INDIANA DEPARTMENT OF TRANSPORTATION

Driving Indiana's Economic Growth

Memorandum

January 24, 2007

CONSTRUCTION MEMORANDUM
07-02

TO: District Deputy Commissioners
District Highway Operation Directors
District Construction Engineers
District Testing Engineers
District Area Engineers
Project Engineers/Supervisors

FROM: Mark A. Miller, Director MAM
Division of Construction Management

SUBJECT: Procedures for Determining When the Davis Bacon Act (DBA) Applies

The guidelines contained in this memorandum were provided by the Divisions of Economic Opportunity and Legal Services to address questions concerning which workers on a jobsite must be paid prevailing wages pursuant to the Davis-Bacon Act. Please use these guidelines in consultation with the District EEO Officer in making a determination for workers on your project. Further assistance will be provided for situations encountered that are not clearly defined in these guidelines.

The determination of whether Davis Bacon applies to a particular employee is based on the specific facts and circumstances of the contract and the employee's work.

The following list of questions is a guide to help determine whether a particular employee should be paid prevailing wages pursuant to the Davis-Bacon Act (DBA). This guide does not cover all situations but attempts to cover the most common situations encountered at the Districts:

1. **Is the employee working on a federal-aid contract in excess of $2000 for the *actual construction, alteration and/or repair* of a building or work?**
   a. If yes, go to next question.
   b. If no, DBA does not apply, but also ask:
      i. Is the contract in excess of $100,000? If so, the Contract Work Hours and Safety Standards Act applies. (This includes federally financed and assisted non-construction contracts.)

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1. If yes, the contractor or subcontractor shall not require or permit a laborer or mechanic to work over forty hours a week without paying one and a half times the basic pay rate. Also the contractor must maintain payrolls and payroll records for three years for all laborers and mechanics.

2. Is the employee doing work on the site of the construction?

-"Site of the work" is the physical place or places where the work called for in the contract will remain; and any other site where a significant portion of the work is constructed, provided that such a site is established specifically for the performance of the contract or project. If the time spent on the site of the work is de minimus (less than 20% of that employee's particular work week), then the time is not covered under Davis-Bacon.

a. If yes, go to next question.
b. If no, DBA does not apply.

3. Is the work that the employee is performing required by the contract specifications?

a. If yes, go to the next question.
b. If no, DBA likely does not apply.

4. Is the employee a *laborer or mechanic* as defined in the DBA? To determine this, ask the following questions:

a. What are the employee's primary duties? (i.e. How does the employee spend 20% or more of his or her particular work week?)
    i. If the employee's primary duties are manual or physical in nature (e.g. he or she uses tools or performs the work of a trade), then the employee is a laborer or mechanic and DBA applies.
    ii. If the employee's primary duties are mental or managerial, the employee is not a laborer or mechanic, and DBA does not apply.
    iii. If the employee's primary duties are administrative, executive, or clerical rather than manual, then the DBA does not apply.
    iv. Is the worker a working foreman who devotes more than twenty percent of time during a particular work week to mechanic or laborer duties?
        1. If yes, then the foreman is a laborer or mechanic for the time so spent, and the DBA applies for that time.
        2. If no, then the DBA does not apply.

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Additional Resources to Davis-Bacon Act/Davis-Bacon Related Acts
The U.S. Department of Labor Davis-Bacon Resource Book (dated 11/2002), which can be accessed at: http://www.wdol.gov/docs/WRB2002.pdf

Q 1. Does it matter who employs the truck driver for the application of Davis Bacon?
Answer:
No. In the decision reached in Building and Construction Trades Dept. v. Midway, decided on May 17, 1991, the Court of Appeals for the District of Columbia Circuit held that language in Department of Labor (DOL) regulation was inconsistent with the Davis-Bacon Act. That case involved truck driver employees of the prime contractor's wholly owned subsidiary, who were delivering materials from a commercial supplier to the construction site. The material delivery truck drivers spent ninety percent of their workday on the highway driving to and from the commercial supply sources, ranging up to 50 miles round trip and stayed on the site of the work only long enough to drop off their loads, usually for not more than ten minutes at a time. At issue before the D.C. Circuit was whether the "material delivery truck drivers" were within the scope of construction as defined by the regulatory provision then in effect. The Court of Appeals ruled that material delivery truck drivers, who come onto the site of the work merely to drop off construction materials, are not covered by the Davis-Bacon Act even if they are employed by the government contractor, because they are not "employed directly upon the site of the work." Subsequent Appeals Court rulings in two other cases further addressed the scope of the "site of the work." In a Final Rule published in the Federal Register on December 20, 2000, the Department of Labor issued revised regulatory definitions of the terms "site of the work" and "construction."

Q 2. Are truck drivers employed by a construction prime contractor to transport materials from the contractor plant or yard to a Davis-Bacon covered project, or from a Davis-Bacon covered project to the contractor's plant or yard covered?
Answer:
Yes. If the contractor/subcontractor's plant or yard is part of the "site of the work," the drivers are covered. If the contractor/subcontractor's plant or yard is not part of the "site of the work," the drivers are generally not covered. The travel time between the plant or yard and the site of work in this instance is never covered. However, if the time spent unloading the material or equipment on the site of work is more than de minimis (20%), then this time is covered.

Q 3. Is the time drivers spend transporting materials or equipment from one Davis-Bacon project to another Davis-Bacon project covered?
Answer:
Generally, no. Again the regulatory definition of "construction …" specifically states that the transportation of materials or supplies to or from the "site of the work" is not considered construction. Nevertheless, there may be some instances where the two sections of highway construction are contiguous and the transportation of materials or equipment is all on the "site of the work" of both sections that constitute a combined covered project.

Q 4. Are drivers transporting material or equipment away from a Davis-Bacon project or another project of the contractor which is not a Davis-Bacon project covered?
Answer:
No. Unless the transportation of such materials or equipment is to a dedicated facility located adjacent or virtually adjacent to the construction area.

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Q 5a. When truck drivers are engaged in hauling excavated material, debris, dirt, asphalt, etc., for recycling away from a Davis-Bacon covered construction site, is the time spent loading at the site covered?
Answer:
Assuming that the location or facility to which the excavated material or debris will be transported is not a facility that is part of the "site of the work" (adjacent or virtually adjacent to the construction work area and dedicated exclusively or nearly so to the performance of the contract or project): If the time spent on the site is not more than de minimis, then loading the debris, dirt, asphalt, etc., is not covered.

Q 5b. When truck drivers are engaged in hauling excavated material, debris, dirt, asphalt, etc., for recycling away from a Davis-Bacon covered construction site, is the time transporting the material away from the site covered?
Answer:
The time transporting the material away from the covered site is not covered. The regulation specifically states that the transportation of materials or supplies to or from the "site of the work" is not considered construction.

Q 5c. When truck drivers are engaged in hauling excavated material, debris, dirt, asphalt, etc., for recycling away from a Davis-Bacon covered construction site, is the time unloading the material covered?
Answer:
The time unloading the material off site is not covered. Davis-Bacon only applies to work done on the "site of the work".

Q 6. Are truck drivers who are employed by an independent contractor or bona fide materialman to haul material to a covered project from a non-covered supply source (i.e., sand or gravel pit, asphalt plant serving the public in general) covered?
Answer:
No. If the material source is commercial in nature and supplies the general public, then the drivers are generally not covered. However if the time spent on the site of work is more than de-minimis (20% of the truck driver's work week), the driver would be covered (regardless of whether they are employed by the contractor or subcontractor, or by an independent contractor or bona fide materialman/supplier).

Q 7. Are truck drivers covered for the delivery of materials to the "site of work" from covered supply sources (e.g., batch plants or borrow pits, stockpiles, etc.) which have been established to serve exclusively, or nearly so, the covered project?
Answer:
Yes. If the supply facility is part of the "site of the work" because it is dedicated (exclusively or nearly so) to performance of the contract or the project and located within or near the project limits – "adjacent or virtually adjacent" to the actual construction site.

Note: DOL has an enforcement position with respect to bona fide owner-operators of trucks who own and drive their own trucks. Certified payrolls including the names of such owner-operators do not need to show the hours worked or rates paid, only the notation "owner-operator". This position does not apply to owner-operators of other equipment such as bulldozers, backhoes, cranes, welding machines, etc.

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Q 8. A barricading company supplies traffic control products for 20 Davis-Bacon projects. The devices are dropped off and picked up at the contractor's yard for each project. No setup work is involved. Are the employees of this company covered?
Answer:
Generally no. If the contractor's yard is not deemed a part of the "site of work," the employees are not covered. However, if the contractor's yard is deemed a part of the "site of work," then the employees would be covered if the time spent on each project is more than 20% of their work week.

Q 9. Would these workers be covered if they are not only involved in drop off/pick up, but are also involved in setting up and servicing the traffic control products?
Answer:
Yes. If a material supplier, manufacturer, or carrier undertakes to perform part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work are subject to the prevailing wage requirements under Davis-Bacon in the same manner as those employed by any other contractor or subcontractor.

Q 10. What prevailing wage rate would apply to the workers in the above example?
Answer:
The employees driving the trucks would be paid truck drivers rates. The employees doing the servicing would be paid at the unskilled or miscellaneous laborers rate. If the driver is doing both activities, Davis-Bacon compliance can be achieved by payment of the higher rate for all hours worked. However, laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked in each, provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

Q 11. A barricading company places the advance warning signs per contract, pounds posts, and places a sign cover which the prime contractor removes when construction begins. Is all the work performed by this company now subject to Davis Bacon?
Answer:
The USDOL position is that if this is a one time incident, before construction begins, and the time spent on the site of work is minimal (less than 20% of the employee's work week) then in this instance, the installation of the advance warning signs will not be covered by Davis-Bacon.

Q 12. Prior to the start of construction, a barricading company places into position and turns on a portable changeable message sign per the contract. What Davis Bacon rules apply to this situation?
Answer:
Again if this is a one time situation before construction begins, and the time spent on the site of work is minimal, (less than 20% of the employee's work week) then Davis-Bacon would not apply in this situation.

Q 13. On the same or the next day, this company sets the drums and temporary signs along the shoulder of the road for the prime to set into position when construction begins. What are the Davis-Bacon rules for this situation?
Answer:
When temporary signs and drums are placed along the shoulder of the road for later placement per the contract, Davis-Bacon does not apply, if the total time spent on the project is not more than 20%.

Q 14. Does it matter if the barricading company is working with a sub-contract or a purchase order, for the purposes of applying Davis-Bacon rules?
Answer:
No. Sub-contract status is irrelevant for the purposes of Davis-Bacon.

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Q 15. The manufacturer of concrete box beams delivers 10 beams to a Davis-Bacon covered project. After beams are set the manufacturer sends a technician out to the project to post tension the beams. Is the post tensioning of the beams covered?

Answer:

For purposes of administration and enforcement of Davis-Bacon, under the applicable regulations issued by the Department of Labor, the regulatory definition of "construction" includes "[m]anufacturing or furnishing of materials, articles, supplies or equipment on the site…", as well as the installation of items fabricated off-site. (See 29 CFR 5.2(l)). As discussed regarding item 8, if a material supplier, manufacturer, or carrier undertakes to perform part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work are subject to the prevailing wage requirements under Davis-Bacon in the same manner as those employed by any other contractor or subcontractor. For example, employees of a materials supplier who are required to perform more than an incidental amount of construction work in any workweek at the site of the work would be covered by Davis-Bacon and due the applicable wage rate for the classification of work performed. For enforcement purposes, the Department of Labor adopts a policy that if such an employee spends more than 20% of his/her time in a workweek engaged in such activities on the site, he/she is covered by Davis-Bacon for all time spent on the site during the workweek.

Q 16. The contractor hires a company to provide inspection services for the contractor's quality control operations on a Davis-Bacon covered project. Are the inspectors subject to prevailing wages?

Answer:

In general, individuals who perform inspections and testing for quality control purposes are not considered laborers or mechanics within the meaning of the Davis-Bacon Act. However, if an employee spends more than 20% of a workweek performing manual, physical and mechanical functions that are normally performed by traditional craftsmen, he/she would be considered laborers and mechanics and covered by the DBRA and due the applicable wage rate for the classification of work performed.

Q 17. The contractor hires an engineering firm to provide surveying and staking activities for a Davis-Bacon covered project. Are these workers subject to prevailing wages?

Answer:

Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activity is covered by Davis-Bacon requirements for laborers and mechanics. The determination of whether certain members of survey crews are laborers or mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, an instrumentman or transitman, rodman, chainman, party chief, etc., are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.

Q 18. Does Davis Bacon apply to warranty work?

Answer:

If a material supplier, manufacturer or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work would be subject to DBRA requirements in the same manner as those employed by any other contractor or subcontractor. This would include warranty and/or repair work. Employees of a material supplier who are required to perform more than an incidental amount of construction work (20%) in any workweek at the site of the work would be covered by the DBRA and due the applicable wage rate for the classification of work performed.

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Q 19. How are truck drivers covered on "split-trip" operations where a portion of the trip meets the criteria for DBRA coverage and the other portions of the trip do not.
Answer:
DBRA coverage is for "laborers and mechanics" for time "employed on the 'site of the work." If the truck driver spends more than de-minimis (20%) of their work week on the site of work, the time he is on the site of work is covered by Davis-Bacon.

Q 20. Does Davis Bacon apply to employees hired by professional engineering firms?
Answer:
If an engineering firm is contracted to supply a professional opinion that is neither required by the contract nor is part of the construction, alteration and/or repair of the project, Davis Bacon does not apply.

If, however, an engineering firm is employed to perform work that is required by the contract, then whether or not Davis Bacon applies depends on the duties of the particular employee in question. Davis Bacon will apply only if the employee spends twenty percent or more of his or her work week doing physical or manual work; however, it will not apply to time spent transporting samples to a lab away from the construction site or to time spent in a lab doing testing.

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