Testimony of Curtis W. Sumner, LS
Executive Director, National Society of Professional Surveyors
Before the
Committee on Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Hearing on
"Promoting the Accuracy and Accountability of the Davis-Bacon Act"
Tuesday, June 18, 2013

Mr. Chairman, members of the Subcommittee. I am Curt Sumner, a licensed professional land surveyor and Executive Director of the National Society of Professional Surveyors (NSPS), a non-profit professional society with affiliates in all 50 states whose goal is to advance the sciences of surveying and mapping and related fields, in furtherance of the welfare of those who use and make surveys, maps and other geographic information. The NSPS membership, which includes surveyors in private practice, government service, industry, and academic instruction, strives to establish and further common interests, objectives, and policy efforts to advance the surveying profession in its service to the people of the United States. NSPS is the successor of the American Congress on Surveying and Mapping (ACSM), founded in 1941 as the voice of the surveying profession.

I am pleased to be here today to share with you the NSPS experience with the Department of Labor and the Davis-Bacon Act.

As you know, Mr. Chairman, the Davis-Bacon Act is a controversial law that requires the payment of the "prevailing wage" to "laborers and mechanics" on federally funded construction projects. It applies to direct federal contracts (prime contractors and subcontractors), as well as to state and local governments expending federal (grant or loan) funds. The prevailing wages required by the law are above and beyond the "minimum wage" provided in the Fair Labor Standards Act.

The Government Accountability Office has long recommended that Davis-Bacon be repealed, noting in 1979 it inflates the cost of federally funded construction projects by "several hundred million of dollars annually".

The Davis-Bacon Act itself applies to "laborers and mechanics", but does not define that term. That is left up to the Department of Labor, under the guidelines provided in the Federal Acquisition Regulation, 48 CFR 22.401.

For more than 50 years, the Labor Department has considered survey crews exempt from the provisions of the Davis-Bacon Act. We have documentation from then-Secretary Arthur Goldberg in the Kennedy Administration stating that members of survey crews are exempt from the Act except to the extent to which they "perform manual work, such as clearing brush and sharpening stakes" which Secretary Goldberg observed, correctly I might add, "are not commonplace". (That letter is attached.)

So since at least the 1960s, both federal agencies, and the private sector have operated with the understanding that survey crews are exempt. There was never any controversy, question or ambiguity.

That was until a few weeks ago when an NSPS member, a small business, received notification pursuant to a federal contract on which he is a subcontractor that the Labor Department has issued a new order, AAM212, reversing more than 50 years of policy and determined that members of land surveying crews working on Federal construction projects are "laborers and mechanics" as that term is used in the Davis Bacon Act, making those workers subject to the Act. (SEE: http://www.dol.gov/whd/programs/dbra/Survey/AAM212.pdf)

This ruling came at the urging of the International Union of Operating Engineers. (See attached letter).

Before I discuss the practical and policy implications and problems with this ruling, permit me to address the process.

The Operating Engineers wrote the Labor Department in August of 2011 asking for this change. While the Labor Department deliberated for 18 months on a reversal of 50+ year policy, NSPS, nor to the best of our knowledge any other business, management, or professional organization related to the surveying community, was notified or consulted. During that 50 year period, NSPS and its predecessor, ACSM had been engaged with the Department, so it knew who we were and that we had an interest in this issue.

A decision was made on March 23 of this year. Again, no notice to affected parties was provided, except to the Operating Engineers and a notice sent to all federal contracting agencies. In the time between the August 2011 letter from the Operating Engineers and the March 2013 decision, there was no public notice that the Labor Department was considering a change in its regulations; no request for public input or comments; no notification, seeking of advice, comment or input from the surveying profession and employers/management; and in fact no public announcement of the new policy.

We believe the manner in which the Department of Labor considered and promulgated this drastic and significant change in policy and government contracting procedure is a violation of the spirit if not the letter of the Administrative Procedures Act (5 U.S.C. § 551-59, 701-06, 1305, 3105, 3344, 5372, 7521), the Regulatory Flexibility Act (5 U.S.C. § 601–612), and the Paperwork Reduction Act (44 U.S.C. § 3501-3521).

There are a number of reasons this ruling is ill-conceived, unnecessary, and detrimental to the surveying profession.

First, the classification of members of survey crews as "laborers and mechanics" is inconsistent with and contrary to virtually every other classification, including those of the Labor Department itself. This ruling is in direct contrast with the classification of such workers promulgated elsewhere in the Department of Labor and other federal agencies, including the Occupational Employment Statistics (17-3031 Surveying and

Mapping Technicians), the Occupational Outlook Handbook (Surveying and Mapping Technicians), the Occupational Information Network, successor to the Dictionary of Occupational Titles, (Code 22521A Surveying Technicians), and the Office of Personnel Management (OPM) General Schedule Qualification Standard (GS 817 Survey Technical Series) for surveying technicians employed by the federal government. None of these federal classifications categorize members of survey crews as "laborers and mechanics".

NSPS administers a "Certified Survey Technician" (CST) program for employees of surveying firms and government agencies, including those who perform field survey functions. The classification of members of survey crews as "laborers and mechanics" is inconsistent with the CST program and the standard in the surveying community. A number of public and private organizations recognize the CST program and its standards. For example, the Metropolitan Washington Area Transit Authority (WMATA), has utilized the CST standard for its employees and contractors since the 1990s.

Second, there has been no legislation, court ruling, Comptroller General or other governmental action that changed Secretary Goldberg's interpretation. In fact, as recently as 2010 a Connecticut Superior Court ruled against Davis-Bacon application to surveying, citing the longstanding federal policy as justification. (SEE: James Fazzino v. State of Connecticut Department of Labor, CV094021804S, October 29, 2010, http://caselaw.findlaw.com/ct-superior-court/1545698.html). The Indiana Department of Transportation issued an opinion on January 24, 2007, consistent with that of Secretary Goldberg (http://www.in.gov/dot/div/contracts/conmemo/07-02.pdf).

Third, there is no evidence that members of survey crews are paid substandard wages and no demonstrated need for including such workers in a "prevailing wage' law. According to the Bureau of Labor Statistics (BLS), the mean annual wage for a surveying technician is $42,680. To put that in perspective, the BLS national employment and wage data from the Occupational Employment Statistics, shows the mean annual wage for all occupations, is $45,790. (http://www.bls.gov/news.release/ocwage.htm)

Finally, this ruling will be an administrative nightmare for surveying firms, contracting agencies, and the Labor Department. AAM 212 itself is vague with regard to which members of survey crews, and which activities, and at what phase in a project the surveying service is being provided. This will result in confusion and costly compliance issues. The letter the Labor Department sent to the Operating Engineers Union is more specific, but since it is in a letter and not a government policy document, confusion will reign. It suggests the Davis-Bacon Act applies to "work immediately prior to or during construction which involves laying off distances and angles to locate construction lines and other layout measurements. This includes the setting of stakes, the determination of grades and levels and other work which is performed as an aid to the crafts which are engaged in the actual physical construction of projects ... the chainmen and rodmen whose work is largely of a physical nature such as clearing brush, sharpening and setting stakes, handling the rod and tape and other comparable activities are laborers and mechanics..."

The Act triggers application to a "laborer and mechanic" when more than 20 percent of the workweek is in the performance of such services on a covered site.

Survey crews are not like construction workers. A survey crew member may be on a construction site a few hours a day, one day a week, and otherwise on a sporadic and intermittent basis, but rarely an entire 40 hour work week. Some work may be preliminary to construction, post-construction, or not related to construction at all. Documenting what every survey crew member is doing every hour of the work day, determining whether an activity is covered or not covered, construction related or not, is an expensive, time consuming and counter-productive burden. The payroll administration required for compliance for a surveying profession dominated by very small businesses is extraordinary.

Moreover, the described activities are outdated and irrelevant to today's surveying. The Labor Department attempts to distinguish between licensed professional surveyors, party chiefs, and technicians, such as rodmen and chainmen. However, with today's computerized data collectors, survey crews can commonly consist of one person. That individual is certainly exercising judgment and working in a supervisory capacity. Today's surveying technicians are performing services that are mental and managerial in nature, and are not "apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act". Therefore, they do *not* meet the criteria for a laborer or mechanic under FAR 22.401.

We believe the Department of Labor has made an arbitrary and capricious decision that is not supported by the facts.

We urge the Labor Department to rescind AAM 212.

Mr. Chairman, we deeply appreciate the time, attention and assistance you and your capable staff have provided and we look forward to working with you to rectify this inappropriate, unnecessary and unfair process and policy employed by the Department of Labor.

39

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

DEC 6 1952

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MEMORANDUM #

TO : AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29 CFR, SUBTITLE A, PART 5.

FROM : James R. Beaird
Assistant Solicitor

SUBJECT: Opinions on application of the Davis-Bacon and related Acts.

Enclosed with previous covering memoranda, copies of opinions on the application of the Davis-Bacon and related Acts were furnished you for information and guidance in your enforcement programs under those Acts.

We are now enclosing a copy of a recent opinion on this same general subject, which we are sure will be of further interest and assistance to you.

Enclosure DB-26

fall within this category depends largely upon questions of fact. This determination, which takes into account the actual duties performed by the employees involved, is primarily the responsibility of the contracting agency.

In those cases where the work of an individual functioning in a survey crew is considered professional or sub-professional in character, this Department has held, in accordance with your view, that one so employed is not a laborer or mechanic within the meaning of the Davis-Bacon Act. On the other hand, where individuals perform primarily manual work, such as clearing brush and sharpening stakes, they would fall within the definition of the term "laborer". It is my understanding that situations of the latter kind are not commonplace. However, to the extent that individuals are so employed, they are covered by the aforementioned law.

I sincerely hope that these views will be of assistance to you and the members of your Society and if I can be of further assistance, please let me know.

Yours sincerely,

(s) Arthur Goldberg

Secretary of Labor

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

NOV 1 2004

Mr. Curt Sumner
Executive Director
American Congress on Surveying
and Mapping
6 Montgomery Village Avenue, Suite 403
Gaithersburg, Maryland 20879

Dear Mr. Sumner:

The Davis-Bacon Act requires the contractors and subcontractors performing work on covered contracts to pay "**all laborers and mechanics employed directly on the site of the work**" the wage rates determined by the Secretary of Labor to be prevailing for corresponding classes of laborers and mechanics engaged on similar projects in the area, in accordance with the Davis-Bacon wage determination in the contract. The Davis-Bacon Act requires that each contract over $2,000 to which the United States of the District of Columbia is a party for the construction, alteration or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract.

In addition to the Davis-Bacon Act itself, Congress has added Davis-Bacon prevailing wage provisions to approximately 60 laws -- "related Acts" -- under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance. These "related Acts" involve construction in such areas as transportation, housing, air and water pollution reduction, and health. Examples of the related Acts are the Federal-Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act. The application of prevailing wage requirements under a "related" Act depends on the provisions of that law.

Thus, on contracts subject to the labor standards of the Davis-Bacon and related Acts, each laborer or mechanic must be paid at least the appropriate prevailing wage (including fringe benefits, if any), in accordance with the Davis-Bacon wage determination in the contract, for work performed on the "site of the work".

As indicated in the 1993 letter you reference, it has been a longstanding position of the Department of Labor that preliminary survey work, such as the preparation of boundary surveys and topographical maps, is not construction work covered by the Davis-Bacon Act, especially when performed pursuant to a separate contract. Thus, the Davis-Bacon prevailing wage requirements generally would not apply to such survey crew work. (With respect to certain projects receiving federal assistance from the U.S. Department of

Housing and Urban Development (HUD), under the United States Housing Act of 1937 and the Housing Act of 1949, the "development of the project" coverage test is broader and may also cover preliminary survey work.)

Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activity is covered by Davis-Bacon requirements for laborers and mechanics. The determination of whether certain members of survey crews are laborers or mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, an instrumentman or transitman, rodman, chainman, party chief, etc., are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.

Regulations that govern the administration and enforcement of the Davis-Bacon and related Acts are set forth in Part 5 of Title 29 of the Code of Federal Regulations (CFR). The standard Davis-Bacon labor standards clauses are set forth in 29 CFR 5, Subpart A, in section 5.5, and **the definition of the term "laborer" or "mechanic" is stated in section 5.2(m)**. Section 5.2(m) defines laborers and mechanics 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 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. [Emphasis added.]

The regulations set forth in 29 CFR 541, issued under the Fair Labor Standards Act (the "FLSA" – the federal minimum wage and overtime law of most general application), implement the exemption from minimum wage and overtime pay for executive, administrative, professional employees, often referred to as the "white collar" exemption. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis at not less than minimum amounts as specified in pertinent sections of these regulations. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. The "541 regulations" (copy enclosed) include guidance concerning the meaning of the term "primary duty" and discuss the meaning of the phrase "customarily and regularly" in sections 541.700 and 541.701.

As you know, some States and local governments have also enacted their own prevailing wage requirements that apply to state or local contracts. Of course, the requirements of such laws may differ from those of the federal statutes, they apply according to the terms therein, and they are administered and enforced by the respective States (and localities). As the prevailing wage laws set minimum requirements, both federal and state and/or

local prevailing wage requirements may apply simultaneously to any given project, according to the provisions of the applicable laws, bid specifications, and contract provisions.

I trust that this information responds to your inquiry. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Timothy J. Helm
Office of Enforcement Policy
Government Contracts Team

Enclosure

THE UNDER SECRETARY OF LABOR

WASHINGTON

Mr. Vern W. Cartwright
Chairman
Cartwright Aerial Surveys, Inc.
Executive Airport
Sacramento, California 95822

Dear Mr. Cartwright:

This is in response to your letter of July 25, concerning the applicability of the Davis-Bacon Act to members of survey crews who are performing on Federally funded or assisted construction projects.

The policy enunciated in former Secretary Goldberg's 1962 letter reflects the Department's current position with respect to the applicability of the Davis-Bacon Act to members of survey crews. While this position was communicated to all the Federal contracting agencies in All Agency Memorandum No. 39, dated August 2, 1962, it is not embodied in the Department's regulations. The Wage and Hour Division of the Employment Standards Administration has informed me that they are not aware of any Federal court cases or Comptroller General's opinions concerning the applicability of the Davis-Bacon Act to members of survey crews. Also, I have been informed that regrettably we do not have any information as to the position that the individual States take with respect to this issue under their various State prevailing wage statutes. Of course, the Department's policy would only apply to those Federally funded or assisted construction projects which are subject to the Davis-Bacon labor standards provisions.

I trust that this responds to your inquiry.

Sincerely,

Ford B. Ford

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

MAR 22 2013

Elizabeth A. Nadeau, Esquire
Associate General Counsel
International Union of Operating Engineers (IUOE)
1125 Seventeenth Street, N.W.
Washington, D.C. 20036-4707

Dear Ms. Nadeau:

This is in response to your August 4, 2011 request, on behalf of the International Union of Operating Engineers (IUOE) and IUOE Local No. 12, that the Wage and Hour Division (WHD) recognize field surveyors performing on-site work that is functionally integrated with construction subject to Davis-Bacon labor standards as a subclassification of operating engineer that may be listed on Davis-Bacon prevailing wage determinations.

DOL guidance concerning survey crews

The DOL provided guidance concerning the applicability of Davis-Bacon labor standards to survey crews in All Agency Memoranda (AAM) Nos. 16 and 39, dated July 25, 1960 and August 6, 1962, respectively. AAM No. 16 distributed a June 29, 1960 letter issued by Acting Solicitor of Labor Harold C. Nystrom in response to a request by IUOE Locals 3 and 12 for reconsideration of the position expressed in a September 14, 1955 letter issued by Acting Assistant Solicitor Baird concerning the status of survey crew workers under the Davis-Bacon Act. In the 1960 letter, Acting Solicitor of Labor Nystrom observed that:

> In [the 1955 Baird] letter, it was pointed out that survey work was often a pre-construction activity performed under a contract separate and apart from that which actually called for construction within the meaning of the Davis-Bacon Act and related Acts. It was also stated therein that the members of survey crews were engaged in professional or subprofessional work and could not, therefore be considered 'laborers or mechanics' within the meaning the [Davis-Bacon and related] Acts.

Acting Solicitor Nystrom, responding to the request of IUOE Locals 3 and 12, determined that:

> Although the position which we have previously entertained is of long standing we have again undertaken to review the subject and have arrived at some new conclusions.
>
> It is still our position that preliminary survey work such as the preparation of boundary surveys and topographical maps is not a part of construction covered by the Act, especially if performed pursuant to a separate contract. We are prepared, however, to assert coverage of survey work which is undertaken immediately prior to or during

construction which involves laying off distances and angles to locate construction lines and other layout measurements. This includes the setting of stakes, the determination of grades and levels and other work which is performed as an aid to the crafts which are engaged in the actual physical construction of projects.

With respect to the status of particular employees, we agree that the chainmen and rodmen whose work is largely of a physical nature such as clearing brush, sharpening and setting stakes, handling the rod and the tape and other comparable activities are laborers and mechanics within the meaning of the Act. On the other hand, a party chief has duties which would appear to place him in an executive class with overtones of a professional. Such a person always supervises two or more persons on the job .... The party chief also has substantial clerical duties and exercises the arts of the engineering profession. Both of these classifications are, of course, excluded from the group commonly accepted as laborers or mechanics.

The only classification which presents substantial difficulty is that of an instrument man working under a party chief as part of a four man crew. These men may occasionally perform the physical work of rodmen or chainmen. They also may carry and place the instruments as well as operate them. They make the sighting and take and record the readings. They may be called upon to exercise discretion, judgment and skill involving problems encountered in the field and they must be able to read blueprints and make sketches or drawings. Again, on the other hand, while construction is actually in progress they may function only as an aid to the construction workers in such matters as determining the placement and levels of pilings, the placement of steel beams and girders, the location of bolt holes, etc. In the specific area covered by your application [i.e., the request by IUOE Locals 3 and 12], they are members of a union engaged in an apprenticable trade and customarily paid by the hour.

While working under a party chief, instrument men are not employed in a bona fide supervisory position. Neither do they qualify as professionals under Regulations, Part 541, issued under the Fair Labor Standards Act. The tests provided by these Regulations or tests similar to them are quite commonly accepted under both Federal and State laws. Therefore a substantial amount of physical work being involved, we believe it appropriate to regard the instrument men employed under a chief of party as laborers or mechanics with the reservation, however, that a contrary conclusion might be reached in particular cases if the facts and circumstances were different from those reflected in your presentation. Accordingly it is our intention to include in future wage determinations where appropriate, the classifications of 'rodmen', 'chainmen' and 'instrument men (serving under a party chief).

Further guidance was issued in an August 2, 1962 letter from Secretary of Labor Arthur J. Goldberg to the Ohio Society of Professional Engineers, which was widely distributed as an attachment to AAM No. 39, dated August 6, 1962. In that letter, Secretary Goldberg referenced a conference he had held with representatives of the Ohio and National Societies of Professional Engineers on May 29, 1962 and a report submitted by the Ohio Society setting

forth its position that the duties of instrumentmen, rodmen and chainmen were "technical in nature" and "part of the engineering process" and not covered by the Davis-Bacon Act.[1] Upon careful review, with regard to whether the work performed by such persons constitutes construction, alteration, and/or repair, the Secretary determined that:

> Since preliminary survey work merely affects construction without being a part of it, it is our position that such work is not generally covered by the Davis-Bacon Act. On the other hand, 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.

He proceeded to observe that "[c]overage of the individuals performing this work would further depend upon their individual status as laborers or mechanics" and he noted a definitional distinction between the term "laborer" as "one who performs manual labor or labors at a toilsome occupation requiring physical strength as distinguished from mental

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[1] In addition, on July 18, 1962, Solicitor of Labor Charles Donahue discussed the status of survey crews in testimony before the House of Representatives Committee on Education and Labor, Special Subcommittee on Labor, concerning Administration of the Davis-Bacon Act. In its July 1962 hearings, the Subcommittee also heard testimony and accepted extensive materials on this subject for the record from Mr. Roger Loveless on behalf of the National Society of Professional Engineers. Subsequent to the testimony presented by Mr. Loveless, Solicitor of Labor Donahue asserted in his oral testimony, and in the written testimony he submitted for the record, respectively:

> By and large, any preliminary surveys concerning construction are not subject to the Davis-Bacon Act. They are not part of the construction contract. ... Now there are occasions when survey work is done in connection with the construction contract. There are cases where foundations are tested, holes are bored, there are other occasions where the surveys are made of the path of a highway, for example, across the country, directly in connection with construction, and in those cases, only in those cases, we would consider the survey as part of the construction work. [Oral testimony.]
>
> [I]n many cases, survey work is not done as part of the construction contract, ... However, in certain cases such work is done as a part of the construction contract, and accordingly, the status of the members of the survey crews becomes an issue. The question to be resolved is, as the Attorney General pointed out, primarily a factual issue. In certain instances some members of the survey crews perform primarily manual work such as clearing brush and sharpening stakes, and in these cases the Department considers an employee so employed to fall within the definition of the term laborer. In other instances the work of the survey crews is limited to work of a professional or subprofessional character. In such instances survey crew members are not considered to be laborers or mechanics.
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> The Department's interpretation is in agreement with Mr. Loveless' conclusion that survey crews are covered only to the extent to which they perform work of a manual character.

Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 87th Congress, "A General Investigation of the Davis-Bacon Act and its Administration," hearings held in Washington, D.C. July 12, 13, 18, 24, 26, 27, 31, and August 7, 1962, Part 3, pages 806 (oral testimony) and 823-824 (written testimony submitted for the record).

training and equipment" and the term "mechanic" as "any skilled worker with tools, one who has learned a trade."[2] In that context, he further stated that:

> A determination that certain members of survey crews fall within this category depends largely upon questions of fact. This determination, which takes into account the actual duties performed by the employees involved, is primarily the responsibility of the contracting agency.
>
> In those cases where the work of an individual functioning in a survey crew is considered professional or sub-professional in character, this Department has held, in accordance with your view, that one so employed is not a laborer or mechanic within the meaning of the Davis-Bacon Act. On the other hand, where individuals perform primarily manual work, such as clearing brush and sharpening stakes, they would fall within the definition of the term 'laborer'. It is my understanding that situations of the latter kind are not commonplace. However, to the extent that individuals are so employed, they are covered by the aforementioned law.

On numerous occasions since June 1962, the 1962 Goldberg letter has been reasserted as the framework of DOL policy regarding applicability of the Davis-Bacon labor standards to survey crew members employed on projects subject to Davis-Bacon requirements. In a January 10, 1964 letter to the California State Conference of Operating Engineers, then Under Secretary of Labor John F. Henning stated that:

> [T]he Solicitor has reviewed the material which you forwarded regarding the coverage under the Davis-Bacon Act of workmen who, with respect to construction are engaged essentially in the transfer on the job site of lines and grades from blueprints to stakes, monuments, and points for use by various classes of construction workers.
>
> From the particular facts and circumstances presented, the Solicitor has concluded that the duties of rodman, chainman and instrument man, which are described in your presentation, are those of laborers and mechanics under the act, as it has been interpreted in former Secretary Goldberg's letter of August 2, 1962, to the President of the Ohio Society of Professional Engineers. The workmen involved appear to perform predominantly manual work as contrasted with work which is professional or subprofessional in character.

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[2] Secretary Goldberg cited 18 Comp. Gen. 341 as the source for this definitional distinction. The definitions appeared in Comptroller General Decision A-97726, concerning the applicability of the 1912 Eight-Hour law. The full paragraph in the Comptroller General's decision states:

> The terms laborer and mechanic have been defined variously in numerous decisions in the courts, usually in connection with the application of lien statutes, but generally the term 'laborer' is defined as one who performs manual labor or labors at a toilsome occupation requiring physical strength as distinguished from mental training and equipment, while a 'mechanic' is any skilled worker with tools who has learned a trade. *In re Osborne*, 104 Fed. 780. Also see 'Words and Phrases' generally as to laborers and mechanics. Hence, the statute is applicable to every public contract otherwise within its terms which may require the employment of labor by hand or tools for its performance.

> The Solicitor has further indicated that this does not in any way reverse the aforementioned letter of August 2, 1962. There it is recognized that whether workmen come within the compass of the terms 'laborer' or 'mechanic' presents largely a question of fact. Consequently, determinations of coverage may well vary in specific situations.
>
> We shall include prevailing wage rates for the classifications noted above in future determinations for work to be performed in California and Nevada, whenever they are requested by the procurement agency or whenever it is apparent from the work to be performed that such classifications will be used in the construction process.

With regard to survey crews, section 15e20 of the WHD Field Operations Handbook (FOH) currently states that:

> (a) Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activity is covered by DBRA. Under the United States Housing Act of 1937 and the Housing Act of 1949, the "development of the project" coverage test is broader and may also cover preliminary survey work.
>
> (b) The determination as to whether certain members of survey crews are laborers or mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, members of the survey party who hold the leveling staff while measurements of distance and elevation are made, who help measure distance with a surveyor chain or other device, who adjust and read instruments for measurement or who direct the work are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent. [Emphasis added.]

IUOE assertions

You have asserted that the "WHD should start with the premise that workers employed on the 'site of the work' performing work that is functionally integrated with the construction are covered unless they are exempt for a reason specifically contemplated by the [Davis-Bacon] Act." You also have asserted that "based upon its misreading of a series of opinions issued between 1960 and 1964 the WHD has taken the position that only very limited functions performed by survey crews are covered"; that "the WHD has misread the regulatory definition of 'laborer and mechanic' in limiting coverage to workers based on the degree of physical demands of on-site construction jobs"; and that "if the WHD continues to limit coverage to work that is physical or manual, the WHD should nonetheless find that the field surveyors are 'laborers or mechanics.'" IUOE letter, pages 1, 14, 19, and 22.

The regulatory definition of laborers or mechanics, set forth in 29 CFR 5.2(m) states:

> 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. 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.

In this context, you describe the duties of field survey crew members as ranging from very physically demanding work, such as use of heavy sledge hammer to pound in laths, walking over challenging terrain, standing, stooping, bending, and carrying heavy objects (including GPS equipment) to more skilled work involved in executing plans prepared by office surveyors. You further indicate that due to technological changes, the norm is no longer the use of four-person crews including a supervisory member, but rather the employment of two-member crews in which a "party chief" is a lead person who performs the functions also performed by other survey crew members. You further state that no minimum level of formal education beyond a GED is required to become a field surveyor, field crew members are not required to hold a license or certification, and they do not exercise judgment or discretion in executing directions of the office surveyors. You assert that the members of field survey crews should not be generally considered as "professional" or "executive" employees. You also note that the mathematical knowledge needed to perform the work of a field surveyor, along with the physical demands of their work and their use of tools and equipment, are comparable to what is also true for other skilled construction trades workers.

Analysis

Since issuance of the 1960 Nystrom letter, the Department has taken the position that some work undertaken immediately prior to or during construction that is performed by survey crew members may be subject to the Davis-Bacon labor standards on covered projects. Clearly, since issuance of the 1962 Goldberg letter, it has been DOL policy that determinations as to whether certain members of survey crews are laborers or mechanics is a question of fact that must take into account the actual duties performed, and this agency's guidance has consistently held that where individuals perform "primarily manual work, such as clearing brush and sharpening stakes," they would fall within the definition of the term "laborer." We note that the 1962 Goldberg letter, while acknowledging a distinction between "laborers" and "mechanics," focused on duties that warrant requiring individual survey crew members to be considered "laborers." The question of whether members of a survey party might be considered "mechanics" – skilled workers with tools, who have learned a trade – generally has not been the focus of guidance concerning survey crew members who work with, adjust and read instruments to take measurements of distance and elevation, or otherwise measure distances and identify locations. In determining whether a worker (including a member of a survey crew) is a "laborer or mechanic" as defined under the Davis-Bacon Act, 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)." 29 C.F.R. 5.2(m).

The status of survey crew members as laborers or mechanics on projects to which the Davis-Bacon labor standards apply depends on the duties they perform. As you noted in your request for reconsideration of the WHD guidance concerning survey crews, the job titles used in classifying survey crew workers vary geographically. Along with variations in job titles, the duties of the classifications may vary from one area to another. Certain prior guidance issued by the Department concerning survey crews employed on construction projects has indicated that individual members of survey crews whose duties are "primarily professional or subprofessional" would not be considered laborers or mechanics. As is made clear in the definition of the term "*laborer* or *mechanic*," professional employees who meet the requirements for exemption under 29 CFR Part 541 are not laborers or mechanics within the meaning of the Davis-Bacon Act. Available information suggests that the term "sub-professional" encompassed survey crew members employed by engineering firms, including individuals pursuing a course of study to become professional engineers.[3] We believe, however, that a focus on whether survey crew members are "sub-professional" cannot substitute for the central inquiry of whether the duties of a survey crew member performing on-site work that is functionally integrated with construction subject to Davis-Bacon labor standards are primarily physical and/or manual.

As we have not closely examined survey crew classifications and duties in detail in recent years, we believe that it is appropriate to identify and evaluate the extent of physical and manual work performed by the various survey crew classifications in use today. For example, you have suggested that current practices include the assignment of significantly modified and diverse duties to survey crew members who perform various tasks such as rodmen (who traditionally held the rod or leveling staff); the chainman (who uses a chain or other devices to assist in the measurement of distances and elevations); and other field surveyors who adjust and read surveyors' equipment (with an element of clerical work involving the recording of data) and/or possibly direct the work of others (in effect, as working foremen). To the extent

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[3] Mr. Loveless, in his testimony on behalf of the of the National Society of Professional Engineers before the House of Representatives Committee on Education and Labor, Special Subcommittee on Labor, cited above, Part 2, pages 544-545, asserted:

> We think that the Nystrom opinion classifying members of survey crews as 'laborers and mechanics' was based on information that is not truly representative of the duties of theses personnel throughout the country. It is very important that we recognize our subprofessional people for what they are. We are professional engineers and we have laborers and mechanics. In getting our work done today there are the people in between professionals and laborers and mechanics, many of whom we classify as subprofessional. It is important that their contribution be recognized. To take a man with 2 years of college or one who is a licensed surveyor or who may be a recent college graduate and is performing these duties as part of his training program in aspiring to become a professional engineer and classify him as a laborer or mechanic is not good for the country. We have to stimulate and move these people up. The engineers work hand in hand and arm and arm with these technical personnel. ... We would like the Congress to define the classification of these people as subprofessional. I think that it is important countrywide.
>
> What we are saying here is that this work is predominantly of a technical and subprofessional and professional category; that if a contractor uses these to cut brush he shouldn't be using them on such and ... they do not fall into this category: In other words we see no reason under Davis-Bacon to list the wages of instrumentmen, rodmen, and chainmen because if they do what they are supposed to be doing they are not laborers and mechanics.

such survey crew members perform primarily physical and/or manual work on the site of the work in direct support of construction crews, such crew members would qualify as laborers or mechanics within the meaning of the Act and its implementing regulations. Moreover, in determining what constitutes physical and/or manual work, we believe it is appropriate to eschew an unduly narrow interpretation of the types of duties that qualify as physical and/or manual. Tasks such as clearing brush or sharpening stakes, for example, are merely illustrations of physical and/or manual work, and by no means reflect the full range of duties that may be considered physical and/or manual.

As we discussed earlier, WHD has historically acknowledged that individuals who perform primarily physical and/or manual work can be considered to be laborers or mechanics and subject to the Davis-Bacon labor standards when employed on the site of the work immediately prior to and during construction and in direct support of construction crews under covered contracts. As a result of our review in response to your request, steps will be taken to ensure that in the conduct of future prevailing wage surveys and in the processing of requests for additional classifications and rates (conformance requests), appropriate consideration will be given to survey crew workers employed by contractors and subcontractors in work performed immediately prior to or during actual construction in direct support of construction crews; and the Davis-Bacon labor standards will be applied to individuals performing such work when they perform primarily physical and/or manual work (including those workers who use tools or who are performing the work of a trade). For example, section 15e20 of the FOH will be revised to reflect that, consistent with a fact-based analysis, survey crew members who perform primarily physical and/or manual work will be considered laborers or mechanics. More detailed guidance will be issued in the near future to advise the contracting agencies concerning the implementation of this policy.

This letter constitutes a final ruling under 29 CFR 5.13 concerning current WHD policy regarding the applicability of Davis-Bacon labor standards to survey crew members. A petition for review may be filed with the Department of Labor Administrative Review Board pursuant to 29 CFR 7.9.

Sincerely,

Mary Beth Maxwell

Mary Beth Maxwell
Acting Deputy Administrator

MAR 22 2013

MEMORANDUM NO. 212

TO: ALL CONTRACTING AGENCIES OF THE FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: Mary Beth Maxwell
Acting Deputy Administrator

SUBJECT: Applicability of Davis-Bacon labor standards to members of survey crews

This memorandum clarifies the application of Davis-Bacon standards to survey crew members who may be employed as laborers or mechanics on projects subject to the labor standards of the Davis-Bacon and related Acts. This guidance supplements the guidance provided in letters that were distributed as attachments to All Agency Memorandum (AAM) No. 16, dated July 25, 1960, and AAM No. 39, dated August 6, 1962, available at http://www.wdol.gov/aam.aspx.

The Wage and Hour Division (WHD) has historically recognized that members of survey crews who perform 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 or mechanics subject to the Davis-Bacon labor standards. As a result of a review of WHD practices and procedures in applying this policy, and in light of information indicating that the composition and work of field survey crews have evolved with new technology field surveyors use in their work, WHD has determined that steps should be taken to ensure that the policy of recognizing survey crew members as laborers or mechanics is implemented appropriately in the administration and enforcement of Davis-Bacon labor standards on covered projects. The discussion below focuses on appropriate processing of requests for additional classifications and rates (conformance requests), reporting of data during the conduct of future WHD prevailing wage surveys, and the enforcement of applicable rates on covered projects.

To ensure that WHD enforcement policy regarding survey crew members is clear, section 15e20 of the Field Operations Handbook (FOH) has been revised to reflect that survey crew members who perform primarily physical and/or manual work while employed by contractors and subcontractors immediately prior to or during actual construction, in direct support of construction crews, will be considered laborers or mechanics when

employed on the site of the work. The FOH, as revised, addresses applicability of Davis-Bacon requirements to survey crew members as follows:

15e20 Survey crews.

(a) Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activity is covered by DBRA. Under the United States Housing Act of 1937 and the Housing Act of 1949, the "development of the project" coverage test is broader and may also cover preliminary survey work.

(b) The determination as to whether certain members of survey crews are laborers or mechanics is a question of fact. In determining whether a worker is a "laborer or mechanic" as defined under the Davis-Bacon Act, 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). 29 CFR 5.2(m). Such a determination must take into account the actual duties performed. A survey crew member who performs primarily physical and/or manual duties while employed by a contractor or subcontractor in work performed immediately prior to or during actual construction in direct support of construction crew(s) on the site of the work will be considered a laborer or mechanic covered by the DB requirements.

With regard to requests for additional classifications and rates (conformance requests), contracting agencies are advised 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. In order to facilitate WHD's processing of conformance requests, each request should include information describing the duties of the survey crew members employed on the project. In examining whether the proposed wages bear a reasonable relationship to the rates in the applicable wage determination, proposed survey crew classifications should be compared with skilled classifications (excluding laborers, power equipment operators, and truck driver classifications) already listed in the applicable wage determination.

With regard to future Davis-Bacon prevailing wage surveys conducted by the WHD for issuance of new wage determinations, we request that contracting agencies encourage contractors and subcontractors to participate in those surveys by providing data to WHD for workers who performed surveying work immediately prior to or during construction in direct support of construction crews on construction projects in the area being surveyed. Information on upcoming surveys and other information concerning Davis-Bacon prevailing wage surveys is available at http://www.dol.gov/whd/programs/dbra/surveys.htm, and contacts in each of the WHD

Regional Offices regarding such surveys are available by clicking on the map or links above the map at http://www.dol.gov/whd/programs/dbra/regions.htm.

We also note that, as the Davis-Bacon Act requires the Secretary of Labor to determine prevailing wage rates for inclusion in covered contracts based on wage rates paid to "corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed," the classifications used for survey crew members may differ from area to area both in nomenclature (job titles) and in the content of the duties performed by particular classifications. The status of survey crew members as laborers and mechanics on projects to which the Davis-Bacon labor standards apply depends on the duties they perform, as well as whether they are employed by a contractor or subcontractor and whether they are employed on the site of the work immediately prior to or during actual construction in direct support of construction crew(s).

Finally, we note 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." Determination of a survey crew member's primary duty must be based on the facts in a particular case, with the major emphasis on the character of the worker's job as a whole. In this context, when determining the primary duty of a survey crew member it is appropriate to consider the relative importance of the manual and/or physical duties as compared with other types of duties performed by the workers in a particular classification. The amount of time normally spent performing manual and/or physical duties can be a useful guide in determining whether that work is the primary duty of an employee. Thus, survey crew members who normally spend more than 50 percent of their time performing such work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test. For example, if a survey crew member meets the tests for exemption as a professional, executive or administrative employee under the rules established by 29 CFR Part 541, that survey crew member is not a laborer or mechanic as defined under 29 CFR 5.2(m).

NSPS

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May 30, 2013

Seth D. Harris
Acting Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Ave., NW
Washington, DC 20210

Dear Secretary Harris:

The National Society of Professional Surveyors (NSPS), the successor to the American Congress on Surveying and Mapping, is the national voice of the surveying profession in the United States.

We strongly object to All Agency Memorandum (AAM) 212, issued by the Wage and Hour Division on March 23, 2013, regarding the applicability of Davis-Bacon Act labor standards to members of survey crews.

We object not only to the substance of this memorandum, but also to the process utilized by the Department of Labor.

AAM 212 reverses more than 50 years of established and accepted federal policy. The memorandum provides no rationale for the change in policy, cites no recent legislation, and references no court case to explain the basis of this new policy.

The policy in AAM 212 is an affront to the surveying profession. As an organization founded in 1941 to advance the sciences and disciplines within the surveying profession, NSPS believes the classification of members of survey crews as "laborers and mechanics" is detrimental to our profession and an inappropriate demotion of valued and skilled employees.

NSPS administers a "Certified Survey Technician" (CST) program for employees of surveying firms, including those who perform field survey functions. The classification of members of survey crews as "laborers and mechanics" is inconsistent with the CST program and the standard in the surveying community. Moreover, AAM 212 is in direct contrast with the classification of such workers promulgated elsewhere in the Department of Labor and other federal agencies, including the Occupational Employment Statistics (17-3031 Surveying and Mapping Technicians), the Occupational Outlook Handbook (Surveying and Mapping Technicians), the Occupational Information Network, successor to the Dictionary of Occupational Titles, (Code 22521A Surveying Technicians), and the Office of Personnel Management (OPM) General Schedule Qualification Standard (GS 817 Survey Technical Series) for surveying technicians employed by the federal government. None of these federal classifications categorize members of survey crews as "laborers and mechanics".

We also strongly object to the process utilized by the Department of Labor to consider and promulgate this change in policy. Apparently, a request for this change was filed by the International Union of Operating Engineers on August 4, 2011. During 19 months of consideration of that request, the Department of Labor never contacted, informed, nor consulted with NSPS, or any other organization of professional surveyors or employers of survey crews. Moreover, upon the issuance of AAM 212 on March 23, 2013, no notification was provided to NSPS or other employer organizations. There was no public notice, no public hearings, and no other attempt to change longstanding policy in a fair and open manner. This lack of transparency gives the appearance of a closed-door, back-room deal that is inconsistent with every reasonable standard of openness, fairness, or consideration of the point of view of all affected stakeholders. We believe the spirit, if not the letter, of the Administrative Procedures Act, Regulatory Flexibility Act, and Paperwork Reduction Act was not honored.

We urge the immediate rescission of AAM 212. Moreover, we hereby request a meeting with you to discuss this very important matter.

Respectfully,

Curtis W. Sumner

Curtis W. Sumner, PLS
Executive Director