AIR FORCE LABOR ADVISORS OFFICE (SAF/AQCA)
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LABOR NOTES

A Newsletter for Air Force Contracting Personnel on
Contract Labor Standards and Contractor Labor Relations

Please share with any and all interested parties. Knowledge is power!

DBA Applicability -- Basic and in "non-construction" Contracts

Does the DBA apply to your procurement? As with many other "labor" issues, it depends. The statutory requirements to apply the DBA are reflected and implemented by the language found at FAR.22.403-1 Although FAR 22.402 is titled "Applicability", to a large extent it discusses those contracts where DBA does *not* apply or explains that DBA *may* apply to "nonconstruction contracts".

First, here are the basics. DBA applies to contracts for (1) **construction, alteration or repair (including painting and decoration)** of (2) **public buildings or public works** (3) within the **United States** and that are (4) **in excess of $2,000.**

Now let's break that down to the various subparts. Note that *all* elements must be met in order for DBA to apply. If any the four (4) elements above is missing or the answer to the question as to whether the procurement meets the criteria is "no", then DBA does *not* apply. Here's a brief discussion of each of the four elements:

A) In addition to activities commonly understood as construction, the legal definition of **"Construction, alteration or repair"** includes: (1) "…altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site", (2) painting and decorating (wall, floor and window coverings), (3) manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work and (4) under some circumstances even the transportation of materials or portions of the building or work.

B) **"Public Buildings or public works"** includes building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. Obviously, most buildings or works (improvements) on Navy/Marine Corps bases would clearly fall within this distinction. Whether the building is an aircraft hanger or a guard station it would still be considered a public building under the DBA. Likewise, whether the "work" is a helicopter landing pad or a children's playground at the child care center, it would still be considered a "public work" under the DBA.

C) "Within the **United States"** means that the construction activity/job site is within the United States or the District of Columbia. Unlike the SCA, the geographic application for the DBA does not extend to any territories or possessions nor would it apply to DOD contracts for construction improvements to a U.S. military base in a foreign nation.

D) In excess of **$2,000** is nearly self explanatory. If the value of the government prime contract exceeds $2,000 and the other requisites for application of DBA are present; then DBA applies. However, some contracts may call for the contractor to be compensated through other valuable consideration such as salvaged materials. In these situations, the market value of the salvaged materials would be used to gauge whether the contract value exceeds $2,000. Although there have been numerous attempts over the years to amend this amount, the $2,000 coverage threshold remains.

DBA Applicability in nonconstruction contracts:

DBA may also apply to supply or service contracts in many situations. Note that unlike the SCA, DBA does *not* have a "principal purpose" (majority) requirement. Therefore, even supply or service contracts that include some "construction, alteration or repair of a public building or public work" may require application of the DBA to that portion of the contract.

The criteria to consider are found at FAR 22.402(b) DBA applies to the construction portions of such contracts if the construction work will be performed on a public building or public work and:

A) The contract contains **specific requirements** for such work. For example, a Base Operations and Maintenance service contract may also include line items for any and all necessary alteration and repair work to the buildings and other facilities.

B) The construction work is **substantial.** Substantial is not clearly defined, however, must be considered within the context of factors such as: (1) the type and quantity of the construction activities, (2) the value of the construction type work standing alone, and (3) the value of the work in relation to the value of the entire contract. The DBA coverage threshold of $2,000 is *not* applied to nonconstruction contracts. Instead Department of Labor (DOL) considers DBA to apply to such work if it is more than a "minor and incidental" amount of construction, alteration, or repair work. DOL has provided that whether construction activity is "substantial" as opposed to "minor and incidental" depends upon the specific circumstances of each particular case and that no fixed rules can be established which would accommodate every fact situation. Therefore, if the work is substantial on its own *or* when compared to the total value of the supply or service contract work; then DBA must be applied. Obviously, if a large construction crew and/or a lengthy period of time is necessary to complete the work; the application of DBA and appropriate wage determination(s) are needed. If only a small number of construction workers are employed and/or if the crew only works a few days (or a few weeks at most); then such work will likely be considered minor and incidental and DBA application is not necessary. If the contractor's SCA-covered workers and/or the workers employed in manufacturing or delivery of the supplies are employed to perform the construction activities, it is more likely that such work will be considered minor and incidental.

C) The construction work is **physically and functionally separate** from and is capable of being performed on a **segregated** basis from, the other work required by the contract. In this regard it is often found that construction, alteration or repair work is performed by a workforce that is entirely separate from the workers that provide the service or supply work required by the contract. A strong indicator of the construction work being segregated from the service/supply work is that it may be performed by a subcontractor with a workforce dedicated to performing *only* the construction, alteration or repair work. A service (or supply) contractor may also have a separate construction trades workforce that performs the construction, alteration, repair, or remodeling work -- in such case, the DBA, if applicable, would apply to that portion of the contractor's workforce.

Note that if DBA is applied to the contract, the work that will be subject to DBA should be identified in the solicitation and contract as discussed in FAR 22.402(a) which states in part "…The contracting officer must incorporate only the appropriate wage determinations in solicitations and contracts and must designate the work to which each determination or part thereof applies." Although this particular passage applies to situations where more than one DBA "general schedule" wage determination applies to the contract, it is also appropriate to use in nonconstruction contract situations where most of the work is subject to either the SCA or Walsh-Healey, but where a "substantial" portion of the contract is covered by the DBA and an appropriate DBA WD.

DBA applicability on nonconstruction contracts can be difficult to analyze and decide, therefore contact the Air Force Labor Advisors with the specific facts and circumstances if you need help.

New Executive Order 12706

New Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors: Many have no doubt seen this by now, but on Labor Day the President issued a new executive order (EO) which will require many of our contractors to grant paid sick leave to them employees working on federal contracts. While we always counsel "wait to see what the FAC says," we can share the high points now:

- Effective date will be 1 Jan 2017
- Applies to contracts for services or construction, if those contracts are subject SCA, DBA or FLSA
- Will apply to most, if not all, concession arrangements/agreements/contracts
- Applies to employees that are exempt from FLSA OT exemptions- in other words, apparently applies to ALL employees, even those not covered by SCA or DBA
- Requires contractors to grant 1 hour of paid sick leave for every 30 hours worked per year- not paid but WORKED- up to a minimum total of 56 hours. No maximum is set by the order.
- Accrued leave will carry over from year to year, and will carry over to new employers (provided the contract is covered)
- Paid sick leave required by the order (up to 56 hours) will NOT count towards an employer's H&W requirement under SCA or DBA.
- Existing paid sick leave policies may be used to satisfy the requirement, as long as they meet the amount and conditions-of-use terms of the EO.
- Will NOT require contractors to "pay out" unused sick leave if an employee separates, terminates, etc
- Enforcement will be DoL's responsibility

Note/aside: If we assume 1920 hours (assumes 10 8 hr holidays and 80 hrs of vacation time) as a "standard work year" per employee, "standard" employees would actually accrue 64 hrs of paid sick leave per year. Note that maximum compensable (hrs worked, hrs in other paid status) hours with an eye towards FAR 52.222-43, in most circumstances, will remain at 2080 per employee.Thus, we believe, at this early date, that we won't see or adjudicate favorably any blanket price adjustment requests for "an additional 56-64 hours of paid sick leave." More likely, we will see a slight increase in contractor employee end-strength (more people) to compensate for lower per-employee productivity (assumes employees use sick leave that they earn)-but that's just our two cents.

Unlike the "$10.10 minimum wage" and "Fair Pay", however, we do not expect DoL regulations and resultant FAR language to be on a fast track to implementation. This one will be much more deliberate and slower to go through the rule-making process- DoL has until 30 Sep 2016 to issue regulations, which would put a FAC implementing this rule out sometime in Nov-Dec 2016.

Special Federal Holiday Issues

"Special" Federal Holiday Issues: The holiday season is upon us. How do we instruct our service contractors in the event that the President declares a down day for federal employees? Last Christmas, President Obama granted federal employees an extra day off (Friday, December 26) since Christmas fell on a Thursday. Our service contractors asked their COs for direction regarding contract performance and employee wages. The key is that the President's order applies to federal employees only -- and not contractor employees.

COs can inform contractors regarding the level of performance expected that day, but may not direct the contractor regarding whether or not to compensate employees if not required to work that day. The Service Contract Act does not require contractor employees to be paid for hours they do not work. The contractor may elect to grant employees the day off with pay, but there is no additional Government contract cost (wages for these hours are already in the contract cost). In some cases, collective bargaining agreements require employees to be paid for the Government-declared day off, however, generally there is no additional cost to the Government.

Air Force Labor Advisors Directory

Air Force Labor Advisors Office

Nick De Quiroga, Chief Labor Advisor
Phone: DSN 847-7341
Commercial: (720) 847-7341
Nicholas.dequiroga@us.af.mil

18401 East A-Basin Ave
Building 606
Buckley AFB, CO 80011

EASTERN REGION

Kyle Roberts, Labor Advisor
Phone: DSN 854-6734
Commercial: (321) 494-6734
DSN Fax: 854-2025

1201 Edward H. White II St.
MS#7200
Patrick AFB, FL 32925-3238
kyle.roberts@patrick.af.mil

Region Served: AL, CT, DE, FL, GA, MA, MD, ME, MI, NC, NH, NJ, NY, OH, PA, RI, SC, VA, VT, WV, Europe/Atlantic

CENTRAL REGION

Gary Lechman, Labor Advisor
Phone: DSN 847-7340

18401 East A-Basin Ave
Building 606

Commercial: (720) 847-7340
gary.lechman@us.af.mil

Buckley AFB, CO 80011

Region Served: AR, CO, IN, IL, KS, KY, LA, MO, MS, NM, OK, TN, TX, WI, WY, Canada and South America

WESTERN REGION

Ward Graham, Labor Advisor
Phone: DSN 775-2097
Commercial: 801-775-2097

6072 Fir Ave (Bldg 1233)
Hill, AFB Utah, 84056
ward.graham@us.af.mil

Region Served: AK, AZ, CA, HI, IA, ID, MN, MT, NE, ND, NV, OR, SD, UT, WA, Pacific