DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
Washington, D.C. 20314-1000

ER 1180-1-8

CECC-C

Regulation
No. 1180-1-8

30 Dec 2016

Contracts
LABOR RELATIONS IN CONSTRUCTION

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This Regulation supersedes ER 1180-1-8, dated 1 August 2006.

Chapter 5. APPLICABILITY OF CONTRACT LABOR PROVISIONS TO VARIOUS SITUATIONS, CONDITIONS, AND WORK ACTIVITIES



Chapter 6. LABOR DISPUTES, WORK STOPPAGES, ACTIVITIES AND COMPLAINTS OF LABOR REPRESENTATIVES

*** Denotes a common problem area on USACE construction contracts. For guidance, contact the HQ labor advisor.

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# CHAPTER 1

## General Provisions

1-1. Purpose. Inasmuch as Reorganization Plan No. 14 of 1950 places primary responsibility for the enforcement of construction labor standards upon the contracting agencies, this ER is devoted primarily to this mission. This regulation is designed to provide guidelines for all Corps of Engineers (Corps or USACE) employees tasked with the administration and enforcement of statutory and contractual labor standards on construction contracts.[1] Its primary aim is to affect a uniform enforcement program throughout the Corps. Achieving compliance with labor standards requires the exercise of ingenuity, initiative and cooperation on the part of all personnel. This ER contains the answers to the questions that most generally arise in connection with contract labor relations functions. Official acquisition policy is found in the Federal Acquisition Regulation (FAR) and its supplements. If there is any conflict between the FAR system requirements and this regulation, the current FAR system rules apply.

1-2. Applicability. This regulation is applicable to all Major Subordinate Commands (MSC), districts, laboratories, centers, and field operating activities under the jurisdiction of the Chief of Engineers.

1-3. Distribution Statement. Approved for public release; distribution is unlimited.

1-4. Note: Positive Law Codification of Title 41. On 29 April 2014, the FAR Council published the final FAR Rule in the Federal Register (79 FR 24192)(FAC 2005-73) concerning the positive law codification of Title 41. The codification changed the names of several laws referenced in this ER. To remain consistent with the U.S. Department of Labor's (DOL) terminology for these laws, which, to date, DOL has not changed, each law will be referenced using its traditional name. For a full list of the codified citations and titles, see Exhibit I in the Appendix to this ER.

1-5. References.

a. 40 (USC) United States Code Sections 327-333 and 3141-3148.

b. 29 (CFR) Code of Federal Regulations Parts 1,3,4 and 5.

[1] For USACE guidance on service contracting, see Engineer Pamphlet (EP) 1180-1-1, Service Contract Act Labor Relations.

c. (FAR) Federal Acquisition Regulation Section 1.105, Subparts 22.3, 22.4 and 52.222.

d. DFARS Part 222.

e. AFARS Part 5122.

f. EP 415-1-260, Area/Resident Engineer Management Guide.

g. DOL All Agency Memoranda Nos. 118, 123, 125, 130, 131, 141, and 157.

h. DOL Wage Appeals Board Decision Nos. 64-3, 76-6, 80-3, 82-8, 83-7, 85-16, 86-33, 90-20, 94-01 and 94-20, and Admin. Rev. Board Decision Nos. 96-133, 02-086, and 07-124.

i. Solicitor of Labor Opinion Letters DB-8, 9, 12, 22, 26, 40, and 45.

1-6. Policy. The development and maintenance of good relations between management, labor, and the Corps is required for the efficient and expeditious conduct of the Corps' mission. Accomplishment of this objective requires a continuous effort on the part of all personnel[2] assigned to contractor activities. The proper enforcement of these provisions must be given the same consideration as all other requirements of the contract and specifications. Efforts to ensure that labor standards deficiencies are detected promptly and addressed in a responsive manner are essential elements in our service to the public.

1-7. Background.

a. The administration of the contract labor program within the Corps is governed by the basic labor policy of Part 22 of the FAR. The program has been further implemented by the DFARS, AFARS and the USACE Acquisition Instruction (UAI). Additionally, the Secretary of Labor has issued regulations implementing the labor statutes which are published in Title 29, Subpart A, Code of Federal Regulations (C.F.R.).

b. The various labor laws were enacted by Congress to prevent exploitation of labor on Government contracts. The laws incorporated within USACE contracts afford each laborer and mechanic employed on the contract the right to receive a prescribed minimum rate subject to certain overtime requirements without subsequent rebate or

[2] Wherever the word 'man', 'men' or their related pronouns appear, they are meant in their generic sense to include all genders.

"kickback." In addition to the statutes, regulations are also applicable to the contractors. Failure of a contractor to comply with the labor provisions, coupled with lax enforcement, results in expensive investigations which may require the imposition of penalties, termination of the contract, debarment, and, in some cases, criminal action. A contractor's disregard for labor standards obligations is frequently accompanied by a disregard for the technical provisions of the contract. Quality assurance is a multi-faceted task.

c. Many labor relations problems involve interpretation of law, and for this reason, questions will arise in the field that are not covered in this regulation. Such problems should be brought to the immediate attention of the District Counsel, the District Labor Advisor, and the HQ Labor Advisor, as appropriate.

1-8. Responsibilities.

a. Contracting Officer (CO). The enforcement of labor standards provisions is the responsibility of the CO. The contract and regulations of the Secretary of Labor are the CO’s means of assuring compliance.

b. Contractors. The contract labor standards provisions apply to all contractors and subcontractors, regardless of their employment policies. The contractor is responsible for: procurement, supervision, and management of all labor required for the completion of the work; compliance with Federal labor standards applicable to his contract and regulations pertaining thereto; and subcontractors' compliance with the contract labor standards provisions.

c. Administrative Contracting Officers (ACO). ACOs and their staffs must fully understand the basic labor provisions and are responsible for specific duties to accomplish program objectives. The labor provisions must be viewed in the same light and enforced just as vigorously as all other provisions of the contract. The ACOs shall be responsible for:

(1) The performance of all required checking of prime and subcontractor's payrolls and field operations to determine their compliance with the labor standards provisions of the contract.

(2) The implementation of the instructions contained in this regulation to assure compliance by all contractors and subcontractors.

(3) The maintenance of the records and submission of the reports prescribed in this regulation.

(4) The appropriate delegation of functions. Although the enforcement methods and procedures in this regulation are the responsibility of the ACO, there may be advantages to sharing responsibilities with the Quality Assurance (QA) Representative as to more effectively use the available personnel. Only the QA Representative at the site of the work will have the knowledge and background necessary to perform certain activities of the enforcement procedures. It is strongly recommended that "detail checking of payrolls," be specifically delegated to a core set of employees as directed by the District, Division, or Center.

d. Contractor Industrial Relations (CIR) Representative. The CIR Representative may be a CIR Specialist (CIRS), also known as the District Labor Advisor, or another individual who is responsible for the administration of all labor standards programs within the district. The CIR Representative advises, assists and instructs USACE personnel on labor standards matters during all phases of the construction mission. Based on public expectations, statutory obligations, regulatory requirements, and organizational demands, the CIR Representatives are essential to the success of the district's mission. The CIR Representative is responsible for "preventive industrial relations," and through pro-active measures, seeks to prevent contractor non-compliance as well as disruption of the USACE construction mission.

(1) The CIR Representative will conduct full-scale investigations (when applicable or when requested by higher headquarters). The CIR Representative's investigation will be based on the guidelines contained within All-Agency Memorandum (AAM) No. 118.[3]

(2) The CIR Representative also serves as the point of contact for any DOL-initiated investigations. The CIR Representative will coordinate such investigations and apprise USACE personnel of the status and findings of these investigations.

[3] AAM No. 118 is available at http://www.wdol.gov/aam/AAM118.pdf.

# CHAPTER 2

## Labor Laws, Regulations and Contractor Provisions

2-1. General. Each of the statutes and their implementing regulations discussed below reflect the Federal Government's commitment to a policy of labor protection. The Government, as a significant buyer of construction, is in a position of depressing bids and by extension, wages. These statutes establish a floor below which wages may not fall.

2-2. The Davis-Bacon Act (40 U.S.C. §3141-48) (DBA) applies to construction contracts in excess of $2,000 to which the Federal Government or the District of Columbia is a party. It specifies that not less than minimum wages be paid to the various classes of laborers and mechanics employed on a particular project based on the wages prevailing in the area as determined by the Secretary of Labor. P.L. 88-349 amended the Act as of July 2, 1964, to include fringe benefits in the "prevailing rate."

2-3. The McNamara-O'Hara Service Contract Act (41 U.S.C. §351-358) (SCA) applies to Federal contracts for services in the United States in excess of $2,500 through the use of service employees. Service employees include all employees working under a contract except those in executive, administrative or professional capacities as those terms are defined in 29 C.F.R. § 541. This definition therefore includes many "white collar" employees formerly excluded prior to the 1976 amendment to the Act. The Act requires minimum wages and fringe benefits as determined to be prevailing by the Secretary of Labor. DOL has primary enforcement responsibility for this law.

2-4. The Walsh-Healey Act (41 U.S.C. §35-45) (PCA)prescribes minimum wages to be paid contractor's employees on contracts in excess of $15,000 for the manufacture or furnishing of supplies. DOL has not issued wage determinations under the Act for many years. Accordingly, the Fair Labor Standards Act minimum wage generally applies. Enforcement responsibility rests with DOL.

2-5. The Contract Work Hours and Safety Standards Act (40 U.S.C. §3701 et seq.) (CWHSSA) applies to both service and construction contracts in excess of $150,000 and requires employees to be paid time and one-half for all hours worked in excess of 40 per week. The Act also contains certain health and safety standards.

2-6. The Copeland (Anti-Kickback) Act (40 U.S.C. §276c and 18 U.S.C. §874) makes it unlawful to induce, by force or otherwise, any person employed within the United States in the construction or repair of public works (including those financed in whole or in part by loans or grants from the United States) to give up any part of the compensation to which he is entitled under his contract of employment.

2-7. The Fair Labor Standards Act (29 U.S.C. §201) (FLSA) provides for the establishment of minimum wage and maximum hour standards, creates a Wage and Hour Division within the DOL for purposes of interpretation and enforcement (including investigations and inspections of Government contracts), and prohibits oppressive child labor. The Act applies to all employees, unless otherwise exempted, who are engaged in (1) interstate commerce or foreign commerce; (2) the production of goods for such commerce, or; (3) any closely related process or occupation essential to such production. Enforcement responsibilities lie with DOL.

2-8. The Miller Act (40 U.S.C. §270(a)) requires that before any contract exceeding $25,000 in amount for the construction, alteration, or repair of any public building, or public work, is awarded to any person, that person must furnish payment and performance bonds to the United States. The payment bonds are for the protection of all persons supplying labor and material. This allows workers not paid prevailing rates to collect against the Surety since they have no enforceable rights against the United States and cannot acquire a lien on a public building.

2-9. Executive Orders. Federal contract standards are also established by the President through the promulgation of Executive Orders. Generally, these Executive Orders require each agency of the Federal Government to incorporate certain clauses in Federal contracts. Among the most relevant Executive Orders are those noted below.

a. Executive Order 13658 increased the minimum wage to $10.10 an hour, with a yearly increase thereafter as issued by the U.S. Department of Labor, Wage and Hour Division. This increase became effective January 1, 2015 and applies to those employees employed on or performing in connection with all Federal contracts subject to the Fair Labor Standards Act, the Davis-Bacon Act, and the McNamara-O'Hara Service Contract Act, to include employees employed on concession type contracts. A yearly increase is expected, until DOL advises otherwise.

b. Executive Orders 11246 (amended under 13672), 11375 and 12086 provide that contractors and subcontractors will act affirmatively to ensure that applicants are employed, and that employees are treated equally during employment, without regard to race, color, religion, sex or national origin. The Secretary of Labor is responsible for the administration and enforcement of prescribed parts of these Orders, and the adoption of rules and regulations necessary to achieve their intended purposes. The head of each agency is responsible for ensuring that the requirements of this subpart are carried out within the agency, and for cooperating with and assisting DOL's Office of Federal Contract Compliance Programs (OFCCP) in fulfilling its responsibilities. See FAR 22.8.

Construction contractors that hold a nonexempt government construction contract are required to meet the contract terms and conditions for affirmative action requirements.

The current goal for the utilization of women is 6.9% of work hours and applies to all of a contractor's construction sites regardless of where the Federal or federally assisted contract is being performed. This goal was originally published in the Federal Register of April 7, 1978, 43 FR 14899, 14900, as Appendix A. Pursuant to a Notice published in the Federal Register of December 30, 1980, 45 FR 5750, 85751, the 6.9% goal was extended indefinitely. The current goals for the utilization of minorities, which vary by location, were published in the Federal Register of October 3, 1980, 45 FR 65979, 65984, as Appendix B-80. As of March 24, 2014, under Section 503 of the Rehabilitation Act, the goal for the utilization of individuals with disabilities (IWDs) is 7% nationwide.

c. Executive Order 13496 requires contractors to post a notice informing employees of their rights under Federal labor laws, including the National Labor Relations Act, 29 U.S.C. 151, et seq.

d. Executive Order 13502 authorizes federal agencies, when awarding any contract in connection with a large scale construction project (defined in section 2 as construction project cost of $25 million or more), to consider, on a project-by-project basis, the merits of requiring a PLA where its use would: (1) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, (2) produce labor-management stability by prohibiting strikes, lockouts and similar job disruptions, and; (3) ensure compliance with laws and regulations governing safety and health, equal employment opportunity, and labor and employment standards.

e. Executive Order 13673 is implemented to improve contractor compliance with labor laws in order to increase economy and efficiency in Federal contracting.

2-10. Contract Clauses. Each of the above-noted labor protective statutes is incorporated within particular contracts depending upon the nature (construction/ service/supply) of the contract. These clauses are generally required for construction contracts subject to the DBA:

a. Notice to the Government of Labor Disputes (FAR 52.222-1)

b. Convict Labor (FAR 52.222-3)

c. Contract Work Hours and Safety Standards Act-Overtime Compensation (FAR 52.222-4)

d. Davis-Bacon Act --- Secondary Site of the Work (FAR 52.222-5)

e. Davis-Bacon Act (FAR 52.222-6)

f. Withholding of Funds (FAR 52.222-7)

g. Payrolls and Basic Records (FAR 52.222-8)

h. Apprentices and Trainees (FAR 52-222-9)

i. Compliance with Copeland Act Requirements (FAR 52.222-10)

j. Subcontracts (Labor Standards) (FAR 52.222-11)

k. Contract Termination - Debarment (FAR 52.222-12)

l. Compliance with Davis-Bacon and Related Regulations (FAR 52.222-13)

m. Disputes Concerning Labor Standards (FAR 52.222-14)

n. Certification of Eligibility (FAR 52.222-15)

o. Approval of Wage Rates (FAR 52.222-16)

p. Nondisplacement of Qualified Workers - (FAR 52.222-17)

q. Certification Regarding Knowledge of Child Labor for Listed End Products (FAR 52.222-18)

r. Child Labor – Cooperation with Authorities and Remedies (FAR 52.222-19)

s. Prohibition of Segregated Facilities (FAR 52.222-21)

t. Previous Contracts and Compliance Reports (FAR 52.222-22)

u. Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction (FAR 52.222-23)

v. Pre-Award On-Site Equal Opportunity Compliance Evaluation (FAR 52.222-24)

w. Affirmative Action Compliance (FAR 52.222-25)

x. Equal Opportunity (FAR 52.222-26)

y. Affirmative Action Compliance Requirements for Construction (FAR 52.222-27)

z. Notification of Visa Denial (52.222-29)

aa. Davis-Bacon Act – Price Adjustment (None or Separately Specified Method) (FAR 52.222-30)

bb. Davis-Bacon Act – Price Adjustment (Percentage Method) (FAR 52.222-31)

cc. Davis-Bacon Act – Price Adjustment (Actual Method) (FAR 52.222-32)

dd. Equal Opportunity for Veterans (FAR 52.222-35)

ee. Affirmative Action for Workers with Disabilities (FAR 52.222-36)

ff. Employment Reports on Veterans (FAR 52.222-37)

gg. Compliance with Veterans' Employment Reporting Requirements (FAR 52.222-38)

hh. Notification of Employee Rights under the National Labor Relations Act (FAR 52.222-40)

ii. Notice of Requirement for Project Labor Agreement (FAR 52.222-33)

jj. Project Labor Agreement (FAR 52.222-34)

kk. Employment Eligibility Verification (FAR 22.222-54)

ll. Minimum Wages Under Executive Order 13658 (FAR 52-222-55)

mm. Fair Pay and Safe Workplaces

nn. Establishing Paid Sick Leave for Federal Contractors (52.222-62).

Guidance as to which clauses are to be incorporated within construction contracts subject to the DBA is set forth at FAR 22.407, Solicitation Provision and Contract Clauses.

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# CHAPTER 3

## Pre-Solicitation Administration and Determinations

3-1. General. The issues and duties discussed herein apply generally to the CIR Representative and supporting staff. However, close coordination with the operating elements such as Contracting, Engineering, Construction and/or Operations is critical to the successful performance of the tasks noted below. Many of the more contentious and protracted labor matters confronting districts may be directly attributed to a failure to communicate essential informational needs in a timely and effective manner during the pre-solicitation phase. The DBA definitions listed below relate to key elements in the determination of applicability and coverage in the pre-solicitation phase.

a. Construction. Generally includes altering, remodeling, installation (where appropriate) on the site of the work items fabricated off-site, painting and decorating, the transporting of materials and supplies to, or from, the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work.

b. Substantial Construction. The word substantial relates to the types and quantity of construction work to be performed and not merely to the total value of the contract. A determination as to whether to include the construction labor standards and clauses is keyed to the following considerations:

(1) The contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at the contract date that a substantial amount of construction work will be necessary for the performance of the contract;

(2) The construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract; and

(3) The requirements are otherwise applicable to the contract.

c. Building Construction. Includes construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment or supplies; all construction of such structures; the installation of utilities and of equipment, both above and below grade levels; as well as incidental grading, utilities and paving. Such structures need not be "habitable" to be building construction. Also, the installation of heavy machinery and/or equipment does not generally change the project's character as a building.

d. Heavy Construction. Includes those projects that are not properly classified as either "building," "highway," or "residential." Unlike these classifications, heavy construction is not a homogenous classification. Because of this catch-all nature, projects within the heavy classification may sometimes be distinguished on the basis of their particular project characteristics, and separate schedules may be issued for dredging projects, water and sewer line projects, dams, major bridges, and flood control projects.

e. Highway Construction. Includes construction, alteration or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy, construction.

f. Residential Construction. Includes the construction, alteration or repair of single family houses, apartment buildings of no more than four stories in height. This includes all incidental items such as site work, parking areas, utilities, streets, and sidewalks.

3-2. Rates to be Included in Solicitations. Wage determinations (WDs) issued by DOL frequently contain more than one schedule of rates, i.e., such as those outlined above. It is necessary to eliminate any possible uncertainties with respect to the application of the wage rates on various phases of the work prior to contract negotiations or opening of bids. Accordingly,

a. Where only one type of work, such as building construction, is contemplated under a given contract, include only the schedule of rates for that type in the advertised specifications.

b. Where a proposed contract involves more than one type of work, such as both building and highway, and the applicable wage decision specifies separate schedules for these various types of construction work, the advertised specifications should identify, as specifically as possible, the schedules which will apply to the particular work items.

c. Similarly, where the proposed construction involves primarily building construction and, based on area practice, DOL also issues a schedule of rates for related incidental paving and utility work, the work to which such schedules are applicable should be clearly indicated in the advertised specifications.

d. Questions as to the proper classification for the work performed by a laborer or mechanic are resolved in accordance with prevailing local area practice. COs should make every effort to keep informed as to area practice, not only to assure contract compliance, but also to assure fairness to all prospective bidders on contracts to be awarded.

Each determination of area practice should be supported by a record of written findings and an analysis of the record leading to that determination.

e. Experience indicates that it is generally better to include an entire schedule, e.g., highway or building, rather than to select individual classifications for incorporation within the specifications.

3-3. Classes of Employees. Because of the differences in coverage of labor laws, construction employees will usually be divided into two basic groups, manual and nonmanual employees.

a. Manual Employees. The DBA applies to construction laborers and trades craftsmen (mechanics), including apprentices, trainees, and working foremen (these latter workers must be listed on the payrolls in the same manner as those they supervise (hours worked, hourly rate paid, etc.)).

b. Nonmanual Employees. The DBA does not apply to nonmanual employees, including supervisory, engineering, architectural, clerical, and administrative personnel. Also included in the nonmanual class, and thus not subject to the Act, are factory representatives, technical engineers, scientific workers and watchmen. Although the DBA does not apply to watchmen, the Contract Work Hours and Safety Standards Act does apply to watchmen and guards for purpose of overtime compensation.

3-4. Wage Determinations (WDs). Two basic types of prevailing-wage rates are established by the DOL: general WDs, also known as area determinations, and project WDs. Less frequently issued and reflecting elements of both area and project determinations are installation WDs. It is critical that the CIR Representative be cognizant of the distinctions among these determinations. The differences among them extend not only to the method of obtaining the determinations but also to their use and terms of effectiveness.

a. General WDs reflect those rates determined by the DOL to be prevailing in a specific area for the type of construction described. The general WDs contain no expiration date and remain in effect until modified, superseded, or withdrawn. These determinations are usually issued whenever the wage patterns for a given location, for a particular type of construction, are well-settled and it appears that there will be a recurring need for determined rates. General WDs are available through the Wage Determinations On-Line system (www.wdol.gov).

b. Project WDs are issued at the specific request of a contracting agency; are applicable to the named project only; and expire 180 calendar days from the date of

issuance unless an extension is requested by an agency and approved by DOL. The agency may request a project WD through the use of SF 308, Request for Wage Determination and Response to Request[4]. DOL also issues installation determinations applicable to a particular installation where there is, or it is anticipated that there will be, substantial construction activity. In order to accommodate an agency's request, DOL requires that the agency furnish a detailed listing of the anticipated projects to which the installation determination would apply.

c. It is critical that maximum effort be undertaken to anticipate the need for WDs and request them in a timely manner. It is thus recommended that the requesting officials coordinate closely with the Engineering Division.

d. The CO should be cognizant of the expiration date of project or installation determinations. New WDs should be requested prior to contract award if it is anticipated that a determination will expire before contract award. However, there may be unanticipated circumstances (i.e., bid protests) which preclude contract award before the expiration of the wage determination. While FAR 22.404-5, Expiration of Project Wage Determinations, contains specific guidance concerning the expiration of project wage determinations, Figure 3-1, which follows Chapter 3, outlines the general procedure for extension requests.

e. If a project is contemplated in an area where problems concerning wage rates and classifications are known or may exist because they are controversial in nature (e.g., where unions claim building rates apply and contractors or contractors' associations contend heavy or highway rates apply), or where unusual circumstances prevail, a report to the Headquarters Labor Advisor should be prepared giving pertinent data relating to the project, well in advance of the need for a wage determination. Such report will include all available wage data, plans, specifications, a map pinpointing the exact site location(s), and a statement as to the anticipated schedule of bid opening and award. The HQ Labor Advisor will provide the report to DOL so as to minimize the probability of delay due to controversy during the advertising and bid opening period.

3-5. Modifications and Supersedeas Determinations. General and project WDs may be modified by DOL in order to ensure that prevailing wage rates are maintained. A modification may specify only the items being changed or may be in the form of a supersedeas wage determination. It is critical that those tasked with furnishing WDs ensure that these modifications be forwarded to the specifications personnel. See 29 C.F.R. § 1.6 relating to the Agency's responsibilities regarding the effective dates

4 SF 308 is available on the WDOL.gov Library Page http://www.wdol.gov/docs/sf308x.pdf).

of modifications. While CIR personnel should be totally cognizant of these requirements, the principal (and often, most troublesome) requirements are outlined below:

a. "10 Day Rule" - Section 1.6(c)(2)(i)(A) - requires contracting agencies to accept modifications to WDs received less than 10 days before bid opening unless (in the case of competitive procurements) the agency finds that there is not sufficient time to notify bidders of the change, in which case such finding must be documented in the contract file, and submitted to the Wage-Hour Administrator upon request.

b. "90 Day Rule" - Section 1.6(c)(3)(iv) - provides that if a contract to which a general wage determination has been applied is not awarded within 90 days after bid opening, any modification published prior to contract award shall be effective unless the agency obtains an extension of the 90-day period from the Administrator.

c. Monitoring of DBA WD modifications to ensure compliance with the above requirements may be facilitated through the Alert Service feature of the WDOL program discussed in paragraph 3-6(b).

3-6. Wage Determinations OnLine (WDOL) Program. The website www.wdol.gov, maintained by the General Services Administration, allows for access to DBA and SCA WDs.

a. Application. Neither the WDOL program nor its accompanying “User’s Guide” relieve the CO or other program users of the requirement to carefully review the contract or solicitation, federal acquisition regulations, and/or DOL regulations related to these actions. Where the CO selects a DBA WD using the WDOL Program, and DOL later determines, whether before or after contract award, that the appropriate DBA WD was not incorporated in a covered contract, the CO, within 30 days of notification by DOL, shall include in the contract the applicable WD issued by DOL (29 C.F.R. § 1.6(f); and FAR Part 22, Subsection 22.404-9).

b. Alert Service Option. To ensure that the CO (or any other interested party) is aware of revisions made by DOL to DBA WDs selected for a specific contract action, the WDOL program user may register for automatic email notification. Upon selection of an appropriate DBA WD, the user may request email notice of future revisions for a specific period of time, or until a specific date. USACE COs are strongly encouraged to request this automatic notification process.

3-7. DBA Covered Contracts With Extensions for Time and Price Adjustments. FAR 22.407, Correction of Wage Determinations Containing Clerical Errors, requires the incorporation of certain clauses (FAR 52.222-30, 52.222-31, or 52.222-32) in DBA-covered contracts that include provisions to extend the term (length) of the contract by option,

extension or otherwise. Contracts that typically require one of these clauses include indefinite delivery indefinite quantity (IDIQ) contracts, and maintenance of facilities contracts that require some construction work, such as military family housing maintenance and base operating services. If the contract is for completion of a specific construction project ("build the building", "build the road", etc.), regardless of the amount of time the project will take to complete, then these clauses to update the wage determination(s) and to allow for the adjustment of the contract price are **not** appropriate or required.

a. If a contract with an option to extend the term of the contract has IDIQ construction requirements, the CO must incorporate the WD that was incorporated into the contract at the exercise of the option into the task orders issued during that option period. The WD will be effective for the complete period of performance of those task orders without further revision.

b. FAR 22.404-12, Labor Standards for Contracts Containing Construction Requirements and Option Provisions that Extend the Term of the Contract, requires that the CO include in fixed-price contracts a clause that specifies one of several methods, suitable to the interest of the Government, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current WD at the exercise of an option to extend the term of the contract. This FAR provision should be reviewed carefully when processing fixed-price contracts.

3-8. Project Labor Agreements. [5] On 6 February 2009, President Obama issued E.O. 13502 encouraging federal agencies to consider requiring the use of Project Labor Agreements (PLAs) on federal construction projects. E.O. 13502 encourages federal agencies, as a part of the procurement planning process for construction projects with a total estimated cost to the Federal Government of $25 million or more, to consider including a solicitation provision requiring a PLA. Pursuant to E.O. 13502, the CO will determine whether the use of a PLA will advance the Government's procurement interests in cost, efficiency, and quality and in promoting labor-management stability as well as compliance with applicable legal requirements governing safety and health, equal employment opportunity, labor and management standards, and other matters. Detailed guidance concerning the implementation of E.O. 13502 is set forth at FAR 22.5, Use of Project Labor Agreements for Federal Construction Projects.

[5] PLAs are pre-hire agreements (permissible in the construction industry under the National Labor Relations Act) which are negotiated between organized labor and contractors or contractor associations. See also, CIR Letter 16-5, Use of Project Labor Agreements on DoD Construction Projects.

a. Policy. In making the decision as to whether a PLA should be required, the contracting officer shall consult with the agency project or program management officials and shall obtain guidance from the HQ Labor Advisor and assigned legal counsel. In determining whether use of a PLA will serve the goals set forth in E.O. 13502, the contracting officer, HQ Labor Advisor, and assigned legal counsel should consider the following factors:

(1) whether past experience with construction projects in the location where the project will be performed reveals a history of labor disputes, work stoppages, safety and health standards violations, or similar problems that delayed, disrupted, or otherwise adversely affected the cost or quality of the work.

(2) whether collective bargaining agreements with labor organizations representing crafts that will be involved in performing the work will expire during performance of the contract.

(3) the availability of qualified crafts in the labor market during performance of the contract, considering contemporaneous construction projects.

(4) the effect on the Government of delays in performance of the construction contract.

(5) the potential effect on competition of a requirement to use a PLA.

(6) whether there is a law applicable to the specific construction project that would preclude use of a PLA.

(7) whether requiring a PLA would improve compliance with safety and health standards, with equal employment opportunity standard and with other labor and employment standards in ways and/or to a degree that the Government could not achieve without requiring a PLA.

b. Documenting the Decision. In accordance with OMB Memorandum M09-22, federal agencies are required to submit a report, on a quarterly basis, identifying all contracts awarded in connection with "large-scale construction projects," as defined in the Order, including the contract number, dollar value of the total contract award, and the product and service code describing the project. For each contract, agencies are to indicate whether a PLA was required in the solicitation, provide a brief explanation of the considerations in deciding whether a PLA was appropriate for the project, and specify at what organizational level the decision was made. Accordingly, it is critical that USACE COs document the rationale supporting the decision to either require or not require a

PLA and include the decision memorandum in the contract file. In accordance with M09-22 requirements, each Division should be prepared to provide a report of its PLA actions to the HQ Labor Advisor.

3-9. Prospective Contractor's Compliance with VETS-4212 (formerly known as 100A) Reporting Requirement. One of the contracting agency's pre-award obligations is to ensure that prospective contractors have complied with certain affirmative action reporting requirements as described below.

a. Under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), any contractor or subcontractor with a contract of $150,000 or more with the Federal Government must take affirmative action to hire and promote qualified covered veterans as defined by 38 U.S.C. § 4212.[6] Contractors and subcontractors with openings for jobs, other than executive or top management jobs, must list them with the nearest State Job Service (also known as State Employment Service) office. The requirement applies to vacancies at all locations of a business not otherwise exempt under the company's Federal contract. Qualified Vietnam-era and special disabled veterans receive priority for referral to Federal contractor job openings listed at those offices. The priority for referral is not a guarantee that referred veterans will be hired. Federal contractors are not required to hire those referred but must have affirmative action plans. Contractors with 50 employees and a $50,000 contract must have a written affirmative action plan. They must be able to show they have followed the plans and that they have not discriminated against veterans or other covered groups. They also must show that they have actively recruited Special disabled veterans, veterans of the Vietnam-era and any other veterans who served on active duty during a war on in a campaign or expedition for which a campaign badge has been authorized and disseminated all information internally regarding promotion activities.

b. As provided by FAR 22.1306, Department of Labor Notices and Reports, covered employers must file an annual VETS-4212 report, which shows the number of target veterans in their work force by job category, hiring location, and number of new hires, including targeted veterans hired during the reporting period and the maximum number and minimum number of employees of such contractor during the period covered

[6] 41 U.S.C. § 1908 requires the FAR Council to review the dollar threshold amounts in certain federal agency procurement related laws, including VEVRAA, every five years to determine whether they need to be adjusted for inflation. This threshold was set at $150,000 in 2015.

by the report. Instructions, information and follow-up assistance is provided to employers who do not understand the reporting and other legal requirements.[7]

c. USACE personnel tasked with ensuring prospective contractor compliance with this obligation may access DOL's Database of contractors having filed the required VETS-4212 report at: www.dol.gov/vets/vets4212.htm.

3-10. Award Notification to the Office of Federal Contract Compliance Programs (OFCCP). Within 10 working days of the award of a construction contract subject to the Affirmative Action requirements as set forth by E.O. 11246 and not otherwise exempted (see FAR 22.807), COs are required to provide a written notice to OFCCP. The notification shall include the name, address, and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed. When requested by the OFCCP regional office,[8] the CO shall arrange a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

[7] On September 25, 2014 VETS of the U.S. Department of Labor published in the Federal Register its Final Rule to revise reporting requirements for federal contractors and subcontractors under the Vietnam Era Veteran's Readjustment Act of 1974, as amended (VEVRAA). Key update differences between the VETS 100A report and the new VETS 4212 report are as follows: The VETS 100A Report is now named the VETS-4212 Report; The VETS-100 Report is rescinded, rendering obsolete the VETS reporting requirements applicable to Government contracts and subcontracts entered into before December 1, 2003; The term "covered veteran" is replaced with the term "protected veteran" and the definition of "other protected veterans" has been updated to reflect the new regulations under VEVRAA, to now include "active duty wartime or campaign badge veteran"); contractors will be required to report on protected veteran hiring and employment numbers in the *aggregate* (rather than by specific protected veteran category, as previously required by the VETS-100 and VETS-100A Reports); Contractors will have the option of reporting new hires data (protected veteran hires and total hires) by EEO-1 category in a hiring location OR reporting only aggregate numbers (totals) for new hires by hiring location.

[8] OFCCP Regional Offices and key personnel may be found at dol.gov/ofccp/contacts/ofcpkeyp.htm.

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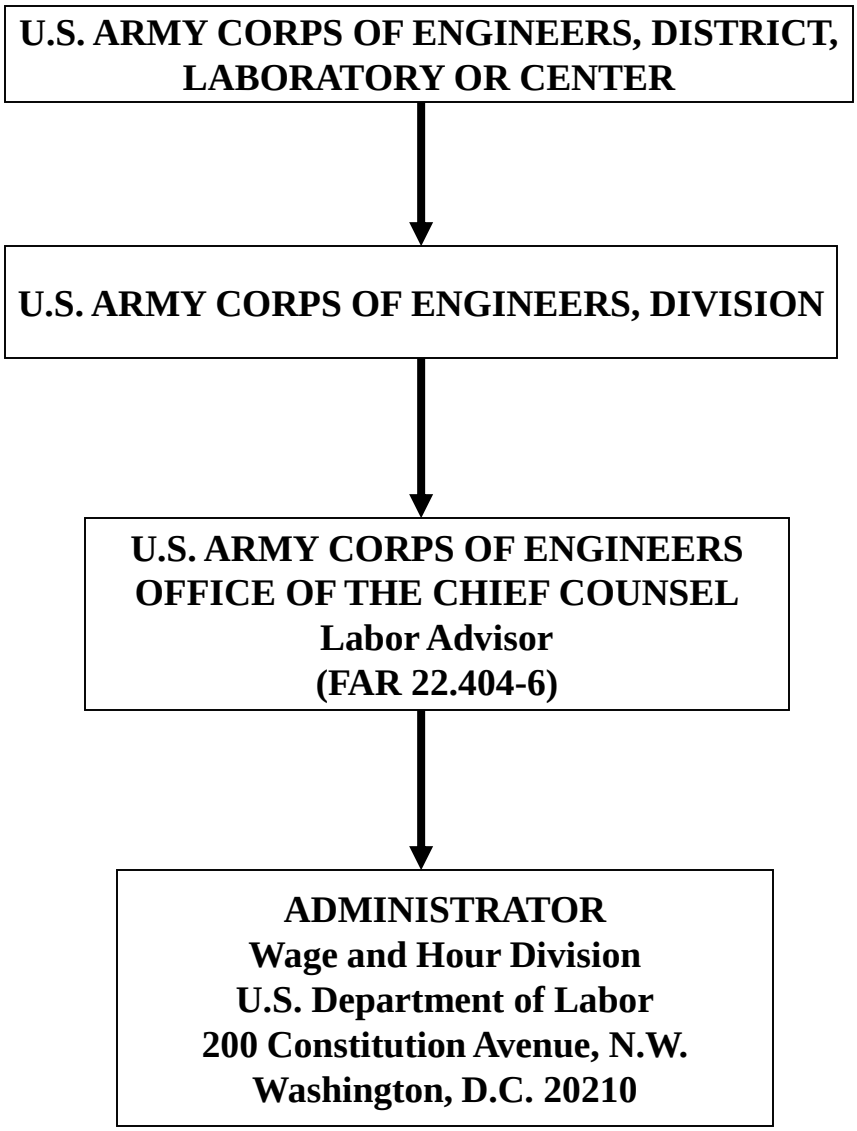


Reference: 29 CFR 1.6(a)(1)
29 CFR 1.6[c](3)(iv)
FAR 22.404-5

Figure 3-1. Processing a request for extension of wage determination that expires after bid opening but prior to contract award

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# CHAPTER 4

## Compliance Procedures - Davis-Bacon and Related Acts

4-1. General. This chapter deals with the scope and application of contract labor provisions affecting the district's enforcement program. Each district should maintain a continuing program including:

a. Training appropriate contract administration, labor relations, quality assurance, and other labor standards enforcement personnel in their responsibilities.

b. Assuring that contractors and subcontractors are informed, prior to commencement of work, of their obligations under the labor standards provisions of their contracts.

c. Adequate payroll review, on site surveillance and employee interviews to determine compliance, and prompt initiation of corrective action when required.

d. Prompt investigation and disposition of complaints.

e. Prompt submission of all reports required by FAR 22.406-8, Investigations.

f. Periodic review of field enforcement activities to assure compliance with applicable regulations.

4-2. Davis-Bacon Act. The application of the DBA and certain rulings as to its coverage have generated much discussion in the construction industry. Cases involving coverage questions of a borderline nature should be submitted to the CIR Representative as early as possible. The provisions of the DBA apply to contracts in excess of $2,000, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works. The Act requires that every such contract contain certain stipulations concerning the rate of wages to be paid laborers and mechanics, and requirements to be met by contractors and subcontractors with respect to the payment of wages earned.

4-3. Basic Hourly Rates and Fringe Benefits. All WD decisions set forth the minimum basic hourly rates to be paid classes of workers employed by contractors and subcontractors on the contract work. Some decisions also specify certain types of fringe benefits which must be paid to all or some classes of workers. Also, there is considerable variation in the type and amount of fringe benefits in wage decisions applicable to different areas as well as different kinds of construction. Therefore, each wage decision in a contract must be studied carefully with particular attention to modifications to the wage decision, which may have been incorporated by amendment.

a. Payment of Basic Hourly Rates and Fringe Benefits. FAR 52.222-6, Construction Wage Rate Requirements, explains how the contractor may discharge his obligation to workers in any classification for which the wage decision contains only a basic hourly rate, or both a basic hourly rate and fringe benefits. The method and/or combination of methods by which a contractor discharges his obligation for payment of fringe benefits will depend upon whether or not he is obligated pursuant to approved funds, plans or programs to make payments (contributions) to funds set up and administered for purpose of the particular fringe benefits. Typically, labor agreements obligate the contractor to make payments to trust funds set up, for example, for pensions, health and welfare, and vacations. Some contractors (generally those who operate non-union) do not participate in plans or programs as just mentioned; however, they must still pay the fringe benefits to all workers according to the wage decision. In such cases, the fringe benefits must be paid in cash (or included in payroll check).

b. Payroll Information. For details concerning what information should be shown on contractor's weekly payrolls, and statement of compliance to be submitted with payrolls, see Paragraph 4-19.

4-4. Classification of Workers and Minimum Basic Rates. Experience has shown that the most common violation of the DBA is the improper classification of workers. It must be stressed that the workers be classified according to, and in conformance with, the work they perform. The contractor is in violation of the Act when he pays a worker at a wage rate less than that contained in the contract. If an individual worker is utilized in performing work of more than one classification, he or she must be paid not less than the contract minimum rate applicable to the respective classifications. The contractor's payroll records must show clearly that the worker's total wages have been computed on the basis of not less than the respective contract minimum rates. There may be instances when a worker performs work within two or more trade classifications, each of which are performed intermittently or only occasionally. In such instances, the contractor may elect to pay only one rate for all work performed if the worker is paid not less than the contract minimum rate applicable to the classification with the highest rate in which he works. Payroll records must reflect the classifications of work performed. (see also Palisades Urban Renewal Enter., LLP, ARB No. 07-124, ALJ No. 2006-DBA-002 (ARB Jul. 30, 2009).

a. Working Foremen. Some contractors pay key employees on a weekly or monthly basis, and salary is paid year-round whether they work or not. Generally, those key employees are supervisory personnel in the contractor's organization who are also experienced equipment operators or mechanics. There may be occasions when a contractor, for lack of work elsewhere, will use those regular salaried employees as operators or mechanics on Government work subject to the DBA. As a general rule, working foremen who devote more than 20% of their time during a workweek to mechanical

or laborer duties are laborers and mechanics for the time so spent. Accordingly, when they perform covered work, the payroll must show the classifications of work performed, daily and weekly number of hours worked, as well as all other required payroll data. It should be noted that a weekly salary is permissible and may be paid for non-manual (supervisory) work. In cases where the employee performs both covered and non-covered work in the same pay period, one line should show the daily hours worked and wages paid for supervisory work, and one line should show the daily and weekly hours worked as a laborer or mechanic with wages computed on an hourly rate basis.

b. Self-Employed Contractors. The DBA makes it clear that Congress intended that individuals performing the work of laborers and mechanics on construction sites be guaranteed the prevailing wage rate "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics...". The requirement in AAM 123 for the prime contractor to list officers/owners of a subcontractor corporation, partnership, or proprietorship, who are themselves performing the work of laborers and mechanics on the prime contractor's payroll records was withdrawn by AAM 125. However, as a practical matter, the prime contractor would have to be able to demonstrate in some manner that the subcontract price equaled or exceeded the applicable prevailing wage rate for the number of hours the owner/partner worked as a laborer or mechanic on a DBA-covered contract, and that the owner/partner was, therefore, paid the proper rate.

4-5. Piece-Rate Work. The payment of employees on a piece-work basis is not, of itself, contrary to the DBA. However, there have been instances where contractors have adopted the piece-work procedure for the apparent purpose of avoiding or minimizing record keeping.

a. Contractors' Responsibility. Notwithstanding any piece-work agreement with an employee, contractors subject to the DBA must keep adequate wage and hour records to demonstrate compliance with labor standards provisions.

b. Advice to Contractors. During preconstruction conferences, ask contractors and subcontractors if they intend to employ any workers on a piece-rate basis. (Prime contractors will be advised at that time that it is their responsibility to inform unrepresented subcontractors of the requirement in 4(a)). If contractors or subcontractors might pay on a piece-rate basis, they must be advised that their piece-work hiring arrangements will have to be reported to the District CIR Representative for determination regarding compliance with all the contract labor standards provisions and particularly the maintenance of adequate basic time and payroll records. The contractors will be further advised to identify all workers involved, describe the work to be performed and materials and tools to be

utilized, list the piece rates to be paid, and describe how and in what form the basic time and payroll records will be maintained.

c. Field Enforcement Activities. When piece-work hiring arrangements are found to exist and have not been reported by the contractor in accordance with the above, contract administration personnel shall inform the contractor to do so immediately.

4-6. Additional Classifications and Rates. FAR 52.222-6 states that the CO shall require that any class of laborers or mechanics not listed in the wage decision and which is to be employed on the contract shall be classified or reclassified to conform to the wage decision. For details concerning the administrative action to be taken by contractors and government personnel see Paragraphs 4-22 through 4-24 of this regulation.[9]

4-7. Wage Rate Posting. The contract requires that a copy of the wage rates be posted at the site of the work. This is mandatory by the express language of the DBA, which says, "... the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work... ". Sometimes the employees of the subcontractors work in an area on the site which is a considerable distance from the operations of other groups of employees (e.g., constructing ridges, dams, reservoirs, sodding operations). The wage rates must be posted so as to be in a prominent and easily accessible place to them. Thus, a sufficient number of postings of wage rates on each work site will depend upon the circumstances. Display of WH Publication 1321, "Notice to Employees Working on Federal or Federally Financed Construction Projects" is a contract requirement. It is available through the DOL's website at http://www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf and should be posted with the DBA contract WD. Each poster at a job site should have printed in the space provided the name of the ACO or a member of his staff designated by the ACO, together with the location of the office, rather than the name and address of the CO.

4-8. Site of Work. The wage requirements apply to all mechanics and laborers employed or working directly upon the site of the work. The meaning of the words "directly upon the site of the work" has been extremely contentious requiring careful consideration of the facts.

a. DOL's implementing regulations reflect the findings in three U.S. Court of Appeals decisions relating to DOL's regulatory definition of "site of the work." In both Building & Constr. Trades Dept., AFL-CIO v. U.S. Dept. of Labor Wage Appeals Bd., 932 F.2d. 985 and Ball, Ball and Brosamer, Inc. v. Reich., 24 F3d 1447, the Court of Appeals for the D.C.

[9] See also DoL's AAM 213, Application of the Davis-Bacon and Related Acts requirement that wage rates for additional classifications, when "conformed" to an existing wage determination, bear a "reasonable relationship" to the wage rates in that wage determination. AAM 213 can be found at http://www.wdol.gov/aam/aam213.pdf.

Circuit concluded that the DOL's long-standing "functional" test for determining the "site of work" conflicted with the Act's "geographic" standard. In L.P. Cavett Co. v. U.S. Dept. of Labor, 932 F2d 985, the Court of Appeals for the Sixth Circuit followed the D.C. Circuit in holding that the prevailing wage protections afforded by the DBA were limited to those laborers and mechanics employed directly upon the site of the work. Based on these decisions, DOL limits DBA coverage of off-site, dedicated support facilities to those that are either “adjacent or virtually adjacent” to the construction location. DOL does not provide either a definition of virtual adjacency or examples illustrating covered and non-covered projects.

b. Definition of the “site of the work”. DOL’s regulations (29 C.F.R. § 5.2(l) now define “site of the work” as follows.

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

c. Administrative Review decision Forrest M. Sanders, ARB No. 05-107, 2007 WL 4248530 (ARB Nov. 30, 2007), provides some guidance in these matters. The ARB emphasized the contracting agency’s obligation to consider two critical elements in its determinations as to whether activities at a certain facility fall within the coverage of the DBA. The first element to be considered is whether the facility was established to serve the

project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work." Such permanent, previously established facilities are not deemed to be part of the site of the work for purposes of Davis-Bacon Act coverage. The second element to be considered is whether the facility is "adjacent or virtually adjacent" to the project. In the subject case, the facility was situated approximately 1,000 to 1,500 yards from the primary site of work and the ARB concluded that such proximity satisfied the regulatory definition of "virtual adjacency," and it was reasonable to include the facility as part of the site of work. This, in combination with the ARB's determination that the facility appeared to have been "dedicated exclusively" for the performance of the project, was sufficient to establish DBA coverage.

d. "Secondary site of the work". DOL has noted (see 29 C.F.R. §5.2(1)) that any other site where a significant portion of the building or work is constructed would be subject to the DBA, provided that the secondary site is established specifically for the performance of the contract or project. This does not cover the manufacture or sale of construction material to be used at the site, but only actual construction that is unique and integrally related to the final building or work.

e. Coverage questions. Questions regarding coverage of possible off-site operations should be discussed during preconstruction conferences. Contractors should be questioned about their plans regarding work to be subcontracted and how they propose to conduct operations involving features of the work which lend themselves to an off-site operation. All unresolved questions regarding coverage of off-site operations must be referred to the District CIR Representative together with the facts and circumstances in each case. The HQ Labor Advisor should be contacted as deemed appropriate.

4-9. Contract Work Hours and Safety Standards Act (40 U.S.C. §327-333) (CWHSSA) is the Federal law applicable to Government construction contracts requiring the payment of overtime compensation to laborers and mechanics for all hours worked in excess of forty per workweek. The contract provisions apply to all laborers and mechanics, including apprentices and trainees, and watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated by the contract. Also, for purposes of the Act, the term laborers and mechanics includes workers performing services in connection with dredging or rock excavation in any river or harbor of the United States, but does not include any employee employed as a seaman. Watchmen and guards must be paid overtime compensation under CWHSSA, but as previously noted, they are not considered as laborers and mechanics within the meaning of the DBA. Consequently no such classifications are contained in DOL's Wage

Rate Decisions. For purposes of overtime compensation, they must be paid one and one-half times their basic or "regular" rate of pay as noted below.

a. Hours of Work - A calendar day is from midnight to midnight; a standard work week is seven consecutive calendar days.

b. Basic Rate of Pay - For purposes of computing the CWHSSA premium, the basic rate of pay is the same as the "regular" rate of pay under the FLSA (see 29 C.F.R. § 5.14 (c); see also Masters v. Maryland Management Company, 493 F. 2d 1329).

c. Methods of Computing Overtime Compensation.

(1) For all overtime hours worked, covered employees must receive compensation at a rate not less than one and one-half times the basic rate of pay.

(2) There are two methods used by contractors to compute compensation for overtime work. The one most commonly used is to multiply the total regular or straight time hours by the basic or straight time hourly rate, and then multiply the total overtime hours by a rate that is one and one-half times the basic rate, the sum of which is the worker's total gross earnings. The other method is to multiply the total of all hours worked (regular and overtime hours) by the basic hourly rate, and then multiply the total overtime hours by one half the basic rate, the sum of which is the worker's total gross earnings. Either method results in the same gross earnings and satisfies the contract requirements with respect to overtime compensation.

(3) DOL has ruled that the DBA requires the payment of fringe benefits for all hours, including overtime hours. See G&C Enterprises, Inc., WAB Case No. 83-07 (1984).

(4) To illustrate, a wage decision may specify that a particular classification requires the payment of a basic hourly rate of $12.00 and fringe benefits of $4.00 for a total hourly rate of $16.00. To compute the total wages due an employee who has worked 41 hours in a week, the contractor would first multiply the total rate (basic plus fringes) by the hours worked, i.e., $16.00 X 41 = $656.00. Note that fringe benefits have been included. To compute the overtime premium due under the CWHSSA, multiply the $12.00 basic hourly rate by one-half, i.e., $12.00 x .5 = $6.00.

d. Employment Under One or More Contracts.

(1) When an employee works for more than one employer under the same contract (e.g., the prime and subcontractors) all hours worked by the employee must be counted for purpose of computing overtime compensation even though the employers are disassociated and separate.

(2) When the employee works for the same contractor under two or more separately awarded contracts, the weekly hours worked under each contract must be combined in computing overtime compensation.

(3) Where two contracts are awarded separately to two different and completely disassociated contractors, and when an employee works not more than 40 hours per week under each contract but in excess of such weekly hours under both, overtime compensation need not be paid.

(4) As distinguished from subparagraph (3) above, if there is an arrangement between the two employers with respect to the employment, or if the contractors are under common control or direction, the combined weekly employment must be counted for the purpose of computing the required overtime compensation.

e. Detection and Reporting Violations.

(1) ACOs shall, immediately upon the detection of any violation, notify the District CIR Representative who will make such additional investigation necessary to determine the appropriate course of action to be taken by the CO.

(2) All correspondence with contractors regarding CWHSSA violations, withholding of liquidated damages, and restitution payments resulting from violations will be initiated by the District CIR Representative for the signature of the CO.

f. Contractor's Right of Appeal.

(1) Section 104 of the Act provides that any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages shall have the right, within 60 days thereafter, to appeal to the head of the agency for which the contract work is done.

(2) Such section also provides that the Agency Head shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination, or if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of the Act inadvertently, notwithstanding the exercise of due care on his part or that of his agents, recommendations may be made to the Secretary of Labor that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages.

g. Notification to Contractors Regarding Violations, and Assessment of Liquidated Damages.

(1) The instructions contained in FAR 22.406-8 are applicable here. As noted above, where the CO's notification to the contractor includes an assessment of liquidated damages, the contractor shall be advised that it may request relief from such assessment. If the contractor does not appeal the proposed assessment within 60 days of such notification, the liquidated damages are assessed automatically.

(2) In those cases requiring the preparation of a CO's Report with recommendations as to the disposition of liquidated damages, the report should include the CO's notification as well as the contractor's request for relief from the proposed assessment. Figure 4-1, which follows Chapter 4, demonstrates the general process of CWHSSA liquidated damages notification and assessment.

(3) All amounts of liquidated damages will be retained as open accounts payable in the project account until the final determination is received from the HQ Labor Advisor. If the determination is in favor of the contractor, the liquidated damages will be released to the contractor. If the determination is to assess the liquidated damages, the funds withheld will be deposited into the General Funds of Treasury.

4-10. Overtime Under Collective Bargaining Agreements. Many collective bargaining agreements provide for premium pay on certain days of the week such as Saturday and Sunday and specific holidays. In some cases the premium rate is double-time after eight hours and on certain particular days. Under no circumstances will a Government representative require a contractor to pay more than the overtime rate required by the contract but at the same time will not interfere with an employer paying in excess of the rate required by the contract.

4-11. Fair Labor Standards Act (FLSA). The FLSA requires payment of time and one-half for work in excess of 40 hours in any one week. It is a part of the general labor law of the U. S., and it may apply to some contractors even though it is not included in the contract. Whether or not it applies depends upon the facts of each case. Since the Corps' function is limited to enforcement of the labor provisions in the contract, it does not include any administrative duties directly related to enforcement of the FLSA. Similarly, the Corps has no authority to issue advice as to the application of this Act to a contract. DOL is the designated agency for administering the FLSA, for making administrative rulings as to coverage, and for receiving employee complaints under the Act.[10]

[10] On 15 July 2015, DOL Wage and Hour Division issued Administrator's Interpretative Bulletin: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors. The Bulletin can be found at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm.

a. Similar to CWHSSA, the FLSA also deals with wages, hours and other conditions and practices of employment with respect to employees other than construction workers.

b. Inquiries concerning the applicability of the FLSA to a contract or protests concerning matters pertaining to the Act should be referred to DOL's Wage and Hour Division.

c. Written notations should be made of any inquiries received on these matters. These should be kept in the project files where they will be available for inspection if needed. The notation should contain date, name of inquirer, whether contractor, employee, or labor representative, contract number, subject of inquiry and information furnished to the inquirer. If the inquirer is an employee, his permanent address should be shown; if a labor representative, the name, number, and address of the union he represents should be listed.

4-12. Copeland (Anti-Kickback) Act. The Anti-Kickback Act, as the name implies, covers the kickback of the employee's wages in any manner to his employer. The law states that whoever by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever, induces any person employed on the contract to give up any part of the compensation to which he is entitled under his contract of employment shall be fined not more than $5,000 or imprisoned not more than five years or both. The applicable contract provision requires the contractor to comply with the Copeland Regulations of the Secretary of Labor (29 C.F.R., Part 3) which are made a part of the contract by reference. The Secretary's regulations made pursuant to the Copeland Act are for the purpose of aiding in the enforcement of the Anti-Kickback Act which is a criminal statute. Thus it can be seen that any restricted payment to any employee is a violation, and in certain instances an offense for which there is a criminal penalty. All contractors and subcontractors are bound by the laws and regulations, and ignorance of the law is no excuse. No contract of employment between the employer and employee can diminish the rights provided the employee by law. Except for fringe benefits paid to funds, the employee must have full and actual freedom of disposition of his wage payment, whether made in cash or by check, and any restricted payment made to an employee is considered to be a deduction.

4-13. Payroll Deductions.

a. Regulations. See the Secretary of Labor's regulations in 29 C.F.R., Sections 3.5 through 3.10 for detailed guidance.

b. Permissible Deductions. Only those deductions described in Section 3.5 of the Secretary's Regulations may be made without application to and approval of the Secretary.

c. Deductions Which Require Approval. Deductions not permitted under Section 3.5 of the regulations require the written approval of the Secretary. A copy of the Secretary of Labor's written approval to make payroll deductions should be submitted by the contractor and/or subcontractor along with the first payroll on which the deductions are made. Refer to Sections 3.6 through 3.8 of the regulations. Deductions for the following purposes are not permissible unless approved by the Secretary:

(1) Apprentice training funds.

(2) Industry promotion funds.

d. The amount and type of each deduction from each employee's wages must be shown on weekly payrolls. Also, all payroll deductions must be described in the appropriate space on DD Form 879 (Appendix A).

e. Discussion with contractors. During preconstruction conferences contractors and subcontractors should be reminded that the Copeland Regulations are a part of the contract and that all payroll deductions must be made in accordance therewith. They should be questioned as to the type of deductions they propose to make and if any proposed deductions are not permissible under Section 3.5 of the regulations, they should make applications to the Secretary.

4-14. Apprentices and Trainees. The Secretary of Labor's Regulations, 29 C.F.R., Part 5, Section 5.2 (c), defines the terms apprentices and trainees as follows:

a. "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. DOL, Employment Training Administration (ETA), Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in his first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

b. "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that Bureau.

4-15. Employment of Apprentices and Trainees. The contract provisions noted at Section 2-10 spell out the strict conditions pertaining to the employment of apprentices

and trainees. If the contractor or any subcontractors intend to use either on the job, they should be reminded of the requirements during the preconstruction conference. These requirements are established by the Bureau of Apprenticeship and Training (BAT), the Federal agency responsible for the administration of the National Apprenticeship System in the United States. BAT was established by the National Apprenticeship Act of 1937, as amended, Public Law 75-308, commonly known as the Fitzgerald Act. BAT is a program of the Office of Apprenticeship Training and Employer and Labor Services (ATELS), Employment and Training Administration.

4-16. Evidence of Registration.

a. The written evidence required for apprentices and trainees is described in paragraphs a and b, respectively, of the contract provision.

b. Contractors participating in such programs should have no problems in obtaining the evidence if, in fact, the programs are registered and approved by the DOL's Bureau of Apprenticeship and Training (BAT), or a state apprenticeship agency recognized by BAT. In any event, it is the responsibility of the contractor and/or subcontractor to see that the required evidence is furnished for each contract. Experience has shown that when contractors request BAT to furnish the written evidence, BAT will furnish it directly to the office administering the contract. Sometimes contractors will submit or cause to be submitted letters from unions or other sources stating that a particular person is an apprentice. Usually such letters are not acceptable because they lack proof of BAT registration and fail to furnish other required information, e.g., ratios, wage rates, and date of registration. If such letters are received, they should be forwarded to the CIR Representative for appropriate liaison with the local BAT office.[11]

4-17. Administration and Enforcement Procedure.

a. Upon receipt of the required evidence, the ACO shall accept and use such ratios and rates for the purpose of checking the contractor's and/or subcontractor's compliance with the contract labor standards provisions. The evidence will be made a part of the official contract payroll files. To the extent necessary, copies of the evidence should be furnished

[11] In an effort to facilitate contracting agency compliance efforts in this area, BAT has compiled a listing of apprenticeship program sponsors which are recognized and registered by BAT or a State Registration Agency (approved by BAT to serve this function). The official name of each program sponsor, along with street address, city, and state is reflected in this listing which may be accessed at. https://oa.doleta.gov/bat.cfm.

ACO personnel for use in checking payrolls and other on-site enforcement activities. There is no requirement to furnish the Solicitor of Labor or other offices copies of the evidence.

b. Due to turnover or training experience needs of particular apprentices, there may be instances where additional apprentices will be employed on the job after the initial submission of the evidence concerning the contractor's program. In such cases, the contractor will be required to submit the required evidence for the additional apprentices along with the payroll on which the apprentice's name first appears.

c. The required wage rate for apprentices is the appropriate percentage of the journeyman wage rate which is listed in the prevailing wage determination, and not a percentage of some other journeyman's rate set by various apprenticeship committees. See Johnson Electric Co., WAB Case No. 30-3, (1983).

d. Whenever a payroll shows employees classified as apprentices or trainees and the contractor has not submitted the required evidence, he will be advised by the responsible ACO that such classification of work will not be accepted until and unless he promptly submits the evidence. If the contractor does not submit such evidence, he shall be directed to pay such employees at the contract wage rate applicable to the classification of work they actually performed.

e. Similarly, if the contractor exceeds the allowable apprentice to journeyman ratio, those apprentices employed in excess of the ratio would be entitled to restitution at the applicable journeyman's wage rate for the craft work performed. For example, if an employer is permitted to employ three apprentices under his apprentice to journeyman ratio and it is disclosed that he is employing five apprentices on the project, the first three apprentices employed shall be considered within the ratio. The last two employed shall be considered improperly employed and restitution would therefore be due these two. As a practical matter, if it is impossible to determine which apprentices were first employed on the project for purposes of restitution computations, any equitable formula will be acceptable. Thus, in the preceding situation, it would be permissible to rotate three of the five apprentices each week as a solution to the problem of which of these employees were "first" employed on the project, and compute restitution for the remaining employees accordingly.

f. In the event of controversy between project personnel and the contractor concerning this matter, the facts and circumstances shall be reported to the District Labor Advisor for further action.

g. The Code of Federal Regulations now contains the DOL's policy that if an apprenticeship or trainee program is silent with regard to payment of fringe benefits, such

employees must be paid the full amount of fringe benefits for the corresponding journeyman classifications as listed on the wage determination, unless DOL determines that a different practice prevails. This section has also been revised to allow contractors to follow the ratios and wage rates (percentages) for approved apprentice and trainee programs in their "home" area rather than requiring contractors to observe the ratios and wage rates in the area where the construction project is performed.

h. The following example illustrates the application of the ratio principle: Assume that a contractor has 100 journeymen and is allowed 10 apprentices. The ratio is thus one apprentice to 10 journeymen. Thus, for example, if he employs 11 journeymen, he will be allowed to employ two apprentices. No apprentice will be allowed unless there is at least one journeyman on the job.

4-18. Helpers.

a. Although the DOL published proposed regulations in connection with the use of semiskilled helpers in 1982, in 1987, in 1989, in 1990, and again in 1996, these regulations have been the subject of both judicial challenges and legislative prohibitions (See, e.g., Building and Constr. Trades Dept., AFL-CIO v. Martin, 961 F.2d 269; Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1 (D.D.C. 1997) as well as Public Laws 102-27 and 103-112).

b. On 20 November 2000, the DOL published (65 FR 69674) a final rule that restored the DOL's policy governing the use of helpers to its pre-1982 position. As provided by the DOL's regulations at 29 C.F.R. § 5.2(n)(4), helpers will be permitted where:

(1) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

(2) The use of such helpers is an established prevailing practice in the area; and

(3) The helper is not employed as a trainee in an informal training program. A ''helper'' classification will be added to WDs pursuant to § 5.5(a)(1)(ii) (A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

4-19. Content of Payrolls and Basic Records.

a. Content and Format.

(1) There is no standard form prescribed for payrolls on Corps contracts. However,

certain information is required to be shown on each payroll for all laborers and mechanics, including apprentices, trainees, watchmen, and guards[12], working at the site of the work. The payrolls must be numbered consecutively and contain the following information: Name and an individually identifying number (e.g., the last four numbers of the employee's social security number)[13] of each employee; his correct classification; hourly rate of pay; daily and weekly number of hours worked; gross earnings; deductions; and actual wages paid.

(2) Submission requirements may be satisfied electronically. First, DOL has posted Form WH-347 at http://www.dol.gov/whd/regs/compliance/posters/davis.htm in a printable and fillable format that automatically performs some mathematical calculations. Second, it is further noted that in 2004 DOL issued a letter to the Corps advising that the submission of electronic signatures satisfied the requirements of the Copeland Act and its regulations.

Similarly, the submission of photocopies or other automated duplication of the contractor's regular payrolls containing all of the required information pertinent to the government construction project(s) is sufficient to satisfy the payroll data requirements. Third, DOL has determined that specific methods of implementing cost savings and efficiencies through more effective use of technology are best left to the contracting community and individual government agencies. DOL encourages all government agencies to review proposals to allow contractors to submit information electronically or through an appropriate agency approved Web-based portal providing the required information and certification. DOL believes these efforts, if properly reviewed and implemented in accord with data privacy requirements, will decrease burden, increase the efficient use of resources and better ensure timely submission of certified payrolls to improve compliance. However, any such initiatives for Corps contracts must be reviewed and endorsed by the HQ Labor Advisor.

(3) The payroll heading should show the name and location of the project, contract number, the name of the contractor or subcontractor and the payroll period. The last payroll should be clearly marked "Final Payroll".

b. Fringe Benefits Information to be Shown on Payrolls. (See paragraph 4 of this chapter for discussion of fringe benefits as they appear in wage rate decisions.)

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[12] Watchmen and guards are reflected on payroll records for Contract Work Hours and Safety Standards Act only.

[13] On 19 Dec 2008, DOL revised its regulations at 29 C.F.R. § 5.5(a)(3) regarding the inclusion of full social security numbers and home addresses for covered employees. While this information is no longer required to be furnished on the weekly payroll submittal, the contractor must nonetheless maintain these records and make them available to the CO upon request for specific compliance review purposes.

(1) The Statement of Compliance, DD Form 879, (Appendix A), contains blocks wherein contractors are required to indicate the method they are using to pay required fringe benefits, i.e., whether they are paying to funds or to the employees, or a combination of both. See the instruction on the reverse of that form.

(2) Where the contractor indicates that all fringes are paid to funds (block (4)(a)), the fund must be identified and the amount contributed to ensure that the total (basic + f.b.) hourly wage obligation has been satisfied. If fringes are paid in cash, such payments must be shown on the payroll.

(3) Overtime premium compensation is not required to be paid on fringe benefits. For this reason, and to clear on the payroll what basic hourly rate is being paid, the rate(s) of fringe benefits paid in cash should be shown separately. If the contractor uses a lump sum rate (as per the example on reverse of DD Form 879) to compute cash in lieu of all fringes, such rate must be not less than the total of all required fringe benefits.

4-20. Statement of Compliance, DD Form 879.

a. DD Form 879 is to be executed in accordance with 29 C.F.R., Part 3, Section 3.3(b) and submitted with each weekly payroll.

b. Some contractors use a combined payroll statement form. The statements on such payroll forms are acceptable in lieu of DD Form 879, provided the statements contain the exact language of DD Form 879, and are properly executed.

c. ACOs should requisition the form and furnish it to all contractors and subcontractors as their needs require.

4-21. Submission of Payrolls.

a. Time of Submission. This contract provision requires that payrolls be submitted weekly to the CO and makes the prime contractor responsible for the submission of payrolls of all subcontractors. In this regard, prime contractors are to be reminded that they are more than mere conduits for the transmission of payrolls. They are obliged to ensure that all required information is furnished on such payrolls prior to their submission to the government. Submission to the ACO within seven calendar days after the regular payment date of the payroll week covered, is considered compliance with the contract provisions. A sample payroll is attached as Appendix B.

b. Delinquent Payrolls.

(1) FAR 22.406-6(b), Withholding for Non-Submission, states that if the contractor fails to submit his or his subcontractors' payrolls promptly, the CO shall withhold approval of such amount of the progress payment estimate as he considers necessary to protect the interests of the government, or of the employees of the contractor or any subcontractor.

(2) Any action pursuant to (1) next above will be taken by the CO in accordance with contractual general provisions. If the contractor becomes delinquent and does not promptly respond to requests by the ACO to comply, the latter shall report the problem to the District Labor Relations Advisor for further action.

4-22. Request for Authorization of Additional Classification and Rate - SF Form 1444. This form (Appendix C) is to be used to accomplish the action required by paragraph (d) of the DBA clause. The additional classification process is outlined in Figure 4-2. This process is explained in the sections that follow.

4-23. Instructions to Contractors.

a. The contractor should be instructed regarding the processing of the form as soon as it is determined that additional classifications are required. This matter should be discussed at the preconstruction conference to determine which, if any, additional classifications will be required by the contractor or subcontractors.

b. All requests must be made by the prime contractor, and where a subcontractor is to use the requested classifications, the name and address of the subcontractor will be shown in Item 10 and signed by the subcontractor in Item 14. Where no subcontractor is involved, show in Item 10 "Not applicable." Union representatives or other representatives of the class of labor are not required to sign the request.

c. It is important to emphasize that the contractor's proposal be supplemented by information relating to how the proposed wage rate was developed. For example, it may be that the contractor is signatory to a collective bargaining agreement wherein the rate for the subject trade classification is established. The contractor may also identify similar construction projects in the vicinity of the Corps contract where such a classification and rate was used. In any event, DOL requires that the contractor, the affected employees (if known) or their representatives, and the CO agree on the proposed classification and rate including the amount designated for fringe benefits where appropriate). DOL requires that the contractor state whether the proposed rate was developed in consultation with the employees.

d. Pending a final determination by DOL, the contractor may tentatively classify and pay affected employees in accordance with the proposal. The contractor should be

advised, however, that he may eventually be required to re-classify the affected employees and/or furnish wage restitution should the proposed additional classification and rate be denied by DOL.[14]

4-24. Submission and Processing Requests.

a. Requests are to be forwarded to the CIR Representative, and every effort should be made to submit the contractor's requests for approval by the CO prior to use of the classification on the contract.

b. DOL has indicated that it will approve, modify, or disapprove every additional classification action within 30 days of receipt or will notify the CO within the 30-day period that additional time is necessary. Experience has shown that DOL has encountered difficulties in processing the requests within 30 days. It is essential that the District CIR Representative monitor delays in DOL responses. All requests which are more than 90 days delinquent or any that precludes the closeout of contracts should be reported to CECC-C for coordination with DOL.[15]

c. Posting - Upon receipt of the DOL's determination, the ACO shall furnish the contractor with DOL's determination. Further, the contractor will be required to post all approved classifications and rates along with the contract wage rate decision in a place accessible to all employees at the project site.

4-25. Subcontracts (Labor Standards). The contract clause set forth at FAR 52.222-11 imposes the certain requirements upon the contractor as noted below.

a. Notice of Award of Subcontracts. This contractual provision requires that within 14 days after the award of any subcontract, either by himself or a lower tier subcontractor, the contractor shall deliver to the CO a statement setting forth the name and address of the

[14] On 22 March 2013 DoL issued All Agency Memorandum (AAM) 213. The AAM provides detailed guidance on what constitutes a bona fide conformance request; and provides measures that can be used by the contractor to ensure a valid request. AAM 213 can be found at http://www.wdol.gov/aam/aam213.pdf.

[15] To assist in expediting conformance requests SF-1444, please forward it to WHD-CBACONFORMANCE_INCOMING@DOL.GOV. The Branch of Construction Wage Determinations will review your submittal and process it accordingly. For analysts and state assignments see https://www.dol.gov/whd/govcontracts/stateassignments.htm.

subcontractor and a summary description of the work subcontracted. At the same time, the prime contractor is required to furnish a statement signed by the subcontractor acknowledging the inclusion in his subcontract of applicable labor clauses.

b. Form of Notice, SF Form 1413. This form (Appendix D) is prescribed for use in complying with the required notification by the prime contractor and the acknowledgment required of the subcontractor. The executed form should be forwarded to the CIR Representative.

4-26. Physical Inclusion of Labor Clause in Subcontracts.

a. 29 C.F.R. § 5.5a(6) requires that such clauses be "inserted" in subcontracts, and under the provision entitled "Subcontracts" the contractor agrees to do so.

b. For purpose of advising contractors, the following information should be included in preconstruction labor relations letters and discussed during preconstruction conferences. Physical inclusion of labor clauses is required for compliance with the General Provisions clause entitled "Subcontracts." Incorporation by reference does not constitute compliance. However, contractors who subcontract by means of purchase orders or other informal type contract forms will be considered in compliance provided they attach copies of the appropriate labor standards clauses to the subcontract form, and provided also that the subcontractor acknowledges receipt in writing.

c. The prime contractor is not required to furnish the CO copies of his subcontract agreements. The only evidence required is the SF Form 1413 properly executed by both the prime and subcontractors.

4-27. E-Verify and Undocumented Workers.

a. E-Verify. Based on Administration directives arising from E.O. 12989 and E.O. 13465, the Department of Homeland Security developed the Employment Eligibility Verification System (E-Verify). While there are very specific E-Verify program registration and participation requirements set out in the Department of Homeland Security regulations, in general, FAR 22.18, Employment Eligibility Verification.

(1) requires the insertion of the E-Verify clause for prime contracts above the simplified acquisition threshold ($150,000);

(2) requires inclusion of the clause in subcontracts of over $3,000 for services or for construction;

(3) allows the Head of the Contracting Activity to waive E-Verify requirements after contract award, either temporarily or for the period of performance, and;

(4) requires contractors and subcontractors to use E-Verify to confirm the employment eligibility of all existing employees who are directly performing work under the covered contract. Contractors participating in the E-Verify program for the first time are provided a 90 calendar day enrollment period to begin using the system for new and existing employees. The E-Verify program rules also provides a longer period after this initial enrollment period (30 calendar days) for contractors to initiate verification of existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered Federal contract. Contractors already enrolled and using the program as Federal contractors have the same extended timeframe for verification of employees assigned to the contract, but the time limits are measured from contract award date instead of from the contractor's E-Verify enrollment date. With regard to verification of new hires, a contractor that has already been enrolled as a Federal contractor for 90 calendar days or more has the standard 3 business days from the date of hire to verify new hires.

b. During routine labor standards compliance activities, USACE CIR Representatives have occasionally identified the presence of undocumented workers performing on USACE construction contracts. The DOL has advised contracting agencies that regardless of immigration status, such workers are entitled to the minimum wage protections set forth in the DBA. In an effort to promote proper coordination in such cases, DOL entered into a Memorandum of Understanding with the Immigration and Customs Enforcement Service (ICE) on 7 December 2011. USACE has been advised by the DOL's Wage and Hour Division that in the event that the presence of undocumented workers is suspected on USACE contracts, CIR Representatives are to contact the respective Wage and Hour and ICE offices.[16]

[16] See dol.gov/whd/america2.htm for the field offices of the Wage and Hour Division (and ice.gov/graphics/investigations/contact.htm) for the field offices of ICE.

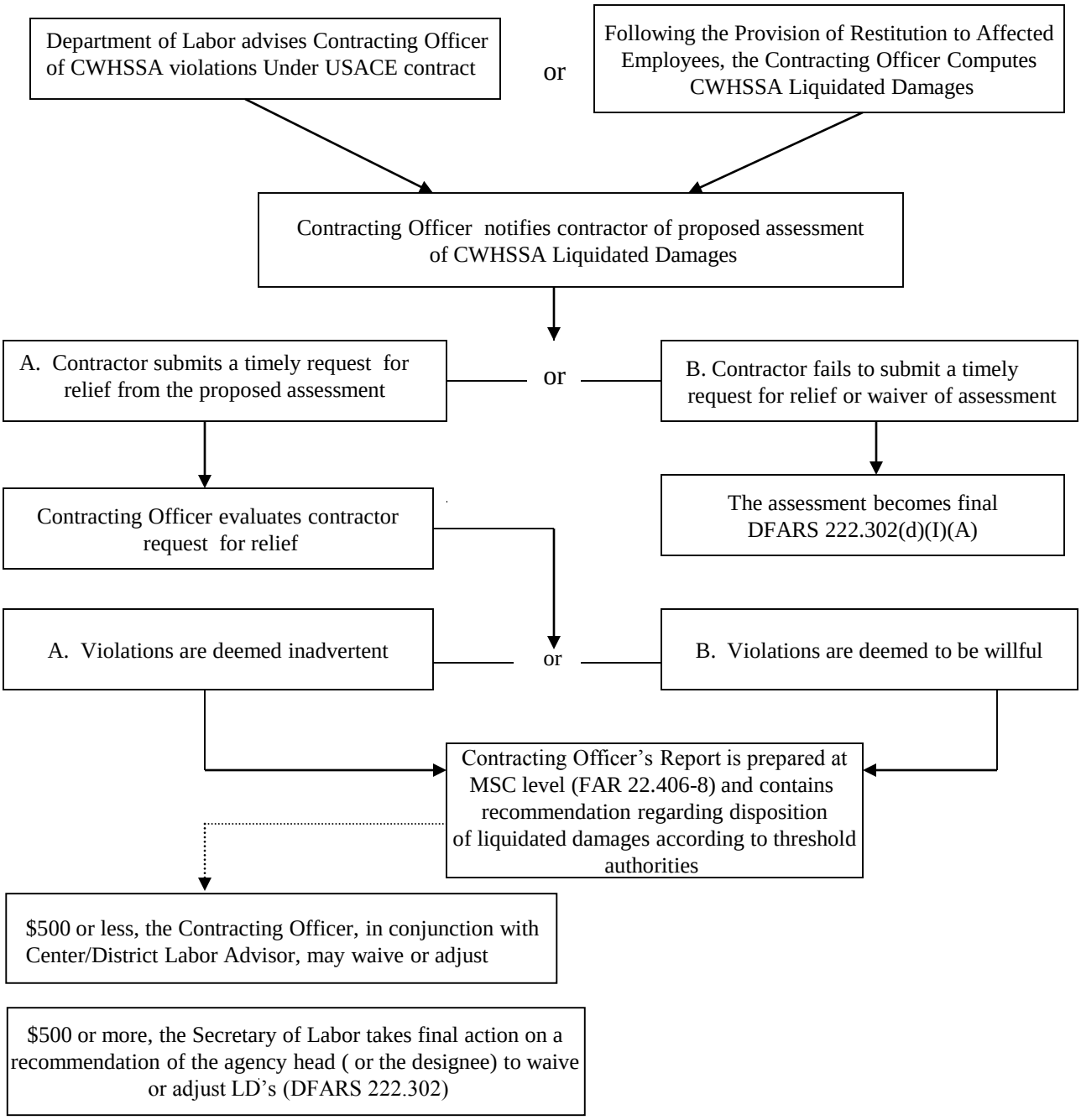


Figure 4-1. Processing of Contracting Officer Reports Relating to Contractor Violations of the Contract Work Hours and Safety Standards Act (CWHSSA) and the Assessment of Liquidated Damages

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Prime Contractor

The contractor submits proposed classification and wage rate with statements relating to the basis of the proposed rate and affected employee concurrence to the Contracting Officer for evaluation.

USACE Contracting Officer

The Contracting Officer evaluates the proposal in light of the following criteria:

a. the classification is appropriate and the work to be performed by the classification is not performed by any classification contained in the applicable wage decision.
b. the classification is utilized in the area by the construction industry
c. the proposed wage rate, including any fringe benefits, bears a reasonable relationship to the wage rates in the wage determination in the contract.

A. Interested parties agree on classification and rate
29 CFR 5.5(1)(ii)(B)

or

B. Interested parties do **not** agree on classification and rate
29 CFR 5.5(1)(ii)(C)

U.S. Army Corps of Engineers, Division

U.S. Army Corps of Engineers
Office of the Chief Counsel, CECC-C

Administrator, Wage & Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Figure 4-2. Processing of SF 1444, *Request for Authorization of Additional Classification and Rate*

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# CHAPTER 5

## Applicability of Contract Labor Provisions to Various Situations, Conditions, and Work Activities

5-1. General. This section deals with questions about coverage of the DBA and related Acts. During the past few years the enforcement activities of Federal agencies have resulted in many decisions by DOL. This part only covers situations that are most common to our construction activities. Consult counsel with questions about a particular situation.

5-2. Survey Crews.

a. If surveying is performed immediately prior to, after, and during actual construction, in direct support of construction crews, such surveying is considered construction work within the meaning of the DBA. Coverage of individuals performing this work would depend on their individual status as laborers or mechanics.

b. If the work of an individual in a survey crew is considered professional or sub-professional, (duties that are technical in nature and are a part of the engineering process), that one so employed is not a laborer or mechanic within the meaning of the DBA. On the other hand, where individuals perform primarily manual work, such as clearing brush and sharpening stakes, they fall within the definition of the term "laborer." (DB-26, 2 Aug 62).[17]

5-3. Owner-Operators of Construction Equipment. Except as stated below, owner-operators of equipment employed by construction contractors or subcontractors are not recognized as independent contractors. They must be carried on the employer's payroll and paid in accordance with all the contract labor provisions.

a. One exception: Contract labor provisions will not be enforced as to "bona fide" owner-operators of trucks or other similar construction equipment who are "independent contractors." As to such owner- operators, the payrolls must contain their names and the notation "Owner-Operator." It is not necessary to show hours worked or rates

[17] DoL issued AAM 212, Applicability of Davis-Bacon labor standards to members of survey crews, on 22 March 2013. This guidance supplements the guidance provided in letters that were distributed as attachments to AAM No. 16, dated 25 July 1960, and AAM No. 39, dated 6 August 1962. Both of these items can be found at http://www.wdol.gov/aam.aspx. Questions and Answers regarding Workers Who Perform Work Activities Involved in Surveying can be found at http://www.dol.gov/whd/govcontracts/DB-QAs.pdf.

allegedly paid. The reference to "trucks or other similar construction equipment" is applicable only to the various types of equipment used exclusively for hauling and does not cover equipment such as bulldozers, backhoes, cranes, drilling rigs, welding machines, and such (DB-9, 13 Sep 61 and DB-12, 26 Sep 61).

b. In some cases the "owner-operator" might own trucks in addition to the one driven by the owner-operator. The drivers of those trucks are not exempt and must be paid in accordance with the contract provisions.

5-4. Operators of Rented Construction Equipment. Except the owner-operators discussed in 5-3a(1), all operators of equipment rented by the prime contractor or any subcontractor for use in performing the contract work are covered by the contract provisions.

a. Method of Computing Earnings.

(1) The method of computing earnings, i.e., per yard, does not have any effect on the status of the operator of the equipment with respect to coverage. Neither does the fact that the equipment is rented on a fixed fee per hour fully operated basis.

(2) To satisfy the DBA, covered operators must be compensated for each hour worked at a rate which is not less than the proper minimum hourly rate specified in the contract.

(3) To satisfy requirements of the contract overtime compensation provisions, covered operators must be compensated at not less than one and one-half times their basic hourly rate for all hours of over-time work.

b. Payrolls.

(1) It is clear from the language of the DBA that equipment operators performing the work of laborers and mechanics must be paid not less than the aggregate of the basic hourly rates and fringe benefits regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics. Also, they must be paid overtime compensation as required by the CWHSSA. It follows that such covered operators are considered to be employees of the contractor or subcontractor, as the case may be, and they must submit payrolls for such operators.

(2) Equipment owners furnishing operators with the equipment to perform covered work are considered to be subcontractors and must comply with all the contract labor

standards provisions; however, the contract with the equipment owner for the manned equipment may provide for payment of the operators by the prime contractor or subcontractor, in which event the operators will be reported on their payrolls.

(3) The required content of payrolls and basic records is the same as for any other covered workers. Also, since payrolls and Statement(s) of Compliance pertain only to compensation for wages, no amounts for equipment rental should be included. Making deductions (withholdings) from wages which may be required by Federal or other tax laws and labor agreements is the responsibility of the employing contractor. An employer's compliance with such withholding requirements is not within the enforcement jurisdiction of contracting officers; however, to the extent deductions are made they are subject to the contracting officer's enforcement of relevant contract labor standards provisions.

5-5. Equipment Repair Activities.

a. Repairs at Job Site by Employees of Construction Contractors and Subcontractors. Laborers and mechanics employed by such contractors and working at the site of construction repairing equipment used on the covered contract must be paid in accordance with the contract requirements.

b. Subcontractor Status of Equipment Dealers Pursuant to Lease Arrangement with Construction Contractors.

(1) This applies to situations where the equipment used by construction contractors is leased or rented from equipment dealers and the lease provides that laborers and mechanics employed by the equipment rental dealer are required to go on site of construction to repair the equipment. This does not apply to purchased equipment and repair work thereon pursuant to manufacturer's or dealer's written warranties and/or guarantees.

(2) The Solicitor of Labor has ruled that equipment rental dealers are subcontractors under the DBA where substantial and recurring repair work on the construction site is involved, "substantial" being defined as work exceeding 20 percent of a person's time in any work week. Accordingly, where laborers and mechanics employed by such a subcontractor perform work meeting the test, they are covered workers entitled to the benefits of the DBA as well as all other contract labor standards provisions See Griffith Co., WAB Case No. 64-3 (1965).

c. Repairs at Home Shop. Where the contractor has an established shop to work on equipment, including equipment used on covered and noncovered contracts, the laborers and mechanics employed therein need not be paid in accordance with the contract.

5-6. Capacity of Trucks. DOL's wage rate decisions contain various truck driver classifications. In some decisions the minimum hourly wage rates vary according to the capacity of the trucks. Some trucks are listed by cubic yard capacity and others are listed according to ton capacity. As a result, questions may arise with respect to the proper wage rate to be applied. The controlling factor is the load carrying capacity of the vehicle and not the rating for registration or other purposes (Solicitor of Labor Opinion letter, 21 Feb 62).

5-7. Furnishing Materials and Hauling Operations.

a. General. Whether the party is a subcontractor or a bona fide materialman in relation to the prime contractor or subcontractor is dependent upon the application of the term "subcontractor," as distinguished from the term "materialman" to the activities involved. Neither the DBA nor DOL's regulations, Part 5, specifically define the terms "subcontractor" and "materialman" as such.

b. Secretary of Labor's Regulations and Rulings.

(1) Regulations, Part 5, Title 29 C.F.R., in Section 5.2(g), say that the terms "construction," "prosecution," "completion," and "repair" mean all types of work done on a particular building or work at the site thereof, including transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work. Thus, it is clear that such employees performing such work are engaged in covered activities (DB-22, 12 Mar 62).

(2) Section 5.2(f) states that the terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. They further state that the manufacture or furnishing of materials, articles, supplies, or equipment is not a "building" or "work" within the meaning of the regulations unless conducted in connection with and at the site of such a building or work. DOL has traditionally considered the manufacture and delivery of supply items to the worksite, when accomplished by bona fide materialmen serving the public in general, as noncovered activities.

5-8. Drilling Services. The Solicitor of Labor has issued specific guidance relating to the applicability of the DBA the various types of drilling services (DB-40, 25 Jun 63; see also CTL Engineering, WAB Case No. 80-7 (1983)).

a. The Act is not applicable to exploratory drilling performed to obtain core borings for use in engineering studies and planning for a dam, where the holes themselves will presumably be abandoned or filled in.

b. Boring for soil samples is covered by the Act where the work is directly related and incidental to the actual construction process (e.g., obtaining soil samples for purposes of setting foundations). Such boring is not covered where it constitutes preliminary work (e.g., obtaining soil samples to formulate plans and specifications, or as part of site investigation).

c. Drilling holes to be used for water wells, ventilating shafts, etc., is covered.

d. The Act does cover digging of test holes which are to be converted to water wells if the tests at a hole indicate adequate yield and a production well is desired at that location. The fact that some of the holes may not be used for wells is not significant - the expectation that some of them may be so used is sufficient.

e. Plugging of oil or gas wells and removal of above-ground equipment, in connection with construction of a reservoir, is covered whether the work is regarded as demolition or drilling.

5-9. Carpet Laying and Installation of Draperies. The DBA applies to carpet laying and the installation of draperies when it is performed as an integral part of, or in conjunction with, new construction. The Service Contract Act (SCA) applies to carpet laying when it is performed as part of routine maintenance, e.g., replacement of worn out carpeting in a public building or a public work where no other construction is contemplated.

5-10. Clean-up Work. Cleaning work is covered by the DBA in situations where the cleaning is performed as a condition precedent to the acceptance of a building as satisfactorily completed. For example, this would include activities such as window scraping and washing, removal of excess paint, and sweeping. Where cleaning is carried out after the construction contractor and subcontractors have finished their work, left the site, and the contracting agency has accepted the work as completed, such work would not be covered under the DBA.

5-11. Demolition Work in Relation to Construction. Demolition, standing alone, is not subject to the DBA. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished and further DBA-covered construction activity

at the site is contemplated, the Act would apply (Solicitor of Labor Opinion, 20 Jun 61).[18] Questions on DB and/or SCA application to HAZMAT duties should be directed to the HQs labor advisor.

5-12. Landscape Contracting. Landscaping performed in conjunction with new construction or renovation work subject to the DBA is covered. In addition, elaborate landscaping activities standing alone such as substantial earth moving and rearrangement of the terrain may constitute construction within the meaning of the Act, without requiring that it be related to other construction work. Landscaping which is not covered by the Act is work for which the SCA may be applicable.

5-13. Painting and Decorating. The DBA provides coverage for the "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." The coverage also includes painting or re-painting of mail collection boxes, street and traffic lines, the refinishing of floors and bowling lanes, and the installation of wall covering or hanging wallpaper. Federal contracts for painting of Government-owned, privately-occupied houses, apartments, commercial properties, etc., are also covered by the Act (DB-45, 1 Jun 65).

5-14. Public Utility Installation.

a. Whether or not the employees of a public utility, who perform construction type work in connection with Federal or federally assisted projects, are covered by Davis-Bacon will depend upon the nature of the contracts involved and the work performed.

b. Where a public utility is furnishing its own materials and is in effect extending its own utility system, work is not covered by the DBA. The same conclusion would apply where the utility company may contract out such work for extending its utility system. However, where the utility company agrees to undertake a portion of the construction of a covered project (e.g., relocation of utility lines or installation of utility lines which are to become the property of the project sponsor), work would be subject to the DBA provisions.

5-15. Sewer Repair Services. The internal inspection of sewer lines for leakage and damage through the use of closed circuit TV inspection and the simultaneous sealing of leaks or other damage in the lines as the machine inspects the sewer line is covered by

[18] DoL's AAM 190, Application of Labor Standards to Demolition Contracts, should be given careful consideration in procurement actions that involve demolition. AAM 190 can be found at: http://www.wdol.gov/aam/AAM190.pdf.

the DBA. On the other hand, if the contract is only for inspection, the DBA would not apply. However, the SCA would apply in the latter situation if the Government was a direct party to the contract.

5-16. Steam and Sand Blast Cleaning. Steam and sand blast cleaning, as well as bird-proofing, are covered by the Act. Such cleaning operations performed on public buildings are authorized for the purpose of renewing the original appearance of these buildings and are performed for the same purpose as painting and decorating which are covered by the Act (DB-8, 17 Jul 61).

5-17. Supply and Installation Contracts.

a. Installation work performed in conjunction with supply or service (e.g., base support) contracts is covered by the DBA where it involves more than an incidental amount of construction activity (i.e., the contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work, and such work is physically or functionally separate from, and can be performed on a segregated basis from the other non-construction work called for by the contract). For example, DBA coverage has been extended to installing a security system or an intrusion detection system, installing permanent shelving which is attached to a structure, installing air-conditioning ducts, excavating outside cable trenches and laying cable, installing heavy generators, mounting radar antenna, and installing instrumentation grounding systems, where a substantial amount of construction work is involved.

b. Whether installation involves more than an incidental amount of construction activity depends upon the specific circumstances and no fixed rules can be established. Factors include the nature of the prime contract work, the type of work performed by the employees installing the equipment on the project site (i.e., the techniques, materials, and equipment used and the skills called for in its performance), the extent to which structural modifications to buildings are needed to accommodate the equipment (such as widening entrances, relocating walls, or installing wiring), and the cost of the installation work - either in terms of absolute amount or in relation to the cost of the equipment and the total project cost.

c. The DBA does not apply to construction work which is incidental to the furnishing of supplies or equipment, if the construction work is merged with non-construction work or so fragmented in terms of the locations or time spans of its performance that the construction work is not capable of being segregated.

d. Coverage questions which cannot be resolved in accordance with the above principles should be directed to DOL through appropriate channels.

5-18. Flaggers. Flaggers who direct traffic on federally funded projects but perform no manual construction work are still "laborers and mechanics" within the meaning of the Act (see AAM No. 141, 19 Aug 85).

5-19. Logging Operations. The cutting and removal of marketable timber by a logger or subcontractor is a part of the contract construction work and employees engaged in cutting and removal come within the purview of the DBA provisions of the construction contract. The test of coverage is whether the work required to satisfy the contract specifications as to clearing and disposal. The fact that the contractor gives the timber to the logger in consideration of the logger's cutting and removal is not relevant. When the contractor has made final disposition of the timber or debris in accordance with the contract requirements, the taking of possession and the hauling away by others is not a part of the contract work. In this connection, there may be situations where the contractor, subcontractor, or logger performs all of the felling, trimming, and sawing into log lengths or other suitable form, ready to be moved into commercial channels. All such work on the contract site is a covered activity and all workers engaged in such must be paid in accordance with the contract labor standards provisions.

5-20. Crews on Towboats and Pushboats Engaged in Transportation and Tending Services.

a. General. Some background discussion is necessary for a clear understanding of this subject. The courts have held that seamen are not laborers or mechanics; therefore, seamen are not subject to the DBA or other construction contract labor standards provisions.

b. Seamen. Pursuant to legislative history and court decisions, DOL's regulations under the FLSA (see DOL Field Operations Handbook §15j00) state that an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels.

c. Not Seamen. (1) The question of whether or not an employee is a seaman depends on the nature of his duties rather than on the title of his occupation. (2) Employees on "floating equipment" who are engaged in the construction of docks, levees, revetments, or other structures, and employees engaged in dredging operations or in the digging or in the processing of sand, gravel or other materials are not employed as seamen within the meaning of the Act but are engaged in performing

essentially industrial or excavation work. (3) The "floating equipment" is that used directly in the prosecution of the construction, including pile drivers, equipment and material barges, dredges, and attendant plant. Such employees, although employed on floating plant, are employed in the performance of construction work and not employed aboard a vessel used as a means of transportation. Therefore, they are laborers and mechanics.

5-21. Removal of Asbestos-Containing Materials. Asbestos abatement projects give rise to problems with respect to the appropriate trade classification and the appropriate labor standards provisions (DBA v. SCA).

a. DBA v. SCA. DOL has advised that either statute may apply depending upon the nature and purpose of the asbestos removal. The SCA applies to asbestos removal performed in conjunction with demolition services (see paragraph 5-11) where no future construction is contemplated. However, where removal is performed in conjunction with the rehabilitation of a public building or work, the DBA would apply.

b. DBA Trade Classification. In addressing this issue, two considerations are critical:

(1) the location of the asbestos-containing material, i.e., mechanical systems (pipes, boilers, and ducts) and;

(2) the disposition of the insulated system (i.e., will it remain in place or be scrapped?). In contracts containing negotiated wage rates, the Fry Brothers, WAB Case No. 76-6 (1977), policy allows the CO to follow negotiated (union) classification practices. In these situations, we may refer to the International Agreement (Appendix G) between the Laborers International Union of North America and the International Association of Heat and Frost Insulators and Asbestos Workers. This agreement describes specific situations for asbestos removal and identifies the proper classification for workers involved in removal work. Experience has shown that although the Agreement specifically determines the classification of workers responsible for the removal of asbestos-containing material, local trade unions may not necessarily adhere to the Agreement. In these cases as well as in contracts containing open-shop (non-union) wage rates, the CIR Representative must perform an area practice survey to determine the proper classification. Further information relating to area practice surveys may be found in Chapter 8.[19]

5-22. Ship-Building, Alteration, Repair and Maintenance. The building, alteration, and repair of ships under Government contracts is work performed upon "public works"

[19] Careful consideration should be given to DoL AAM 153, Application of the Davis-Bacon Act to Contracts for Asbestos and/or Paint Removal. AAM 153 can be found at http://www.wdol.gov/aam/AAM153.pdf .

within the meaning of the DBA. WDs for ship-building are issued only if the location of contract performance is known when bids are solicited. However, a contract which calls for the construction, alteration, furnishing, or equipping of a "naval vessel" (U.S. Navy and U.S. Coast Guard vessels) is subject to the Walsh-Healey Public Contracts Act. A contract which calls for the maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel is a service contract covered by the SCA.

5-23. Air-Balance Engineers. In general, air balance engineers are not considered laborers or mechanics within the meaning of the DBA. The primary function of such employees is to take measurements and to accumulate data upon which recommend-dations are based to advise mechanical contractors how to rectify imperfections or imbalances in heating or air conditioning systems which may become apparent after the contractor(s) have installed such systems. Generally, however, such employees do not physically make the required corrections. If, however, such employees spend a substantial amount of their time in any workweek (i.e., more than 20 percent) on the site performing manual, physical, and mechanical functions which are those of the tradition-al craftsmen, they would be considered laborers or mechanics for the time so spent.

5-24. Leases Involving Construction Activity. The applicability of the DBA to leases involving construction has been the subject of various Wage Appeals Board proceed-ings (Military Housing, Ft. Drum, WAB Case No. 85-16 (1985); Crown Point, Indiana Outpatient Clinic, WAB Case No. 86-33 (1987) and related litigation (Building and Constr. Trades Dept. v. Turnage, 705 F. Supp. 5 (D.D.C. 1988)). The applicability of the Act to a lease can be determined only by considering the facts of the particular contract. Consider the length of the lease, the extent of government involvement in the construction project, the extent to which the construction will be used for private rather than public purposes, and the extent to which the costs of construction will be fully paid for by the lease payments. Questions with respect to the applicability of the Act should be referred to the District Counsel for consideration of these factors.[20]

[20]See CityCenterDC Project – District of Columbia v. Dept. of Labor, 34 F. Supp. 3d 172 (D.D.C. 2014); CIR Letter 14-7; and ARB Decision on Davis-Bacon application to SpaceX – Space Exploration Technologies Corp., ARB No. 14-001, 2016 WL 4238458 (ARB Jun 16, 2016).

5-25. "Working Subcontractors". The DBA requires that all laborers and mechanics employed directly upon the site of the work be paid the predetermined wage rates "…regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and laborers and mechanics…". A 1960 legal opinion states in relevant part "the gist of the Secretary of Labor's position is that the word 'employed' in the phrase "mechanics and laborers' does not necessarily import 'employee". (see 41 U.S. Op. Atty. Gen 488 (1960)). Owners of subcontractor firms who are performing the work of laborers and mechanics are entitled to the applicable prevailing wage rate for the work performed (see Ray Wilson Co., ARB No. 02-086, ALJ No. 2000-DBA-14 (ARB Feb. 24, 2004). If the subcontract price covers the applicable wage rate for the number of hours worked as a laborer or mechanic on the DBA job, DOL considers the owner/subcontractor to have been paid in compliance.

5-26. Non-Federal Work-in-Kind Performed Pursuant to Project Cooperation Agreements. DOL has advised that certain Civil Works projects authorized by annual Energy and Water Resources Development Acts are subject to the DBA. In particular, DOL asserted DBA coverage of non-Federal work-in-kind that is undertaken by non-Federal interests for credit or reimbursement. DOL concluded that all Project Cooperation Agreements (PCAs) and similar type agreements that provide for prospective non-Federal work-in-kind, for which the work is "construction" within the meaning of the DBA, are covered by the Act and must include references to DBA.

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# CHAPTER 6

## Labor Disputes, Work Stoppages, Activities And Complaints of Labor Representatives

6-1. General. The contractor is responsible for handling labor difficulties and work stoppages. As provided in FAR 52.222-1, "Notice to the Government of Labor Disputes," whenever the contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of the contract, the contractor is required to give immediate notice, including all relevant information, to the CO.

6-2. Action at District Office Level.

a. CO and CIR Representative Duties. The scope of action at the District level is limited and must not involve the Corps in the merits of labor disputes which clearly do not involve allegations of violations of the government contract labor standards provisions. In such cases the CO or the CIR Representative may assist in settlement of disputes only by advising contractors to make use of any facilities for conciliation and arbitration available, including the Federal Mediation and Conciliation Service, the National Labor Relations Board, state and local labor services, or arbitration procedures established by collective bargaining agreements or by labor and contractor organizations.

b. Handling Jurisdictional Disputes. Neither the CO nor the CIR Representative will take part in the actual adjudication of jurisdictional disputes between unions or similar disputes between labor representatives and contractors. They may, however, attempt to get the parties together to settle their differences. In a dispute over work jurisdiction between unions within the Building and Construction Trades Department, AFL-CIO, the contractor should be advised to refer the question to the National Joint Board for the Settlement of Jurisdictional Disputes if attempts to settle the dispute locally fail. Attempts should be made to settle disputes over work jurisdiction or union representation between other organized labor groups by agreement of the local, regional, or national union leaders concerned or by the facilities offered by the Federal Mediation and Conciliation Service and the National Labor Relations Board if the parties to the dispute cannot settle.

c. Reporting Disputes. Reports on labor disputes required by FAR 22.101-3 will be elevated by the CIR Representative as expeditiously as the importance and impact of the situation dictates. Reporting procedures to be followed by ACO personnel are outlined in Figure 6-1, which follows Chapter 6. These procedures are set forth below.

6-3. Action by Contractor. In some cases, work stoppages cause delays in the timely performance of contracts. The CO should advise the contractor that it will be held accountable for delays that are reasonably avoidable. It should be emphasized that the standard contract clauses dealing with default, excusable delays, etc., do not relieve the contractor of delays that are not beyond his or his subcontractors' control. A delay caused by a strike, which is an unfair labor practice and which the contractor could not reasonably prevent, can be excused only to the extent that it does not go beyond the point at which a reasonably diligent contractor could resume the delayed performance by:

a. Filing a charge with the National Labor Relations Board so as to permit the NLRB to seek injunctive relief in court;

b. Using the National Joint Board for the Settlement of Jurisdictional Disputes, or other private Boards or organizations for the settlement of disputes.

6-4. Reporting Labor Disputes and Work Stoppages.

a. Quality Assurance Personnel. All field personnel should be on the alert for labor difficulties, and when they become aware of any actual or potential labor difficulties, such information will be given to the ACO to contact immediately the contractor to obtain all relevant information. QA personnel should make such inquiry of the contractor as is necessary to obtain all information available for reporting purposes. If labor representatives are on the jobsite, contacts with them by QA personnel should be limited to obtaining information which is pertinent to a complete preliminary report. Higher headquarters should be kept informed regularly.

b. Reporting by the ACO. When a labor dispute, work stoppage, or threatened work stoppage occurs, the ACO will comply with the following procedure:

(1) Initial Report. The initial report should be forwarded by email to the CIR Representative and the CO. The report will contain the information available as set forth at DFARS PGI 222.101-3, Reporting Labor Disputes.

(2) Follow-up Reports. Such reports will be made in accordance with paragraph (1) above, to report significant changes in the situation as previously reported. At a minimum, follow-up reports will be made weekly for the duration of the dispute.

(3) Final Reports. Final reports, signed by the responsible official of the reporting office, will be forwarded within five days after the conclusion of the work stoppage.

6-5. Labor Activities.

a. Union and Open-Shop Contractors. Evaluation of proposals and contract award are irrespective of the contractor's labor policies in regard to employment of "union" or "non-union" workers.

b. Activities of Representatives of Labor Organizations.

(1) Accredited representatives of labor unions or other organizations may carry on legitimate and normal business dealings with the contractor or District Commander and will not, because of their position, be denied access to a project. The following applies to labor activities on military reservations, civil works reservations and all other contract work sites.

(2) Whenever labor representatives request permission to enter Corps installations on which private contractor employees are engaged in contract work, to conduct union business during working hours in connection with the Government contract on which union members are employed, the ACO may admit such representatives, provided:

(a) the presence and activities of the labor representatives will not interfere with the progress of the contract work involved, and

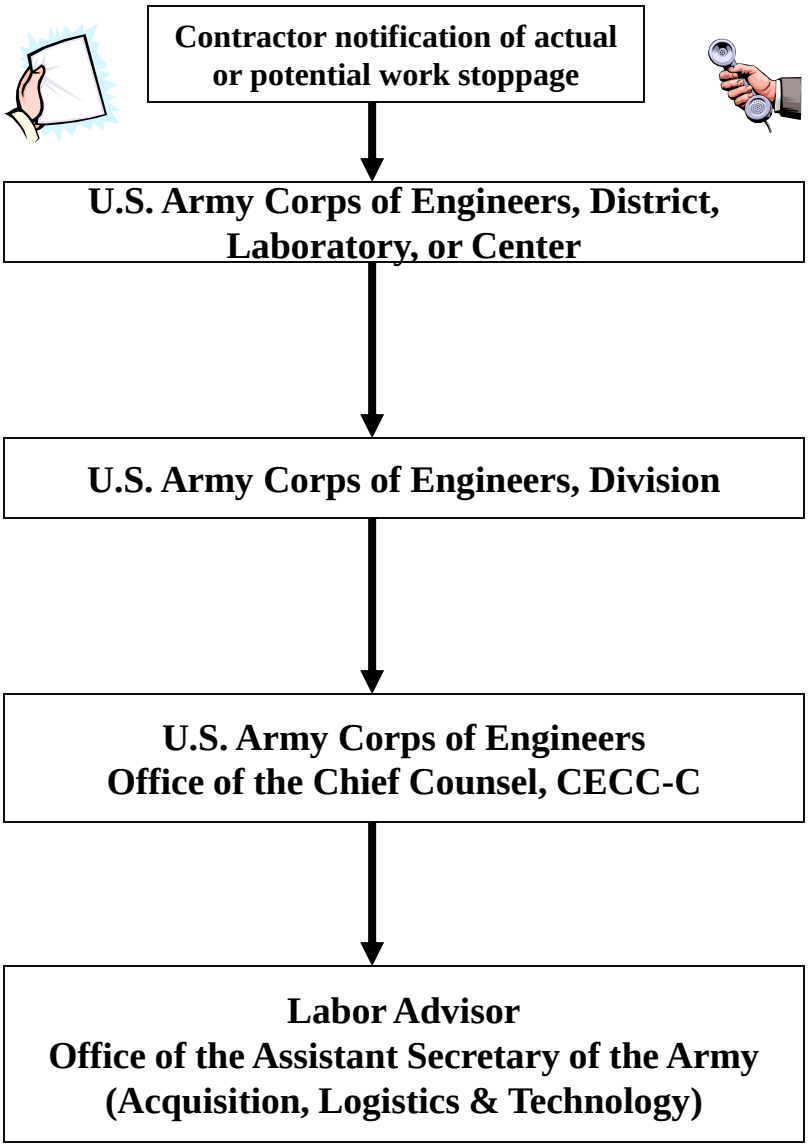
(b) the entry of such representatives to the installation will not violate pertinent safety or security regulations. Labor representatives are not authorized to engage in organizing activities, collective bargaining discussions, or other matters not directly connected with the Government contract, on such installations. However, the ACO may authorize labor representatives to enter the installation for the purpose of distributing organizational literature and authorization cards to private contractors' employees, provided such distribution does not:

- occur in working areas or during working times of employees concerned;
- interfere with contract performance;
- interfere with the efficient operation of the installation, or;
- violate pertinent safety or security regulations.

The determination as to who is an appropriate labor representative should be made by the ACO on recommendation of the CIR Representative after consultation with local union officials. Business offices or desk space for labor organizations for solicitation of membership, collection of dues, or other business of the labor organization, not directly connected with the contract work shall not be permitted on the installation, except for

the routine functions of the working steward whose union duties are incidental to his assigned job. In the event the ACO denies entry to a labor representative for any reason, he shall include the reasons for denial, including (1) names and addresses of representatives denied entry and (2) union affiliation of such representatives if known.

c. Complaints from Representatives of Unions, Trust Funds and Apprenticeship Programs. Complaints from such representatives, other interested parties, or contractor employees, alleging that a contractor is not complying with the fringe benefit payment requirements, or other labor requirements of the government contract provisions, are not to be regarded as "disputes." Complaints regarding nonpayment of fringe benefits involve a question of compliance with the contract minimum wage requirements which COs are responsible for enforcing. Accordingly, an investigation by the CIR Representative, including an interview with the complainant(s), shall be promptly conducted to determine the facts, and extent of corrective action, if any, required of the contractor.




Reference: FAR 22.101
DFARS 222.101-3

Figure 6-1. - Processing of Contractor's Notification of Actual or Potential Labor Dispute

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# CHAPTER 7

## Enforcement Procedure and Reporting

7-1. General. A sound enforcement program to assure that contractors are aware of their responsibilities and that laborers and mechanics are properly paid includes: A preconstruction labor relations letter; a preconstruction conference; and an adequate review of the contractor's payroll records and field inspection of his operations. The preconstruction labor relations letter will provide information regarding the labor standards clauses and wage determination requirements of the contract. This letter may also include guidance as to the submission of required forms.

7-2. Preconstruction Conferences.

a. Such conferences are required to discuss what the CO expects of the contractor with respect to construction features, safety, labor relations, and contractor inspection system, and to ascertain how the contractor proposes to comply with the contract requirements. The discussion of labor standards requirements will depend upon the contractor's previous experience and compliance record on government contracts as well as the complexity of the construction at hand. Discussion of the contractor's proposed method of construction may disclose conditions which were not anticipated. This is one of the primary purposes of such conferences, i.e., to the extent possible to identify matters which need to be clarified. Chapter 5 contains guidance on specific subjects to discuss at these conferences. Appendix E, Preconstruction Conference Check List, is suggested as a guide.

b. The CIR Representative should participate in such conferences whenever possible. Contractors should be represented by a principal of the firm, or the project superintendent, together with the principal assistants who will be engaged in hiring and supervision, preparation of payrolls and payment of wages, and similar representatives of subcontractors. The material in the preconstruction letter should be emphasized during the conference, including references to DOD and DOL regulations, and instructions contained in this regulation.

c. The record (minutes) of the conference shall include appropriate coverage of items discussed with regard to labor standards requirements.

7-3. Routine Enforcement Activities. The ACO is responsible for ensuring that prime contractors submit payrolls in a timely manner. The ACO shall review the contractor's

field operations, including payrolls, and report irregularities that require further investigation or action at higher level.[21]

7-4. Quality Assurance Representative's On-the-Site Activities.

a. General. The QA Representative will observe that all posters and wage scales are properly displayed and will be familiar with the overall working conditions on the job.

b. Employee Interviews. Labor standards interviews are essential to the detection of employee misclassification or other common violations. The QA Representative shall, at the start of the work, inform the contractor's representative that the Government is required to and will conduct interviews during working hours, as stated in the contract. Interviews should be scheduled as to cause the least possible interference with the performance of the employee's job and other duties of the QA Representative. Interviews shall not be held in the presence of the employer, a supervisor, another employee, or any other person. The employee should be advised that pursuant to the Privacy Act (5 U.S.C. § 552a) the information is confidential and that his or her identity will not be disclosed to the employer without the employee's consent.

c. Frequency and Number of Interviews.

(1) In order to obtain a representative sample of the work force, interviews of employees working in the various trades (power equipment operators, laborers, carpenters, ironworkers, etc.) should be conducted on a periodic basis.

(2) The number of interviews during any particular week should be determined by the type of work, turnover of employees, the number of employees working, as well as the length of time required to perform the contract work. Interviews should be suspended when it is obvious that continued interviews would be repetitive and involve the same workers week after week. This is not to say no further interviews are required in such a situation. To ensure continued compliance with labor provisions, interviews will be resumed and conducted at such intervals as the circumstances on the contract may dictate.

[21] By the Designated Letter, the ACO has ultimate responsibility for ensuring and overseeing labor compliance on the specific procurement action. However, where designated, and consistent with the designated Letter, the QAR, COR, Resident Engineer and Area Engineer can assume certain responsibilities.

d. Reports of Interviews.

(1) QA Representatives use SF 1445,[22] Labor Standards Interview (Appendix F) when conducting interviews. All interview reports will be attached to the payroll covering the week during which interviews were held. Any irregularities should be noted and called to the attention of the ACO office for appropriate corrective actions.

(2) The SF 1445 is to be signed by the employee. One question pertains to cash payments for fringe benefits required by the posted WD. In this regard, some WDs do not contain (require) any fringe benefits; some WDs contain fringe benefits for only some classifications of laborers and mechanics; and some WDs contain fringe benefits for all classifications. In those cases where the applicable WD does not require any fringe benefits with respect to the class of worker involved, the answer to the question should be "None required" instead of checking yes or no. If the employee declines to sign the form the interviewer will, as a part of his comments, state the reason given.

e. Handling Complaints. Complaints received from employees or union representatives regarding classification and rates of pay should be brought to the immediate attention of the ACO for further investigation. The QA Representative should be prepared to answer questions from employees about the applicable contract rate or overtime provision. Under no circumstances should the QA Representative opine as to whether any back wages are due any employee.

f. Whistleblower Protections. The CIR Representative should be cognizant of the "whistleblower" protections created by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994, P.L. 103-355. The implementing regulation (FAR 3.903) provides that “Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract.” In this regard, upon receipt of a DBA minimum wage rate complaint that includes an allegation of retaliatory discharge, the complainant should be advised of the complaint procedures set forth at FAR 3.904, Procedures for Filing Complaints.

g. Examination of Payrolls. QA Representatives shall examine payrolls submitted by the contractor against interviews and on-site observations of the various classes of labor. Upon receipt of the contractor's payroll, the QA Representative will record

[22] A separate format showing the Privacy Act statement applicable to SF 1445 may be reproduced locally and attached to the SF 1445.

specific payroll statement data on ENG Form 3180, Contractor Payroll Record (Appendix G). The payroll should reflect the actual conditions at the work site.

(1) Confirm that the names and addresses of employees are on the payroll; that they are properly classified and such classifications are descriptive of the type work or equipment involved; that they are paid not less than the contract rate for their classification as well as fringe benefits when required.

(2) Check the hours of work shown as compared to shift-hours or existing work conditions. Also, check for proper overtime hours and rates.

(3) Compare the payroll with the daily logs to see that the payroll reflects the various activities reported on the daily logs for the work week involved.

(4) Check for disproportionate use of laborers, trainees, and apprentices to journeymen and proof of registration of apprentices and trainees.

(5) Examine the contractor's Statement of Compliance to see that it is complete, that the dates and deductions listed are consistent with those on the payroll, that no unauthorized deductions are made, and when fringe benefits are required, check the fringe benefits portion of the statement for completeness and proper execution. Upon completion of his examination, the QA Representative will so indicate by his initials and forward the payroll, statements, and interview reports to the ACO Office.

7-5. Corrective Action on Nonaggravated or Nonwillful Violations. When instances of noncompliance, discrepancies, errors, or omissions are found, the following action shall be taken:

a. General. Payrolls are not to be returned to the contractor to make corrections. The custody and control of any payroll should not be relinquished by the Government. Minor corrections may be effected only by the contractor or his authorized representative on the payrolls in the ACO office in the presence of the QA Representative or ACO personnel, or by the contractor's submission of amended payrolls reflecting such corrections. Corrections made directly on the payrolls should be initialed by the same person who signed the Statement of Compliance submitted with the payroll. Examples of permissible corrections are:

(1) Correcting a wrong classification or one omitted as distinguished from a real misclassification involving underpayments; correcting dates, computations, and other figures; and corrections necessary to ensure that the payroll data is correct and complete.

(2) Corrections involving any adjustment of money, which must be handled by supplemental payroll and statement.

b. Overpayments. Experience has shown that contractor's payrolls occasionally reflect what appears to be an overpayment of wages to an employee. Although the net amount of pay shown for the employee appears to satisfy the contract minimum pay requirements, in some cases the payroll is incorrect on its face. The contractor is responsible for submitting a payroll that is both correct and complete, and so long as the payroll is not correct on its face it is not an acceptable payroll. Such discrepancies should not be a matter for speculation by ACO personnel but should be explained by the contractor. The contractor may make such explanation by a note on the payroll or in a separate writing.

c. Underpayments Involving Overtime Pay. Payrolls reflecting any underpayments involving overtime compensation, regardless of cause, shall be dispatched immediately to the CIR Representative. The CIR Representative will compute the overtime underpayments as well as the CWHSSA liquidated damages and prepare, for signature by the ACO, written instructions to the contractor concerning proposed corrective action and statutory appeals procedures relating to the assessment of liquidated damages.

d. Other Underpayments. At the ACO office level the contractor may be instructed to make restitution of underpayments and submit supplemental payrolls and statements in cases resulting from misclassifications (where there is no disagreement as to the proper classification) or other reasons, all of which are found not to be willful or aggravated. Correction of underpayments may also be handled on the next regular payroll, provided the payroll data clearly identifies the reason for the extra pay as well as the usual computations to support and distinguish the regular pay from such additional pay. In all cases where the contractor is instructed at this level to make restitution payments, the responsible QA Representative will ensure that the corrective action is adequate. In the event the contractor or any subcontractor does not satisfactorily and voluntarily comply with the instructions of ACO personnel, the matter shall be called to the attention of the CIR Representative immediately and processed in the manner set forth in paragraph 7-6 of this chapter.

e. Disputes. In cases where there is disagreement as to the proper classification, the ACO shall not direct any corrective action but rather forward all relevant information, including the following, to the CIR Representative: Name and address of employee; payroll classification and wage rate, dates, and hours worked on current payroll; total hours misclassified; total wages paid; brief description of duties and suggested classification; and contractor's position on the matter. The CIR Representative will then process the matter as prescribed by 29 C.F.R. § 5.13, FAR 22.406-10 and the

contractual general provision entitled "Disputes Concerning Labor Standards." Figure 7-1, which follows Chapter 7, outlines the report process.

f. Proof of Effecting Restitution Payments. Where restitution is found due at the project level, DOL regulations require that evidence of restitution payments be obtained by the ACO and incorporated into the contract files. QA personnel may require the contractor to prepare payroll receipts to be signed by the employee or furnish copies of canceled checks. Either method must be used in all cases where the employee is no longer employed on the jobsite or not available for interview by the QA Representative. If the employees are still on the job site, Corps personnel may question the employee and sign an appropriate statement, either on the supplemental payroll or separate writing, and attach it to the payroll.

7-6. Action on Aggravated or Willful Violations. In the event enforcement activities indicate the contractor or his subcontractor are in aggravated or willful violation of the labor standards provisions, or if the amount of restitution wage payments to one or more employees exceeds $1000, a special investigation shall be made by the CIR Representative. Under these circumstances, the QA Representative should not attempt to conduct any interviews with the contractor or his employees. If any employees make inquiries or complaints before a full scale investigation is started, they should be advised that an investigation will be made. All such inquiries, complaints, or evidence which an employee may present should be treated as strictly confidential, and no attempt should be made to advise them as to whether any back wages are due or corrective action will be required.[23] Upon completion of the investigation, the CIR Representative will forward a report of findings to the CO for further disposition of the case as provided by applicable regulations and as outlined in Figure 7-2.

7-7. Records and Reports.

a. Payroll Record Card. A Contractor Payroll Record, ENG Form 3180-R (Appendix G), will be maintained for each contract. When all work on the contract is complete, this record will be signed by the Resident Engineer or Area Engineer and attached to the final payroll.

b. Contract Completion. When a contract is nearing completion, the status of payroll submissions and any required corrections should be reviewed in order that any

[23] Detailed guidance as to the conduct and content of these investigations may be found at Defense Federal Acquisition Regulation Supplement (DFARS) and Procedures, Guidance, and Information (PGI) 222.406-8 (http://www.acq.osd.mil/dpap/dars/pgi/pgi_pdf/current/PGI222_4.pdf).

deficiencies may be discovered and appropriate action taken prior to the processing of final payment to the contractor.

7-8. Withholding of Funds from Contractor's Payment Estimates - Administrative Procedures.

a. When the CO believes a violation exists, he shall withhold from payments due the contractor an amount equal to the estimated underpayments, as well as any estimated liquidated damages due the United States under the CWHSSA. FAR 22.406-9) and the accompanying contract clauses (52.222-4 and 52.222-7) as well as DFARS 222.406-9, Withholding from or Suspension of contract Payments, provide detailed guidance

b. The CO's formal correspondence to the contractor initiates the withholding action by those responsible for preparing payment estimates; therefore, a copy of such correspondence must be furnished to the responsible office, and a copy should also be furnished to the appropriate unit of the District Finance and Accounting Office. Whether payment estimates are prepared on ENG Form 93 or a contractor's invoice and receiving report procedure is used, the amounts withheld (for wages and liquidated damages) must be clearly identified on the payment documents (e.g., ENG Form 93, Item 15G with appropriate explanatory notes on reverse thereof). Also, such amounts withheld must be in addition to any other deductions such as those for retained percentage and/or liquidated damages for late performance. No part of the amounts withheld for labor violations is to be released to the contractor until written clearance is received from the CO.

c. In accordance with the Streamlining Claims Processing for Federal Contractor Employees Act, P.L. 113-50, funds withheld from the contractor’s earnings to satisfy DBA/CWHSSA wage underpayments should be forwarded to the U.S. DoL, Wage and Hour Division. Procedures for forwarding such funds can be found in DoL’s AAM 215, Procedures for Implementation of the “Streamlining Claims for Federal Contractor Employees Act, issued on March 10, 2014. AAM 215 can be found at http://www.wdol.gov/aam/aam215.pdf.

d. Priority of Withheld Funds. A review of DOL Administrative Law proceedings and Wage Appeals Board decisions (Quincy Housing Authority, WAB Case No. 87-32 (1989) reveals a consistent position in which accrued funds withheld for payment of wages may not be used or set aside for other purposes until such time as the prevailing wage issues are resolved. DOL reasons that to give contracting agency reprocurement claims priority, for example, would essentially make the affected employees unfairly pay for the breach of contract between their employer and the Government. DOL has

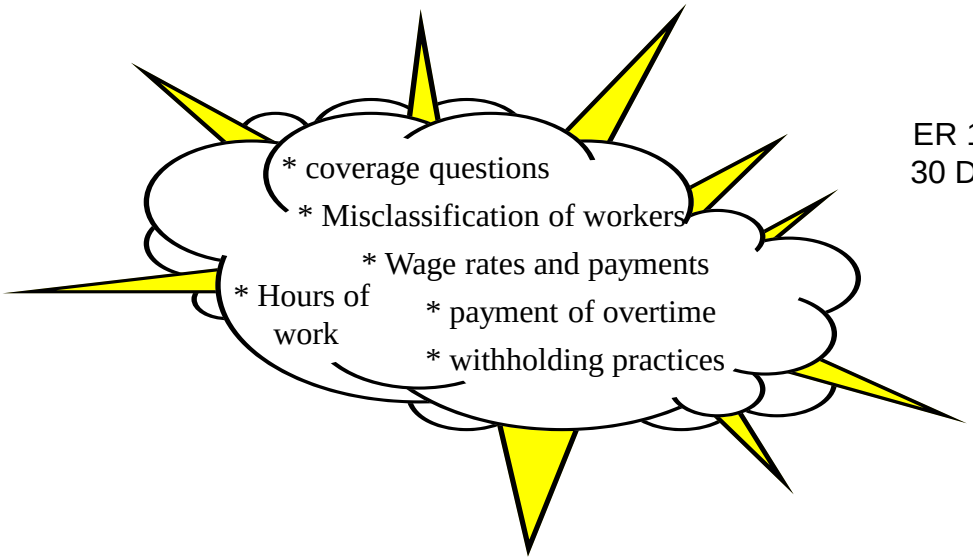
maintained that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. DOL's position is predicated on the view that to hold otherwise would be inequitable and contrary to public policy since the affected employees have already performed work from which the Government has received the benefit. Thus, employees' wage claims for underpayments have priority over:

(1) An Internal Revenue Service levy for unpaid taxes (T. D'Ambrosia d.b.a. Ambrosia Constr. Co., B-182355, Feb. 11, 1976);

(2) Re-procurement costs of the contracting agency after a contractor's default or termination for cause (Nat'l Sur. Corp. v. U.S., 132 Ct. Cl. 724, 133 F. Supp. 381 (1955));

(3) Any claim by a trustee in bankruptcy (Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962)).

Consult counsel to determine the Government's responsibility to protect remaining contract funds that have been withheld for any reason, and do not release withheld funds to the prime contractor or the payment bond surety or its assignee if there is a possibility of multiple claims on the remaining funds.




**U.S. Army Corps of Engineers, District, Laboratory, or Center**

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**U.S. Army Corps of Engineers, Division**

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**U.S. Army Corps of Engineers**
**Office of the Chief Counsel, CECC-C**

↓

**Administrator, Wage & Hour Division**
**U. S. Department of Labor**
**200 Constitution Avenue, N.W.**
**Washington, D.C. 20210**

Reference: 29 CFR 5.13
FAR 22.406-10
DFARS 222.406-103

Figure 7-1. - Processing of administrative matters relating to disputes between contracting officers and contractor concerning labor standards compliance

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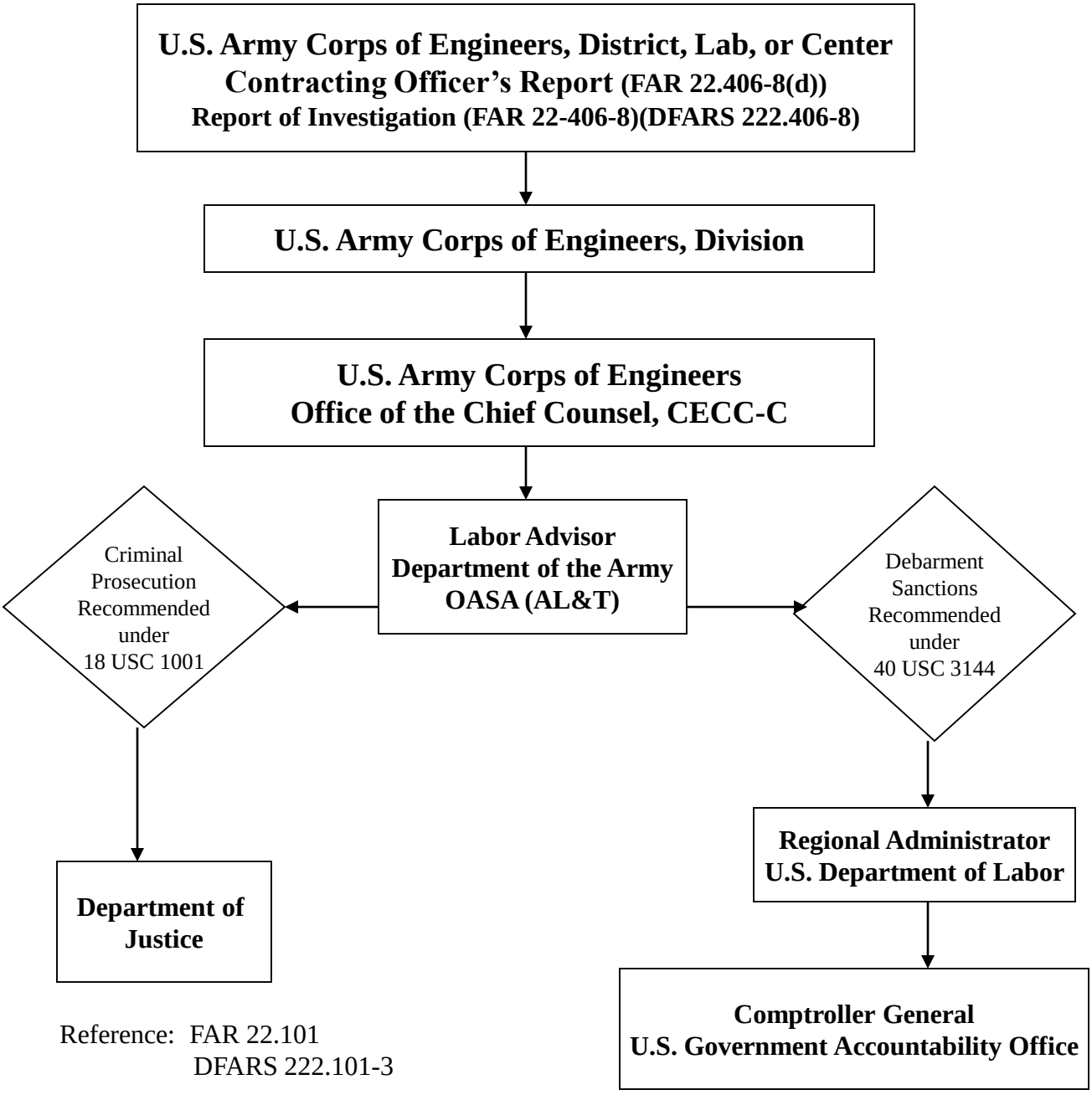


Reference: FAR 22.101
DFARS 222.101-3

Figure 7-2. Processing of reports relating to Corps of Engineers Investigations of violations of the Davis-Bacon and Related Acts

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# CHAPTER 8

## Area Practice Surveys

8-1. General. At the core of the CO's effort to ensure contractor compliance is the duty to be cognizant of "area practice." Whether to ensure the proper trade classification of specific workers or to ensure the application of the proper schedule of wage rates, the CIR Representative is frequently involved in the compilation and assessment of data relating to classification practices in the vicinity of Corps projects.

8-2. Trade Classification Issues. The most common violation of the DBA is the incorrect classification of employees. The misclassification of employees and the detection of resulting wage underpayments will sometimes be readily recognizable. However, there are many occasions when the distinction between trade classifications is a matter of dispute. Further, disputes may arise which involve the CO, contractors, contractor associations, contractor employees, unions and/or the DOL. There has been an increasing trend towards specialty or task-oriented trades (e.g., Metal-building Assemblers). This represents a diminished focus upon traditional craft classifications (e.g., Ironworker). This tendency may underlie many of the additional classification requests that have been submitted to the DOL in recent years. The basis for the resolution of disputes may be found in the Act, which states in pertinent part:

> "prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the State, in which the work is to be performed,".

When a dispute concerning the proper trade classification arises, the CIR Representative should contact the appropriate DOL Regional Wage Specialist. The DOL policy in classification matters was established by the Wage Appeals Board in Fry Brothers Corporation (WAB Case No. 76-6 (1977)). It was reasoned that the proper classification of work performed by workers is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination. Thus, the first step in the process of determining proper classification would be to determine the nature of the contract wage determination. In the survey of wage conditions in the applicable area, DOL will have already determined that one of three conditions prevails. The resulting DOL wage determination will be based on 1) union negotiated, 2) open shop (non-union) wage rates, or 3) a mixed schedule (e.g., union electricians and open shop laborers). The content of the area practice survey thus depends upon which of the three conditions apply. Information relating to which of these three conditions apply may be gathered from the "identifiers" provided by DOL in the wage determination. Above each classification (or group of classifications) listed within a particular determination, an alphanumeric "identifier" and

date provide information about the source of the classification(s) and wage rate(s) listed for it. Thus, SU indicates that the rates were derived from survey data which may include union and non-union data. Any identifier beginning with characters other than SU is used where union classification(s) and wage rate(s) have been found prevailing. In each such identifier, the first four letters indicate the international union for the local union that negotiated the wage rates under that identifier. Then there is a four digit code that indicates the local union number. For example, for the identifier ELEV0101, ELEV represents the Elevator Constructors Union and 0101 represents their local union number. For purposes of determining appropriate classifications therefore, one of the following conditions may apply:

(a) If the applicable wage determination reflects union rates for the classifications involved, the unions whose jurisdiction the work may be within should be contacted by the CIR Representative to determine whether the respective union performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, each union should be asked how the individuals who performed that work were classified. The information provided by the unions should be confirmed with collective bargaining representatives of management (e.g., contractors' associations such as local chapters of the Associated General Contractors of America, the Associated Builders and Contractors, the National Electrical Contractors Association, etc.). A recent DOL ARB decision provides additional guidance in this regard. In Tesco Builders, Inc., ARB No. 05-102 (ARB Oct. 31, 2007) the DOL developed the following additional key points for personnel in evaluating DBA trade classification and pay practices. With the satisfaction of the below criteria, the proper classification for the work in question, the area practice is established.

(1) Fry Brothers policy applies to job classifications but not to wage rates within the classification.

(2) The Administrator of the Wage and Hour Division cannot merely ask the local union how a definition should apply but must consider other “concrete data.” While the ARB explained that the “concrete project data” should include photographs as well as architectural, engineering and structural elements of the project, that information must be related to similar projects in the vicinity.

(3) Union(s) should thereafter be asked to furnish contact information for 4-5 of their larger signatory contractors. These contractors should be queried as to their classification and pay practices on similar projects.

(b) If the applicable wage determination reflects open shop rates for the classifications involved, open shop contractors should be contacted and asked whether they performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, these contractors should be asked how the employees who performed this work were classified. If all contractors agree, or if a clear majority of the contractors agree, the area practice is established. If no open shop contractor performed the work at issue in the county in the time period one year prior to the beginning of construction, the CIR Representative should contact the DOL's Regional Wage Specialist for further guidance.

(c) If the applicable wage determination reflects a mixed schedule of rates, it is necessary to contact the unions as well as union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects in the area in the period one year prior to the beginning of construction of the project. If all parties agree, or if a clear majority of the parties agree on the classification, the area practice is established.

8-3. Full Scale Area Practice Surveys. Whether the survey is conducted in order to evaluate a contractor's request for authorization of additional classification and rate or to identify a possible misclassification, it is essential that the CIR Representative document the steps undertaken in the survey. For each of the above conditions, there are many reasons why the parties may not agree (i.e., union jurisdictional disputes, management disputes with the union, or disagreement among open shop contractors). In the absence of agreement or a clear majority of parties in agreement, it becomes necessary to conduct a full scale area practice survey. In recent years, DOL has directed contracting agencies to conduct such full scale surveys. However, there is neither regulatory guidance (i.e., C.F.R., FAR) nor policy directives (i.e., All-Agency Memoranda) available for such efforts. Accordingly, agencies have naturally been reluctant to assume responsibility for such surveys, maintaining that this work should only be performed by DOL personnel since they are responsible for the predetermination of prevailing rates. DOL has determined that Reorganization Plan No. 14 of 1950 tasks the CO with the responsibility of day to day enforcement of labor standards. It is argued that a prerequisite to the exercise of such responsibility is a familiarity with classification practices within the project area. Without attempting to here resolve the issue of primary responsibility for full scale surveys, it can nonetheless be stated that for those districts with the resources to conduct such surveys, classification disputes will be more expeditiously resolved when they are forwarded to DOL with as much area practice information as can be developed by the contracting agency. Experience has also demonstrated that contractor requests for authorization of additional classifications and rates are processed more expeditiously when they are submitted with area practice

information. The following section details the method of conducting a full scale area practice survey for purposes of determining the appropriate trade classification.

8-4. Documenting the Area Practice Survey. As with the survey procedures noted above, the CIR Representative should attempt to identify similar projects in the same geographical area as the project under investigation which were in progress during the period one year prior to the start of construction for the subject project. If no similar projects were built in the area during that time frame, it may be necessary to expand the survey in time (two or three years) and/or to contiguous counties. After establishing the framework for the survey, the following steps are to be taken:

a. Determine what firms performed the work in question on these projects and contact those which are either open shop or union depending on the basis for the wage rates issued in the applicable wage determination. It is important to note that the existence of a classification within a collective bargaining agreement alone is not sufficient to determine the appropriate classification. It must be demonstrated that an existing classification actually performs the work in question (More Drywall, Inc., WAB Case No. 90-20 (1991); Miller Insulation Co., WAB Case No. 94-01 (1994); and Volkman Railroad Builders, WAB Case No. 94-10 (1994).

b. From each firm contacted, determine the week in which the greatest number of employees performed such work on these projects (i.e., "peak week") and determine how such employees were classified.

c. Compile all information received and total the number of employees in each classification which performed the work in question. The classification which has the clear majority of employees performing the work is the proper classification. However, if it is found that only 51% to 60% of the employees in a classification performed the work in question, contact the DOL's Regional Wage Specialist for further guidance. If no common, single classification practice is found to be predominant in the area or if no project involving work of a similar nature is found, DOL generally will not take exception to the contractor's particular classification practices.

d. O*Net, published by the Employment & Training Administration, may be used as reference material. It cannot be relied on for resolving DBA classification questions.

8-5. Determining the Appropriate Schedule of Wage Rates.

a. AAM Nos. 130 and 131 (Appendix H) give general outlines of the proper categories of construction (building, heavy, highway and residential) subject to "local or

area practice". For example, where a contract for a project contains multiple wage schedules (e.g., building and heavy), it may be necessary to resort to area practice to determine which schedule of rates applies to parts of a project.

b. The survey is conducted in essentially the same manner as described in paragraph 8-4 above, except that the pivotal issue becomes the determination of which rates were paid on similar projects for the type of work in dispute rather than which particular classification of laborer or mechanic performed a specific task. In conducting such a survey, all projects of a character similar are generally considered. However, in the case of either building or residential construction wage schedules, whether other DBA covered projects may be included in the area practice survey must first be determined from the DOL's Regional Wage Specialist. This will depend upon whether such covered projects were included in the wage survey that served as the basis for issuing the wage rates in the applicable WD.

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# CHAPTER 9

## Labor Standards Resources, Information Systems and Reports

9-1. General. This chapter provides CIR representatives with an overview of labor standards resources, information systems and reports. It highlights resources that enhance labor standards compliance, the management information system required for tracking cases and the generation of reports that identify program trends. These resources and systems are revised frequently to meet labor standards compliance assurance requirements and objectives.

9-2. WDOL. The WDOL Library contains links relating to the following:

a. Significant All Agency Memos Issued by DOL

b. DOL Prevailing Wage Resource Book

c. Veterans Employment and Training Service - VETS 4212 Federal Contractor Program

d. Office of Federal Contract Compliance Programs (OFCCP) National Pre-Award Registry

e. OFCCP's Construction Industry Goals for Minority and Female Participation

9-3. Contractor Industrial Relations Sub-Community of Practice. USACE CIR Representatives may access the Engineering Knowledge Online (EKO™) Contractor Industrial Relations Portal for a CIR Roster, resource library, training materials, and information such as:

a. CIR Forms. Commonly used forms (e.g., SF, DD ENG forms).

b. CIR Information Letter Index. CIR Information letters are annotated with reference to subsequent developments relating to specific labor standards matters.

c. CIR Information Letters. More than 250 guidance letters relating to CIR compliance issues as well as legislative and regulatory developments.

d. CIR Letters. General CIR correspondence templates covering recurring labor standards actions.

e. Guidebooks. Contract labor standards guidebooks that have been issued by DOL and USACE.

f. Opinion Letters. This section contains a collection of opinion letters issued by the DOL in connection with various labor standards coverage and classification matters

9-4. Resident Management System (RMS). RMS is a Windows-based system designed to support contract construction management at USACE field offices and district headquarters offices. Of particular relevance to the USACE labor standards mission is the QCS module that provides for a systematic approach to various labor standards compliance activities. Among the activities that are addressed in the QA/QC planning phase is the ability to plan/track labor standards interviews and contractor payroll submissions. The QA/QC module enables USACE CIR representatives to acquire a detailed picture of the firms performing on a particular date as well as the types of equipment used and the number of employees performing on site.

9-5. Semi-Annual Labor Standards Enforcement Report.

a. DOL Regulations 29 C.F.R. § 5.7(b) require Federal agencies administering programs subject to DBA and CWHSSA labor standards to furnish a Semi-Annual Labor Standards Enforcement Report to the Administrator of the Wage and Hour Division. These reports are due to DOL on April 30 and October 31. The information required for this report highlights two related activities: contract awards and labor standards enforcement activities. The contract award information comprises the first two data elements of the report while the labor standards enforcement data comprises the balance. Information concerning the number of construction contracts subject to the DBA awarded during the reporting period and the dollar amount of those contracts can be retrieved from the Standard Procurement System (SPS). The District CIR Representative should initiate a request for assistance to the SPS Administrator for the reporting element identifying the information sought. This data call should cite the regulatory basis (29 C.F.R. § 5.7) for the information requested.

b. USACE CIR Representatives preparing Semi-Annual Labor Standards Enforcement Reports shall follow the guidelines set forth below.

(1) Period covered. The subject period covers only contracts awarded during the reporting period. Not included in this element are contracts awarded prior to this period even though the contract may still be underway.

(2) Number of prime contracts awarded. Enter total number of prime contracts subject to DBRA/CWHSSA that were awarded during this period.

(3) Total dollar amount of prime contracts awarded. Enter the dollar amount of the contracts reported in (2) above.

(4) Number of contractors/subcontractors against whom complaints were received.

(i) Prime Contractors
(ii) Subcontractors

(5) Number of investigations.

(i) Undertaken
(ii) Completed

(6) Number of contractors/subcontractors found in violation.

(i) Prime Contractors
(ii) Subcontractors

(7) Amount of wage restitution found due under –

(i) DBA
(ii) CWHSSA

(8) Number of employees due wage restitution under –

(i) Davis Bacon Act
(ii) CWHSSA

(9) Amount of liquidated damages assessed under the CWHSSA –

(i) Total amount
(ii) Number of contracts involved

(10) Number of complaints received from –

(i) labor unions
(ii) Individual employees
(iii) DOL
(iv) Others

(iv) Others

(11) Number of employees and the total amount paid/withheld under

(i) DBA
- employees
- amount

(ii) CWHSSA
- employees
- amount

(iii) Copeland Act
- employees
- amount

(12) Preconstruction activities -

(i) Number of conferences held
(ii) Preconstruction letters sent

(13) Number of Compliance Checks performed. Include the total number of onsite inspections (in which the QA Representative notes the work performed, the classifications, job site posting requirements), the number of payrolls checked, and labor standards interviews conducted.

(14) Number of Employees Interviewed. Include in item (13) above and report separately in (14).

FOR THE COMMANDER:

9 Appendices
(See Table of Contents)

PAUL E. OWEN
COL, EN
Chief of Staff

# Appendix A

## STATEMENT OF COMPLIANCE.



PLEASE DO NOT RETURN YOUR COMPLETED FORM TO EITHER OF THESE ADDRESSES. RETURN THE COMPLETED FORM TO THE CONTRACTING OFFICER.

| 1. PAYROLL NUMBER | 2. PAYROLL PAYMENT DATE (YYMMDD) | 3. CONTRACT NUMBER | |
|---|---|---|---|

1. _____ (Name of signatory party) _____ (Title) do hereby state

(1) That I pay or supervise the payment of the persons employed by _____ (Contractor or subcontractor) on the _____ (Building or work); that during the payroll period commencing on the _____ day of _____, 19 ____, and ending the _____ day of _____, 19 ____, all personsons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said _____ (Contractor or subcontractor) from the full weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended (48 Stat. 948, 63 Stat. 108, 72 Stat. 967; 76 Stat. 357; 40 U.S. C. 276c), and described below:

_____

_____

_____

(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborer or mechanics contained therin are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therin for each laborer or mechanic conform with the work performed.

(3) That anyu apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

(4) That:

(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS, OR PROGRAMS

☐ In addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in Section 4(c) below.

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

☐ Each laborer or mechanic listed in the above referenced payroll has been paid as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract.

(c) EXCEPTIONS

| EXCEPTION (Craft) | EXPLANATION |
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| | |

5. REMARKS

| 6. NAME (Last, First, Middle Initial) | 7. TITLE | 8. SIGNATURE |
|---|---|---|
| | | |

The willful falsification of any of the above statements may subject the contractor of subcontractor to civil or criminal prosecution.

DD Form 879, APR 1998

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Appendix B

**U.S. Department of Labor**
Wage and Hour Division

# PAYROLL

(For Contractor's Optional Use; See Instructions at www.dol.gov/whd/forms/wh347instr.htm)

*Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.*

ER 1180-1-8
30 Dec 16

U.S. Wage and Hour Division
Rev. Dec. 2008

OMB No.: 1235-0008
Expires: 02/28/2018

| NAME OF CONTRACTOR ☐ OR SUBCONTRACTOR ☐ | ADDRESS | |
|---|---|---|
| PAYROLL NO. | FOR WEEK ENDING | PROJECT AND LOCATION / PROJECT OR CONTRACT NO. |

| (1) NAME AND INDIVIDUAL IDENTIFYING NUMBER (e.g., LAST FOUR DIGITS OF SOCIAL SECURITY NUMBER) OF WORKER | (2) NO. OF WITHHOLDING EXEMPTIONS | (3) WORK CLASSIFICATION | OT. OR ST. | (4) DAY AND DATE — HOURS WORKED EACH DAY | (5) TOTAL HOURS | (6) RATE OF PAY | (7) GROSS AMOUNT EARNED | (8) DEDUCTIONS: FICA | WITH-HOLDING TAX | | | OTHER | TOTAL DEDUCTIONS | (9) NET WAGES PAID FOR WEEK |
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While completion of Form WH-347 is optional, it is mandatory for covered contractors and subcontractors performing work on Federally financed or assisted construction contracts to respond to the information collection contained in 29 C.F.R. §§ 3.3, 5.5(a). The Copeland Act (40 U.S.C. § 3145) contractors and subcontractors performing work on Federally financed or assisted construction contracts to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." U.S. Department of Labor (DOL) regulations at 29 C.F.R. § 5.5(a)(3)(ii) require contractors to submit weekly a copy of all payrolls to the Federal agency contracting for or financing the construction project, accompanied by a signed "Statement of Compliance" indicating that the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon prevailing wage rate for the work performed. DOL and federal contracting agencies receiving this information review the information to determine that employees have received legally required wages and fringe benefits.

**Public Burden Statement**

We estimate that is will take an average of 55 minutes to complete this collection, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding these estimates or any other aspect of this collection, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S3502, 200 Constitution Avenue, N.W. Washington, D.C. 20210

Date _____

I, _____ _____
(Name of Signatory Party) (Title)

do hereby state:

(1) That I pay or supervise the payment of the persons employed by

_____ on the
(Contractor or Subcontractor)

_____; that during the payroll period commencing on the
(Building or Work)

_____ day of _____, _____, and ending the _____ day of _____, _____,

all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said

_____ from the full
(Contractor or Subcontractor)

weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 C.F.R. Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended (48 Stat. 948, 63 Stat. 108, 72 Stat. 967; 76 Stat. 357; 40 U.S.C. § 3145), and described below:

(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work he performed.

(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

(4) That:

(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS, OR PROGRAMS

☐ – in addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in section 4(c) below.

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

☐ – Each laborer or mechanic listed in the above referenced payroll has been paid, as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract, except as noted in section 4(c) below.

(c) EXCEPTIONS

| EXCEPTION (CRAFT) | EXPLANATION |
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| | |

REMARKS:

| NAME AND TITLE | SIGNATURE |
|---|---|
| | |

THE WILLFUL FALSIFICATION OF ANY OF THE ABOVE STATEMENTS MAY SUBJECT THE CONTRACTOR OR SUBCONTRACTOR TO CIVIL OR CRIMINAL PROSECUTION. SEE SECTION 1001 OF TITLE 18 AND SECTION 231 OF TITLE 31 OF THE UNITED STATES CODE.

AUTHORIZED FOR LOCAL REPRODUCTION

| REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND RATE | CHECK APPROPRIATE BOX<br>SERVICE CONTRACT<br>CONSTRUCTION CONTRACT | OMB Number: 9000-0089<br>Expiration Date: 9/30/2017 |
|---|---|---|

PAPERWORK REDUCTION ACT STATEMENT: Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing this burden, to U.S. General Services Administration, Regulatory Secretariat (MVCB)/IC 9000-0089, Office of Governmentwide Acquisition Policy, 1800 F Street, NW, Washington, DC 20405.

**INSTRUCTIONS:** THE CONTRACTOR SHALL COMPLETE ITEMS 3 THROUGH 16, KEEP A PENDING COPY, AND SUBMIT THE REQUEST, IN QUADRUPLICATE, TO THE CONTRACTING OFFICER.

| 1. TO: | 2. FROM: *(REPORTING OFFICE)* |
|---|---|
| ADMINISTRATOR,<br>WAGE AND HOUR DIVISION<br>U.S. DEPARTMENT OF LABOR<br>WASHINGTON, DC 20210 | |

| 3. CONTRACTOR | 4. DATE OF REQUEST |
|---|---|
| | |

| 5. CONTRACT NUMBER | 6. DATE BID OPENED *(SEALED BIDDING)* | 7. DATE OF AWARD | 8. DATE CONTRACT WORK STARTED | 9. DATE OPTION EXERCISED (If *APPLICABLE) (SERVICE CONTRACT ONLY)* |
|---|---|---|---|---|
| | | | | |

10. SUBCONTRACTOR *(IF ANY)*

11. PROJECT AND DESCRIPTION OF WORK *(ATTACH ADDITIONAL SHEET IF NEEDED)*

12. LOCATION *(CITY, COUNTY AND STATE)*

13. IN ORDER TO COMPLETE THE WORK PROVIDED FOR UNDER THE ABOVE CONTRACT, IT IS NECESSARY TO ESTABLISH THE FOLLOWING RATE(S) FOR THE INDICATED CLASSIFICATION(S) NOT INCLUDED IN THE DEPARTMENT OF LABOR DETERMINATION

NUMBER: _____ DATED: _____

| a. LIST IN ORDER: PROPOSED CLASSIFICATION TITLE(S); JOB DESCRIPTION(S); DUTIES; AND RATIONALE FOR PROPOSED CLASSIFICATIONS *(Service contracts only)* | b. WAGE RATE(S) | c. FRINGE BENEFITS PAYMENTS |
|---|---|---|
| *(Use reverse or attach additional sheets, if necessary)* | | |

| 14. SIGNATURE AND TITLE OF SUBCONTRACTOR REPRESENTATIVE *(IF ANY)* | 15. SIGNATURE AND TITLE OF PRIME CONTRACTOR REPRESENTATIVE |
|---|---|
| | |

| 16. SIGNATURE OF EMPLOYEE OR REPRESENTATIVE | TITLE | CHECK APPROPRIATE BOX-REFERENCING BLOCK 13. |
|---|---|---|
| | | ☐ AGREE ☐ DISAGREE |

**TO BE COMPLETED BY CONTRACTING OFFICER** ***(CHECK AS APPROPRIATE - SEE FAR 22.1019 (SERVICE CONTRACT LABOR STANDARDS) OR FAR 22.406-3 (CONSTRUCTION WAGE RATE REQUIREMENTS))***

☐ THE INTERESTED PARTIES AGREE AND THE CONTRACTING OFFICER RECOMMENDS APPROVAL BY THE WAGE AND HOUR DIVISION. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.

☐ THE INTERESTED PARTIES CANNOT AGREE ON THE PROPOSED CLASSIFICATION AND WAGE RATE. A DETERMINATION OF THE QUESTION BY THE WAGE AND HOUR DIVISION IS THEREFORE REQUESTED. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.

*(Send 3 copies to the Department of Labor)*

| SIGNATURE OF CONTRACTING OFFICER OR REPRESENTATIVE | TITLE AND COMMERCIAL TELEPHONE NUMBER | DATE SUBMITTED |
|---|---|---|
| | | |

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**STANDARD FORM 1444** (REV. 4/2013)
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# STATEMENT AND ACKNOWLEDGMENT

OMB Control Number: 9000-0014
Expiration Date: 12/31/2017

PAPERWORK REDUCTION ACT STATEMENT: Public reporting burden for this collection of information is estimated to average .05 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing this burden, to U.S. General Services Administration, Regulatory Secretariat (MVCB)/IC 9000-0014, Office of Governmentwide Acquisition Policy,1800 F Street, NW, Washington, DC 20405.

## PART I - STATEMENT OF PRIME CONTRACTOR

| 1. PRIME CONTRACT NO. | 2. DATE SUBCONTRACT AWARDED | 3. SUBCONTRACT NUMBER |
|---|---|---|

| 4. PRIME CONTRACTOR | | | 5. SUBCONTRACTOR | | |
|---|---|---|---|---|---|
| a. NAME | | | a. NAME | | |
| b. STREET ADDRESS | | | b. STREET ADDRESS | | |
| c. CITY | d. STATE | e. ZIP CODE | c. CITY | d. STATE | e. ZIP CODE |

6. The prime contract ☐ does, ☐ does not contain the clause entitled "Contract Work Hours and Safety Standards Act -- Overtime Compensation."

7. The prime contractor states that under the contract shown in Item 1, a subcontract was awarded on the date shown in Item 2 to the subcontractor identified in Item 5 by the following firm:

a. NAME OF AWARDING FIRM

b. DESCRIPTION OF WORK BY SUBCONTRACTOR

| 8. PROJECT | 9. LOCATION |
|---|---|

| 10a. NAME OF PERSON SIGNING | 11. BY *(Signature)* | 12. DATE SIGNED |
|---|---|---|
| 10b. TITLE OF PERSON SIGNING | | |

## PART II - ACKNOWLEDGMENT OF SUBCONTRACTOR

13. The subcontractor acknowledges that the following clauses of the contract shown in Item 1 are included in this subcontract:

Contract Work Hours and Safety Standards Act - Overtime Compensation (If included in prime contract see Block 6)
Payrolls and Basic Records
Withholding of Funds
Disputes Concerning Labor Standards
Compliance with Construction Wage Rate Requirements and Related Regulations
Construction Wage Rate Requirements
Apprentices and Trainees
Compliance with Copeland Act Requirements
Subcontracts (Labor Standards)
Contract Termination - Debarment Certification of Eligibility

14. NAME(S) OF ANY INTERMEDIATE SUBCONTRACTORS, IF ANY

| | | | |
|---|---|---|---|
| A | | C | |
| B | | D | |

| 15a. NAME OF PERSON SIGNING | 16. BY *(Signature)* | 17. DATE SIGNED |
|---|---|---|
| 15b. TITLE OF PERSON SIGNING | | |

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# APPENDIX E
# PRECONSTRUCTION CONFERENCE CHECKLIST

This list is not intended to address details of all matters that may need to be discussed for a particular project. Please refer to ER 1180-1-8 for additional guidance when preparing for a conference.

Davis-Bacon Act
- Minimum wage and posting requirements
- Additional classifications, explain procedure, furnish SF 1444
- Fringe benefit requirements
- Required payroll data, record-keeping requirements
- CO and DOL authority to review payrolls and basic records
- CO and DOL authority to withhold contract earnings for non-compliance

Apprentices and Trainees
- Registration requirements

Compliance Assurance Measures
- Payroll checking
- Labor standards interviews

Potential Sanctions for Violations
- Debarment
- Criminal prosecution under False Claims Act for willful violations

Particular Areas of Concern
- Undocumented Workers (E-verify obligations)
- Piece rate workers
- Misclassification of workers as independent contractors
- "Site of Work"
- Subcontracts
  - Report award of all subcontracts
  - Inclusion of labor standard clauses in all subcontracts
  - Furnish SF 1413, Statement and Acknowledgement

Contract Work Hours and Safety Standards Act
- Payment of Overtime compensation
- Liquidated Damages for each CWHSSA violation

USACE team members are strongly encouraged to familiarize themselves with all contract labor standards provisions of the contract as these items are only a partial representation of those that are generally applicable to construction contracts.

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Appendix F

## LABOR STANDARDS INTERVIEW

| CONTRACT NUMBER | EMPLOYEE INFORMATION | | |
|---|---|---|---|
| | LAST NAME | FIRST NAME | MI |
| NAME OF PRIME CONTRACTOR | | | |
| | STREET ADDRESS | | |
| NAME OF EMPLOYER | | | |
| | CITY | STATE | ZIP CODE |
| SUPERVISOR'S NAME | | | |
| LAST NAME / FIRST NAME / MI | WORK CLASSIFICATION | WAGE RATE | |

| ACTION | CHECK BELOW YES | NO |
|---|---|---|
| Do you work over 8 hours per day? | | |
| Do you work over 40 hours per week? | | |
| Are you paid at least time and a half for overtime hours? | | |
| Are you receiving any cash payments for fringe benefits required by the posted wage determination decision? | | |

WHAT DEDUCTIONS OTHER THAN TAXES AND SOCIAL SECURITY ARE MADE FROM YOUR PAY?

| | TOOLS YOU USE | |
|---|---|---|
| HOW MANY HOURS DID YOU WORK ON YOUR LAST WORK DAY BEFORE THIS INTERVIEW? | | |
| DATE OF LAST WORK DAY BEFORE INTERVIEW *(YYMMDD)* | | |
| DATE YOU BEGAN WORK ON THIS PROJECT *(YYMMDD)* | | |

THE ABOVE IS CORRECT TO THE BEST OF MY KNOWLEDGE

| EMPLOYEE'S SIGNATURE | DATE *(YYMMDD)* |
|---|---|
| | |

| INTERVIEWER | SIGNATURE | TYPED OR PRINTED NAME | DATE *(YYMMDD)* |
|---|---|---|---|
| | | | |

### INTERVIEWER'S COMMENTS

| WORK EMPLOYEE WAS DOING WHEN INTERVIEWED | ACTION *(If explanation is needed, use comments section)* | YES | NO |
|---|---|---|---|
| | IS EMPLOYEE PROPERLY CLASSIFIED AND PAID? | | |
| | ARE WAGE RATES AND POSTERS DISPLAYED? | | |

### FOR USE BY PAYROLL CHECKER

IS ABOVE INFORMATION IN AGREEMENT WITH PAYROLL DATA?

☐ YES ☐ NO

COMMENTS

CHECKER

| LAST NAME | FIRST NAME | MI | JOB TITLE |
|---|---|---|---|
| | | | |

| SIGNATURE | DATE *(YYMMDD)* |
|---|---|
| | |

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# Appendix G

| CONTRACTOR PAYROLL RECORD | CONTRACT NO.<br>DOLLAR VALUE: | CONTRACT DATE<br>DATE WORK |
|---|---|---|
| PROJECT, LOCATION AND DESCRIPTION OF WORK | | STARTED<br>COMPLETED |
| WAGE DETERMINATION NO. & DATE | BID OPEN DATE | SUBCONTRACTOR *(Name and Address)* / SF 1413 SUBMITTED *(Date)* |
| PRIME CONTRACTOR *(Name and Address)* | | FOR: / STARTED *(Date)* |

| P-R NO. | W-E DATE | CHECKED BY & DATE | DATE SUBMITTED TO DIST OFF | NUMBER EMPLOYED | NUMBER INTERVIEWED | DATE INTERVIEW INFO & P-R ENTRY COMPARED | MANHOURS WORKED *(Total)* | | P-R NO. | W-E DATE | CHECKED BY & DATE | DATE SUBMITTED TO DIST OFF | NUMBER EMPLOYED | NUMBER INTERVIEWED | DATE INTERVIEW INFO & P-R ENTRY COMPARED | MANHOURS WORKED *(Total)* | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
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All work performed under this contract has been covered by payrolls from the prime or subcontractors. These have been checked and found to be correct.

*(Date)* *(Title)* *(Signature)*

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Appendix H

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
WASHINGTON, D.C. 20210

MAR 17 1978

ALL AGENCY MEMORANDUM NO. 130

TO: ALL GOVERNMENT CONTRACTING AGENCIES AND THE DISTRICT OF COLUMBIA

FROM: XAVIER M. VELA
ADMINISTRATOR

SUBJECT: Application Of The Standard Of Comparison "Projects Of A Character Similar" Under The Davis-Bacon And Related Acts

The purpose of this memorandum is to set forth present policies of the Wage and Hour Division with regard to the determination of "projects of a character similar to the contract work" for wage determination purposes. The guidelines contained in the memorandum are to be used by the contracting agencies in selecting the proper schedule(s) of wage rates from the Federal Register and in instructing contractors regarding the application of multiple schedules. This memorandum supersedes All Agency Memorandum No. 68 (July 19, 1966).

The Davis-Bacon and related Acts require the Secretary of Labor to determine the prevailing wage rates for corresponding classes of laborers and mechanics on projects in the area which are of a "character similar" to the proposed contract work to which the determination will be applied. The Department's Wage Appeals Board in a decision specifically relating to high-rise apartment buildings (WAB Case No. stated:76-11, dated January 27, 1977) stated:

> The test of whether a project is of a character similar to another project refers to the nature of the project itself in a construction sense, not to whether union or nonunion wages are paid or whether union or nonunion workers are employed. Since the 1935 amendments to the Davis-Bacon Act, the statutory focus has always been on the character of the project itself rather than on who was employed on the project or how much he or she was being paid.

Again, in a decision relating to a water treatment plant project (WAB Case No. 77-20, dated September 30, 1977), the Board stated: "When it is clear from the nature of the project itself in a construction sense that it is to be categorized as either building, heavy, or highway construction it is not necessary to resort to an area practice survey to determine the appropriate categorization of the project."

Generally construction projects are classified as either Building, Heavy, Highway or Residential. 1/ Below are descriptions of these classifications with an illustrative listing of the kinds of projects that are generally included within the classification. Contracting agencies should utilize these descriptions and illustrations in carrying out their responsibilities, to insure a uniform and consistent administration of the Davis-Bacon and related prevailing wage statutes. The advertised and contract specifications should identify as specifically as possible the segments of work to which the schedules will apply. Note, however, that the descriptions and illustrations are guides. Contracting agencies should seek a determination from the Department of Labor on close questions or when the appropriate classification is in dispute. In making this determination where a project does not readily fall within any category, the Department of Labor may consider wages being paid on analogous projects as an indication of the proper category. As stated by the Wage Appeals Board in WAB Case No. 77-23, dated December 30, 1977: "Wages, however, are only one indication. It is also necessary to look at other characteristics of the project, including the construction techniques, the material and equipment being used on the project, the type of skills called for on the project work and other similar factors which would indicate the proper category of construction."

BUILDING CONSTRUCTION

Building construction generally is the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade

1/ Generally, for wage determination purposes, a project consists of all construction necessary to complete a facility regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place. For example, demolition or site work preparatory to building construction is considered a part of the building project for wage determination purposes. Where a project, such as a water and sewage treatment plant, includes construction items that in themselves would be otherwise classified, a multiple classification may be justified if such construction items are a substantial part of the project. Further, however, a separate classification would not apply if such construction items are merely incidental to the total project to which they are closely related in function. For example, water or sewer line work which is a part of a building project would not generally be separately classified. Where construction is "incidental" in function, 20 percent of project cost is used as a rough guide for determining when construction is also "incidental" in amount to the overall project.

level, as well as incidental grading, utilities and paving. Additionally, such structures need not be "habitable" to be building construction. The installation of heavy machinery and/or equipment does not generally change the project's character as a building.

Examples

Alterations and additions to buildings
Apartment buildings (5 stories and above)
Arenas (enclosed)
Auditoriums
Automobile parking garages
Banks and financial buildings
Barracks
Churches
City halls
Civic centers
Commercial buildings
Court houses
Detention facilities
Dormitories
Farm buildings
Fire stations
Hospitals
Hotels
Industrial buildings
Institutional buildings
Libraries
Mausoleums
Motels
Museums
Nursing and convalescent facilities
Office buildings
Out-patient clinics
Passenger and freight terminal buildings
Police stations
Post offices Power plants
Prefabricated buildings
Remodeling buildings
Renovating buildings
Repairing buildings
Restaurants
Schools
Service stations
Shopping centers
Stores
Subway stations
Theaters
Warehouses Water and sewage treatment plants (buildings only)

RESIDENTIAL CONSTRUCTION

Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four(4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.

Examples

Town or row houses
Apartment buildings (4 stories or less)
Single family houses
Mobile home developments
Multi-family houses
Married student housing

HEAVY CONSTRUCTION

Heavy projects are those projects that are not properly classified as either "building", "highway", or "residential". Unlike these classifications, heavy construction is not a homogeneous classification. Because of this catch-all nature, projects within the heavy classification may sometimes be distinguished on the basis of their particular project characteristics, and separate schedules issued. For example, separate schedules may be issued for dredging projects, water and sewer line projects, dams, major bridges, and flood control projects.

Examples

Antenna towers
Bridges (major bridges designed for commercial navigation) 2/
Breakwaters
Caissons (other than building or highway)
Canals
Channels
Channel cut-offs
Chemical complexes or facilities (other than buildings)
Cofferdams
Coke ovens
Dams
Demolition (not incidental to construction)
Dikes
Docks
Drainage projects

2/ Major bridges contain elements of both heavy and highway construction. See WAB Case No. 772 (October 21, 1977)

Dredging projects
Electrification projects (outdoor)
Flood control projects
Industrial incinerators (other than building)
Irrigation projects
Jetties
Kilns
Land drainage (not incidental to other construction)
Land leveling (not incidental to other construction)
Land reclamation
Levees
Locks, waterways
Oil refineries (other than buildings)
Pipe lines
Ponds
Pumping stations (prefabricated drop-in units - not buildings)
Railroad construction
Reservoirs
Revetments
Sewage collection and disposal lines
Sewers (sanitary, storm, etc)
Shoreline maintenance
Ski tows
Storage tanks
Swimming pools (outdoor)
Subways (other than buildings)
Tipples
Tunnels
Unsheltered piers and wharves
Viaducts (other than highway)
Water mains
Water-way construction
Water supply lines (not incidental to building)
Water and sewage treatment plants (other than buildings)
Wells

HIGHWAY CONSTRUCTION

Highway projects include the construction, alteration or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy construction.

Examples

Alleys
Base courses
Bituminous treatments
Bridle paths
Concrete pavement
Curbs
Excavation and embankment (for road construction)

Fencing (highway)
Grade crossing elimination (overpasses or underpasses)
Guard rails on highway
Highway signs
Highway bridges (overpasses; underpasses; grade separation)
Medians
Parking lots
Parkways
Resurfacing streets and highways
Roadbeds
Roadways
Runways
Shoulders
Stabilizing courses
Storm sewers incidental to road construction
Street Paving
Surface courses
Taxiways
Trails

In applying these guidelines contracting agencies are reminded that they have the authority only in the first instance to designate the appropriate wage schedule(s) from the Federal Resister, and to determine the application of multiple schedules issued by the Wage and Hour Division in project wage determinations. Any questions regarding the application of the guidelines set forth in this memorandum to a particular project or any disputes regarding the application of the wage schedules are to be referred to the Wage and Hour Division for resolution, and the instructions of the Wage and Hour Division are to be observed in all instances. Furthermore, where multiple schedules are issued by the Wage and Hour Division, they must be utilized in the contract specifications unless the agency requests and receives a change in the wage determination from the Wage and Hour Division. To ensure that appropriate schedules are issued, contracting agencies are advised to provide the Wage and Hour Division in their requests for wage determinations with a sufficiently specific description of the project to be able to determine its character.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
WASHINGTON, D.C. 20210

JUL 14 1978

ALL AGENCY MEMORANDUM NO. 131

TO: ALL GOVERNMENT CONTRACTING AGENCIES AND THE DISTRICT OF COLUMBIA

FROM: XAVIER M. VELA
ADMINISTRATOR

SUBJECT: Clarification of All Agency Memorandum No. 130

The purpose of this memorandum is to clarify Memorandum No. 130, dated March 17, 1978. Although the Wage and Hour Division has received a positive reaction from most contracting agencies who work regularly with the issues raised, some questions have arisen over specific aspects of the memorandum.

Memorandum No. 130 is intended to be a guide to categories of projects in a construction sense and is to be applied uniformly by the contracting agencies in the absence of specific direction on the wage determination or advice by the Wage and Hour Division. However, the Wage and Hour Division is aware that in some circumstances the category of a project may appear to be unclear or a literal application of the guidelines may be inappropriate. For example, questions frequently arise over pumping stations, which may vary greatly in sophistication and construction techniques. Therefore, if the contracting agency has any questions regarding application of the guidelines in a specific case, or if a question is raised with the agency by interested parties, the issue of application of the wage rate schedules should be referred to the Wage and Hour Division. This referral should include a complete description of the project, any evidence available of area practice regarding wages paid on similar projects, comments by interested parties which may have been submitted to the agency, and the agency's recommendation. Where the nature of the project in a construction sense is not clear, area practice regarding wages paid will be taken into consideration together with other factors such as construction techniques and classifications of workers required on the project. See WAB Case No. 77-23 (December 30, 1977).

Questions have also arisen regarding the circumstances in which multiple schedules of wage rates are issued for a project which includes construction items that in themselves would be

different categories of construction. Because of the complexities in application of multiple schedules, the contracting agency should consult with the Wage and Hour Division whenever it appears that more than one schedule of rates is appropriate for a project, unless the wage decision(s) as issued indicates that multiple schedules are applicable.

Generally, multiple schedules are issued if the construction items are substantial in relation to project cost -- more than approximately 20 percent. Only one schedule is issued if construction items are "incidental" in function to the over-all character of a project (e.g. paving of parking lots or an access road on a building project), and if there is not a substantial amount of construction in the second category. Note, however, that 20 percent is a rough guide. For example, when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost.

Although the example given is that of incidental paving and utilities, the same principles are applied to other categories, such as building construction on a heavy or highway project. Thus, in a recent case, the Wage and Hour Division deleted the building schedule when it learned that a small building under a contract primarily for runway construction was approximately 4 percent of project cost. Another example of general interest is the applicability of the building schedule to a building in a rest area of a highway. In this situation, applying the principles of MARTA, WAB Case No. 75-5, for extensive projects, the project for comparison purposes is the rest area itself, rather than the entire highway.

These principles regarding incidental construction are not in conflict with the Wage and Hour Division's recognition in certain circumstances (WAB Case No. 77-19) of a clearly established practice of paying different wage rates on specific portions of building projects. For example, different rates may be paid for incidental paving and utilities than are paid in the construction of buildings on building projects. These projects are building projects, and the wage rates issued by the Wage and Hour Division for incidental paving and utilities reflect wages paid on such work on building projects.

Contracting agencies are reminded of their responsibility to advise contractors on the application of multiple wage schedules issued by the Wage and Hour Division or obtained by the agency from the Federal Register. If any questions arise regarding application of the schedules to the project in accordance with these guidelines, or if it appears that a

wage schedule may have been issued in error, a ruling should be requested from the Wage and Hour Division. On these issues, as in all other matters in the administration of the Davis-Bacon and related acts, we will continue to work cooperatively with the contracting agencies. For convenience, Memorandum No. 130 is attached.

Attachment

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Appendix I

| Historical Title of Act | **Division/Chapter/Subchapter** | **Title** |
|---|---|---|
| Anti-Kickback Act | 41 U.S.C. Chapter 87 | Kickbacks |
| Brooks Architect-Engineer Act | 40 U.S.C. Chapter 11 | Selection of Architects and Engineers |
| Buy American Act | 41 U.S.C. Chapter 83 | Buy American |
| Contract Disputes Act of 1978 | 41 U.S.C. Chapter 71 | Contract Disputes |
| Contract Work Hours and Safety Standards Act | 40 U.S.C. Chapter 37 | Contract Work Hours and Safety Standards |
| Davis-Bacon Act | 40 U.S.C. Chapter 31, Subchapter IV | Wage Rate Requirements (Construction) |
| Drug-Free Workplace Act | 41 U.S.C. Chapter 81 | Drug-Free Workplace |
| Federal Property and Administrative Services Act of 1949, Title III | 41 U.S.C. Div. C of Subtitle I* | Procurement |
| Javits-Wagner-O'Day Act | 41 U.S.C. Chapter 85 | Committee for Purchase from People Who Are Blind or Severely Disabled |
| Miller Act | 40 U.S.C. Chapter 31, Subchapter III | Bonds |
| Office of Federal Procurement Policy Act | 41 U.S.C. Div. B of Subtitle I** | Office of Federal Procurement Policy |
| Procurement Integrity Act | 41 U.S.C. Chapter 21 | Restrictions on Obtaining and Disclosing Certain Information |
| Service Contract Act of 1965 | 41 U.S.C. Chapter 67 | Service Contract Labor Standards |
| Truth in Negotiations Act | 41 U.S.C. Chapter 35 | Truthful Cost or Pricing Data |
| Walsh-Healey Public Contracts Act | 41 U.S.C. Chapter 65 | Contracts for Materials, Supplies, Articles, and Equipment Exceeding $15,000 |

*Except sections 3302, 3501(b), 3509, 3906, 4710, and 4711.

**Except sections 1704 and 2303.

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