U.S. AIR FORCE

DAVIS-BACON ACT DESKTOP GUIDE

Air Force Contracting guide to understanding the Davis-Bacon Act and its impact on U.S. Air Force contracts

Air Force Contracting (SAF/AQC)

Labor Advisors Office

THE DAVIS-BACON ACT
Desktop Guide

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The information provided in this guide does not substitute for full and careful review of the contract and all applicable statutes and regulations, such as the Federal Acquisition Regulation (FAR) and its Supplements and the U.S. Department of Labor (DOL) regulations related to these issues. If there is any conflict between those requirements and this guide, the statutes and regulations applicable at the time of contract award will apply.

This publication is intended as a general informational guide, does not replace or modify contract clauses/regulations or labor regulations, and is not intended as an authoritative source of Department of Labor (DOL) enforcement positions.

The **Positive Law Codification** is a process that is updating the historical titles of Acts. There are no substantive changes to the statutes, only terminology revisions. The Department of Defense Federal Acquisition Regulation Supplement (DFARS) has already incorporated these changes along with the Federal Acquisition Regulations (FAR) reflecting the Positive Law Codification changes. The following changes will affect this guide:

- The **Service Contract Act** became the "Service Contract Labor Standards statute."
- The **Davis-Bacon Act** became the "Construction Wage Rate Requirements statute."
- The **Copeland** Anti-Kickback Act will be referred to as "Kickbacks."
- The **Contract Work Hours Standards Safety Act (CWHSSA)** became the "Contract Work Hours and Safety Standards statute" (CWHSS).

For ease of reading as well as recognition of terms, however, the old terms (Davis-Bacon, SCA, etc.) are used throughout this guide.

Outline:

Background

The Davis-Bacon Act (DBA) requires that all laborers and mechanics employed on the site of the project be paid not less than the wages and fringe benefits determined by the Department of Labor (DOL) to be prevailing in the area. The Davis-Bacon Act, the first Federal wage law protecting non-government wage rates, was passed in March 1931. A 1964 amendment added a requirement to pay fringe benefits if they prevail in the area for the craft.

President Truman issued Reorganization Plan 14 in March of 1950. The Plan authorized the Secretary of Labor to standardize regulations and procedures governing DBA enforcement and administrative activities of Federal agencies, which until then had been conducting enforcement activities under their own individual guidelines. The responsibility to investigate complaints and violations remained the duty of the contracting agencies, under the Plan, but DOL was also given secondary enforcement powers to conduct investigations as it saw necessary.

The regulations were issued by the Secretary of Labor in 29 CFR for administration and enforcement of the Davis-Bacon Act (Parts 1, 5, & 7) and for accompanying statutes such as the Copeland Anti-Kickback Act (Part 3) and the Contract Work Hours and Safety Standards Act (Part 5, Section 5.15). DOL also issues periodic guidance concerning these regulations by way of legal memoranda

sequentially numbered and called All Agency Memorandum (AAM). The FAR guidelines are found at FAR 22.4, and FAR contract clauses at 52.222. DOL regulations are referenced at FAR 22.403-6. DOL is responsible for determining the minimum wages required under the Act and regularly publishing these wages in Wage Determinations.

The prime contractor is responsible for the full compliance of all contractors (regardless of tier) with the labor standard provisions applicable to the project. Because of the contractual relationship between a prime contractor and the subcontractors, questions to, from or concerning compliance about subcontractors must always be directed to the prime contractor. The prime contractor must include all applicable labor clauses in all subcontracts and require its subcontractors to include the labor clauses in all lower tier subcontracts. Within 14-days of the award of a subcontract, regardless of tier, the prime contractor must submit a statement notifying the contracting agency of the subcontract award and acknowledging the inclusion of the labor clauses (SF 1413, Statement and Acknowledgment) in the subcontract.

The contracting officer is responsible for the proper administration and enforcement of the federal labor standards provisions in contracts covered by DBA requirements. The contracting officer may assign a person (or persons) who will provide labor standards advice and support to the prime contractor. The contracting officer ensures that the proper wage determination and contract clauses are incorporated into the contract. The contracting officer (or representative) also monitors labor standards compliance by conducting interviews with construction workers at the job site and reviewing payroll reports, and oversees any enforcement actions that may be required. DOL also has a role in monitoring DBA administration and enforcement. A DOL investigator may visit DBA construction sites to conduct investigations by interviewing construction workers and reviewing payroll information.

A. Applicability

The statute applies to contracts **"…in excess of $2,000** to which the **United States or the District of Columbia** is a party for **construction, alteration, and/or repair, including painting and decorating, of public building or public works** of the United States or the District of Columbia."

Four Elements Are Required:

(1) Public building or public work. Public buildings include the building structure and all utility systems and other improvements to the structure. This includes plumbing, electrical, and lighting systems, fire alarm and suppression systems, heating, ventilation and air conditioning systems, elevators, material handling systems, built-in cranes, hoists, attached antennas, etc. Public works are structures and improvements other than buildings, such as roads, runways, bike-

paths, storage tanks, wells, exterior portions of utility systems, exterior pools, playgrounds, playing courts, antennas not attached to a building, etc. "Public" does not require access by the general public.

(2) Party to contract. Will the work be performed either under an **Air Force contract or by authority of or with funds of the Air Force** to serve the interest of the general public? It doesn't matter whether or not the Air Force will take title to the completed public building or public work. This is usually pretty simple, since most contracts will clearly meet all of the tests. However, the courts have ruled that DBA also applies to many "lease construction" contracts under which construction is funded by third parties such as banks (AAM No. 176, dated 22 Jun 94). The government merely contracts to lease the completed facilities at a specified rate for a specified number of years. DBA would also apply to so-called "no cost" improvements to public buildings performed by utility companies (such as installation of energy-efficient lighting-the cost of which is deducted from future savings).

(3) United States or D.C. DBA applies only within the 50 states, D.C and Commonwealth of the Northern Mariana Islands. It does not apply to Federal construction contracts in Guam, Puerto Rico, Virgin Islands or other territories, although other laws may invoke DBA on certain civilian projects there.

(4) Construction, Alteration, or Repair and Painting and Decorating. Construction, alteration, repair, painting, or decorating **does not include regularly-recurring, routine maintenance** of public buildings and works. Alteration involves making a relatively permanent improvement to a building or work. Repair goes beyond maintenance, and is usually performed to return something to operational use rather than to keep it operating.

> *Example: overhaul of an elevator is much more extensive than simple maintenance, and must be considered repair.* Renovation also goes beyond maintenance. *Example: replacing several cracked windowpanes is a maintenance task but replacing all windowpanes in a building or part of a building must be considered renovation subject to DBA.*

All painting other than minor touch-up following routine maintenance is subject to DBA. DBA also covers decorating, which may involve wallpapering, paneling/wainscoting, installation of decorative ironwork, wood trim, etc. DFARS guidance instructs the use of "a less than 32 work-hours (SCA)" vs. "32 or more work-hours (DBA)" work hours test (200 or more SF for painting) **only** when it is **unclear** whether the work is SCA-type maintenance or DBA repair.

Projects worth separate mention include:

(a) **Demolition**: DBA applies if construction is reasonably anticipated on that site in the relatively near future. If there is no follow-on construction

contemplated on that site, the Service Contract Act applies to the demolition. Note "partial demolition" is considered building alteration subject to DBA whether or not there is follow-on construction.

(b) **Asbestos and/or paint removal**: DBA applies, with one exception. If asbestos or paint is being removed prior to demolition properly subject to the Service Contract Act [see (a), above] then the asbestos and/or paint removal is also subject to SCA. (AAM No. 153).

Note: Due to jurisdictional issues as it pertains to the proper job classifications (Asbestos Workers v. Laborers) being utilized on such projects, contact your Regional Air Force Labor Advisor for further guidance.

(c) **Environmental Cleanup**: DBA applies if the work involves substantial excavation and reclamation or elaborate landscaping activity. This may include simple removal and replacement of contaminated soil, removal and treatment of contaminated soil, or decontamination of soil in-place through installation of aquifers, etc. DBA does not apply to simple grading and planting of trees, shrubs, and lawn unless performed in conjunction with substantial excavation and reclamation or other construction work. Testing water wells that are to be used for cleanup tasks or may later be converted to water wells are subject to DBA. (Reference AAM No. 155.)

(d) **Carpeting**: 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, alteration, or reconstruction. On federal contracts the SCA applies to carpet laying when it is performed as a 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.

(e) **Refinishing wood floors or concrete sealant application**: DOL considers this work renovation/repair. It includes refinishing bowling alley lanes, gymnasium floors, housing floors, etc. DBA would also cover application of a sealant to hangar and shop floors to repel spilled fluids.

(f) **Removal of rubber deposits from runways**: DOL considers this repair subject to DBA. Deposits are normally removed by blasting the surface with sand, beads, or water. DBA application to removal of deposits by other means is less certain; contact your Regional Air Force Labor Advisors Office if non-traditional work is involved.

(g)**Public Utility Installation:** Where a public utility is furnishing its own materials and is in effect extending its own utility system, such 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), such work would be subject to the DBA provisions.

DBA and Non-Construction Contracts

The Act may also apply to non-construction contracts involving some construction work, such as contracts for supplies or services that also require construction, alteration, or repair work. DBA will apply **if** the contract contains specific requirements for a **substantial** amount of construction, alteration, or repair (including painting) and the work is physically or functionally separate from and is able to be performed on a **segregated** basis from other work required by the contract. FAR 22.402(b)(i) states that the word "**substantial**" as used in that section "…relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract."

Examples:

1) The cost for a building security system is $10,000, plus $9000 for installation. DBA **would apply** to the installation, since $9000 is a substantial share of the total contract amount of $19,000. (The installation portion is not an issue since it can be easily segregated from the other contract work.)

2) Purchase and installation of equipment is $85,000, but the building must be altered at a cost of $6,000. DBA **would not apply**, since $6,000 is not substantial in its own right or when compared to total contract price (even though the alteration work would be segregable from the other work).

3) Purchase and installation of equipment is $10 mil, the building must be altered at a cost of $500,000. DBA **would apply** to the alteration, since $500,000 is substantial in its own right-- even though only 5% of contract price.

Installation Support Contracts normally require both the Service Contract Act and Davis-Bacon Act because they usually include requirements for substantial and segregable amounts of construction, alteration, renovation, painting, or repair work as well as maintenance and other services work (DFARS 222.402-70) . This guidance requires SCA and DBA on many Operation & Maintenance and Base Operations Support contracts, as well as on contracts for Military Family Housing Maintenance, (not to be confused with housing privatization contracts) and Civil Engineering Services. SCA is applied to contract work involving services such as custodial work, maintenance, pest control, etc. DBA is applied to construction requirements such as roof shingling, hardwood floor refinishing, building structural repair, paving repair, etc. DFARS guidance instructs the use of "a less

than 32 work-hours (SCA)" vs. "32 or more work-hours (DBA)" work hours test (200 or more SF for painting) **only** when it is **unclear** whether the work is SCA-type maintenance or DBA repair.

When DBA is applied to part of a non-construction contract, the contract **must clearly state** which portion of the contract is subject to DBA. Example: "Davis-Bacon Act labor standards apply to on-site installation of the generators" or "...applies to CLIN 0006."

Supply and Installation contracts involve a substantial amount of construction work on a public building or work (exceeding the monetary threshold for DBA application). They are, also subject to the DBA if the construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract. (The word *substantial* relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract.) *See* FAR 22.402 (b).

Examples:

1) Contract for the supply and installation of a security system that requires:

Replacement of existing conduit,
Laying cable, and
Tearing out and replacing walls.

2) Contract for the supply and installation of modular furniture or energy-efficient lighting fixtures that requires:

Bolting furniture or fixtures to floors, walls and/or ceilings,
Modifying walls, floors and/or ceilings to accommodate shelving, installing electrical connections for desk area outlets, or installing new ballasts and/or lighting fixtures.

3) Contract that provides for the supply and installation equipment requiring construction activity, such as:

Reconfiguration or alteration of building space,
Upgrade to utilities, or
Bolting or affixing equipment to floors, walls and/or ceiling.

Whether installation involves more than an incidental amount of construction activity depends upon the specific circumstances of each particular case and no fixed rules can be established which would accommodate every factual situation. Factors requiring consideration 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.

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 as a separate contractual requirement.

Contract Clauses

FAR 22.407 specifies the contract clauses required in solicitations and contracts for work covered by the Davis-Bacon Act. The Contracting Officer must also include the appropriate wage determination(s).

B. Wage Determinations/Decisions (WD)

DOL conducts surveys of contractors and interested parties to collect payroll data in order to determine the DBA-required wage rates. These surveys are defined by type of construction, geographic area, and time period; response is voluntary. DOL analyzes the data to determine the wage rate "prevailing" for each classification in the defined locality and type of construction. The "prevailing " wage is either the wage paid to the majority of workers in the classification, or if there is no majority, the weighted average of the reported wage rates in the classification. These prevailing rates are issued in either General Wage Determinations or Project Wage Determinations.

General Wage Determinations/Decisions (WD)

Use and Effectiveness of WDs: General WDs reflect rates determined by DOL to be prevailing in a specific geographic area for the type of construction described. The most current WD/modification must be incorporated in the contract. To determine whether a modification or new WD is "effective" (timely) see the rules at FAR 22.404-6(b) for sealed bids and FAR 22.404-6(c) for negotiated contracts. Modifications are considered "received" by the Contracting Officer when the WD or modification is posted to the System for Award Management, the successor site to Wage Determinations On-Line website (beta.SAM.gov). They have no expiration date and remain in effect until modified, superseded or withdrawn. Once a contract is awarded with an appropriate and effective wage determination,

that WD applies for the life of the contract—unless the contract includes options to extend the contract term. See discussion (below) re "Construction Contracts with Option Periods".

10 Day Rule: Section 1.6(c) - 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

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.

WD Modifications: DOL normally issues a superseding WD ("Modification 0") annually in February or March, with the number of the new year incorporated in the WD number (the two digits after the state abbreviation-UT**16**0001, CA**16**0023). They may be modified periodically during the year to reflect changes to rates for one or more individual classifications (union rate updates), or to replace the entire WD schedule if a new survey has been conducted. Each modification supersedes the WD or modification preceding it (changes are cumulative during the year). Always check superseding WDs and modifications to make sure that the county or counties needed and appropriate type of construction work (i.e., "residential," "heavy," etc.) is still covered by that WD. Contracting personnel are not permitted to edit WDs in any way.

Obtaining Published WDs: WDs are easily obtained through beta.SAM.gov (beta.SAM.gov). Follow the menu under "Selecting DBA WDs", and either insert the WD number ("TX6" –not entire number) or the State, County, and Construction Type to obtain the correct wage determination. In the rare event that you need a wage determination that will be retroactive (due to an error, etc.) these can be obtained under the "History" portion of the page. If in doubt as to the correct WD to use, contact your Regional Air Force Labor Advisor.

Wage Determination Types: Separate WDs (also called schedules) are issued for different types of construction. The criteria for determining what type of schedule applies to a particular project were issued by DOL under AAM Nos. 130 and 131. The most commonly used schedules are:

- **Residential** – Covers single-family homes and apartment buildings of no more than four stories in height. It does not include dormitories, visiting officers' quarters (VOQ), visiting airmen quarters (VAQ), etc. All work on exterior utilities, streets, playgrounds, etc. in residential areas falls under the

heavy or highway schedule (as appropriate) rather than the residential schedule, unless the work is incidental to initial construction or incidental to subsequent construction, alteration, repair, or painting of the residential unit(s). See "Mixed Projects", below.

- **Building** – Non-residential sheltered enclosures with walk-in access to house people, machinery, equipment or supplies.

- **Highway** – Roads, streets, highways, runways, taxiways, etc.

- **Heavy** – "Other" - all projects that do not fit under one of the other schedules. "Heavy" covers exterior utility projects, exterior pools, playgrounds, and playing courts, and most other exterior work other than highway work.

Combined Schedules: When DOL determines that the rates on different schedules are essentially the same, they will publish them as one schedule. "Heavy and Highway" and "Building, Heavy, and Highway" are the most common combined schedules.

> **Watch for exclusions (and inclusions) in the "construction type**". A number of WDs will exclude work normally covered by that construction type. For example, it is not unusual to see "Heavy Construction (Excluding Water and Sewer Line Work)". The excluded work is then listed as an "inclusion" under the "Building Construction" or a separate "Heavy" WD.

Demolition Work: When demolition is to be followed by construction on the same site (and thus subject to DBA), use the same WD schedule for the demolition that will be used for the follow-on construction.

> *Example: If demolishing a warehouse to build a road, use the Highway schedule for both the demolition and construction.*

As discussed earlier in this guide, the **Service Contract Act** applies to demolition where construction is not contemplated in the relatively near future

Additional Schedules: Separate schedules are sometimes issued for specific types of construction, such as dredging, sewer line work, water well drilling, etc., if not included under one of the four most common types. Most of these are available at beta.SAM.gov and can be accessed by selecting a State, then County to see a list of all WD schedules applicable to that county.

Mixed Projects: Mixed projects involving more than one category of construction, i.e. Building and Heavy, or Heavy and Residential, etc., may require the use of more than one WD schedule in the contract. As a general rule, apply a

second schedule if more than approximately 20% of the project will involve work of a different character than the major portion of the project (AAM No. 131).

> *Example: If a contract for renovation of the building also calls for renovation and improvement of the access road and parking areas, the highway schedule would also be required if the cost for renovating the access road and parking areas exceeds 20% of the total contract price.*

If the work is not over 20% of the total, but is a "substantial" portion, especially in large contracts, consult your Regional Air Force Labor Advisor regarding inclusion of an additional schedule. The Contracting Officer may include a second wage determination schedule (even when not required), especially if it will provide better coverage of the needed classifications (avoids conformance). When more than one schedule is incorporated, the solicitation must state the portion of work to which each WD schedule applies. For example, "the Highway WD schedule applies to all parking lot work" or "the Building WD schedule applies to all work within five feet of the building line, and the heavy and highway WD schedule applies to all other work".

Caution: Resist the temptation to "back into" a WD by the types of classifications listed or not listed on WDs for the area. If a Residential schedule does not list a painter for a painting project, it is improper to use the Building schedule just because it lists a painter. If a necessary classification is missing from the appropriate schedule, the wage rate must be obtained via either the Conformance procedure (after award) or a Project Wage Determination (prior to award). See each process below.

Executive Order 13706 and FAR 52.222-62. The requirements of the Executive Order apply only to certain categories of contracts with the Federal Government, and only to contracts that are "new" on or after January 1, 2017. As written and implemented, the categories of covered contracts are identical to those covered by the Final Rule implementing Executive Order 13658, establishing a Minimum Wage for Contractors (Minimum Wage Executive Order). Executive Order 13706 does not apply to options for existing contracts awarded prior to January 1, 2017. The order and resultant policy is implemented by FAR 52.222-62.

The policy explains that employees whose wages are governed by the DBA and thus covered under the policy include laborers and mechanics who are covered by the DBA, including any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

Under the Executive Order, a contractor must permit an employee to accrue (earn) not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, up to 56 hours annually. The accrual requirements of the proposed rule

do not apply to employees who spend less than 20 percent of their hours worked in a particular workweek performing on such contracts.

DBA enforcement rests with the Air Force and should be handled as such. However, complaints may be filed with the WHD by any person or entity that believes a violation of the Executive Order or its implementing regulations has occurred. Complaints received by those individuals working in connection with covered Federal contracts whose wages are governed by the FLSA, or outside the scope of the SCA, or the DBA should be referred to the WHD by the Contracting Officer or hereby directing the individual(s) to contact WHD directly.

For Price Adjustment questions related to implementation of this policy, please contact your Regional Air Force Labor Advisor.

Construction Contracts with Option Periods

FAR 22.404-12 requires incorporation of current DBA WDs at option years (and extension periods).

Note: For military housing privatization projects, the general wage determinations placed in the contract at its inception are never updated and remain in place for the life of the contract. This rule will remain in effect until the Department of Labor either changes or amends their regulations for such contracts.

Required Clause: The clause prescriptions at FAR 22.407(e), (f), and (g) require the Contracting Officer to select and include one of three possible clauses in solicitations and resultant contracts. Contract price adjustment—if any—depends upon the specific clause incorporated, but all three clauses inform bidders/offerors that a new WD will be incorporated for each option year. The three possible clauses are as follows:

1. FAR 22.407(e) / Clause 52.222-30 "Davis-Bacon Act Price Adjustment (None or Separately Specified Method)" may be used for either (1) fixed-price contracts containing DBA provisions and one or more options to extend the contract term, if the Contracting Officer determines this pricing method to be the most appropriate of the methods identified at 22.404-12(c) or (2) all *cost-reimbursement* contracts subject to DBA and containing one or more options to extend the contract term. Under this clause, no adjustment is made on fixed-price contracts or one is made only if there is a separate price adjustment provision in the contract. If there will be no adjustment, the Contracting Officer may allow bidders/offerors to price options at differently from the base year. FAR 22.404-12(b)(1) suggests that the "no adjustment" avenue is more appropriate for fixed-price construction-only contracts (with options to extend the term) that are not expected to exceed a total of three years.

OR

2. FAR 22.407(f) / Clause 52.222-31 "Davis-Bacon Act Price Adjustment (Percentage Method)" may be used for fixed-price contracts containing DBA provisions and one or more options to extend contract term, if the Contracting Officer determines this pricing method to be the most appropriate of the methods identified at 22.404-12(c). Under this clause, any adjustment is based on a published economic indicator designated in the solicitation and resultant contract. This provision requires the Contracting Officer to designate in this clause in the solicitation the percentage of the contract (or contract unit price) believed to represent labor costs (50%, unless the Contracting Officer has determined another percentage is more appropriate). The economic indicator is applied only to this "labor portion" of the contract. Example: option year price X 50% (labor portion) X 3.2% (from published economic indicator) = adjustment amount.

OR

3. FAR 22.407(g) / Clause 52.222-32 "Davis-Bacon Act Price Adjustment (Actual Method)" may be used for fixed-price contracts containing DBA provisions and one or more options to extend contract term, if the Contracting Officer determines this pricing method to be the most appropriate of the methods identified at 22.404-12(c). This clause is patterned after the Service Contract Act price adjustment clause (Far 52.222-43) that provides an adjustment based on the projected actual cost impact. We recommend this clause only when it is clearly in the best interest of the government because the level of work and/or the wage rate escalation cannot be satisfactorily projected

NOTE: The above information is in summary form, and does not discuss all the provisions of the requirement. Contracting personnel are strongly advised to review FAR 22.404-12 and 22.407 to determine exactly how this requirement will affect a particular solicitation and contract.

Simplified Acquisition of Base Engineering Requirements (SABER) Contracts: WD incorporation for new SABER solicitations and contracts should be handled per FAR 22.404-6(b) or (c) depending on whether sealed bidding or negotiated procurement is used. For option and extensions period, FAR 22.404-12 and 22.407 procedures will apply. SABER contracts, or IDIQ contracts with options to extend ordering periods, like other construction contracts with provisions to extend the term of the contract, require incorporation of the most current DBA WD with the exercise of each option (or extension). The current year WD rates are then applied to each task or delivery order issued during that contract year. Once incorporated in a task or delivery order, the WD is good for

the life of the individual work order-even after the start of a new contract year containing a more current WD. Whether FAR 22.407(e), (f), or (g) is used to adjust price (or not) will be determined by the Contracting Officer. In either case it's imperative that the methodology be specific and stated in the solicitation by incorporation of one of the three clauses, so the ground rules will be clear to both the bidders and the Government.

Incorporating Wage Determinations in Contracts with Options:
General Wage Determinations: The most current WD/modification available at option exercise must be incorporated for contracts containing one or more published General Wage Determinations (most DBA-covered contracts). The GWDs can be obtained at beta.SAM.gov. The WD(s) incorporated must be from the same schedule as WD(s) incorporated in the contract. If the contract was subject to only the "Building" schedule for a specific area, only the most current modification of the Building WD or superseding Building WD for the same area must be incorporated. Always confirm that the WD still covers both the correct geographic area and the proper schedule (Building, Residential, Heavy, Highway, etc.).

Project Wage Determinations/Decisions

Use of Project WDs: In rare instances where there is no published WD for the category of construction involved (building, heavy, etc.), a Project WD must be requested from DOL. A project WD **should also be requested when virtually all work (100%) is not covered by a published WD**-- such as a when the published WD does not list a roofer classification for a roofing contract. (Also include the published GWD for the construction type to cover any work not under the Project WD.) Request project WDs by Standard Form 308 at least 60 days prior to solicitation. The response WD may only be used for the specific project(s) listed in the request and will "expire" 180 days from the date it was issued. However, provided the contract containing a Project WD is awarded prior to that expiration date, that WD is valid for the life of the contract—unless the contract includes option(s) to extend the contract term.

Conformances

Adding Additional Classifications: Classifications needed for contract performance, but not listed in the applicable wage determination must be "conformed" after contract award. Conformance is the process of requesting DOL to approve a classification and rate for work not covered by the contract WD. The contractor is responsible for initiating a Standard Form 1444, REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND RATE, within 30 days of using any unlisted classification. However, if the Contracting Officer is aware of an unlisted class being used, he or she must require the contractor to submit the SF1444.

Not Conformable:

- Primary duties covered by WD classification(s) listed - regardless of job title.
- Subordinate Classifications: If the WD lists a 'Mason', a 'Junior Mason' may not be conformed at a lower rate.
- Helpers: Helpers can only be used if the contract WD lists a helper classification covering the type of work involved.
- Exempt classes: Contractor employees not performing as "laborers or mechanics" such as managers, administrative employees, and inspectors, are not subject to DBA; conformance is not required or permitted.

SF1444 Completion: The contractor completes blocks 2-15. Each employee in the classification (or their union representative or attorney, if any) must complete block 16 or an attachment with the same information. A contractor management official may not sign for the employee. If employees have not yet been hired, the contractor may make that statement in Block 16 in lieu of employee signatures.

Review by Contracting Officer: Upon receipt of the SF1444 from the contractor, the Contracting Officer reviews the request for the following criteria to the best of the Contracting Officer's knowledge:

(1) The classification is appropriate and the work to be performed by this classification is not performed by any classification already listed in the applicable WD.
(2) The classification is recognized and utilized in the locality by the construction industry.
(3) The proposed wage rate and fringe benefit bears a reasonable relationship to the other wage rates listed in the WD applicable to the contract.

Submittal to DOL: If the above criteria are met and the request has been properly completed, the Contracting Officer indicates his/her agreement or disagreement with the proposed action and mails the request and any supporting documentation to DOL at: U.S. Department of Labor, Administrator, Wage and Hour Division, 200 Constitution Avenue NW, Washington DC 20210. Conformances may also be emailed to the following address: WHD-CBACONFORMANCE_INCOMING@dol.gov

DOL "Rule of Thumb" for DBA Conformances: DOL in the past approved a conformance if the above criteria are met and the rate proposed for a skilled classification is equal to or above the lowest total rate (wages + FBs) for a skilled classification listed on the WD, excluding truck drivers and power equipment operators. DOL's review would exclude proposed wage rates below unskilled or semi-skilled classes (laborers, helpers, tenders, etc.), Proposed rates for additional truck drivers or power equipment operators should be comparable to other listed truck driver or power equipment operator rates, respectively.

Note: On March 22, 2013, DOL changed its conformance criteria for new contracts issued on or after the March 22nd date. Please refer to the Davis-Bacon

conformance guide in Section F (pg. 33) for further instructions regarding the new criteria.

DOL Response: Pending a response from 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 the DOL. The rate set by DOL is retroactive to the date any employees first worked in the classification(s). **No adjustment is made to contract price, regardless of the nature of DOL's response.** The contractor must either furnish a response copy to employees affected or post the response with the WD at the worksite.

Note: DOL has 30 days to process conformance requests unless they request additional time and or information. If the contracting officer has not received a written response from DOL within the allotted time period, the contracting officer should contact their Regional Air Force Labor Advisor for further assistance.

C. Requirements

Contractors are required to inform employees of the required wage rates, pay no less than the stipulated wages to covered employees performing work on the construction site, and provide certification of such payment to the Contracting Officer. Contracting Officers have primary responsibility for enforcement.

Site of Work

DBA only applies to work performed on the "site of work." "Site of work" is the actual physical location or locations where the construction called for in the contract will remain when work on it has been completed. It also includes adjacent property used by the contractor in construction and fabrication plants if they are adjacent to the site of work and dedicated, or nearly so, to performance of the contract. Work performed off the "site of work" is not subject to DBA. For example, fabrication at a contractor's pre-existing yard or shop is not covered.

Secondary site of the work: DOL noted 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.

In the event an offeror intends to perform a "significant" portion of the work at a "**secondary site**" per the definition in 22.401 under "Site of the work", and this secondary site is not included in the geographic area specified in the solicitation

WD(s), the offeror must request-- and the Contracting Officer provide-- a wage determination applicable to the secondary site (FAR 52.222-5).

Employee Coverage

Laborers and Mechanics: Laborers and mechanics are those persons performing manual or physical labor, including the skilled trades, on the "site of work". The term includes:

- **Working Foremen** who spend over 20% of their time in a week performing hands-on work as a laborer or mechanic are covered for those hours (and must be listed on the certified payroll for those hours).

- **Truck Drivers** delivering materials to the site or hauling debris away from the site, but only if the time spent on-site is more than incidental (and then, only the time spent on-site is covered). Since 1992, many "off-site" truck drivers formerly covered by DBA are no longer covered.

- **Subcontractor "owners" and "partners"** are generally **included.** The Act states that it applies to laborers and mechanics "...regardless of any contractual relationship which may be alleged to exist". Occasionally, work is performed by bona fide owners and partners exempt from the protections of the Act; consult your Regional Labor Advisor (see pg. 28) regarding exemptions claimed on this basis.

- **Independent Contractors** Independent contractors, by definition, are self-employed and because they are not employees, independent contractors are not covered by employment, labor, and related tax laws. Employers may be tempted to reclassify employees as independent contractors in order to avoid taxes, benefits, and other liability. Whether or not a worker is covered by a particular employment, labor, or tax law hinges on the definition of an employee. As a result of the serious implications of falsely classifying workers as independent contractors please refer to the DOL Independent Contractor Advisor in Section H of this guide or contact you Regional Air Force Labor Advisor for further assistance.

- **Apprentices and Trainees:**

  "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. DOL, Employment Training Administration, 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.

"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 DOL's Employment Training Administration, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that Bureau.

Evidence of Registration: 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 Regional Labor Advisor for appropriate liaison with the local BAT office.

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 www.doleta.gov/atels/sac.htm.

Administration and Enforcement: Upon receipt of the required evidence, the CO 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.

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 CO 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.

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.

The Code of Federal Regulations 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 rate percentages for approved apprentice and trainee programs in their "home" area rather than requiring contractors to observe the ratios and percentages in the area where the construction project is performed. The wage rate percentages are based upon the wage rates listed on General Wage Determination incorporated into the contract.

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.

- **Helpers.** A Helper classification may <u>not</u> be used on Davis-Bacon Act covered work unless DOL has listed the established helper classification on the WD. That will only occur if DOL finds that:
  - use of helpers is a prevailing practice in the area,
  - the helpers have duties distinct from those of journeymen or laborers, and,
  - the helper position is not a trainee.

Employees Not Covered: DBA does not cover executive, administrative, or professional employees as defined in DOL Regulation 29 CFR Part 541. DBA also does not cover or protect “white collar” workers such as office workers, timekeepers, truck scale clerks, inspectors, security escorts, or most survey crew members.-whether or not they are employed at a construction site.

Compensation Requirements

Minimum Compensation-General: DBA work must be compensated at no less than the applicable wage determination wages and fringe benefits (FB) for the classification of work actually performed. A contractor may elect to pay some or all of any required FBs in cash or some of the wages in FBs. Generally, a contractor can comply with DBA by paying any combination of wages and FBs that totals or exceeds the required wages and fringe benefits. Wages include only the amount paid for work performed and do not include any payments for lodging, meals, or employee-furnished vehicles, gas, tools, or materials. These payments are considered reimbursements for company business expenses initially paid by the employee.

Example:

A Davis-Bacon wage determination requires:

Basic hourly rate $14.00
Fringe benefit 1.00
Total prevailing rate $15.00

Here are some examples of how a contractor can comply:

1. $15.00 in cash wages;
2. $14.00 plus $1.00 in pension contributions or other "bona fide" fringe benefits; or
3. $12.00 plus $3.00 in pension contributions or any combination of "bona fide" fringe benefits.

(In this case, to compute the minimum overtime rate under CWHSSA, half the basic rate listed, i.e., $7.00 must be added to the full $15.00 straight time DBA prevailing wage. Thus, the CWHSSA overtime pay rate would be $22.00 per hour.)

Note: Under DBA/DBRA monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.

Piecework payment is permitted if the average hourly rate in each week meets or exceeds the DBA wage and fringe benefit minimum. Overtime must be paid at 1 1/2 times the actual average hourly rate, or the contractor can establish a straight-time piece rate and an overtime piece rate. The contractor must record daily and weekly hours worked and include that information on the certified payroll.

This practice is more commonly found within the building trades such as with the drywall industry. **The regular rate of pay for an employee paid on a piecework basis is obtained by dividing the total weekly earnings by the total**

number of hours worked in that week. The employee is entitled to an additional one-half times this regular rate for each hour over 40, plus the full piecework earnings. The basic hourly rate for a piece rate employee must be calculated on a weekly basis.

Example: An employee paid on a piecework basis works 45 hours in a week and earns $405. The regular rate of pay for that week is $405 divided by 45, or $9.00 an hour. In addition to the straight-time pay, the employee is also entitled to $4.50 (half the regular rate) for each hour over 40 - an additional $22.50 for the 5 overtime hours - for a total of $427.50.

There have been instances where contractors have adopted the piece-work procedure for the apparent purpose of avoiding or minimizing recordkeeping. This is in disregard of their contractual and statutory obligation to assure that their employees are paid not less than the amounts due them computed on the basis of the hours worked at the prescribed wage rates.

During preconstruction conferences, contractors and subcontractors should be questioned as to whether 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 all subcontractors who are not represented at such conferences of the above.) If the contractor and subcontractors state that no piece-work hiring arrangements will be used on the contract work, no detailed discussion is necessary; however, if they state that they plan to pay on a piece-rate basis or there is indication that they might, they must be advised that their piece-work hiring arrangements will have to be reported to the District Labor Relations Advisor 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 that their reports on such hiring arrangements must identify all workers involved, describe the specific 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.

Fringe Benefits include cash payments in place of FBs and irrevocable contributions (made at least quarterly) to bona fide fringe benefit plans or programs (pension funds, health plans, etc.). Contact your Air Force Regional Labor Advisors Office if there is a question regarding credit for pro-rated holiday, vacation, or sick leave.

Benefits stated as a % on the WD are computed as a percent of the hourly wage rate.

> ***Example:*** *Min. wage = $20.00, min. FBs =$4.00 + 3%.*
> *Computation-- 3% X $20.00 = $.60, then + $20.00 + $4.00 = $24.60.*

Benefits contained in WDs listed within a ‘block’ covering a particular craft apply only to classifications listed in the same block.

Note: For more of an in-depth guide, please refer to the Davis-Bacon Fringe Benefit Guide in Section H, Exhibit B. Any questions surrounding the viability of a bona fide fringe benefit should be referred to your Regional Air Force Advisor.

Overtime Compensation is required for **all hours worked** over 40 per week. Non-work hours such as holidays, vacation, and sick leave are not counted towards the 40 hours. No premium is required for night, weekend, or holiday work. The overtime rate is 1 1/2 times the regular rate of pay. The regular rate of pay, for this calculation, can be no less than the applicable DBA WD rate-even if the contractor is paying part of the required wage rate in fringe benefits. In instances where required fringe benefits are paid in cash, the fringe benefit portion may be excluded from the overtime calculation. While fringe benefits are required to be paid on overtime hours, they are added after the calculation of "1 1/2 X regular rate".

The following examples reflect the correct computations under DBRA and CWHSSA for an employee who worked 44 hours on a covered contract as an electrician, where the wage determination rate for an electrician is $22.00 (basic hourly rate) plus $5.00 in fringe benefits.

If the employer paid $22.00 in cash wages and paid $5.00 for fringe benefits, the electrician would receive:
44 hours x $22.00 = $ 968.00 for cash wages
44 hours x $ 5.00 = $ 220.00 in fringe benefits
4 hours x ½ x $22.00 = $ 44.00 for CWHSSA earnings
Total: $1232.00

If the employer paid $20.00 in cash wages and $7.00 cash in lieu of fringe benefits:
44 hours x $20.00 = $ 880.00 in cash wages
44 hours x $ 7.00 = $ 308.00 in fringe benefits
4 hours x ½ x $22.00 = $ 44.00 in CWHSSA earnings
Total: $1232.00

If the employer paid $24.00 in cash wages and $3.00 in fringe benefits:
44 hours x $24.00 = $1056.00 in cash wages
44 hours x $ 3.00 = $ 132.00 in fringe benefits
4 hours x ½ x $24.00 = $ 48.00 in CWHSSA earnings
Total: $1236.00

Overtime is required by the Contract Work Hours and Safety Standards Act (CWSSA) for construction (and service) contracts over $100,000. Overtime may be required for work performed under smaller contracts, by the Fair Labor

Standards Act and/or state law. Contracting Officers are responsible to enforce CWHSSA, but must refer other suspected overtime violations to DOL or state authorities.

Effective January 1, 1986, the daily (8-hour) overtime requirement was eliminated. Therefore, like the FLSA, CWHSSA requires overtime pay after 40 hours in a workweek.

Overtime under Collective Bargaining Agreements: Many collective bargaining agreements between employers and labor organizations 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.

Deductions from Wages: To guard against prohibited 'kickbacks', deductions from employee wages are allowed only for certain purposes. Authorized deductions include income taxes, FICA (Social Security and Medicare) and union dues. Employee contributions to fringe benefit plans (pension, health, vacation, etc.) are permitted if the employee consented to the deduction at some time prior to the week(s) in which the deductions were made. It is not necessary to confirm that all fringe benefit plan deductions were voluntary, but complaints or other information received regarding this issue should be resolved to ensure compliance. No credit toward compliance is allowed for benefits paid by employees through deductions. Documentation is always required for deductions to repay an employer for a company loan, a pay advance, employee purchase of tools, and similar deductions.

Classification: Employees must be classified by the work performed, regardless of their skill at that work or any private agreement between the contractor and employee. All DBA-covered employees must be classified in accordance with DBA "prevailing area practice."

If the contract WD indicates that the wage rate for a particular craft reflect the union scale ('union dominance', see below), employees must be classified as union firms in the area would classify employees performing that work. The opposite is also true. If union rates are not reflected on the WD for a particular craft, the open-shop (non-union) classification practice determines the work activities included in the named craft.

Proper classification **determination is craft-by-craft**, and may vary by craft, WD schedule, and geographic area. For example, union rates may be listed for

building project carpenters, but not for residential carpenters in the same geographic area. Employees must be classified according to the work they perform, and must be paid no less than the wage rate for that classification. If an employee works in more than one classification, the employee must be paid not less than the minimum rate that applies to each class. The contractor's certified payrolls must reflect the hours spent in each classification. If the contractor fails to accurately record the hours performed in each classification by the employee, the contractor must pay the highest rate for all the hours worked by that employee.

"Union dominance", the reflection of union rates on a WD for particular classification, occurs when DOL's surveys indicate the union wage rates to be prevailing for the classification, type of construction, and locality. It is indicated on WDs by a four-character abbreviation at the beginning of a separate "block" for that craft. For example, "union dominance" carpenters rates would be listed under CARP#### (#s may indicate union local number or other number internal to DOL—not significant). Classes where union rates are not prevailing are listed under the designation "SUxx…." with xx being the state name abbreviation. For example "SUND2019-007 05/04/2018" indicates survey rates in North Dakota, followed by internal DOL numbers and the date of survey.

Certified Payroll Requirement

The prime contractor and all subcontractors must provide certified payrolls weekly for the life of the project in accordance with the Copeland Anti-Kickback Act (see FAR 22-406-6). Payroll submissions are not required for weeks in which no DBA work is performed, but the first payroll following such week(s) should state "No work performed since [date]." As required by the "Payrolls and Basic Records" clause at 52.222-8, certified payrolls must contain the following information: name; address; SSAN; classification; hourly wage rate paid; fringe benefits paid or to be paid monthly or quarterly to funds or plans; daily and weekly hours worked; deductions made; and actual wages paid. Payrolls may be computer-generated, typed, or legibly handwritten, but the accompanying "Statement of Compliance" must be either a DD 879 form or the reverse of DOL's WH 347 payroll form (DFARS 222.406-6). (See also, "Review of Certified Payrolls" under "Compliance Review", below)

Owner-Operators of 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.

The exception mentioned above is as follows: The 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 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.

Effective January 18, 2009, payrolls shall not report employee addresses or full Social Security Numbers (SSNs). Instead, the first payroll on which each employee appears shall include the employee's name and an individually identifying number, usually the last 4 digits of the employee's SSN. Afterward, the identifying number does not need to be reported unless it is necessary to distinguish between employees, e.g., if two employees have the same name.

Employers (prime contractors and subcontractors) must maintain the current address and full SSN for each employee and must provide this information upon request to the contracting agency or other authorized representative responsible for federal labor standards compliance monitoring. Prime contractors may require a subcontractor(s) to provide this information for the prime contractor's records. DOL has modified form WH- 347, Payroll, to accommodate these reporting requirements.

Delinquent payrolls:
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.

D. Compliance Review

Responsibility: Contracting agencies have **primary** responsibility for enforcement of the Davis-Bacon Act. This cannot be contracted out or delegated to prime contractors as part of their oversight responsibility. FAR 22.406-1 requires Contracting Officers to make compliance checks as necessary to ensure compliance with the labor standards of the contract. The Department of Labor (DOL) Wage and Hour Division performs certain oversight functions and issues regulations and enforcement standards. DOL determines prevailing wages and issues the wage decisions. DOL also has independent authority to conduct investigations, request withholding of funds, distribute back wages, and institute debarment proceedings against the contractor. As a practical matter, most serious violations are referred to the nearest DOL District Office for investigation.

As part of an investigation being conducted by the Department of Labor, the contracting officer shall cooperate by gathering and disseminating information

upon request or make available for inspection (once redacted of classified, sensitive, proprietary and PII materials).

In conjunction with this, the contracting officer shall ensure that proper Air Force base/site access protocol is adhered by the Department of Labor. For further information or guidance, please contact your Regional Air Force Labor Advisor.

Preconstruction Letters and Conferences: Preconstruction letters informing the contractor of the labor standards requirements and explaining the requirements must be issued to contractors promptly after award of a contract. The preconstruction conference must include a review of the contractor's responsibility for Davis-Bacon Act compliance by the contractor and all subcontractors performing on the contract. Any compliance issues unique to the area or otherwise troublesome should be explained to the contractor. Inform the contractor that certified payrolls are required weekly, and that regular site visits will be made to interview employees. Furnish the required posters.

Posting: The contractor is required to post the wage determination and the DOL form WH-1321 poster "Notice to Employees Working on Federal and Federally Financed Construction Projects." The name, address, and phone number of the contracting officer should be stated on the poster. These posters must be placed in a prominent location where employees can easily review them.

Statement and Acknowledgement (SF1413): The prime contractor is required to flow down the labor requirements to all subcontractors of any tier. The SF1413 form is an acknowledgment by the individual subcontractors that the labor provisions have been included in their subcontract. Require the contractor to provide a SF1413 for every subcontractor performing work on the site, regardless of tier.

Note: The Statement and Acknowledgement renders that the prime or general contractor is responsible for the full compliance of all employers (the contractor, subcontractors and any lower-tier subcontractors) with the labor standards provisions applicable to the project. Because of the contractual relationship between the prime contractor and his/her subcontractors, subcontractors generally should communicate with the contracting officer only through the prime contractor.

In accordance with the FAR 52.222-54, the prime contractor is responsible for implementing employment eligibility verification for their employees when working on an Air Force installation construction contract. This also would apply to all subcontractors and any lower-tier subcontractors.

Compliance Checks: Conduct regular compliance checks, such as payroll review and site visits, as often as necessary to ensure compliance with contract labor standards (FAR 22.406-7). The frequency will depend on the factual situation and

perceived contractor compliance or non-compliance on each contract. Keep in mind that any issue not resolved early is likely to become a much larger monetary issue and be more difficult to resolve later.

Review of Certified Payrolls: Ensure that the payrolls are submitted on time, no later than one week after the wages have been paid. Ensure that all the required information is included. Check that the wage rates and fringe benefits are correct for each classification. If any fringe benefits are not paid in cash, determine how the contractor is meeting this requirement. Make sure that apprenticeship certificates have been obtained for all apprentices, and that their use is within the allowable ratio of apprentices to journeymen. Crosscheck payroll information with employee interviews and the daily inspection reports. Question excessive use of Laborers (unskilled and semi-skilled workers) during weeks when skilled workers would appear to be required by the nature of the work. Note the use of classifications that are not listed on the wage determination and determine whether or not a conformance request is necessary (SF1444). (See also, "Certified Payroll Requirement", above.)

On-site Inspections: On-site inspections should be made regularly after reviewing the payrolls to crosscheck the information. On the job site, note the type of work being performed, tools used, number of employees working on the site, and the equipment operated. Note the progress of the project in comparison to the reported hours and classifications worked. Note that the posters are posted in an appropriate location for the employees to have free access.

Employee Interviews: Employee interviews should be carefully planned to crosscheck the information provided on the certified payroll and observed at the site. Verify the classifications, payment of the required wage rate, receipt of the reported fringe benefits, and determine that all hours worked are recorded and paid properly. Use interviews to verify the number of employees working in the same classification, the number of apprentices, if any, the identity of employees working in other classifications, and whether the supervisor works with the crew or manages and supervises the crew, and thus is exempt from the wage requirements. Note any unreported employees or subcontractors.

- Identify yourself to the employee and explain the reason for the interview. Take care to maintain the confidentiality of the interview; interview each employee individually-- apart from the others, and interview at several employees if possible. Select which employees you would like to interview rather than allowing a supervisor to select. If an employee is reluctant to be interviewed, offer them the opportunity to contact you later at your office.

- Plan to ask specific questions designed to determine the correct classification performed by the employee. Ask the employee to describe the work they perform with their own hands, the tools used, and where they work. Ask if

their work on the project varies from day to day, who works with them, and what the other employees do.

- Determine the hours worked by asking employees what time of day they are required to be at the job site or contractor's shop, the length and frequency of any breaks during the day, and the time they are excused from work each day. Ask about any variations from this work schedule.

- Verify the rates of pay and fringe benefits by asking the employees what rate they are paid, when and how they are paid, and what fringe benefits they receive, if any. Ask if there are any deductions from their wages for any reason and the exact nature of the deductions.

- Ask each employee to review the interview statement and make any changes necessary. Ask employees to sign their statements once they are satisfied the statement is complete and accurate. Answer any questions from the employees promptly if they have questions about their rights under the labor laws. SF1445 "Labor Standards Interview" is used to document interviews. Note the additional information on the back of the form prior to requesting the employee to review and sign the statement.

- Conduct a detailed review of any discrepancies between the information provided on the certified payrolls and your site visits and employee interviews.

Special compliance checks: Includes additional site visits and interviews to verify findings of a regular compliance check, and/or to obtain additional information. A special compliance check should also be performed in response to receipt of a complaint alleging violations of the labor standards on a contract. The additional information obtained through a special compliance check will assist in determining whether or not a violation exists, and– if so-- how best to proceed.

Informal Resolution of Labor Standards Violations and Disputes

Resolve violation issues informally, if possible, but exercise care to ensure the confidentiality of the individual workers to prevent retaliation by the employer. Most unintentional violations can be resolved quickly and efficiently by directly approaching the contractor and requesting correction. However, if the violations appear systemic and widespread, contact your Regional Air Force Labor Advisors Office. They will help plan a strategy to achieve compliance and minimize the potential impact on individual workers.

Unresolved labor standards issues may require the withholding of contract funds for estimated unpaid wage and/or liquidated damages.

Withholding of Contract Funds

The Contracting Officer is authorized by the clause at FAR 52.222-7 (Withholding of Funds) to withhold contract funds at the request of the U.S. Department of Labor or under his or her own authority. Funds, as well as any estimated liquidated damages due under CWHSSA, may be withheld from the contract under which the suspected violations occurred or under any other Federal contract with the same prime contractor ("cross-withholding"). The amount of funds to be withheld should be carefully estimated so as to protect back wages that may be due employees, to the extent of estimating for somewhat of a "worst case" given the information at hand. However, funds significantly in excess of that required to protect employees possible back wage should not be withheld as an inducement to obtain settlement, as a punishment, or for any other reason. Excessive withholding for alleged labor violations may be grounds for the contractor to obtain interest payments on excess funds withheld.

Corrective administrative Action: Regulations require that evidence of restitution payments be obtained and incorporated into the contract files. When the contractor is directed at the contract level to make restitution payments such evidence will be obtained. The Contracting Officer may require the contractor to prepare payroll receipts to be signed by the employee, furnish copies of canceled checks or EFTs.

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 Contracting officer subsequent to the payment. If the employees are still on the job site, Air Force contracting personnel may question the employee concerning same and sign an appropriate statement, either on the supplemental payroll or separate writing, and attach it to the payroll.

Priority of Withheld Funds. A review of DOL Administrative Law proceedings and Wage Appeals Board decisions (Quincy Housing Authority, WAB Case No. 87-32, 17 Feb 89) 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. It is reasoned that to give contracting agency re-procurement claims priority, for example, would essentially make the affected employees unfairly pay for the breach of contract between their employer and the Government. The DOL has maintained that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. The 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;

(2) Re-procurement costs of the contracting agency after a contractor's default or termination for cause;
(3) Any claim by a trustee in bankruptcy.

Please refer to DOL's AAM 215 for funds withheld from the contractor's earnings to satisfy DBA/CWHSSA wage underpayments.

E. Contract Work Hours and Safety Standards Act and Other Labor Laws

The Contract Work Hours and Safety Standards Act (CWHSSA) requires contracts that may involve the use of laborers or mechanics (including watchmen or guards) to contain a clause specifying that such workers performing contract work must be paid at time and one-half the basic rate of pay for all hours over forty in the work week. Violators must pay the back wages. In addition, they are liable to the Government for liquidated damages, computed on the basis of $10 for each calendar day per employee.

The Contracting Officer must insert the clause at 52.222-4, CWHSSA - Overtime Compensation, in solicitations and contracts when the contract may require or involve the work of laborers and mechanics. However, FAR 22.305 instructs that CWHSSA should NOT be included for:

(1) Contracts for **less than $100,000 (Defers to the FLSA)**.

(2) Contracts for supplies, materials, or articles ordinarily available in the open market.

(3) Contracts for transportation by land, air, or water, or for the transmission of intelligence.

(4) Contracts requiring work to be done solely in accordance with the Walsh-Healey Public Contracts Act (See FAR 22.6).

(5) Contracts for work performed solely outside of the United States (and specified territories).

(6) Exempt under DOL regulations at 29 C.F.R. 5.15.

Copeland Act. The Copeland (Anti-Kickback) Act makes it a crime for anyone to require any laborer or mechanic employed on a federally funded project to pay back any part of his or her wages. In addition, the Act prohibits any deductions from pay other than those specifically listed as permissible. The Copeland Act also requires that contractors and subcontractors at all tiers submit weekly certified payrolls.

Fair Labor Standards Act. The Fair Labor Standards Act (FLSA) requires payment of the federal minimum wage rates and overtime premium. FLSA applies to most employers in the U.S. These requirements generally apply to any work performed and may be superseded by other federal standards such as DBA prevailing wage requirements and CWHSSA O/T provisions. Only DOL has the authority to administer and enforce FLSA. The Air force will refer any indication of FLSA violations that are found on their projects to DOL.
The Miller Act (40 USC 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.

Executive Order 13658. On February 12, 2014, the President signed Executive Order 13658, "Establishing a Minimum Wage for Contractors," to raise the minimum wage to $10.10 for all workers on Federal contracts for construction covered by the Davis-Bacon Act (DBA). As well as workers performing on or in connection with covered Federal contracts whose wages are governed by the FLSA, the SCA, or the DBA are generally entitled to receive the Executive Order minimum wage for all time spent performing on or in connection with covered Federal contracts. For example, the Executive Order minimum wage applies to FLSA-covered workers who provide support on SCA- and DBA-covered contracts that is necessary for the performance of the contract, such as an FLSA-covered security guard monitoring a DBA covered project for the entire work week.

Contracting agencies are responsible for ensuring that the contract clause, FAR 52.222-55, implementing the Executive Order minimum wage requirement is included in any new contracts or solicitations issued on or after January 1, 2015 for contracts covered by the Executive Order. Contracting agencies are also responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to pay the required Executive Order minimum wage, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13658 to the U.S. Department of Labor, Wage and Hour Division (WHD).

The final rule sets forth certain obligations that contractors and subcontractors must fulfill in order to comply with the Executive Order. For example, contractors and subcontractors must include FAR 52.222-55 in any covered lower-tiered subcontracts. They also must notify all workers performing on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order.

Contractors and subcontractors must pay covered workers the Executive Order minimum wage for all hours worked on or in connection with covered contracts, and must comply with pay frequency and recordkeeping obligations. Finally, the final

rule prohibits the taking of kickbacks from wages paid to workers on covered contracts as well as retaliation against any worker for exercising his or her rights under the Executive Order or the implementing regulations.

Under the Executive Order and the Department's rule, the Secretary of Labor is required to determine the Executive Order minimum wage rate yearly beginning January 1, 2016, and publish this wage rate at least 90 days before the wage is to take effect.

DBA enforcement rests with the Air Force and should be handled as such. However, complaints may be filed with the WHD by any person or entity that believes a violation of the Executive Order or its implementing regulations has occurred. Complaints received by those individuals working in connection with covered Federal contracts whose wages are governed by the FLSA, or outside the scope of the SCA, or the DBA should be referred to the WHD by the Contracting Officer or hereby directing the individual(s) to contact WHD directly.

F. Davis-Bacon – Related Web Sites

Air Force Contracting:
http://ww3.safaq.hq.af.mil/contracting/

Air Force Forms:
http://www.e-publishing.af.mil/

DOD Forms:
http://www.dtic.mil/whs/directives/forms/index.htm

SF Forms:
http://www.opm.gov/forms/standard-forms/

DOL Davis-Bacon and Related Acts Homepage:
http://www.dol.gov//agencies/whd/government-contracts/construction

DOL Regulations:
29 CFR parts 1-99

DOL Davis-Bacon Field Operations Handbook:
http://www.dol.gov/whd/FOH/FOH_Ch15.pdf

Davis-Bacon Wage Decisions:
https://beta.sam.gov

Davis-Bacon Conformance Guide: http://www.dol.gov//agencies/whd/government-contracts/construction

DOL Forms:
http://www.dol.gov/whd/programs/dbra/forms.htm

FAR/DFARS Site:
https://www.acquisition.gov/content/regulations

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Questions about the content of this Guide should be directed to the Chief or Regional Air Force Labor Advisors Office.