



National Society of Professional Surveyors

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U.S. Department of Labor
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Wage and Hour Division Staff:

The National Society of Professional Surveyors (NSPS) is the voice of the professional surveying community in the US and its territories. Through its affiliation agreements with the respective state surveying societies, NSPS has a strong constituency base through which it communicates directly with lawmakers, agencies, and regulators at both the national and state level. NSPS monitors and comments on legislation, regulation, and policies that have potential impact on the activities of its members and their clients and collaborates with a multitude of other organizations within the geospatial community on issues of mutual interest.

NSPS strongly opposes the proposed rule, "Updating the Davis-Bacon and Related Acts Regulations" (Regulatory Information Number (RIN) 1235-AA40) as it applies to members of survey crews.

Members of land surveying crews working on federally funded construction projects are not "laborers and mechanics" as that term is applied in the Davis-Bacon Act. The proposed rule would reverse more than 60 years of policy and practice. This is an arbitrary and capricious action on the part of the Wage and Hour Division that has no merit, inaccurately reflects the reality of surveying practice, deviates from longstanding application of the law, and has no basis or justification based on legislative enactment or history, case law, or any other governmental action.

Secretary Arthur Goldberg, under President John F. Kennedy, in 1962 ruled that members of survey crews were EXEMPT from Davis-Bacon. He noted that such workers are covered ONLY to the extent to which they "perform manual work, such as clearing brush and sharpening stakes," which he said, "are not commonplace."

The proposed rule fails to acknowledge the Goldberg standard. Rather, it suggests a new standard to apply to members of survey crews as laborers or mechanics under the Act, which is unprecedented and is outside of the boundaries of the Act and the regulations.

The proposed rule provides: "The Department has historically recognized that members of survey crews who perform primarily physical and/or manual work on a DBA or Related Acts 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.”

This is not true. The Department has historically recognized that members of survey crews are not laborers or mechanics subject to the Davis-Bacon labor standards. The Department has long recognized that members of survey crews do not perform primarily physical and/or manual work.

The Federal Acquisition Regulation (48 CFR § 22.401) defines a “laborers or mechanics” as 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 proposed rule blatantly misrepresents the history and the standard by which members of survey crews would be covered by the Act. It fails to recognize the reality of surveying practice, in which members of survey crews are engaged in activities that are predominately intellectual, analytical, and judgmental in nature, NOT physical or manual. Staking by survey crews on a job site is 1% the physical and manual task of putting a stake in the ground and 99% collecting and analyzing data and making judgements for determining where to set a stake.

The classification of members of survey crews as “laborers and mechanics” is contrary to virtually every other government and private sector classification, including those of the Labor Department itself and the Office of Personnel Management (OPM) for surveying technicians employed by the federal government.

A survey technician working for a federal agency is subject to OPM position classification 817 - Survey Technical Series. The OPM classification states: “This series covers positions that require primarily the application of a technical knowledge of surveying methods, equipment, and techniques in the measurement or determination of distances, elevations, areas, angles, land boundaries, and other features of the earth's surface. Specifically included are topographic, hydrographic, geodetic, land, control, and construction surveying.”

It goes on to establish these individual occupational requirements:

“Basic Requirements:

Specialized Experience (for positions at GS-4 or equivalent and above): Specialized experience is technical work which provided the knowledge and skills needed for work in the type of surveying involved. It must have required the use of the pertinent instruments and techniques of surveying. Examples of qualifying specialized experience include, but are not limited to, work as an engineering technician, soil conservation technician, or construction inspector.

or

Education and Training:

For GS-3 or equivalent: Successful completion of 1 year of postsecondary education that included at least one course in surveying, engineering, industrial technology, construction,

physics, drafting, forestry, geography, navigation, cartography, physical science, or mathematics.

For GS-4 or equivalent: Successful completion of 2 years of postsecondary education that included at least 12 semester hours in any combination of courses such as those shown above for GS-3 or equivalent.

For GS-5 or equivalent: Successful completion of a full 4-year course of study leading to a bachelor's degree from an accredited or pre-accredited institution (a) with major study in an appropriate field of surveying, engineering, construction, or industrial technology, or (b) that included at least 24 semester hours in any combination of courses such as those shown above for GS-3 or equivalent."

These standards do not describe positions of laborers or mechanics, nor workers who perform physical and/or manual work. Rather, it demonstrates that survey technicians are engaged in work that is more intellectual, analytical, and judgmental in nature. If rather than being federal employees, these workers were employed by contractors or subcontractors, they clearly would be considered exempt from Davis Bacon and Related Acts.

Moreover, the Bureau of Labor Statistics provides a similar, high level description of survey technicians that a reasonable review would conclude are not laborers or mechanics and do not perform primarily physical and/or manual work.

"17-3031 Surveying and Mapping Technicians

Perform surveying and mapping duties, usually under the direction of an engineer, surveyor, cartographer, or photogrammetrist, to obtain data used for construction, mapmaking, boundary location, mining, or other purposes. May calculate mapmaking information and create maps from source data, such as surveying notes, aerial photography, satellite data, or other maps to show topographical features, political boundaries, and other features. May verify accuracy and completeness of maps."

The Occupational Outlook Handbook, published by the Bureau of Labor Statistics, describes the work of survey technicians:

"Surveying and mapping technicians collect data and make maps of the Earth's surface. Surveying technicians visit sites to take measurements of the land. Mapping technicians use geographic data to create maps. They both assist surveyors, and cartographers and photogrammetrists.

Surveying technicians typically do the following:

Visit sites to record survey measurements and other descriptive data

Operate surveying instruments, such as electronic distance-measuring equipment (robotic total stations), to collect data on a location

Set out stakes and marks to conduct a survey

Search for previous survey points, such as old stone markers

Enter the data from surveying instruments into computers, either in the field or in an office

Surveying technicians help surveyors in the field on teams known as survey parties. A typical survey party has a party chief and one or more surveying technicians. The party chief, either a surveyor or a senior surveying technician, leads day-to-day work activities.

After data is collected by the survey party, surveying technicians help process the data by entering the data into computers."

<https://www.bls.gov/ooh/architecture-and-engineering/surveying-and-mapping-technicians.htm#tab-2>

Again, this does not describe the work of laborers or mechanics and does not define an occupation to perform primarily physical and/or manual work.

The proposed rule is arbitrary and capricious inasmuch as there has been no legislation, court ruling, Comptroller General decision or other governmental action that changed Secretary Goldberg's interpretation. In fact, there have been rulings upholding the exemption of surveyors from the Davis-Bacon Act.

A 2010 Connecticut Superior Court case ruled against its state 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, <https://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 (<https://www.in.gov/dot/div/contracts/conmemo/07-02.pdf>).

Congress recognized and clarified that surveying is a professional service in 1988 when it passed legislation specifically including surveying in the "Brooks Act" (40 USC 1101 et seq), a qualifications based selection process in federal procurement, which requires federal agencies to select firms for these services on the basis of demonstrated competence and qualifications, rather than the lowest bid. The law provided a clear classification of surveying as a professional service and indicated a relationship between surveying and other design professional services, such as engineering and architecture. The Federal law defines "architectural, engineering and related services" as:

- (a) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered or certified to provide such services as described in this paragraph;
- (b) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration or repair of real property; and
- (c) such other professional services or an architectural or engineering nature, or incidental services, which members of the architectural or engineering professions (and individuals in their employ) may logically or justifiably perform including studies, investigations, surveying, mapping ... and other related services."

The qualifications-based selection process for professional architectural, engineering, and surveying services has also been enacted into state law in more than 45 states, and is endorsed in the American Bar Association (ABA) Model Procurement Code for State and Local Government.

Regulations implementing this law (Federal Acquisition Regulations, 48 CFR 36.601) also refer to surveying as a professional service.

"The Government shall publicly announce all requirements for surveying and mapping services that are associated with research, planning, development, design, construction,

alteration, or repair of real property and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices."

Prior to enacting this law, Congress ordered the Office of Federal Procurement Policy to study contracting in professional services and develop

"... a plan to increase opportunities to achieve full and open competition on the basis of qualifications, quality, and other factors in the procurement of professional, technical and managerial services." (SEE Public Law 98-369, section 2753). In its instructions to the agency, Congress ordered consultation "with experts in such fields as ... surveying and mapping and other professional services..." (SEE H. Rept. 98-861)

The report issued pursuant to this law included in its appendix a list of "professional services" to which its recommendations apply. That list included "Land Surveys, Cadastral Services, Photogrammetric Services". (SEE "Study of Professional Services Contracting", Report to the Congress, Office of Federal Procurement Policy, Office of Management and Budget, Executive Office of the President, 1985)

Congress recognized that the work of survey technicians as an integral part of professional surveying services. The relationship between the field work of survey technicians and professional services of an architectural, engineering, and surveying nature, was illustrated by Senator Jennings Randolph (D-WV) on the Senate floor during the 1972 debate on the legislation that became the original Brooks Act:

"Ask 10 A/E firms to bid on the design of a particular facility and many agencies will take the easy way out and select the low bidder. Under such circumstances, we may end up with a technically capable architect or engineer, but one who, for lack of experience or because of a desire to stay within his bid reduces the time spent on field surveys or in the preparation of detailed drawings, or in providing inspection services. As a result, the government may have saved itself a half of one percent to the cost of construction, operation, or maintenance." (SEE: 118 Cong. Rec. 36188)

All 50 states license individuals to engage in the professional practice of surveying. The state legislatures that enacted licensing laws, and the state licensing boards that implement these laws and administer the licenses, recognize the role survey technicians play in support of the work of licensed professional surveyors. All 50 state laws require a licensed professional surveyor to be in "responsible charge" of the work of technicians under the surveyor's ultimate supervision. This relationship is integral to the definition of the "Practice of Surveying or Land Surveying," as defined in the model law of the National Council of Examiners for Engineering and Surveying (NCEES), which defines that term:

"shall mean providing professional services such as consultation, investigation, testimony evaluation, expert technical testimony, planning, mapping, assembling, and interpreting reliable scientific measurements and information relative to the location, size, shape, or physical features of the earth, improvements on the earth, the space above the earth, or any part of the earth, and utilization and development of these facts and interpretation into an orderly survey map, plan, report, description, or project. The practice of surveying or land surveying includes, but is not limited to, any one or more of the following:

- (a) Determining the configuration or contour of the earth's surface or the position of fixed objects thereon by measuring lines and angles and applying the principles of mathematics or photogrammetry.
- (b) Performing geodetic surveying which includes surveying for determination of the size and shape of the earth utilizing angular and linear measurements through spatially oriented spherical geometry.
- (c) Determining, by the use of principles of surveying, the position for any survey control (non-boundary) monument or reference point; or setting, resetting, or replacing any such monument or reference point.
- (d) Creating, preparing, or modifying electronic or computerized data, including land information systems, and geographic information systems, relative to the performance of the activities in the above described items (a) through (c).
- (e) Locating, relocating, establishing, reestablishing, laying out, or retracing any property line or boundary of any tract of land or any road, right of way, easement, alignment, or elevation of any of the fixed works embraced within the practice of engineering.
- (f) Making any survey for the subdivision of any tract of land.
- (g) Determining, by the use of principles of land surveying, the position for any survey monument or reference point; or setting, resetting, or replacing any such monument or reference point.
- (h) Creating, preparing, or modifying electronic or computerized data, including land information systems, and geographic information systems, relative to the performance of the activities in the above described items (e) through (g)."

This model law, which has been enacted in several states, demonstrates the work performed by technicians performing tasks in support of the licensed surveyor, and the fact that such activities are not those of laborers or mechanics and are not primarily physical and/or manual work.

The U.S. Army Corps of Engineers manages and administers the largest construction program in the federal government and is the single largest construction agency in the United States. It, too, recognizes surveying as a professional service, with important tasks carried out by technicians on survey crews in support of licensed professionals, which are intellectual and analytical in nature, and not primarily physical and/or manual work.

(SEE EP 715-1-7, Appendix I:

https://www.publications.usace.army.mil/portals/76/publications/engineerpamphlets/ep_715-1-7.pdf)

"USACE defines surveying, mapping or geospatial services as follows:

a. In USACE "surveying and mapping services" includes activities associated with measuring, locating and preparing maps, charts, or other graphical or digital presentations depicting natural and man-made physical features, phenomena, and legal boundaries of the earth, such as:

(1) Topographic Engineering Surveying, which includes acquisition of topographic oriented surveying and mapping data for design, construction, master planning, operations, as-built conditions, precise structure stability studies utilizing conventional and electronic

instrumentation, photogrammetric, remote sensing, inertial, satellite, and other survey methods as applicable.

(2) Hydrographic Engineering Surveying, which includes acquisition of hydrographic oriented surveying and mapping data for design, construction, dredging, master planning, operations, and as-built conditions utilizing conventional and electronic instrumentation, and photogrammetric, remote sensing, inertial, satellite, side scan sonar, subbottom profiling, and other surveying methods as applicable.

(3) Land Surveying, which includes property and boundary surveys, monumentation, marking and posting, preparation of tract descriptions, etc., utilizing conventional, electronic instrumentation, photogrammetric, inertial, satellite, and other survey methods as applicable.

(4) Geodetic Surveying, which includes 1st, 2nd, and 3rd order horizontal and vertical control surveys, geodetic astronomy, gravity and magnetic surveys utilizing conventional, electronic instrumentation, photogrammetric, inertial, satellite, and other survey methods as applicable.

(5) Cartographic Surveying, which includes acquisition of topographic and hydrographic oriented surveying and mapping data for construction of maps, charts, and similar products for general use other than those for engineering, construction, and/boundary or geodetic purposes - utilizing conventional and electronic instrumentation, photogrammetric, inertial, satellite, and other survey methods as applicable.

(6) Mapping, charting, and related geospatial database development, which includes the design, compilation, digitizing, attributing, scribing, drafting, printing and dissemination of EP 715-1-7 29 Feb 12 I-2 printed or digital map, chart, and related geospatial database products associated with planning, engineering, operations, and related real estate activities utilizing photogrammetric, geographic information systems, and other manual and computer assisted methods as applicable.

(7) Technical Operations, such as aerial photography, are not considered surveying and mapping services unless they are an integral part of a broader-scoped contract that results in a surveying or mapping product.

b. The performance of surveying and mapping services will not be limited to registered or licensed architect-engineer firms, but will also include surveying and mapping professionals such as licensed surveyors, geodesists, and cartographers."

99% of surveying firms are small business. Expansion of Davis-Bacon to survey crews will result in a costly, enormously burdensome, and inefficient mandate. Small business surveying firms cannot afford multiple payrolls or payroll administrators to keep track of "market" compensation versus government-mandated "prevailing" rates from project to project.

Finally, the old adage "if it ain't broke, don't fix it" applies to this matter. 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. Not only does the work of survey crews not fall in the category of primarily physical and/or manual work, but there is no economic justification for expanding the definition of laborer or mechanic in order to apply the Davis Bacon Act to members of survey crews. According to data from the Labor Department's Bureau of Labor Statistics (BLS), Survey Technicians earn more than Construction Helpers, the occupational category the Wage and Hour Division most

commonly used when AAM 212 was in place from 2013 until it was repealed in 2020 by AAM 235:

Mean annual wage:

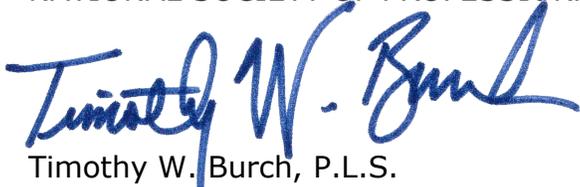
Survey Technicians - \$49,810

Helpers, Construction Trades - \$37,340

CONCLUSION: The language in the proposed rule regarding survey crews should be stricken and the final rule should state: "In recognition of longstanding policy and standard surveying practice, members of survey crews are not laborers and mechanics as defined herein and are therefore exempt from the Act and regulations, except to the extent to which such workers perform manual work, such as clearing brush and sharpening stakes which are not commonplace".

Sincerely,

NATIONAL SOCIETY OF PROFESSIONAL SURVEYORS



Timothy W. Burch, P.L.S.
Executive Director

cc: John Palatiello, John "JB" Byrd, Mark Sargent (NSPS)