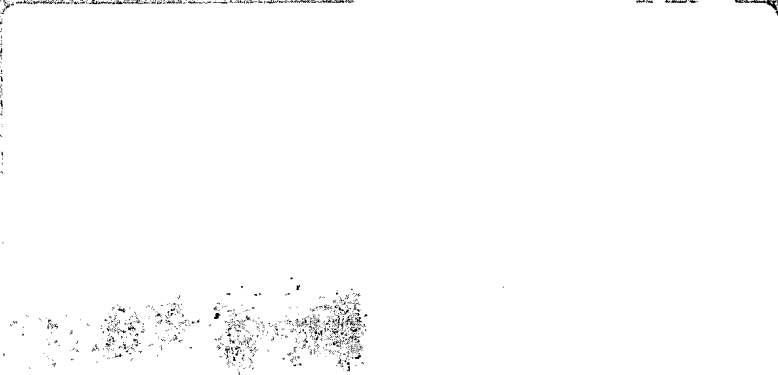


Public Sector Construction and The Underground Economy



The National Alliance for Fair Contracting is a non-profit labor and management organization that is dedicated to the advancement of fair competitive contracting in the public sector construction industry.



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INTRODUCTION

In an era of Federal, State and local governments scrambling to balance budgets by cutting spending and increasing taxes, there is a little noticed scam being perpetrated on the American people. This scam is costing the American taxpayers billions of dollars, and if left unchecked, it could ultimately make criminals of otherwise legitimate public sector construction contractors.

The scam we speak of **reduces** tax revenues to all levels of government, **decreases** social security payments, **diminishes** unemployment insurance premiums, and **adds** to workers' compensation insurance problems. Like most scams, it is illegal. Unlike most scams, there are those who, under the guise of saving taxpayers' dollars, want to repeal the only law that stands in the way of wholesale fraud upon the American public.

The scam is employers cheating on prevailing wage laws, without fear of getting caught or suffering no consequences if they are caught. A nation's legal system is sure to suffer if the law of the land can be broken with impunity. Such is the case with prevailing wage laws. The public construction bidding system allows unscrupulous contractors to obtain construction projects using the scam as a competitive advantage.

The purpose of this document is to present a factual case regarding prevailing wage laws, and their impact on government contracting and the economy.

More importantly, we hope this document will provide the uninitiated with the tools to objectively analyze prevailing wage laws in the face of constant, unsubstantiated rhetoric calling for changes or repeal.

Highlights of this document are:

- ▼ Cost estimates of the Davis-Bacon Act and prevailing wage laws are so varied they defy belief. Where are the documented cost studies?
- ▼ Documented proof that higher wages do **not** increase construction costs.
- ▼ How the underground economy works.
- ▼ Industry attempts to stop the underground economy.
- ▼ Economic costs of status quo.
- ▼ Prevailing wage laws provide economic stimulus.
- ▼ Improving enforcement without increasing budgets.

Studies by various independent and interested parties are presented in this report to support the conclusion that prevailing wage laws can provide a strong stimulus for the national and local economies. These studies are based upon factual data routinely collected by federal and state governments. These data offer documentation to dispel the misleading and unproven rhetoric surrounding prevailing wage laws.

This report should prove beyond reasonable doubt that there are **no** economic data to prove lower

wages translate into lower construction costs, and that strong, enforced prevailing wage laws can prove to be a sound economic investment.

We're not the only entity that realizes this fact. For example, a 1992 study by the New York State Labor Commissioner entitled "Strategy for More Effective Enforcement of Prevailing Wage" sums up New York's recognition of the enforcement problem:

"As with any law, enforcement is the key. In recent years, the Department of Labor's Bureau of Public Work has been faced with a situation where the number of complaints has vastly increased, the number of field investigations has significantly decreased, and the willingness of contractors to dispute cases to the furthest possible point has made cases much more complex and time-consuming.

This set of facts has combined to place the Bureau in the position of inspecting fewer contractors overall, and, conducting limited routine or program inspections. Unscrupulous contractors are well aware of this situation and it is our belief that they are using this opportunity to disregard the prevailing wage statutes and underpay their employees.

In addition, the letting of public contracts by the State of New York, local governments, public authorities and public benefit corporations is governed by several statutes requiring that bids be let to the 'lowest responsible bidder.' However, the phrase 'lowest responsible bidder' is not statutorily defined."

Costs of Prevailing Wage Laws Undocumented

When opponents of prevailing wage laws call for repeal or changes, they continually use the rhetoric that it will save the government millions of dollars because high wage rates would be reduced. To the uninitiated, this rhetoric is believable because it seems logical that cutting wages means cutting construction costs. If it is that simple, then ask yourself why the opponents can't get their rhetoric straight and why can't they produce any documented evidence to support their claims?

For example, for more than 20 years there have been numerous studies and pronouncements on the impact of the Davis-Bacon Act and state prevailing wage laws on construction costs. These studies and pronouncements are so varied that their conclusions cannot possibly be substantiated.

Some of these pronouncements are summarized below:

1. The General Accounting Office (GAO) published a report in 1971 citing inflated construction costs of between 5 to 15 percent due to Davis-Bacon requirements;
2. The Associated General Contractors (AGC) in a report titled, "Davis-Bacon Fuels Inflation in Vermont," asserted Davis-Bacon inflated project costs by approximately 35 percent;
3. A Federal Highway Administration (FHA) memo (Subject: Davis-Bacon and

Highway Construction, January 20, 1976) stated, in part:

"Although the effect of the Davis-Bacon Act on highway construction costs is estimated to be considerable, it is difficult to specifically isolate this one factor (emphasis added). In studies conducted to date, the presence of State prevailing wage laws in the majority of the States, general economic conditions, the variability in the supply and demand for labor and high way construction and the inconsistencies in the Act's administration, among other things, contributed to the problems of making a quantitative identification of an individual factor, the Davis-Bacon Act;"

4. A 1983 estimate by the U.S. Department of Labor said the Act cost the Federal Government nearly \$500 million a year in added labor costs (*New York Times*, May 1, 1986);
5. The Congressional Budget Office (CBO) estimated that the Davis-Bacon Act costs the Federal Government about \$900 million a year (*New York Times* editorial, May 15, 1986);
6. According to testimony by the Institute for the Study of Labor in Society - Construction Research Section, Indiana University, before the Indiana House-Senate Interim Labor Study Committee on October 1, 1987, "A review of the

literature concerning the impact of prevailing wage laws on costs indicated that the Associated Builders and Contractors assumption of a 20 percent figure for savings in Indiana is wholly unreliable."

7. Senator Trent Lott (R-MS) in early 1993, in a one-page report regarding "painless" budget cuts, stated that the government could save \$6.2 billion by repealing the Davis-Bacon Act (*Washington Post*; 3/7/93). No facts to date have been utilized to back-up the Senator's statement;
8. In a briefing paper on Davis-Bacon dated January 18, 1993 prepared by the Cato Institute - Center for Constitutional Studies, that organization simply writes "Davis-Bacon costs the federal government billions (of dollars) every year." In this 16-page report not one statistical number, fact or cost data was used to back-up this claim; and
9. On March 22, 1993 Senator Larry Craig (R-ID) introduced legislation that called for repeal of the Davis-Bacon Act because it would "reduce the federal deficit by \$3.29 billion in fiscal years 1994-98;" the Senator's bill was short-lived, as it was soundly defeated on the Senate floor a few days later.

As can be readily seen, the studies of the supposed added costs of Federally financed construction due to the Davis-Bacon Act are

vastly wide-ranging and subjective. The Congressional Budget Office (CBO) director Robert D. Reischauer delivered testimony on May 4, 1993 and stated, "higher wage rates do not necessarily increase costs....If these differences in wages were offset by hiring more skilled and productive workers no additional construction costs would result."

There is no study available that shows construction costs are cheaper when there is no prevailing wage.

Opponents of the Davis-Bacon Act neglect other cost variables of a construction project, as well, when doing their cost studies. **One fact, however, stands out: No two studies or pronouncements are the same and none of them are supported by sound economic data.**

compared the cost to build a mile of highway in high-wage states versus the cost to build a mile of highway in low-wage states. This

report dispels the myth once and for all that lowering construction wages will lower construction costs. In fact, it will do just the opposite. There is no study available

that shows construction costs are cheaper when there is no prevailing wage.

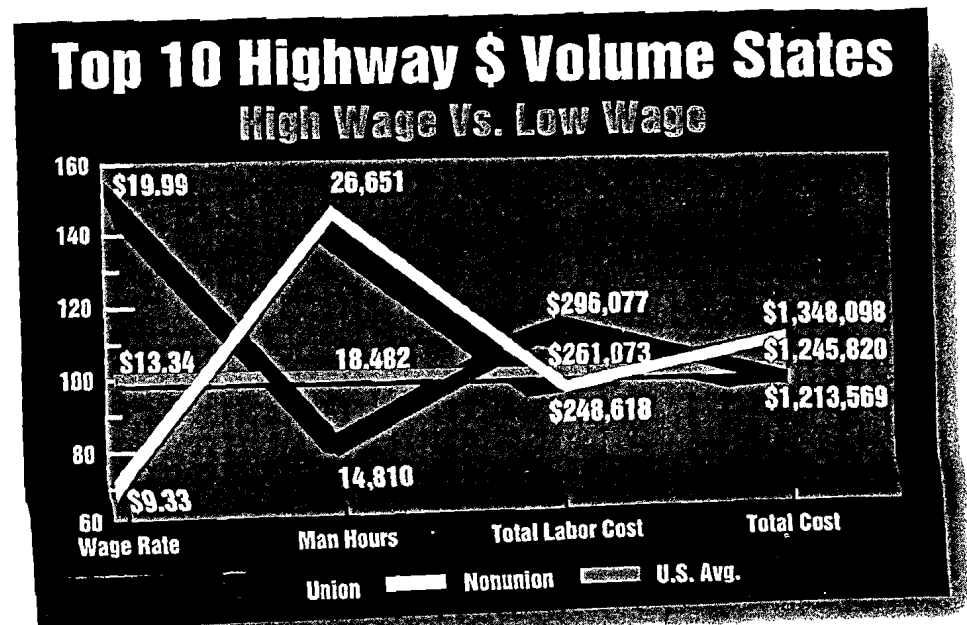
The IUOE study included the years 1987 through 1990 for the ten states with the highest dollar volume of federally-aided construction. A summary of the study follows:

- ▼ The high-wage states completed the work with 56% fewer man-hours;
- ▼ Florida, Georgia, Texas and Virginia (low-wage states) required 136 million manhours to build 5,109 miles of highway;
- ▼ California, Illinois, Michigan, Missouri, New York and Pennsylvania (high-wage states) required 77 million manhours to build 5,216 miles of highway; and
- ▼ The high-wage states built 74.4 more miles of roadbed and 32.8 more miles of bridges for \$557 million less with a wage package more than **double** the low-wage states.

These facts alone should question the wisdom of legislators who want to reduce a worker's wages under the guise of saving on construction costs. This is proof positive that higher paid workers are more productive and actually

Prevailing Wage Laws Do Not Increase Construction Costs

First of all, it is a myth that eliminating a state prevailing wage law or the Davis-Bacon Act will lower wages and thereby lower construction costs. This can be confidently stated based on a study compiled by the independent statistical analyst firm of Ruttenberg, Kilgallon & Associates, Inc., commissioned by the International Union of Operating Engineers (IUOE), which used data provided directly by the Federal Highway Administration. This 1992 study



Source: Int'l Union of Op. Engineers & Fed. Highway Administration

reduce construction costs. And remember, the data used to compile this study was provided by the U. S. Federal Highway Administration.

How the Underground Economy Works

Each year federal, state, and local governments award thousands of construction contracts requiring the payment of prevailing wages. These construction contracts are estimated to total well over \$60 billion annually, with payrolls for on-site construction workers running \$15 to \$20 billion. For each of these thousands of construction contracts, a prevailing wage is issued requiring the payment of minimum wages for such classifications as Carpenters, Iron Workers, Power Equipment Operators, Laborers and others as might be employed on the project.

The sheer magnitude of contracts and the dispersion of construction workers precludes visual inspection by the government to insure that each and every worker is paid the proper prevailing wage. This has led to widespread violations which are further encouraged by ineffective civil and criminal penalties. In such a climate, the underground economy thrives and the nation's tax base gets significantly eroded.

Here are some of the ways that unscrupulous contractors use the system to win government contracts, and line their pockets at the expense of the taxpayer (i.e., the underground economy):

- ▼ Misclassifying higher skilled workers as "laborers." This practice can reduce a contractor's hourly costs by \$4.00 to \$5.00 per hour per worker, and more. On major projects employing hundreds of workers, lost wages and taxes would amount to millions of dollars.
- ▼ Paying workers at less than prevailing wages and not getting caught by the contracting agency. Certified payroll records abound with this method of cheating. One such example of this practice was found during construction of the Washington, D.C. subway system where a trucking company's certified payrolls reflected an **underpayment** of \$4.00 per hour, per worker.
- ▼ Submitting falsified certified payrolls indicating they pay workers the proper rate when in practice they do not. (To stop this practice payroll stubs must be compared with the payrolls.)
- ▼ Classifying skilled workers as "helpers" or "tenders." This practice was found, among other projects, on the Trident Submarine Base in Kings Bay, Georgia. In a one-month period on that \$96 million project, the contractor certified that it paid 129 workers at the much lower "mason tenders" rate and 125 bricklayers at "bricklayers" rate, a difference of \$5.00 per hour. How can there be more "mason tenders" than there are "bricklayers?"
- ▼ Reducing payroll costs by diverting a portion of the hourly rates to bogus benefit plans. For example, one Delaware contractor was caught deducting health care contributions from workers then laying them off before their coverage began. Many enterprising companies are today advertising such services in the construction industry.
- ▼ Working employees off the clock. Recently, a New Jersey contractor on a \$92 million project was caught starting workers one-half hour early **without** pay.
- ▼ Misclassifying employees as "independent contractors." For example, a New Jersey contractor's bid documents reflected 17 subcontracts to 17 minority truckers on two separate projects, totalling \$260,000 for each trucker. If these 17 individuals are working for the same contractor on two projects, are they really "independent?" **No** taxes or payroll costs were paid or withheld on over \$4 million in this single instance.

In these few examples, which are not isolated cases, millions and millions of dollars are being lost to the government. Adding to the overall problem is the attitude of those responsible for enforcement. To our knowledge, none of the contractors in these examples were investigated, fined or otherwise punished for their questionable practices. In fact, the U.S. Navy actually allowed the contractor to change classifications on previously submitted

certified payrolls on the Trident project, and no charges or penalties were incurred by the use of “independent” contractors on the New Jersey job.

A 1985 report by the Inspector General of Housing and Urban Development (HUD) who performed an audit of HUD’s monitoring and enforcement of the Davis-Bacon Act stated, “HUD’s staff did not fully comply with its responsibilities for administering and enforcing labor standards... Therefore, workers on HUD projects were not assured of receiving appropriate wages and benefits.”

In another audit the HUD Inspector General concluded:

“The government has lost substantial tax revenues because of undisclosed labor wage payments. This occurred because of ineffective labor standards enforcement and lack of staff training (emphasis added). Because staff did not have the knowledge to establish quantifiable measurements of labor hours required to complete phases or types of project construction, they had no objective criteria to signal illegal wage under-reportings. As a result, nearly all underpayments investigated on

HUD projects were disclosed only after workers complained or filed for unpaid benefits.

We found a direct relationship between labor standards violations and construction deficiencies.

“A 1985 HUD report states: The government has lost substantial tax revenues because of undisclosed labor wage payments. This occurred because of ineffective labor standards enforcement and lack of staff training.”

The violations and related construction deficiencies were not identified and corrected because HUD inspections were deficient (emphasis added). As a result, poor quality multi-family projects could be overinsured and excessive maintenance expenses [were] incurred

correcting defective construction. Management needs to reemphasize the importance of inspections in protecting HUD’s interest and increase monitoring of inspector performance.

Because there was no system to identify repeat violators, contractors with labor violation histories continued to work on HUD projects and underpay workers (emphasis added). The Regional Labor Relations Office should establish a system to identify repeat violators.

Proactive labor standards monitoring and enforcement procedures were not carried out (emphasis added). Wage interviews were not done or were done

inadequately. Additionally, wage interview and payroll discrepancies were not identified or acted on when found. Timely submission of weekly payrolls was not being enforced and when submitted, payroll reviews were not always timely. Finally, program participants were not obtaining evidence of apprenticeship registrations.

Willful violators were not properly reported to management and referrals were inadequately monitored. This occurred because of perceptions that referrals do not result in effective actions and management’s failure to develop written monitoring procedures. As a result, willful violators continued to work on HUD projects and Labor Relations staff had insufficient information concerning referral status or results.” (emphasis added)

Unfortunately, the problems identified with enforcement at HUD are only too typical of those in the other agencies having responsibility for Davis-Bacon and state prevailing wage enforcement.

These are just a few examples of violations that have been uncovered. As you can see, the amounts involved in these violations are substantial and represent only a fraction of the violations that occur. In today’s climate it is highly likely that about 95% of the cheaters never get caught, which gives you an idea of the amount of revenue being lost at all levels of government.

Construction Industry Initiatives

Unfortunately, lack of enforcement of the Davis-Bacon Act and prevailing wage laws has become more rampant in the '90s. Born of frustration, and driven to create a climate of fair and equitable competition in the construction industry, organizations are springing up across the country to insure compliance with prevailing wage laws. Realizing prevailing wage laws are useless if they are not enforced, these "fair contracting" and "work preservation" groups have been created to, in effect, do the work of the government by

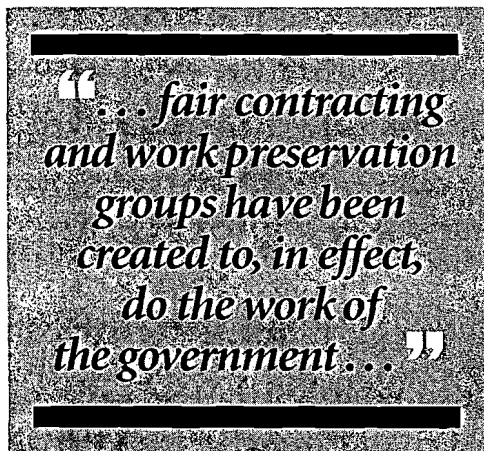
investigating and reporting violations of prevailing wage laws. These "enforcement" groups are usually funded by both labor and management. Currently there are nearly 40

such full-time groups in operation around the country as well as over 170 other organizations interested in fair contracting through their membership in the National Alliance for Fair Contracting (NAFC).

However, even the most successful of these groups have been stymied because they are forced to turn over their violations to the very same governmental agencies who are not enforcing the laws in the first place. These fair contracting groups are spending millions of dollars on

enforcement only because they are being told that agencies do **not** have the will, nor the financial resources or personnel to enforce the laws or pursue its violators.

While all of these organizations should be commended for their efforts, the fact remains that private enforcement groups are being funded by both labor and management to do a job that the Department of Labor and procurement agencies are required to do by law. Even when these groups conduct investigations which uncover violations they still must turn to a reluctant government to recover back wages and fringe benefits for workers.



The very first wage enforcement program in the country, the Painting and Drywall Work Preservation Fund, Inc. (WPF), based in Oakland, California, was established in 1977 by repre-

sentatives of the International Brotherhood of Painters and Allied Trades, the Painting and Decorating Contractors Association and the Drywall Contractors Association. In the fifteen years since it began operating in California, the WPF has caused over \$15 million dollars of public works—in the painting and drywall taping trades alone—to be taken away from law-breaking contractors and awarded to responsible low bidders.

In fiscal year 1992, with just two full-time and two part-time

employees, and with construction work down throughout California, the WPF managed to turn around \$2.5 million dollars in contracts in northern and central California to responsible contractors.

In 1976 California enacted its first debarment statute for willful violations of state apprenticeship law. In the 17 years the law has been in effect, only 23 contractors have been debarred. Fourteen of these (or 60%) were the direct result of WPF complaints filed with the State Apprenticeship Division.

Another pioneering enforcement group is the Center for Contract Compliance (CCC), based in southern California and covering eleven counties. It has expanded over the past few years to encompass five offices. Some of the highlights and accomplishments of the CCC in the years 1990 and 1991 were:

- ▼ handled 3,408 worker complaints in 1990;
- ▼ protested 61 bids in 1990 with 11 successful protests;
- ▼ protested 93 bids in 1991, of which 27 were successful;
- ▼ had three contractors debarred in California in 1990, and one in 1991, with two of those serving prison time for cheating workers;
- ▼ the dollar volume of successful bid protests was \$116 million in 1990 and \$161 million in 1991;
- ▼ investigated 989 job sites in 1990 and 1,124 job sites in 1991.

These are just some of the accomplishments and highlights of southern California's Center for Contract Compliance. However, the job it is doing should be done by the Department of Labor and various procurement agencies under the law.

Another enforcement group is the Foundation for Fair Contracting (FFC) of Eastern Pennsylvania, which also covers New Jersey. In early 1992 the FFC investigated and discovered that the general contractor and subcontractors at an elementary school project in Monmouth County were violating the New Jersey Prevailing Wage Act for failing to submit certified payroll records to the school district. After meeting with the FFC the local school board notified all contractors on the project that payments would be withheld until they complied with the law.

The FFC once discovered that a contractor working on a major project in Camden, New Jersey had recently been debarred from performing work in that state! After notifying New Jersey's Department of Labor, the FFC met with the Camden County Board which said the contractor would be immediately termi-

“From a 1989 Cal-Berkeley study: the contractor's employment practices resulted in a loss of construction payroll, that could have gone to local workers, of \$36.5 million over the duration of the job and a loss of spending in the local community of approximately \$18.6 million.”

revealed that the entire project was being built by carpenters! No laborers, no masons, no ironworkers, etc. And not only that, but these carpenters were being paid various wages. Meetings with county officials are currently underway to resolve these misclassifications and to pay the workers the wages they should have received.

One of the very first enforcement groups that was formed and one of the most successful is the Foundation for Fair Contracting in northern California, which covers 56 counties. It is jointly funded by labor and management and was begun in 1985. During the summer months it employs up to 60 field monitors to investigate and visit construction sites.

From March to August, 1992 the Foundation monitored 159 job sites and investigated 1,475. It

nated. (That's some law... you get debarred by a state for cheating and your reward is that the same state who kicked you out gives you another job!)

A recent FFC investigation of the certified payrolls of a New Jersey county's Administration Building - Lab and Service Area project

visited various federal, state and local government agencies 328 times. It filed 69 complaints over this time period regarding the improper payment of wages. Of these 69 complaints, a total of \$141,035 was collected by the state to uphold the law, otherwise that \$141,035 would have gone into the pockets of the cheating contractor.

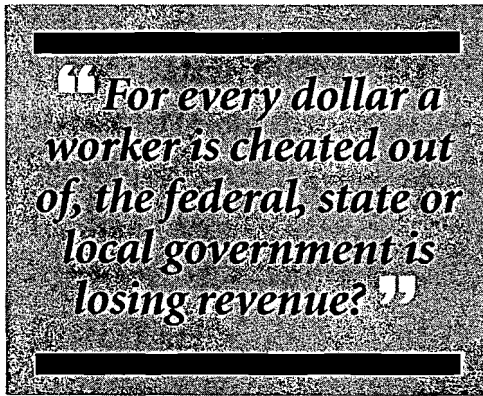
Economic Costs of Status Quo

inevitably, in an economic recession there is renewal of the old rhetoric that millions of dollars could be saved for the taxpayers by repealing the Davis-Bacon Act. Even the *Wall Street Journal* has jumped on the Anti-Davis-Bacon bandwagon, albeit with a glaring lack of documented facts.

In a recent editorial the *Wall Street Journal* stated that the Davis-Bacon Act is an “obstacle” to the rebuilding of the neighborhoods of south-central Los Angeles after the recent riots there. As we all know, when a newspaper as respected as the *Wall Street Journal* states something in an editorial, literally millions of people take the opinion as fact. The editorial continued with the same old undocumented rhetoric that seems to flourish whenever someone or something wants to repeal the Act or decrease the pay of construction workers. Experience has shown that low wages, whether on private or government financed projects, actually costs the taxpayer a lot of money.

A detailed study of what happens economically to a local community when workers are employed at **less** than the local prevailing rate which was prepared in September, 1989 for the Out-of-Area Worker Task Force of the Contra Costa County (California) Board of Supervisors. It is a case in point.

It was written by the Center for Labor Research and Education Institute of Industrial Relations at the University of California, Berkeley.



The construction project in question was the \$350 million modernization of a steel plant in Pittsburg, California, a small Bay Area town with a population of approximately 33,000. A dual owner, which included a company from South Korea, proceeded to hire out-of-town workers at reduced wage rates. It was documented that these out-of-town workers eventually totaled 43% of the workforce. For purposes of the study an out-of-town worker was defined as a person whose place of residence prior to employment on the steel mill project was greater than 75 miles from the county.

According to this Cal-Berkeley study the contractor's employment practices resulted in a loss of construction payroll, that could have gone to local workers, of \$36.5 million over the duration of the job and a loss of **spending** in the local community of approximately \$18.6

million. These losses resulted in the county **losing** approximately \$385,655 in local sales tax revenue alone, according to the study.

Additionally, workers who were brought in from outside California temporarily enrolled approximately 150 more students in the county school system at a cost to the state of approximately \$365,000. This increased enrollment aggravated the already overcrowded school system. The study even suggested that

the steel plant contractor should have paid the county for the local school overcrowding. Now honestly, would the average citizen ever think that just because a contractor hired out-of-town workers that this would increase the operating costs of the local schools? These are a few of the economic spin-offs of paying less than the prevailing wages in a local community.

What happened in Pittsburg, California is precisely one of the reasons for enactment of the Davis-Bacon Act in the first place.

With this in mind, the National Alliance for Fair Contracting (NAFC) decided to take a look at infrastructure investments on the basis of economics involved in order to present a clearer picture of the impact of lower wages on state and federal revenues. Unless we are missing something, the **lower** the wage rate paid to a worker, the **fewer** federal and state taxes, social

security taxes, unemployment taxes, etc., are collected.

Furthermore, the less disposable income an individual has, the less is spent on goods and services. The less spent on goods and services, the less jobs.

For this reason, the NAFC engaged the Construction Labor Research Council (CLRC), an employer funded organization that among other things assembles economic statistics on collective bargaining agreements, to do a study to determine what economic impact highway labor costs have on federal and state government revenues.

Prevailing Wage Laws Provide Economic Stimulus

To show the impact of government revenues on wages, the NAFC asked the Construction Labor Research Council (CLRC) to look at the same ten states as in the IUOE study. The stated objective was to find out what kind of return is generated for every dollar spent on wages in these states.

The results of the study, entitled "Highway Labor Costs and Government Revenues," clearly proves that building highways and bridges is a sound economic investment. Not only does such an investment create jobs and reduce unemployment costs, but it actually produces a return to the states for every dollar spent on labor.

Given these facts it makes you wonder why Congress and the states don't use infrastructure investments to stimulate the

economy by authorizing expenditures in line with needs. As you will soon see, the money would be well spent.

In the majority of cases, states contribute only a small portion of a federally financed construction project, so it stands to reason their return in the form of income and sales taxes should be substantial. Also, the federal government gets a return for every dollar it spends on labor costs to build a highway through income taxes, social security taxes and federal unemployment taxes. The total return to the federal and state governments is not only the taxes they collect but also the jobs they create, which result in substantially reduced costs for unemployment benefits.

To put all this in perspective, here are some facts from the CLRC study to prove that infrastructure investments are good for the economy, and lowering a wage rate does **not** provide any economic benefit:

- ▼ The average annual earnings in the high-wage states was \$32,624 (hourly labor cost X 1600 hours) versus \$14,908 in low-wage states;
- ▼ Federal income and social security taxes were 29% higher in the high-wage states than in the low-wage states (\$77,987 vs. \$60,667 per mile of highway);
- ▼ State revenue generated per mile of highway were 20% greater in high-wage states than in low-wage states (\$20,378 vs. \$16,916);

▼ Each dollar spent on highway construction for labor generated an average of \$2.40 in other economic activity, such as spending for basic needs like housing, food, etc. This \$2.40 is known as the “multiplier;” and

▼ Using this multiplier and assuming a state’s cost share of a project is 10%, the high-wage states returned \$1.60 for each dollar spent on labor while \$1.48 for each dollar spent was returned to low-wage states (multiplier x state’s revenue ÷ state cost share).

The bottom line is that if a state or anyone else were told that it could get a 50% to 60% return on an investment, would it put up the money? The real question should be, who wouldn’t?

There should be no argument that investment in infrastructure is good for the economy. It provides on-site and off-site construction jobs whose workers generate other jobs by spending their money for goods and services. It provides revenue to the federal and state governments in the form of taxes and a reduction of unemployment and social programs costs’.

Why do states and the federal government continue to look the other way when employers cheat workers out of their pay when it is obvious that for every dollar a worker is cheated out of, the federal, state or local government is losing revenue?

Once people really understand the economics of infrastructure

the opposition will largely disappear as people realize that lower wages do not really result in lower costs.

(For a copy of the CLRC and IUOE studies, please call NAFC toll free at 800-292-9268.)

Improving Enforcement

The most effective enforcement tool for any law is voluntary compliance due to the fear of getting caught and facing harsh penalties. If you could steal money from your employer without fear of reprisal the government could never hire enough policemen to catch all the thieves. What’s worse, if you got caught stealing money and all you had to do is pay it back, with no further penalty, chances are there would be many more thieves around than there are now.

Unfortunately, under many current prevailing wage laws a contractor can illegally underpay his/her workers with little or no fear of getting caught. And if caught, the worst thing to happen to the contractor is for him/her to pay the money back, without further penalties.

To show there is no deterrent to violating the prevailing wage laws, the NAFC in 1991 sent a letter to all 50 states requesting a list of their debarred contractors. Of the 16 states responding only **two** states had a list of debarred contractors.

So with little fear of getting caught, being debarred, or encountering penalties, it stands to reason that legitimate contractors are being forced to cheat along with the illegitimate ones in order to remain competitive.

Hiring more compliance officers is not the only answer because there are simply too many construction projects and construction workers to adequately monitor.

We believe we have soundly made the case for the economics of strong prevailing wage laws. Now the task is to improve upon the enforcement of these laws without requiring heavy additional expenditure of scarce financial and manpower resources. To accomplish this objective the NAFC requested each prevailing wage enforcement organization from throughout the country to provide specific recommendations to enhance enforcement of prevailing wage laws **without** adding to budget problems.

The following initiatives and the suggested language to implement them are generic in nature and are intended to be used where needed in order to supplement and improve existing prevailing wage laws.

Rights of Employees

Under the Davis-Bacon Act and many prevailing wage laws employees do not have the right to sue employers to collect proper wage payments. There are

those who will argue that giving a worker the right to go to court to collect wages will place an undue burden on the court system. On the other hand, can anyone imagine a corporation not being allowed to go to court to

collect payment for services rendered?

The rationale behind giving a worker a private right of action is not to encourage lawsuits, but to act as a deterrent and increase voluntary compliance due to the fear of court action. Giving workers the following private right of action will increase compliance at no cost to the enforcement agency:

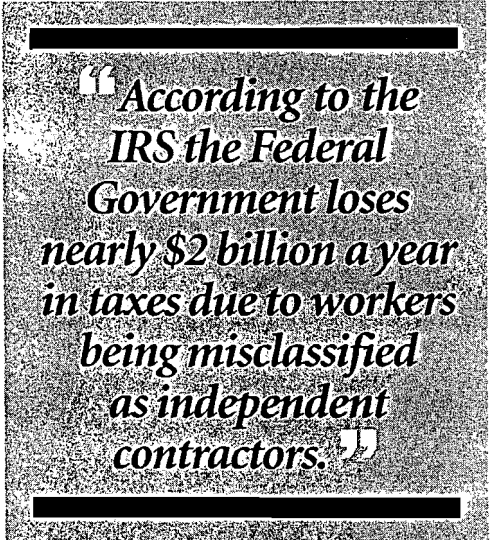
All interested parties who have alleged violations of any of the provisions of the <<*>insert name of prevailing wage law*>> shall, after exhausting available administrative remedies, have a private right of action to seek legal redress in any appropriate court of law.

Defining the Term "Employee"

One of the easiest ways to circumvent prevailing wage laws is to misclassify an employee as an "independent contractor." Under this scheme a contractor issues an Internal Revenue Service Form #1099 showing an amount paid to a worker at years-end in which **no** withholding deductions are made for federal, state and unemployment taxes. In addition to no payroll taxes withheld, the contractor pays no workers' compensation premiums and since the worker is not considered an employee, he/she is not included on certified payrolls.

Currently the IRS uses 20 common-law tests to determine if a worker is an employee or truly an independent contractor. The primary determining factor is the contractor's control of the employee while on the job site. Those familiar with the construction process know in virtually every case a worker is under the constant direction of the contractor and should never be considered an "independent." If an individual is truly independent then he/she should be required to bid on a scope of work and be considered a subcontractor.

According to the IRS the Federal Government loses nearly \$2 billion a year in taxes due to workers being misclassified as independent contractors. Estimates are not available as to the financial drain on state and local governments due to this oft-used



"According to the IRS the Federal Government loses nearly \$2 billion a year in taxes due to workers being misclassified as independent contractors."

loophole. You can bet that it is substantial.

Here again, compliance can be achieved by changing the complicated definition of "independent contractor" to one that addresses the uniqueness of the construction industry; that is to eliminate the term from being utilized in construction and either consider the worker as an employee or a legitimate subcontractor. This can be accomplished by a simple change in definition that may not require legislative action:

An "employee" as used in this section is any individual performing construction or construction related work on any construction project subject to the <<insert name of prevailing wage law**>> regardless of any contractual relationship alleged to exist.**

The general contractor and any subcontractor shall be jointly responsible to provide all employee insurance required by any Federal, State or Local statute during the period of the performance of construction activities covered by the Act.

The general contractor and any subcontractor shall be jointly and severally liable to insure that all payroll taxes are withheld and other required deductions are withheld from employee wages and remitted to the appropriate taxing and regulatory agencies as required by law.

Duty of Contractor

As previously stated it is an extremely time consuming process to file a wage complaint, conduct an investigation, and bring about a resolution to the complaint. The very nature of the construction industry dictates that the complaint settlement process should not take longer than the life of the construction project itself.

Under current law a worker files a complaint for improper wage payment and then the enforcement agency processes the complaint by determining if the alleged violation occurred. While sometimes this takes years to resolve, the contractor keeps the contested money, knowing that in the worst possible case full restitution will be made to the worker.

We believe that workers who show documentation of violations should not be subjected to this lengthy and unworkable process. Without eliminating a contractor's right to due process, we believe the contractor has an obligation to show that no violation occurred. Therefore, upon presentation of documented proof of wage payment violations, the burden of proof should be shifted to the contractor allegedly making the violation by adding the following language:

Any contractor performing work on a construction contract covered by this Act shall upon the filing of a complaint with the enforcement authority

containing evidence of a violation of any of the Act's provisions have the burden of proof of compliance with any of the provisions in question.

Upon receipt of such complaint, the enforcement authority shall withhold an amount sufficient to cover the amount of the complaint plus any penalties, interest, fines or fees. Failure to present proof of compliance within <<insert number**>> calendar days shall be cause for debarment.**

Prevailing Wage Appeals Board

In order to expedite enforcement of prevailing wage violations in a fair and equitable manner, prevailing wage laws should have an administrative body and procedure to rule on such cases. This would provide a contractor with due process by individuals familiar with the construction industry and with prevailing wage laws. Such a board should be set up along the following lines:

There is hereby created in the <<insert enforcement agency name**>> a tripartite appeals board consisting of an equal number of members representing the public, the construction industry, and labor organizations for the purpose of assisting the agency in administering the <<**insert name of prevailing wage law**>>.**

This Board is created for the purpose of hearing and deter-

mining grievances arising out of the administration of this <<*>insert name of prevailing wage law*>>.

This Prevailing Wage Appeals Board shall have the power and duty to:

- (1) Hear and determine any grievance or appeal arising out of the administration of the <<*>insert name of prevailing wage law*>>.**
- (2) Promulgate rules and regulations necessary to carry out the duties placed upon the Board by this Act: Provided, however, that any such rules and regulations shall provide for notice of filing of grievances and appeals, public hearings, right of representation and all other procedures required by due process of law.**

In the event that the Appeals Board shall determine, after notice and hearing, that any person or firm has failed to pay the prevailing wages and that such failure was deliberate, it shall thereupon notify all public bodies of the name or names of such persons or firms and no contract shall be awarded to such persons or firms or to any firm, corporation or partnership in which such persons or firms have any interest until three years have elapsed from the date of the notice to the public bodies

aforsaid. The Appeals Board may, in addition thereto, request the Attorney General to proceed to recover the penalties for the enforcement agency which are payable under this Act.

Penalties

The Davis-Bacon Act and many prevailing wage laws currently have no really effective penalties for violations. Lack of sufficient penalties combined with non-existent enforcement is actually encouraging cheating and is exacerbating the problem of enforcement.

Put yourself in a contractor's position: You're in a business that ignores prevailing wage laws and when ignored there are no penalties, no fines and no fear of being jailed. What if an individual could embezzle money from his/her employer and the only thing that happens when they get caught is to pay the money back? No jail time. No fine. No loss of job. Just pay the money back. Ridiculous? Well, it's the same thing with prevailing wage compliance.

If a prevailing wage law has penalties or fines, the enforcement agency collects the money and turns it into the general treasury. Then, that same agency goes through the budgetary process to get appropriations to run the agency. We believe the enforcement agency would have a greater incentive toward enforcement if penalties and fines were applied to offset their own budgets.

One of the most important (and presently lacking) components of an effective prevailing wage law is the penalties which may be levied for noncompliance. The following provision is explicitly harsh for violators. This is necessary to maintain a sufficiently adequate deterrent to any contractor tempted to cheat. In the sample provisions the penalty is limited to "deliberate" violations. This language provides some measure of protection to contractors who occasionally make an inadvertent mistake:

Any contractor who is found to have deliberately violated any provision of the Act shall be required to make restitution to the aggrieved employee(s) of the monies owed, plus interest at the current rate, plus expenses incurred by the aggrieved employee(s) in bringing the enforcement action. Additionally, the contractor will pay to the agency with enforcement authority an amount equal to treble the monies owed to the aggrieved employee(s).

Recordkeeping Requirements

In the construction industry today it is normal practice for a contractor to change company names as circumstances warrant. Since there is no requirement for enforcement agencies to maintain records of prevailing wage law violations it makes it easy to continue in business even though a single employer might have accumulated numerous violations. In fact, it has been known

for a debarred contractor only to change names, continue to bid and be awarded work under another name.

In today's computer age it is relatively inexpensive to maintain a list of violators and violations which would make enforcement that much easier. Such recordkeeping requirements should be made available to the public and contain the following:

The agency responsible for enforcement of the <<*>insert name of prevailing wage law*>> shall keep and maintain computerized records of all complaints, violations, fines, penalties and debarments of contractors and subcontractors. Such records shall include company name, owners, partners, directors and officers and shall be kept and made available for public examination for a period of not less than three years after completion of the construction project.

Certification of Fringe Benefit Plan

Under the Davis-Bacon Act there is no requirement to report the name of a fringe benefit plan or the benefits provided under the plan. All a contractor is required to report is that a deduction is being made for fringe benefits.

In recent years the construction industry has seen the advent of "bogus" fringe benefit plans that charge hefty administrative fees and severely restrict workers access to their own money. This

practice allows a contractor to reduce payroll costs because in many cases this deduction amounts to 25% of the total prevailing wage. For this reason, contractors are willing partners with plans that deduct large sums of money for fringe benefits that will never benefit the workers.

Since a greater percentage of payroll now goes to fringe benefits we believe it is imperative to require contractors to provide more information on where the workers money is going and whether or not it is truly a 'bona fide' fringe benefit. The following would accomplish this goal:

The agency responsible for enforcement of the <<*>insert name of prevailing wage law*>> shall be required to investigate and approve of the fringe benefit plans to insure the contribution accrues to the benefit of the covered worker.

Each contractor or subcontractor performing work on a construction project covered by the <<*>insert name of prevailing wage law*>> shall, as a part of the certified payrolls, list any fringe benefit contribution, the name of the fringe benefit plan, and the address and telephone number of the location receiving the contribution.

Responsible Bidder

The term "responsible bidder" under federal procurement regulations means only that a contractor has a bid bond and performance bond. A contractor

can be deemed responsible even though it may have violated prevailing wage laws, violated safety regulations, or failed to install materials in accordance with contract specifications. In other words, under current law a contractor can be "responsible" even though it is really irresponsible. Responsible bidder under current procurement regulations is a contradiction in terms. This must be changed to the following true definition:

Any contractor or subcontractor (including its' owners or partners and immediate family members, officers and directors) or any firm in which such person(s) has an interest who have been found in violation of any contract specifications during the previous three (3) years on any federally funded or assisted or state funded or assisted construction project, or any firm in which such person has an interest, may not be considered a responsible bidder for any contracts to be let by this state or locality, and may not be awarded a publicly funded contract for construction.

Certified Payrolls

As previously stated in this report certified payrolls continue to be a source that can and should be utilized for enforcement purposes. As we pointed out, however, the various governmental agencies charged with reviewing these records do not do a very competent job in discovering discrepancies and, in fact, more

often than not do not even review the payroll records.

To compound the difficulties in obtaining and reviewing certified payrolls the federal government has, over the years, restricted access to these records or it delays access by moving as slowly as it possibly can regarding Freedom of Information Act (FOIA) requests. Unfortunately, recent cases and the subsequent court decisions have prohibited the public from obtaining certain information contained in these payroll records.

Due to the restrictions, delays, censoring of various information, etc., that are commonplace regarding access to certified payrolls, it is imperative that some type of language be developed and implemented to insure easy and unobstructed access to these important documents. The following is suggested:

Certified payroll records shall be submitted in accordance with the <<insert name of prevailing wage law>> attesting that the appropriate wage rates and fringe benefits shall be paid in accordance with this Act and its regulations.

All certified payroll records, as submitted by the contractor or subcontractor shall be a matter of public record. Failure to submit certified payrolls as prescribed may result in withholding of progress payments for construction.

Access to Records and Project Sites

Presently, fair contracting associations have no standing for conducting investigations other than that afforded a private citizen. In most instances these organizations are doing the work of state agencies charged with that responsibility. States should formally recognize the service these organizations provide by granting them the authority necessary to perform their work. This should include access rights as well as other investigative authority. After all, these enforcement groups are enhancing federal and state revenues and should be given the ability to carry out their stated purpose of fair competitive bidding. Providing such access will enhance the contracting agency's responsibility to enforce prevailing wage laws. The suggested language is:

Any private entity duly recognized by <<insert name of state enforcement agency>> engaged in activities related to the enforcement of <<insert name of prevailing wage law>> may be delegated have the same authority to investigate as afforded to the state authority charged with responsibility for enforcement.

Conclusion

These suggested legislative amendments are provided in an attempt to change current thinking on prevailing wage laws and to passing strong, enforce-

able prevailing wage laws which are a good investment in your state and community.

This document can be used to assist in passing prevailing wage laws, fight repeal of state laws, and aid in greater enforcement of existing laws. Obviously, all recommended changes must be adapted to suit the needs and political realities of each state.

Traditionally, introduction of, or changes to, prevailing wage laws bring about opposition by contractors who want to maintain the status quo. Those who object are those who increase their profits at the expense of workers and taxpayers, and who continually hide behind the same old unsubstantiated rhetoric regarding the Davis-Bacon Act.

The National Alliance for Fair Contracting deals with and supports legitimate contractors who recognize the need and benefit of strong prevailing wage laws. These legitimate contractors know that the continued fair competitive bidding process is at stake, and that honest contractors must step forward to preserve the process. If you desire assistance from legitimate contractors to testify on prevailing wage laws in your state, or need other assistance, please contact the NAFC at 1-800-292-9268.

Remember, those who oppose enforceable prevailing wage laws have a hidden profit-motivated agenda and use the "cost" smokescreen for public support. Don't let them get away with it!