VIA ELECTRONIC SUBMISSION

August 27, 2021

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Wage and Hour Division
U.S. Department of Labor
Room S-3502
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Re: RIN 1235–AA41,

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contracts by March 30, 2022. Beginning Jan. 1, 2023, EO 14026 also requires agencies to raise the minimum wage annually by an amount determined by the Secretary of Labor.

On July 22, the WHD issued a notice of proposed rulemaking to implement EO 14026 and is seeking public feedback on the order's minimum wage increase for federal contractors, among other things.[12]

By letter dated July 28, ABC requested extension of the public comment period to Sept. 20, which is 60 days from the date of the published notice, to allow for substantive feedback from ABC's federal contractor members that will be affected by the proposed changes.[13] In response to ABC's and other comment extension requests, the WHD extended the comment period by four days to Aug. 27, stating that extending the comment period beyond that date would jeopardize the government's ability to ensure that all necessary federal action is completed by Jan. 30, 2022, when the EO is set to take effect.[14]

Summary of ABC's Comments in Response to the Proposed Rulemaking

It should be noted that most of ABC's contractor members engaged in private construction and government construction [illegible]

performed, or in the District of Columbia if the work is to be performed there."[15] Pursuant to this statute, the department has created an elaborate regulatory scheme for determining prevailing wage rates in the construction industry.[16]

Congress also has established a regime for the calculation of minimum wages on non-construction service contracts covered by the SCA. That law states, "The contract and bid specification shall contain a provision specifying the minimum wage to be paid to each class of service employee engaged in the performance of the contract or any subcontract, as determined by the Secretary or the Secretary's authorized representative, in accordance with prevailing rates in the locality, or, where a collective-bargaining agreement covers the service employees, in accordance with the rates provided for in the agreement, including prospective wage increases provided for in the agreement as a result of arm's length negotiations."[17] Section 6704 of the SCA further incorporates by reference the minimum wage provision of the FLSA, which specifies that the minimum wage currently shall be $7.25 per hour for every employee engaged in commerce.[18]

By the plain language of these statutes, Congress has established as a matter of law the minimum wages that must be paid by federal contractors. The NPRM nevertheless asserts that the minimum wage requirements of EO 14026 are "separate and distinct legal obligations from the prevailing wage requirements of the SCA and the DBA."[19] This assertion confirms that the president and the department are creating a new minimum wage requirement in derogation of congressional intent. As a result, in a limited but significant number of instances under the DBA and SCA, wage rates that the department has previously found to be the minimum wages "prevailing" in local jurisdictions according to the dictates of Congress will under the proposed rule no longer be deemed to be the minimum wage.[20]

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[15] *See* 40 U.S.C. § 3142 (b).
[16] *See* U.S. Department of Labor Prevailing Wage Resource Book, available at

Neither the president nor the department has any authority to override acts of Congress by setting a new minimum wage that contractors must pay in a manner that is plainly inconsistent with the statutes that already govern this issue.[21]

The sole authority for the executive order or the proposed rule cited by either the president or the NPRM is the Federal Property and Administrative Services Act of 1949,[22] which authorizes the president to "prescribe policies and directives" that [he] considers necessary to carry out the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. No court has previously applied this law as authority for a presidential executive order attempting to establish a minimum wage for government contractors. While the proposed rule here relies on President Obama's order imposing a $10.10 minimum wage in 2014, that order was never challenged in court because it affected so few government contractors. In any event, the Procurement Act's authorization to achieve greater economy or efficiency cannot truthfully be said to authorize the president or the department to increase the government's costs, as will be the most likely result of increasing the minimum wages that government contractors must pay their employees.

The D.C. Circuit considered and rejected a similar claim of presidential authority to impose new obligations on government contractors under the FPASA in *Chamber of Commerce v. Reich*, 74 F. 3d at 1333. The court observed that the authority vested in the president under the FPASA is limited:

> The Procurement Act was designed to address broad concerns quite different from the more focused question of the [issue before the court]. The text of the Procurement Act and its legislative history indicate that Congress was troubled by the absence of central management that could coordinate the entire government's procurement activities in an efficient and economical manner. The legislative history is replete with references for the need to have an "efficient, businesslike system of property management." S.REP. No. 475, 81st Cong., 1st Sess. 1 (1949); *see also* H.R.REP. No. 670, 81st Cong. 1st Sess. 2 (1949).

As a result, the *Reich* court found that the FPASA provided no authority for the president to dictate to government contractors as to matters on which Congress has already spoken.[23]

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[21] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson concurring) ®

In the present circumstance, as in *Reich*, Congress has already made the judgment that the government will achieve its greatest economy and efficiency by requiring government contractors to pay only the minimum wages specified by the DBA, SCA and FLSA. Reasonable minds may differ as to whether Congress has set the minimum wage at the most economical or efficient levels for government contractors, but once Congress has made the political judgment necessary to set the minimum wage and has acted upon it in the form of legislation, the president and the DOL are required by the Constitution to faithfully execute the laws so enacted by Congress.[24]

Finally, whereas the department has sometimes (though not always) declared that legal challenges to the president's authority to issue an executive order are "beyond its purview,"[25] such a response is inappropriate here. Section 4 of EO 14026 specifically instructs the department to issue regulations implementing the Order only "to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act" … "including providing exclusions from the requirements set forth in this order where appropriate."[26] Section 4 further instructs the department to "incorporate existing definitions, procedures, remedies, and enforcement processes" under the FLSA, SCA, DBA and EO 13658.[27] These instructions confer upon the department all the discretion necessary to decline to enforce the EO in a manner that is inconsistent with congressional authority (i.e., by declining to set a new minimum wage for any employee covered by the DBA, SCA or FLSA that differs from the congressionally mandated minimum wages under the foregoing statutes).

For each of these reasons, the NPRM should be withdrawn or substantially modified to avoid imposing any new minimum wage that is different from the minimum wages dictated by Congress.

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that left such an option to private decision-making. *Id.* at 1333. The D.C. Circuit opinion in *Reich* distinguished the only previous case where the Procurement Act had been found to grant authority for an executive order dealing at all with government contractors' wages: *AFL-CIO v. Kahn*, 618 F. 2d 784 (1979). The *Reich* court found that the executive order in *Kahn* was not inconsistent with any federal statute, where the president acted only to restrict employer wage <u>increases</u> as an emergency anti-inflation measure. *Id.* As noted above, no court has applied the FPASA as authority for a presidential EO attempting to establish a minimum wage for government contractors.

[24] Neither the president nor the secretary can claim a right to "supplement" the congressional minimum wage mandates with their own independent scheme, as has been permitted for state governments under the DBA, SCA and FLSA. *See Frank Bros., Inc. v. Wisconsin Dept. of Transp.*, 409 F. 3d 880 (7th Cir. 2005) (holding that Davis-Bacon sets a "floor" that state governments are entitled to supplement because the state minimum wage acts are not preempted by the federal laws). Here, both Congress and the

At a Minimum, the Department Should Conform the Proposed New Minimum Wage to the Existing Requirements of the DBA and SCA in Order to Avoid Confusion and Unnecessary Burdens on Government Contractors

Aside from the questions surrounding the department's legal authority to implement the proposed rule, it would be administratively prudent for the department and entirely consistent with Section 4 of EO 14026, to modify the proposal to achieve greater conformity with the DBA and SCA. As written, the department's proposed new minimum wage overlaps with, but differs significantly from, the extensive regulations implementing the DBA and SCA in ways that will cause considerable confusion among government contractors.

Issues likely to cause particular confusion to contractors are highlighted below.

Type and Location of Covered Employee Classifications

The NPRM interprets the EO as extending to laborers and mechanics on DBA-covered contracts.[28] However, the NPRM also interprets the EO "as extending coverage to workers performing on DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA."[29] Furthermore, according to the NPRM, FLSA-covered employees working on DBA-covered contracts are not required to be physically present on the DBA-covered worksite to be covered by the minimum wage requirements of the EO.[30]

Construction contractors that have spent decades complying with the department's regulations implementing the DBA have long become accustomed to looking at the department's published wage determinations to determine what their laborers and mechanics will be paid at the site of the work. The department's own regulations make clear that prevailing wages must only be paid for such laborers and mechanics and only for those who perform at the site of the construction work.[31]

The NPRM creates unnecessary confusion and imposes administrative burdens on contractors by substantially increasing the wage requirements for workers on DBA-covered jobsites at rates that in some instances may exceed those in the published wage determinations. At the same time, and despite additional potential confusion and burdens on contractors, the NPRM maintains the 2014 interpretation and expands the covered types of workers beyond the categories of laborers and mechanics.[32]

[28] 86 Fed. Reg. 38829.
[29] *Id.*
[30] *Id.*
[31] *See* 29 C.F.R. Part 5.
[32] 86 Fed. Reg. 38830.

contractors within the construction industry to easily comply along with the various current wage requirements.

Respectfully submitted,

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Of Counsel: