the Department uses surveys to support its area determinations, GAO also reviewed the 530 area wage determinations. Clearly, this sample was far too small to justify the Report's sweeping conclusions.

The vulnerability of the Davis-Bacon Act to evaluations such as the GAO report stems in large part from the fact that the administrators of the Act are continuously required to exercise broad discretion in order to arrive at wage determinations. The language of the statute is, after all, not very precise in that it calls for the determinations to be based on the wages paid to "corresponding classes of laborers and mechanics employed on projects of a character similar in the city, town, village, or other civil subdivision of the State in which the work is to be performed." The Department must make judgments as to appropriate occupational classifications and project classifications, and it must, for example, sometimes issue wage determinations for localities in which "projects of a character similar" are nonexistent. The Department of Labor issues thousands of prevailing wage determinations each year, and they apply to workers in many different crafts and occupations at tens of thousands of covered projects. Occasional errors must be expected.

The GAO report ignores this vital consideration. For instance, the report states that about one-half of the 73 wage determinations in the sample were not based on wage surveys. The Department's response to this criticism was that its 48 years of experience indicates that it is unnecessary and wasteful to undertake a full survey in some localities. The Department explained in its comments to GAO that through the maintenance of a continuing liaison with contracting agencies, contractor and labor groups, and other interested and knowledgeable parties, it is able to develop and update economic information which provides a clear indication of the prevailing wage rates in many localities without undertaking a full-scale survey. Thus, the decision to forego a full wage survey only occurs when there is substantial evidence already available which indicates that union wages prevail. Certainly, the Department's policy is not unreasonable, or contrary to the legislative intent of the Act. In fact, the Council on Wage and Price Stability observed during its review of the Davis-Bacon program that wage surveys of employers cost between $200 and $400 per employer and that the Department's policy provides a great savings of administrative costs.

For this reason, it is not surprising that GAO found that every wage determination issued by the Department which was not supported by a wage survey reflected wage rates equal to those negotiated by local building trades unions. GAO attributes this finding solely to the blind adoption of collectively bargained wage rates. This is a favorite myth of present day critics of the Act. No doubt the Building and Construction Trades Department and

its affiliated councils and international unions wish this were so, but it is not the case.

There are, after all, collectively bargained wage rates applicable to almost every county in the United States. Yet, Department of Labor data show that approximately 57 percent of its wage determinations reflect wage rates other than those bargained for by local building trades unions. Rather, local collective bargaining agreements are used by the Department as a source of applicable wage rates only when, in its judgment, union wages prevail in the locality. They are not relied upon in lieu of other economic data as support for determinations that union rates do, in fact, prevail.

GAO also criticizes the procedures which the Department of Labor employs whenever a wage survey is conducted. The report finds that the Department's reliance on the voluntary submission of wage data does not work well because of a lack of total cooperation among area contractors which results in a failure "to obtain data on the universe of construction activitiy in a county or project area." Moreover, GAO notes that the Department does little verification of the wage data which it obtains.

The Department's response to the former criticism is a succinct statement of the true facts regarding the adequacy of its method of gathering wage data:

> ". . . the Department has found no significant problems with the voluntary cooperation programs which comport with Administration policy for voluntary participation in government programs.
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> "As a first step, we check the data submitted voluntarily against other objective data available to us. Further, in the great majority of instances,

the prevailing wage rate is clearly either union or non-union, and a total response is not necessary. Where the union rates prevail, a survey would be superfluous, and labor agreements are an excellent resource to identify the actual rate. In non-union situations experience has repeatedly demonstrated that a representative sample will produce substantially the same results as a complete survey of the universe. . . . (Fortunately, in those areas in contention between union and non-union forces, the adversary nature of the proceedings leads to quite comprehensive information with both union and non-union interests furnishing as much data as possible to support their positions.)

"Where necessary to assure a representative sample, the Department will make successive contacts of potential survey respondents by mail, telephone, or even personal visits. In order to make surveys as complete and accurate as possible, the Department requests information not only from the specific contractors and subcontractors know to have worked on similar projects in the area, but also from contractor associations, labor unions, and others likely to have knowledge of the area. Using these multiple sources increases the overall response level, and multiple responses on the projects help establish their validity."

Similarly, the Department's comments on its alleged failure to verify wage data which it receives deserve repeating:

"Contrary to the report's statements and the examples given in Appendix V, the Department's practices do provide for verification of data. Where data is questionable for any reason, it is not used unless the questions can be resolved after due consideration. The mere fact that examples cited in Appendix V of the Report show discrepancies between the information given by contractors to GAO representatives some time after it was given to Department representatives does not support GAO's contention that the Department accepted inaccurate data. There was a considerable lapse between the occasions when the Department and GAO gathered the data, and some contractor records are frequently not well maintained for any considerable period. Also, there were occasions when contractors supplied combined wage and fringe benefit information to the Department and simply wage rates to GAO. Certainly, the few examples cited in Appendix V are hardly representative of the construction industry universe."

The GAO report again resurrects three issues concerning the Department's Davis-Bacon rules and procedures. First, the report alleges that the Department includes wage data from projects that are not of a "character similar" to the proposed contract. The selection of "projects of a character similar" for purposes of wage comparison is a prime example of the role which administrative discretion plays in the statutory scheme of the Davis-Bacon Act. The report claims that the Department regularly compares wages from projects which are dissimilar, however, it does not offer any guidance as to how determinations of project similarity can be improved. The report implies that "projects of a character similar" is synonomous with "projects of a character identical". The problem with this standard is that it is impossible to apply in many instances, especially in rural localities where there is substantially less construction activity than in the urban centers. Thus, GAO's criticism is not well taken.

Second, the GAO report found that the Department of Labor continues to "import" wages from one locality into another. This has been a recurring criticism by Davis-Bacon opponents since 1935.

The concept of "importation" derives from the fact that a less-populous area may not have any "projects of a character similar" which the Department can use for purposes of comparison. Perhaps the last "project of a character similar" in the area was completed some time ago, in which case the wages paid would be

out of date. In order to avoid the use of out-of-date wage rates in its surveys, the Department normally does not consider wages paid on a project completed more than 12 months earlier. Consequently, it may be necessary for the Department to go outside the immediate area to gather sufficient data to support a wage determination.

This practice is not contrary to the intent of the Act. From its inception, the Davis-Bacon Act has referred to the prevailing wages in the "city, town, village, or other civil subdivision of the State in which the covered project is located." And, from its inception, this language has failed to describe, with precision, the manner in which the Act should be administered with respect to the geographic scope of the areas involved in wage determinations. Congress was simply unable to design language which would deal adequately with all of the eventualities and chose, instead, to let the Department of Labor wrestle with the details.

The legislative history of the 1935 amendment of the Act indicates that there were many such situations for which Congress could find no adequate language. It opted, instead, to leave undisturbed the reference to "city, town, village, or other civil subdivision of the State," although it obviously anticipated that there would be any number of occasions in which prevailing rate determinations would, so-to-speak, involve the "importation" of wage rates.

GAO also takes excpetion with the Department's long-standing interpretation of "prevailing wage rate" used in the Davis-Bacon Act.

The basic regulations employed by the Department of Labor in determining the prevailing wage for any occupation have been in effect since September 1935. They provide that the prevailing wage rate for any occupation in any area shall be:

(1) that rate which is being received by a majority of the workers employed in the occupational classification on projects of a character similar in the area in which the construction is to be undertaken; or

(2) if there is no majority at the same rate, then the rate paid the greatest number, provided they comprise at least 30 percent of those employed in the classification; or

(3) if there is no single rate received by at least 30 percent of the workers covered by the survey, then the prevailing rate is to be based on the average of the rates paid to all the workers employed in the occupational classification.

GAO argues that the second step of the procedure results in a "minority" of the workers in a locality dictating the prevailing wage rates. A wage rate is "prevailing" if it occurs more frequently than any other, but not necessarily in a majority of the instances. "Prevailing" also means that the rate determined must be a rate which is actually being paid, rather than an artificial rate, such as the average or mean which may not be paid to any

workers in the locality.

The problem which GAO and other critics have with this procedure is that collective bargaining results in a clustering of employees at a single wage rate. That is, unionized craftsmen in the same craft are all paid the same rate. Among the nonunion workers in the craft, such clustering is less likely. However, a strong argument can be made that the term "prevailing wage rate" could be interpreted as the rate paid to the largest number of mechanics or laborers at work in the locality regardless of what percentage of the total workforce they represent and still be consistent with the language of the Davis-Bacon Act. This interpretation would virtually guarantee that the collective bargaining wage rates would invariably "prevail". A great deal of consideration was given to this idea during legislative debate of the 1935 amendments of the Davis-Bacon Act. The present three-step procedure was adopted by the Department as a compromise.

In addition to these three standard criticisms of the Department of Labor's administration of the Act, GAO also raises two other contentions to support its conclusion that the Act is poorly handled. GAO argues that the legislative intent of the Act is that wage determinations should be based exclusively on surveys of privately funded construction. Therefore, according to GAO's interpretation, surveys should not include wages paid on publicly funded construction work in the area. There was, admittedly, some reference to surveying only private construction in a 1931 Senate Report; however, a complete analysis

of the legislative history of the Act supports the Department's long-established practice of surveying privately and publicly financed construction. As a practical matter, federally financed construction must be included in wage surveys in order to provide realistic data on which to base determinations issued for highway construction, sewers, bridges, dams, and similar kinds of public works. Almost all of these projects are built with some federal funds.

GAO also cites the problem of counting the same workers more than once in a single survey. While this is a problem which requires a solution, it is important to note that the double counting does not always cause a distortion of the prevailing wage rate which results in a wage determination which is higher than the true prevailing rate. In fact, most instances of severe double counting occur when small nonunion contractors move their low paid workers from one small job to another in a short period of time. These workers are more likely to be counted two or more times in a single survey. In most instances, this flaw in the survey procedure has a depressing effect on the wage determination contrary to GAO's conclusion.

Each of the GAO's criticisms of the Department of Labor's administration of the Davis-Bacon Act is an expression of disagreement with the Department's exercise of judgment. It is not too difficult, by trimming a fact here, by emphasizing a point there to make it appear that a particular decision is totally inconsistent with the intent of the statute or with the public interest.

To persons not fully familiar with the peculiarities of the construction industry, these arguments may appear reasonable. But they are not.

The GAO report completely overlooked an important aspect of the Davis-Bacon program which is designed to provide all interested parties an opportunity to reverse a decision by the Department. The first step in the procedure is informal, in which program officials review the challenged wage determination. Most complaints are resolved in this manner. Any party who is dissatisfied with the program official's decision may appeal to the independent Wage Appeals Board. The Board's decision becomes binding on the Department. Most of the problems cited by GAO could have been addressed in this manner if brought to the Department's attention.

GAO's failure to mention this appeal process is a major oversight.

There Is No Identifiable Inflationary Effect Atrributable to The Davis-Bacon Act.

Finally, the GAO report states that the Davis-Bacon Act substantially increases the cost of federally funded construction because the Department of Labor generally adopts the wage rates negotiated in local collective bargaining agreements. In addition, GAO claims that the administrative costs of complying with the Act are high. As a result, the report concludes that the Davis-Bacon Act has "an inflationary impact on the construction industry and the national economy as a whole". Each of these findings is

without merit because they lack factual support.

GAO's finding that the Davis-Bacon Act increases the cost of federally funded construction is based on a study of 30 locations selected from its random sample of 73 wage determinations. GAO concedes that the sample size is too small to produce statistically valid findings. Nevertheless, GAO proceeds to estimate that construction costs are increased about $500 million per year because of the Davis-Bacon Act.

There are three other major flaws in this conclusion, each substantial enough to provide an important basis for invalidating the GAO survey results. First, GAO used procedures and criteria in making its surveys different than those regularly employed by the Department of Labor. GAO excluded all projects in the survey areas which were federally financed. The GAO's exclusion of federally financed projects is inconsistent with the legislative intent of the Davis-Bacon Act and unrealistic for some types of construction, such as highways, dams and wastewater treatment plants.

It is not clear, but it appears that GAO also ignored the "30 percent rule" and, instead, averaged all of the wage rates surveyed to arrive at its "prevailing" wage determinations. GAO emerged, not unexpectedly, with different results in each of its 30 wage surveys. On 12, or 40 percent, of the 30 wage determinations reviewed, GAO's wage surveys resulted in lower prevailing rates than the rates required in the Department's wage determination.

Second, GAO then applied its lower rates to one construction project covered by each determination. On this basis, GAO found an average difference of 3.3 percent higher construction costs. GAO assumed that the number of hours required to complete each project would have been the same regardless of the wage rates paid. GAO failed to take into consideration the extent higher wage costs are offset by the greater productivity of more highly paid workers. A recent M.I.T. study found that payment of higher wages may reduce overall construction costs because workers with more training and/or experience are attracted; contractors employ more highly skilled workers; and supervisors pay more attention to training and managing their workers. The M.I.T. findings are consistent with traditional microeconomic production theory.

Third, GAO assumes that there is an exact correlation between wages and contract costs to the Government -- that contract costs would necessarily be higher if a wage decision is high or that there would have been a proportional savings had wage rates been lower. Neither assumption is correct. For instance, in housing, a 20 percent increase in labor costs on most construction projects is responsible, at the most, for about a 4 percent increase of construction and development costs. Conversely, a 20 percent reduction in wages will decrease the cost of construction by only the same relatively small amount.

Despite these four major flaws in its data, GAO assumed that application of the Department of Labor's wage determinations caused a 3.3 percent increase in the cost of these projects.

After warning that ". . . the size [of the 12 project sample] was insufficient to project the results to the universe of construction costs during the year with any statistical validity", the report speculates that, "if these projects are representative", industry costs "may" have been increased a half billion dollars a year.

There is even less support for GAO's finding that the Act's reporting and records maintenance requirements add $200 million to the annual cost of construction. This is based exclusively on a 1972 survey conducted by the Associated General Contractors of America (AGC), which determined that Davis-Bacon reporting requirements add one-half of one percent to the cost of construction. GAO applied this estimate to the $40 billion in federal construction funds expended annually and arrived at the figure of $200 million.

According to the Department of Labor's comments on this section of the GAO report, nine to ten thousand construction employers were asked by AGC to estimate their "cost of preparing and filing weekly payrolls [Davis-Bacon reports] . . . in terms of a percentage of contract price, or in terms of dollars and cents on given projects." There were only 276 responses, of which, only 41 were used to arrive at the one-half percent of contract price which GAO relies upon to calculate a cost of $200 million. That this calculation is without merit is self-evident.

The fact is that most of the records and reports which employers are required to file are required by other laws, including Federal tax laws, and the cost of compliance is miniscule. Moreover, these reports are vital to the effective

enforcement of the Act.

Despite their weakness, GAO relies upon these unsubstantiated findings regarding costs attributable to the Davis-Bacon Act for its final conclusion that the Act has an inflationary impact. This conclusion is based on the same survey of 12 projects upon which GAO relies to determine that Davis-Bacon wage determinations are higher on 40 percent of all federally funded construction than the "actual" prevailing wages. The same criticisms of GAO's calculations of increased costs allegedly caused by the Davis-Bacon program are equally applicable to its finding concerning the alleged inflationary impact of the Act.

The only other support for this conclusion are a number of reports on the Act, none of which include a serious study of the actual cost impact of the Act. Most of the reports consist of a few examples and illustrations of particular wage determinations which raised wage levels on selected projects. Since there are over 14,000 wage determinations issued every year, such samples have questionable probative value.

Actually, the GAO report's claim is unsupported by any attempt to quantify the extent of the alleged inflationary impact on the economy. Instead, the report recites the fact that wage settlements in the construction industry were high in the early 1970's. This is, of course, entirely irrelevant to the current inflationary spiral because recent statistics indicate that construction industry wage increases have been lower than all-industry increases since 1971 and that construction

union wage settlements during 1978 provided for a first year average increase of 6.6 percent and 6.2 percent over the life of the contract, the lowest since 1967. At the same time, recent studies also show that productivity in the construction industry is increasing at a higher rate than in any other industry.

Conclusion.

In sum, what does the GAO report amount to? Its findings may have some superficial attractiveness to those who are concerned about rising inflation and over-regulation. But the GAO's findings are not supported by the facts.

Moreover, the justification for the Davis-Bacon Act and other prevailing wage laws is not to be found in the manipulation of statistics as GAO has done. Its justification is, rather, in its legislative purpose which is that the Federal Government, under its construction programs, shall not participate in depressing local wage conditions. To deny the potential for such results in the modern construction industry in the event Davis-Bacon is repealed, is to deny a certainty. An indicator of the potential for wage depressing practices is the number of violations of Davis-Bacon which are detected annually by the Department of Labor. According to the Department, these violations only represent a small fraction of the violations which actually occur but go undetected.

Thus, despite the recommendation of the General Accounting Office, the Davis-Bacon Act is as important today as it was in 1931 and, instead of considering its repeal, there should be a major commitment by the Federal Government to strengthen the Act and its administration. In the long run, a strictly enforced Davis-Bacon Act may reduce construction costs by eliminating incompetent contractors who compete for federally funded contracts only by virtue of low wages and by reducing industrial strife through maintenance of decent labor standards. The hidden economic and social costs of repeal more than outweigh GAO's speculative savings.