May 28,2002

BY FACSIMILE AND OVERNIGHT MAIL

Mr. John Morall
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Room 10235
725 17th Street, N.W.
Washington, DC 20503

Re: Proposed Reform of Davis-Bacon Act and Service Contract Act Regulations to: (1) Permit the Crediting of Employee Benefits Paid by Self-Insured Programs toward Prevailing Wage Determinations: and (2) Raise the Contract Threshold to $75,000

Dear Mr. Morall:

I. Summary of Position

I am writing, on behalf of the Council for Employment Law Equity ("CELE"), to nominate regulations currently being enforced by the U.S. Department of Labor ("DOL") for review and reform. In particular, the CELE is concerned about the federal regulations implementing the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.,* and the Service Contract Act, 41 U.S.C. § 351 *et seq.*

Specifically, the treatment of self-insured/self-funded employee pension and benefit plans under the current regulations is inappropriate and unnecessary as a matter of national public policy because it disallows applicable credit toward the fringe benefits requirements of relevant Prevailing Wage Determinations. Furthermore, the process under which such plans are determined to be "bona fide" is *much* more burdensome on non-union contractors than on union contractors, resulting in a substantial – and unjustified – bias in favor of unionized contractors.

The CELE urges the Office of Management and Budget ("OMB") to review and revise these regulations to permit the crediting of employee benefits paid by self-insured company programs to be applied toward Prevailing Wage Determinations.

To update these regulations is necessary, and would recognize that the current landscape on employee pensions and benefits is radically different (and improved) since the Davis-Bacon Act regulations affecting the treatment of fringe benefits were adopted in 1964, and since the Service Contract Act's identical regulations were parroted in 1967 at the time the Service Contract Act was enacted.

Among other changes in the field of employee pensions and benefits nearly 40 years later is the undeniable fact that self-insuredlself-fundedplans are now a widely accepted and highly effective fixture in the non-union sector. The disparate treatment of self-funded plans artificially prevents non-union companies from taking the appropriate deductions under government labor standards – with the unnecessary, inappropriate, and unintended consequence of decreasing competition, driving up the costs of government contracts, and penalizing non-union employers (the companies who have self-funded plans). By increasing competition for government contracts, especially from the more cost-effective non-union sector. the reforms the CELE advocates would save the federal government hundreds of millions of dollars in the next three-to-five years.

The inequity of disallowing credits for self-insured/self-funded plans toward Prevailing Wage Determinations is perpetuated by outdated regulations which are pertinent to a different time and a different employee pension and benefits landscape. This inequity is costly, unfair, and discriminatory – *without* an appropriatejustification or basis.

In fact, regulations which have the effect of significantly favoring union plans have the impact of destroying the "level playing field'' in government contracting. There may have been a time long ago when that was politically palatable – but that time surely is *not* today, and surely is *not* this Administration.

Moreover, the Davis-Bacon Act and Service Contract Act regulations are particularly obsolete and inappropriate as organized labor continues its dramatic private-sector decline in the Twenty-First Century (unions now represent approximately seven percent of the *competitive* [excluding "monopoly industries" such as utilities and urban mass transit] private-sector work force), and unionized contractors are less and less accessible in more and more markets.

The Davis-Bacon Act and Service Contract Act regulations' treatment of self-insured programs and self-funded plans is antiquated and obsolete. Reform is both necessary and appropriate. There is no compelling reason why self-funded employee pension and benefit plans should not be able to fully credit such benefit payments toward Prevailing Wage Determinations by the U.S. Department of Labor.

II. Background on the CELE

By way of background, the CELE is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices. The CELE is dedicated to promoting such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large.

The CELE regularly files *amicus curiae* briefs in the federal and state courts on employment and labor issues of broad concern to the employer community, and otherwise attempts to positively and constructively influence the policy-making and consideration of national issues of importance in the employment area, such as through the filing of comments in regulatory proceedings to various federal agencies.

111. The Service Contract Act

The Service Contract Act applies to every contract entered into by the federal government or the District of Columbia when the principal purpose of the contract is to provide services in the United States through the use of service employees. Under the Service Contract Act, service employees performing government contract work covered by that law must be paid the prevailing wage and fringe benefits determined by the Secretary of Labor. The required wage rates and fringe benefits are specified in the Service Contract Act's "Wage Determinations" applicable to the contract. In today's competitive environment, many contractors – like employers generally throughout the United States economy – provide significant pension and benefits to their employees, but these are often provided from self-funded plans.

This is *particularly* true since the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), which had an appropriate impact of substantially expanding the implementation of self-funded/self-insured plans. For contractors of the significant size necessary to compete for – and perform on – many federal contracts, such plans are extremely common.

Under DOL's current regulations, if a contractor has a self-funded/self-insured health and welfare benefit plan, it is not generally considered to be a "bona fide" plan and/or equivalent benefit for purposes of the law. 29 C.F.R. § 4.171. In order to be considered a "bona fide" fringe benefit for purposes of the Service Contract Act, "a fringe benefit plan... must constitute a legally enforceable obligation" which meets certain rigorous criteria set out in the implementing regulations. 29 C.F.R. § 4.171(a). These criteria include, but are not limited to: (1) the provisions of the plan must be in writing and be communicated to effected employees; (2) contributions must be made pursuant to the terms of the plan; (3) the primary purpose of the plan must be to provide for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, supplemental unemployment benefits, and the like; and (4) the plan must contain a formula for determining the amount to be contributed by the contractor and a formula for determining the benefits for each of the employees participating in the plan. 29 C.F.R. § 4.171(a)(1)–(6).

DOL takes the view that self-funded/self-insured benefit plans are *not* normally considered "bona fide" plans for purposes of the Service Contract Act. There are circumstances, however, under which the DOL Administrator can approve such a plan and permit a contractor to credit benefits provided under the plan toward the Service Contract Act requirements. However, these requirements can be onerous and subjectively applied. Section 4.171(b)(2) states, in pertinent part:

> A contractor may request approval by the Administrator of an unfunded self-insured plan in order to allow credit for payments under the plan to meet the fringe benefit requirements of the Act. In considering whether such a plan is bona fide, the Administrator will consider such factors as whether it could be reasonably anticipated to provide the prescribed benefits, whether it represents a legally enforceable commitment to provide such benefits, whether it is carried out under a financially responsible program, and whether the plan has been communicated to the employees in writing.

29 C.F.R. § 4.171(b)(2). If a self-insured plan meets these difficult criteria, the Administrator, in his or her discretion, may approve the plan and allow the contractor to credit the benefits awarded under the plan towards the contractor's obligations. However, the process is not only lengthy and cumbersome, there is – in effect – a presumption *against* approval of such exceptions. Furthermore, the Administrator's discretion is broad and unrestrained, and historically has frequently been affected by political and labor-management-relations considerations, particularly in a union-friendly Administration.

Even if a self-funded/self-insured plan meets the stringent requirements and attains "bona fide" status, such plans are treated differently than other bona fide plans as DOL will only accept the actual paid claims as legitimate plan costs that can be charged to the contract.

With outside-funded/self-insured plans, DOL will accept costs charged to the trust for plan administration as legitimate costs that can be charged to the contract. Furthermore, DOL will accept costs charged to the trust for plan administration as legitimate costs that can be included in the monthly premium charged for the coverage for fully insured plans. The unequal treatment for similar services penalizes some contractors for providing similar benefits under a self-funded/self-insured plan instead of using an insurance provider.

Therefore, the CELE respectfully urges the OMB to review 29 C.F.R. §§ 4.171 and 4.172, to seek comments and implement additional rule-making, and to reform and rectify this disparate and inequitable treatment.

IV. The Davis-Bacon Act

The Davis-Bacon Act provides prevailing wage and fringe benefits protection to non-government workers. It requires the payment of prevailing wages and fringe benefits to laborers and mechanics employed by contractors and subcontractors engaged in federal construction projects. The Davis-Bacon Act covers all contracts over $2,000 which call for the construction, alteration, and/or repair – including painting and decorating – of public buildings or public works, as well as other construction work financed from federal funds under statutes containing Davis-Bacon provisions. All covered contracts must contain a wage determination issued by the Secretary of Labor.

Like the Service Contract Act, the Davis-Bacon Act treats self-funded plans differently even when the plan is determined by the Secretary of Labor to be a "bona fide" fringe benefit plan under 29 C.F.R. §§ 5.28-29. Contractors and subcontractors seeking credit under the Davis-Bacon Act for costs incurred under these plans must request specific permission from the Secretary under 29 C.F.R. § 5.5. Contractors administering bona fide, self-funded/self-insured plans are treated unfavorably with regard to the crediting of the fringe benefits provided under the contract because these contractors do not use insurance providers. When similar, financially responsible benefit plans are provided, the treatment as to crediting the costs associated with the administration of these benefits should be the same. Therefore, the CELE respectfully urges the OMB also to review and revise 29 C.F.R. §§ 5.5, 5.28-29 to rectify this unnecessary and inappropriate disparate treatment.

V. Contract Thresholds

Another clear indication of the Davis-Bacon Act's outdated application to today's government-contracting landscape is the aforementioned $2,000 threshold for applicability.

Are there *any* federal government contracts in 2002 for less than $2000? In 1936, when the Depression-era Davis-Bacon Act was passed, $2,000 may have been an appropriate contract amount threshold. Sixty-six years later, it is not.

The same logic is applicable to the Service Contract Act and its $2,000 contract amount threshold for applicability, adopted in 1967 verbatim from the Davis-Bacon Act's provisions.

The CELE strongly endorses a raising of the contract amount threshold from $2,000 to $75,000 for both the Davis-Bacon Act and the Service Contract Act.

VI. Preference for Union Status

Self-funded/self-insured plans are modem and effective means of providing employees with vital health and welfare benefits. When such plans meet their financial obligations and are actuarially sound, the contractor maintaining such plans should *not* be placed at a competitive disadvantage merely because the plans are not part of a collective bargaining agreement.

Moreover, the DOL Administrator's discretion should be limited to minimize the possibility that political influence and/or labor-management considerations will play a determinative role. DOL's regulations addressing the requirements for self-funded/self-insured plans to attain "bona fide" status should be revisited, and rule-making initiated in order to ensure balance and consistency in the treatment of union and non-union contractors who provide equivalent benefits to their employees.

VII. Conclusion

On behalf of the Council for Employment Law Equity, I respectfully urge the Office of Management and Budget to seek a reform and updating of the regulations issued by the U.S. Department of Labor under the Davis-Bacon Act and the Service Contract Act. Specifically, the CELE strongly recommends that both regulations be amended to: (1) permit self-funded/self-insured employee pension and benefit plans to credit employee fringe benefits for Prevailing Wage Determinations; and **(2)** increase the contract threshold for application of the Davis-Bacon Act and the Service Contract Act from $2,000 to $75,000.

I appreciate your consideration of these views, and would be happy to provide any additional information or assistance in this regard in the future.

Sincerely,

Mark A. de Bernardo
General Counsel