



# INDIANA DEPARTMENT OF TRANSPORTATION

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April 6, 2015

## CONSTRUCTION MEMORANDUM 15-05

TO: District Deputy Commissioners  
District Construction Directors  
District Technical Services Directors  
District Area Engineers  
District Project Management Director  
Project Management Director  
Project Engineers/Supervisors

FROM: *Mark Miller*  
Mark A. Miller, Director  
Division of Construction Management and District Support

SUBJECT: Davis-Bacon and Related Acts Questions and Answers

SUPERSEDES: Construction Memorandum 07-02, issued January 24, 2007

The questions and answers attached to this memorandum were provided by the INDOT Economic Opportunity Division to provide guidance concerning Davis-Bacon Act and Related Acts describing its applicability to the Federal-Aid Highway Projects, site of the work, wage determination, and other requirements. This guide does not cover all situations but attempts to cover the most common situations encountered at the Districts.

These guidelines will help determine which workers on a jobsite must be paid prevailing wages pursuant to the Davis-Bacon Act. 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.

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.

ATTACHMENT: Davis-Bacon and Related Acts Questions and Answers

MAM/ajp

## DAVIS-BACON AND RELATED ACTS

### Questions and Answers

#### GENERAL

1) What is the Davis-Bacon Act (DBA)?

The Davis-Bacon Act (DBA) was enacted by Congress on March 3, 1931, to assure local workers a fair wage and to provide local contractors a fair opportunity to compete for local federal government contracts.

In general, the DBA, as amended, requires that each contract over \$2,000 to which the United States or the District of Columbia is a party for the construction, alteration, and/or repair (including painting or decorating) of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classifications of laborers and mechanics employed under the contract. (The Davis Bacon Act is incorporated under 23 U.S.C. 113 as a Davis-Bacon related act statute and is applicable to construction of Federal-aid highways funded with Federal-aid funding. See the discussion on Applicability to Federal-aid Highway projects, questions 7 and 8.)

Contractors and subcontractors are required to pay their laborers and mechanics employed directly upon the "site of the work" no less than the locally prevailing wage and fringe benefit rates for corresponding work on similar projects in the area "regardless of any contractual relationship which may be alleged to exist." The Department of Labor determines and sets the prevailing wage rates. The geographical scope of the DBA is limited, by its terms, to the 50 States and the District of Columbia.

29 CFR Part 5  
The Davis-Bacon Act (WH-1246)

2) What do the terms "buildings or works" in the Davis-Bacon Act refer to?

The terms "building or work" refer to any construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include, without limitation, buildings, structures, and other facilities on which construction type improvements are performed. Some of the construction type improvements are related to facilities, such as: bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping.

29 CFR 5.2(i)

3) What do the terms "construction, prosecution, completion, or repair" in the Davis-Bacon Act refer to?

The terms "construction, prosecution, completion, or repair" refer to all types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work, including without limitation:

- a) Altering, remodeling, installation (where appropriate) on the site of the building or work on items fabricated off-site;
- b) Painting and decorating;

- c) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work; and
- d) Transportation between the site of the work and a facility which is dedicated to the construction of the building or work and deemed part of the site of the work, such as:
  - Project office.
  - Tool yards.
  - Batch plants.
  - Borrow pits, etc.

- 4) Is the manufacturing or furnishing of materials, articles, supplies or equipment covered under the Davis-Bacon Act?

The requirements of the Davis-Bacon Act apply to construction, alteration, and/or repair (including painting or decorating) of public buildings or public works. Only when the manufacturing or furnishing of materials, articles, supplies or equipment is conducted in connection with and at the "site of the work" called for in the contract, are those activities covered under the Davis-Bacon Act.

29 CFR 5.2(j)

- 5) What is the minimum contract size/threshold for the prevailing wage rate requirements to apply?

The minimum contract size/threshold for the prevailing wage rate requirements to apply is over \$2,000.

40 U.S.C. 3142(a)

29 CFR 5.5(a)

- 6) Does the minimum contract size/threshold for the prevailing wage rate requirements apply to the contractor and/or subcontractors on a project?

The minimum contract size/threshold of \$2,000 only applies to the prime contractor. All related subcontractors on the project are covered under the DBA regardless of the size of the subcontract.

40 U.S.C. 3142(c)

29 CFR 5.5(a)

#### **APPLICABILITY TO THE FEDERAL-AID HIGHWAY PROJECTS**

- 7) What are the "Davis-Bacon Related Acts (DBRA)?"

The Davis-Bacon Related Acts are those Acts extending the Davis-Bacon Act provisions to Federal agencies that provide financial assistance for public works construction through grants, loans, loan guarantees, and insurance. The Federal-aid Highway Acts extended the Davis-Bacon Act provisions to Federally funded construction contracts on Federal-aid highways in the 50 United States, the District of Columbia, Guam, Puerto Rico, the Virgin Islands or other territories.

29 CFR 5.1(a)

23 U.S.C. 113

- 8) What are the Davis-Bacon labor standard clauses that must be included in a covered contract?

The Davis-Bacon Act requires contracting agencies to insert in full on any covered contract the clauses in the regulations at 29 CFR 5.5(a). If a contracting agency has a specific need which requires they modify the clauses, they can do so provided, that such modifications are first approved by the Department of Labor (USDOL). For Federal-aid highway construction projects, the contract clauses required by 29 CFR 5.5(a) are included in Form FHWA-1273 which is required to be physically incorporated in every prime contract and all subcontracts. The required contract clauses address the following topics:

- a) Minimum wages.
- b) Withholdings.
- c) Payrolls and basic records.
- d) Apprenticeships and trainees.
- e) Compliance with Copeland Act requirements.
- f) Subcontracts.
- g) Contract termination; debarment.
- h) Compliance with Davis-Bacon and Related Act requirements.
- i) Disputes concerning labor standards.
- j) Certification of eligibility.

40 U.S.C. 3142(c)  
29 CFR 5.5(a)

- 9) Are prevailing wage rate requirements applicable to highway construction projects on Federal-aid highways, as defined in the 23 U.S.C. 113?

The prevailing wage rate requirements apply to any Federal-aid highway construction project (regardless of Federal-aid funding source) over \$2,000 that is:

- a) Located physically within the existing right-of-way of a Federal-aid highway (defined in 23 U.S.C. 101 as "... a highway eligible for assistance under this chapter other than highways classified as local roads or rural minor collectors.)
- b) Located outside the physically existing right-of-way of a Federal-aid highway but is linked to or dependent upon a Federal-aid highway project based on proximity or impact (i.e. without the Federal-aid highway the project would not exist); or
- c) Funded under the Transportation Alternatives Program (TAP) (except for projects carried out under the Recreational Trails Program set-aside).

Transportation Alternatives Program Guidance

- 10) May contracting agencies apply prevailing wage rate requirements to projects not located on a Federal-aid highway?

Yes, although not required to do so contracting agencies may apply prevailing wage rate requirements to projects not located on a Federal-aid highway.

- 11) When a contracting agency uses Federal-aid funds for preliminary engineering, is the related construction project federalized thus making the prevailing wage rate requirements applicable to the construction contract?

NO. The prevailing wage rate requirements apply on a "contract basis." A contracting agency may elect to use Federal-aid funds for the preliminary engineering phase of a project and 100% state funds for the construction phase. Since there are no Federal-aid funds in the construction phase contract, the prevailing wage rate requirements do not apply.

- 12) When a contracting agency "ties" a Federal-aid funded project to a State or locally-funded project, do the prevailing wage rate requirements apply to all "tied" projects?

Some agencies "tie" or combine separate construction projects for bidding purposes to take advantage of economies of scale, thereby providing an incentive for contractors to provide more competitive bids for all contract lettings. In these cases, the projects are designed, constructed, and administered as separate projects.

- If the "tied" projects are awarded as separate contracts (each contract has its own performance bond, pay items, and separate and distinct funding sources.) and are "tied" for the purpose of bidding and award, then the prevailing wage rate requirements only apply to the Federal-aid funded project or projects.
- If the "tied" projects are awarded as one contract, then the prevailing wage rate requirements apply to all projects since the contract is being funded as a Federal-aid project.

- 13) Do the prevailing wage rate requirements apply to force account contracts for emergency repair work performed by the following parties:

- a) Contracts let by State or local government agencies using force account procedures?

YES. The prevailing wage rate requirements apply to work performed by contractors and subcontractors on State or local government-let contracts using force account procedures.

- b) Work performed by State or local government forces using the force account method?

NO. The prevailing wage rate requirements apply to work performed by contractors or subcontractors. State or local government agencies are not considered contractors or subcontractors, therefore the prevailing wage rate requirements do not apply.

29 CFR 5.2(h)

Memorandum June 26, 2008 (item3)

- 14) Do the prevailing wage rate requirements apply to contracts for emergency repair work solely for debris removal?

NO. Prevailing wage rate requirements do not apply to contracts where the scope of work is solely for the removal of debris and related clean up; however, if the debris removal is performed in conjunction with other repair or reconstruction work, prevailing wage rate requirements apply.

Memorandum June 26, 2008 (item3)

#### SITE OF THE WORK

- 15) What is the "site of the work" where laborers and mechanics are covered by the prevailing wage rate requirements?"

The "site of the work" is the physical place or places where the building or work called for in the contract will remain once the contract work has been completed and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.

29 CFR 5.2(l)(1)

16) What criteria must be satisfied for a facility to be deemed part of the site of the work?

- a) Dedicated exclusively, or nearly so, to the performance of the contract; and
- b) Adjacent or virtually adjacent to the site of the work.

29 CFR 5.2(l)(2)

17) What locations are generally not included in the site of the work?

- a) Permanent home offices;
- b) Branch plant establishment;
- c) Fabrication plants;
- d) Tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally-assisted contract or project; and
- e) Commercial or material supplier fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., established by supplier for the project before opening of bids but not on the site of the work.

29 CFR 5.2(l)(3)

\* 18) Under what circumstances are truck drivers covered under the DBRA?

- a) Drivers of a contractor or subcontractor for time spent working on the site of the work;
- b) Drivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not de minimis;
- c) Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site; and
- d) Truck drivers transporting portion(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the physical place(s) where the building or work called for in the contract(s) will remain.

Prevailing Wage Resource Book, DBA/DBRA Compliance Principles, Truck Drivers

\* 19) Under what circumstances are truck drivers not covered under the DBRA?

- a) Material delivery truck drivers while off "the site of the work;"
- b) Drivers of a contractor or subcontractor traveling between a Davis-Bacon job and a commercial supply facility while they are off the "site of the work;" and
- c) Truck drivers whose time spent on the site of the work is de minimis, such as only a few minutes at a time merely to pick up or drop off materials or supplies.

Prevailing Wage Resource Book, DBA/DBRA Compliance Principles, Truck Drivers

20) When site of the work issues arise, how are they resolved?

The USDOL Wage and Hour Division should be consulted when contracting agencies are confronted with "site of the work" issues. Refer to WHD Local Offices for information on contacting the local offices of the USDOL Wage and Hour Division.

- 21) Are the prevailing wage rate requirements applicable on projects to move or relocate facilities necessary for an associated Federal-aid construction project in the following situations?

- a) Contract let by a railroad or utility.

When a railroad or utility let a contract to move or relocate their facility to accommodate a highway construction project, payment under the contract is considered compensation for moving or relocating their facility, and not highway construction; therefore the prevailing wage rate requirements do not apply.

- b) Highway construction contract.

When the work to move or relocate a railroad or utility to accommodate a highway construction project is performed under the highway construction contract, the work is considered highway construction; therefore the prevailing wage rate requirements apply.

Memorandum June 26, 2008 (fourth item)

- 22) Are ferry boat projects covered by the prevailing wage rate requirements?

The construction and reconstruction of ferry boats and docking facilities is considered work performed upon "public works" within the meaning of the Davis-Bacon Act. When the location of the contract performance is known when bids are solicited, a wage determination would be issued. See DOL's Field Operations Handbook, Section 15d11 for guidance.

### WHO IS COVERED UNDER THE DBA?

- 23) Who is covered under the Davis-Bacon Act?

The requirements of the Davis-Bacon Act apply to laborers and mechanics, which are those workers performing work that is physical and/or manual in nature (including those who use tools or who are performing the work of a trade), and employed by a contractor or subcontractor on the "site of the work," as distinguished from mental or managerial work. Laborers and mechanics also include apprentices, trainees, and helpers.

Laborers and mechanics do not include workers whose duties are primarily administrative, executive, or clerical rather than manual. In instances where supervisory employees and other employees whose work is not physical in nature (such as foremen, and other non-laborers and non-mechanics workers) devote over 20% of their time in a work week to physical and/or manual labors, they are covered under the DBA for the time spent performing the work of a laborer or mechanic. Persons employed in a bona fide executive, administrative, and professional capacity are not covered under the Davis-Bacon Act.

29 CFR 5.2(m)

- 24) What are some of the worker classifications covered under the Davis-Bacon Act?

The following are some of the worker classifications of laborers or mechanics covered under the Davis-Bacon Act:

- a) Carpenters.

- b) Electricians.
- c) Plumbers.
- d) Ironworkers.
- e) Flaggers.
- f) Craftsmen.
- g) Welders.
- h) Concrete Finishers.
- i) Longshoremen.
- j) Power Equipment Operators.
- k) Helpers.
- l) Workers participating in a special program that has not established specific wage rates and other compensations for the participants.

AAM No. 141

- 25) What are some of the worker classifications generally NOT covered under the Davis-Bacon Act?

The following worker classifications of laborers or mechanics are generally NOT covered under the Davis-Bacon Act:

- a) Architects.
- b) Engineers.
- c) Timekeepers.
- d) Supervisors.
- e) Foremen.
- f) Workers performing exploratory drilling services, such as subsurface utility engineering or utility location services, for the purpose of obtaining data to be used in engineering studies and the planning of a project. (The work performed is related to an activity and not a project; therefore the Davis-Bacon Act does not apply.)
- g) Employees of railroads.
- h) Employees of public utilities.
- i) Contracting agency inspectors.
- j) Public agency employees performing work on a public Agency force account basis.
- k) Contractor Quality Assurance Inspector.
- l) Material men and suppliers.
- m) Survey crew members using the equipment for measuring heights, distances, and bearings.
- n) Owner-Operators of trucks who drive their own trucks (The certified payroll would indicate that the work was performed by named "owner-operator" but would not need to show hours worked or the rate of pay).
- o) Bona fide programs approved by the USDOL with established wage rates, living allowances and other compensation. Some of the programs included:
  - 1. Summer youth opportunity programs, such as those sponsored by union and management or by a governmental or community group, and
  - 2. Federal Youth Program, such as: Youth Conservation Corps, Public Land Corps, American Conservation and Youth Service Corps (AmeriCorps), and Volunteers in Service to America (VISTA).

- 26) What are the requirements for apprentices and trainees?

The USDOL requirements of 29 CFR 5.5(a)(4)(i) and (ii) apply to apprentices and trainees individually registered in a bona fide apprenticeship program registered with the USDOL, Employment and Training Administration, Office of Apprenticeship Training, Employer and



Labor Services, or with a State Apprenticeship Agency recognized by the Office. Even though apprentices and trainees are laborers and mechanics, these worker classifications are not listed on a wage determination. The wages and fringe benefits rates they receive are specified in their approved training program and may be less than the journeyman rate for the type of work performed.

Apprentices and trainees performing on Federal-aid highway construction contracts and enrolled in programs certified by the Secretary of the Department of Transportation are exempt from the DBRA requirements of 29 CFR 5.5(a)(4)(i) and (ii) for apprentices and trainees.

23 U.S.C. 113(c)  
29 CFR 5.5(a)(4)(i)  
29 CFR 5.5(a)(4)(ii)

27) Is a helper classification included in a General Wage Determination?

NO. The wage and fringe benefit rates for a helper classification are not included in a General Wage Determination. The helper classification must be included in a project wage determination, or added by the USDOL Wage and Hour Division, only when the following conditions are met:

- a) The work duties are clearly defined and distinct from any other classification in the wage determination;
- b) The work performed by a helper is not performed by a classification in the wage determination;
- c) The use of helpers is an established prevailing practice in the area; and
- d) The helper is not employed as a trainee in an informal training program.

29 CFR 5.2 (n)(4)

## **WAGE DETERMINATIONS**

28) What is a "wage determination?"

A "wage determination" is the listing of wage rates and fringe benefit rates for each classification of laborers and mechanics which the Administrator of the Wage and Hour Division of the USDOL has determined to be prevailing in a given geographical area for a particular type of construction (e.g., building, heavy, highway, or residential). The prevailing wage is the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the same period. If the same wage is not paid to a majority of those employed in the classification, the prevailing wage shall be the average of the wages paid, weighted by the total employed in the classification. A "wage determination" includes not only the original determination (or decision) but any subsequent determinations modifying, superseding, correcting, or otherwise changing the rates and scope of the original determination.

The USDOL Wage and Hour Division issues two types of wage determinations: general wage determinations, also known as area wage determinations, and project wage determinations.

29 CFR 1.2(a)(1)  
WHD Davis-Bacon and Related Acts Frequently Asked Questions, I.

## 29) What is a "general wage determination?"

A "general wage determination" (GWD) reflects those rates determined to be prevailing in a specific geographic area for the type of construction described. "General wage determinations," including any subsequent decisions modifying, superseding, correcting, or otherwise changing the rates and scope of the original wage decision, contain no expiration dates and are effective from their date of publication on the Wage Determination On Line (WDOL) web site at <http://www.wdol.gov>; or notice in the Federal Register; or on the date the written notice is received by the contracting agency, whichever is earlier.

When a contracting agency has a proposed construction project to which a published GWD would be applicable, that wage determination may be used by the contracting agency without consulting the USDOL, provided that questions concerning its use shall be referred to the USDOL in accordance with 29 CFR 1.6(b).

When a contracting agency has a proposed construction project to which there is not an applicable published GWD, the contracting agency must request a wage determination using Standard Form (SF) 308, "Request For Wage Determination And Response To Request."

29 CFR 1.6(a)(2)

Wage Determination OnLine (WDOL)

WHD Davis-Bacon & Related Acts Frequently Asked Questions, I., General WD

## 30) What is a "project wage determination?"

A "project wage determination" is a wage determination for a specific named construction project. It is issued at the request of a Federal agency or a "State highway department under the Federal-aid Highway Acts" using Form SF-308, "Request For Wage Determination And Response To Request." A "project wage determination" expires 180 calendar days from the date of issuance unless an extension of the expiration date is requested by the contracting agency and approved by the USDOL Wage and Hour Division.

29 CFR 1.6

29 CFR 1.5(b)

Standard Form (SF) 308

WHD Davis-Bacon & Related Acts Frequently Asked Questions, I., Project WD

## 31) When a wage determination does not contain a classification of worker needed to complete construction of a project, can the wage and fringe benefit rates for a worker classification be transferred to other workers on the project?

NO. The wage and fringe benefit rates for worker classifications listed in wage determinations are unique to a particular type of construction and the type of work being performed. Therefore, wage and fringe benefit rates for a worker classification are not transferrable to other worker classification.

## 32) What are the procedures for requesting a missing worker classification?

The contracting agency shall require that any classification of laborers or mechanics which are not listed in the wage determination and which are to be employed under the contract be classified in conformance with the wage determination.

When a classification considered necessary for performance of the work is missing from the WD, the contractor must initiate a request for approval for a proposed wage and benefit rate that conforms to the wage determination. The contractor can initiate this action by preparing a Standard Form 1444 (SF-1444), *Request for Authorization of Additional Classification and Rate*. The wage rate proposed by the contractor must bear a "reasonable relationship" to the wage rates in the WD.

AAM No. 213

When only one classification necessary for performance of the work is missing in the WD, the contracting agency may request a project wage determination using Standard Form (SF) 308, "Request For Wage Determination And Response To Request." Once the contract has been awarded, the project wage determination may be incorporated into the contract through supplemental agreement or through change order.

WHD Davis-Bacon and Related Acts Frequently Asked Questions, VI.

- 33) What criteria must be satisfied for an additional worker classification to be approved by the USDOL Wage and Hour Division?

The approval of an additional worker classification and the proposed wage and fringe benefits rates requires that the following criteria be satisfied:

- a) The work to be performed by the worker classification requested is not performed by any other worker classification in the wage determination; and
- b) The worker classification requested is utilized in the area by the construction industry; and
- c) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and
- d) There is evidence of agreement on the worker classification and proposed wage rate among the parties involved, or the views of those involved -- the contractor(s), employees (if known) or their representative, and the contracting officer/agency -- are forwarded for consideration to the Wage and Hour Division; and
- e) The request does not involve wage rates for apprentices or trainees.

29 CFR 5.5(a)(1)(ii)

WHD Davis-Bacon and Related Acts Frequently Asked Questions, VI.

- 34) Who is responsible for deciding which wage determination would be appropriate to use on a specific project?

The contracting agency is responsible for determining the applicable wage determination to furnish to all parties involved on a project. See Where can I obtain a copy of the General Wage Determination needed for a covered federal project? for more details.

- 35) How does the USDOL Wage and Hour Division determine prevailing wages?

The US DOL Wage and Hour Division establishes prevailing wage rates using available data showing the rates for the type of construction and worker classification prevailing in a specific geographical area. The sources of data may include, but is not limited to:

- a) Conducting in-house reviews of payroll data, or
- b) Conducting surveys of wage data from active projects.

36) What prevailing wage determination applies to laborers and mechanics engaged in warranty or repair work under a construction contract?

The original contract prevailing wage determination applies regardless of when the warranty work is done. This is true whether or not there is a pay item for the warranty work.

29 CFR 1.6(a)(1)  
AAM No. 157

37) What prevailing wage determination should be used when a project is located on the border between two States with separate wage determinations?

The prevailing wage determinations are based on the prevailing wage rates for the area that the work will be performed. When a project site of the work is located in more than one area with separate wage determinations, the contracting agency has two options:

- a) Include all applicable GWDs in the contract, therefore, the contractor is required to pay employees based on where the work was performed using the appropriate GWD, or;
- b) Request a project wage rate determination for the project using Standard Form (SF) 308, "Request for Wage Determination and Response to Request."

38) What wage rate determination should be used on a contract that has more than one wage rate schedule with the same worker classification?

The contracting agency is responsible for insuring that only the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications, and for designating specifically the work to which such wage determination will apply. It is possible for a project to have a worker classification for heavy construction and the same worker classification for highway construction. Because of the complexities in applying multiple wage rate schedules, the contracting agency should consult with the Wage and Hour Division to resolve any questions.

29 CFR 1.6(b)

39) Is the contractor allowed an equitable adjustment if a correction is necessary for a wage determination based on a clerical error by the USDOL?

YES. The contractor is compensated for any increases in wages resulting from a necessary wage rate modification retroactive to the beginning of construction through the effective date of the modification.

40) Do new wage determinations apply to construction contracts that have already been awarded?

A proper wage determination incorporated into a bid solicitation and related contract award establishes the minimum wage and fringe benefits rates which must be paid to the

laborers and mechanics for the entire term of the contract. Modifications to a wage determination issued after the bid opening do not apply.

Upon his or her own initiative or at the request of a contracting agency, the USDOL Wage and Hour Division may correct any wage determination believed to contain an inadvertent clerical error. Such corrections shall be included in any bid specifications containing the wage determination, or in any on-going contract containing the wage determination in question, retroactively to the start of construction.

29 CFR 1.6(d)  
Prevailing Wage Rates

- 41) What prevailing wage determination applies when a contracting agency executes an option provision in a multi-year contract to extend the terms of the contract for a specified period of time?

When a contracting agency executes an option provision in a multi-year contract to extend the terms of the contract for a specified period of time, the prevailing wage determination effective at that time the option was executed must be incorporated into the contract. See November 20, 1998, Federal Register Notice titled: "Guidance to All Government Contracting Agencies of the Federal Government and the District of Columbia Concerning Application of Davis-Bacon Wage Determinations to Contracts With Option Clauses" for detailed guidance.

- 42) What is a supersedeas wage determination?

Supersedeas Wage Determinations are issued annually to replace general decisions issued in the previous edition of the publication entitled General Wage Determinations issued under the Davis-Bacon and Related Acts. Supersedeas project wage determinations may also be issued.

Supersedeas decisions affecting determinations are effective under the same circumstances as "modifications." Whereas a modification to a wage determination may make changes in only selected provisions of the wage determination, a supersedeas determination replaces the entire existing wage decision.

WHD Davis-Bacon and Related Acts Frequently Asked Questions, I.

- 43) What is the 10-day rule?

A contracting agency is responsible for incorporating the applicable wage rate determination into each federally-assisted contract entered into pursuant to competitive bidding procedures. When notice of a change to a wage determination is published in the Federal Register 10 days or more before the opening of bids, the USDOL requires that the new wage determination be incorporated into the contract by amendment.

29 CFR 1.6(c)(3)(i)

- 44) When a contracting agency has failed to incorporate a wage determination in a covered contract and/or has incorporated a wage determination that clearly does not apply to the contract (e.g. inaccurate description of project, inaccurate location in a wage determination request), what can the contracting agency do?

- a) Terminate and re-solicit the contract with a valid wage determination, or
- b) Incorporate a valid wage determination retroactive to the beginning of construction

through supplemental agreement or through change order. The contractor must be compensated for any increases in wages resulting from such contract change.

29 CFR 1.6(f)

### **CONTRACT ADMINISTRATION**

- 45) Where are the prevailing wage determinations found?

Prevailing wage determinations are available on the internet at: Wage Determinations OnLine.gov.

- 46) May a contracting agency reference the wage determination(s) in a bid proposal?

YES. The contracting agency may reference the wage determination(s) in a bid proposal.  
FHWA Questions and Answers Regarding Electronic Contracting, No. 7

- 47) May a contracting agency reference the wage determination(s) in a construction contract?

NO. The contract between the contracting agency and the contractor (or between the contracting agency and the design-builder) must physically incorporate the applicable wage determination(s) into that contract.

FHWA Questions and Answers Regarding Electronic Contracting, No. 7

- 48) May a prime contractor reference the wage determination(s) in their contracts with subcontractors?

NO. The contracts between the prime contractor and the subcontractors must physically incorporate the applicable wage determination(s) into those contracts.

### **RECORDKEEPING / PAYROLL**

- 49) What payroll and basic information must contractors and subcontractors covered by the Davis-Bacon Act maintain for all laborers and mechanics employed on the site of the work?

- a) Name;
- b) Address;
- c) Full social security number;
- d) Worker classification;
- e) Regular hourly rate of pay, including rates of contributions or costs anticipated for fringe benefits or their cash equivalents;
- f) Daily and weekly numbers of hours worked;
- g) Deductions;
- h) Actual wage paid;
- i) If applicable, detailed information regarding various fringe benefit plans and programs, including records that show that the plan or program has been communicated in writing to the laborers and mechanics affected; and
- j) If applicable, detailed information regarding approved apprenticeship or trainee programs.

29 CFR 5.5(a)(3)(i)

- 50) What information must contractors and subcontractors provide on the weekly certified payroll submittals?

Contractors and subcontractors performing on contracts covered by the Davis-Bacon Act are required to pay laborers and mechanics on a weekly basis. They must submit a weekly payroll statement to the contracting agency that includes the following information:

- a) Name of each worker;
- b) Employee identification number (e.g., the last four digits of the employee's social security number);
- c) Worker classification;
- d) Hourly rates of wages paid;
- e) Daily and weekly number of hours worked;
- f) Deductions (fringe benefits, etc.) made; and
- g) Actual wages paid.

29 CFR 5.5(a)(3)(ii)

- 51) Does the USDOL require weekly certified payrolls to be submitted on form WH-347?

The Form WH-347 is available for the convenience of contractors and subcontractors in submitting weekly certified payrolls. Use of the form is optional; however, the information necessary to properly fill out the form satisfies the requirements of a certified payroll submission in connection with contracts subject to the Davis-Bacon and related Acts and the Copeland Act. A properly executed certification set forth on the reverse side of Form WH-347 satisfies the requirement for submission of the "Statement of Compliance."

By signing the "Statement of Compliance," the contractor or subcontractor is certifying that the following statements for the pay period are correct:

- a) The information required under 29 CFR 5.5(a)(3)(ii) and 29 CFR 5.5(a)(3)(i) is being maintained and is correct and complete;
- b) Each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR Part 3; and
- c) Each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

- 52) Do the record retention requirements that apply to paper records also apply to records maintained electronically?

YES. When records are maintained electronically, contractors must take care to ensure that good records management system practices are used and that the electronic records system provides integrity, accuracy, authenticity, and reliability. As an example, see the guidance provided by the Office of Federal Contract Compliance Programs - "Retention Provisions for Electronic Records."

- 53) How long are contractors and subcontractors required to retain employee records, including payroll records?

Contractors and subcontractors must retain employee records, including payroll records, during the course of the contract work and three years after final payments and all other pending matters are closed; i.e. FHWA's final acceptance of the project.

29 CFR 5.5(a)(3)(i)  
23 CFR 635.118  
49 CFR 18.36(i)(11)

- 54) Are electronic submittals and electronic signatures acceptable for the contractor's weekly payroll and the "Statement of Compliance" submittals?

YES. The USDOL Wage and Hour Division permits the use of electronic submittals and electronic signatures for the contractor's weekly payroll and the "Statement of Compliance" submittals. For more information, refer to the USDOL's November 12, 2004, letter regarding Electronic Signatures and the Copeland Act.

29 CFR 5.5(a)(3)  
WH-347 and instructions

### OVERSIGHT

- 55) What are the functions/responsibilities of the U.S. Department of Labor under the Davis-Bacon Act?

The U.S. Department of Labor (USDOL) Wage and Hour Division has regulatory and oversight authority to assure coordination of administration and consistency of enforcement of the labor standards provisions of the Davis-Bacon Act. The USDOL Wage and Hour Division issues regulations establishing standards and procedures for the administration and enforcement of the Davis-Bacon labor standard provisions.

- 56) What are the responsibilities of FHWA and recipients of federal assistance under the Federal Aid Highway Acts in administering and ensuring compliance with the labor standard provisions of the Davis-Bacon Act?

The FHWA has the overall responsibility for ensuring that recipients in the Federal-aid highway program comply with the requirements and policies for prevailing wage rates on covered construction contracts. The FHWA is responsible for ensuring that all contracting agencies (State DOTs, local public agencies, and other grant recipients) are correctly administering prevailing wage rate requirements. The FHWA oversees compliance of these requirements through a risk-based stewardship and oversight program administered by each FHWA Division Office but is also charged under DOL guidance to conduct such investigations as appropriate to enforce Davis Bacon Act requirements.

On Federal-aid highway construction projects, contracting agencies are responsible for properly applying and enforcing prevailing wage rate requirements in covered contracts including:

- a) Verifying that covered contracts have incorporated the required Davis-Bacon clauses and the applicable wage determination(s);
- b) Verifying that the Davis-Bacon notice and the applicable wage determination(s) are displayed at the site of the work in a conspicuous location in clear view of everyone;
- c) Reviewing certified payrolls in a timely manner;
- d) Conducting employee interviews;
- e) Conducting reviews and investigations of covered contracts in conjunction with FHWA



- as appropriate;
- f) Forwarding refusal to pay and/or debarment consideration cases to the USDOL Wage and Hour Division for appropriate action; and
- g) Submitting enforcement reports and semi-annual enforcement reports to the USDOL Wage and Hour Division.

57) What are some of the typical violations of the DBRA?

The following are some of the typical violations of the Davis-Bacon and Related Acts requirements:

- a) Misclassification of laborers and mechanics;
- b) Failure to pay full prevailing wage, including fringe benefits, for all hours worked (including overtime hours);
- c) Inadequate recordkeeping, such as not counting all hours worked or not recording hours worked by an individual in two or more classifications during a day;
- d) Failure of to maintain a copy of bona fide apprenticeship program and individual registration documents for apprentices;
- e) Failure to submit certified payrolls weekly; and
- f) Failure to post the Davis-Bacon poster and applicable wage determination.

58) What is FHWA's guidance regarding late submittals of weekly payroll statements?

Unless the contractor provides a satisfactory explanation, the FHWA recommends that the contracting agency consider initiating a compliance investigation if a contractor is habitually late in submitting payroll statements.

59) What actions can be taken when a contractor is continually late with payroll submittals?

The contracting agency must send the prime contractor a written notice restating the contract requirements for submitting the weekly payroll statements. If the contractor continues to submit the payroll statements late, the following actions can be taken:

- a) Withhold payments until the payroll submittal requirements are met;
- b) Terminate the contract; or
- c) Refer the violating contractor to the USDOL for possible legal prosecution and/or debarment.

60) What actions can be taken if a contractor is not paying prevailing wages?

The contracting agency may withhold contract funds, on its own initiative or at the direction of the USDOL, in a sufficient amount to satisfy any alleged wage underpayments ending resolution of a wage dispute.

When a subcontractor has not paid the prevailing wages, the prime contractor who is responsible for compliance on the contract and liable for any back wages not paid, may decide to withhold final payment from the subcontractor until the back wage issues are resolved.

When contractors or subcontractors are found to have disregarded their obligations to employees, or to have committed aggravated or willful violations while performing work on

Davis-Bacon Act covered projects, they may be subject to contract termination and debarment from future contracts for up to three years.

40 U.S.C. 3142(c)(3)  
29 CFR 5.5(a)(2)  
29 CFR 5.5(b)(3)

- 61) Who is responsible for assuring that the standard provisions of the Davis-Bacon and Related Acts have been inserted into covered federally-assisted construction contracts?

The Federal agency is responsible for ascertaining whether the clauses required by 29 CFR 5.5 have been inserted into construction contracts covered under the Davis-Bacon and Related Acts. For Federal-aid highway construction projects, FHWA requires the inclusion of form FHWA-1273 which incorporates the contract clauses of 29 CFR 5.5.

23 CFR Part 633

- 62) What action should a contracting agency take when there is cause to believe a back wage violation exists?

The contracting agency should withhold, or cause to be withheld, from the contractor as much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. The funds are withheld from active contracts or any other contracts of the contractor where the prevailing wage rates apply.

29 CFR 5.5(a)(2)

- 63) What can contracting agencies do in situations where back wage violations occurred on a contract that has been accepted and paid as complete?

When funds remain on a contract under which a violation occurred are insufficient to cover back wages due, the contracting agency can withhold funds from other contracts subject to DBRA or any other federal contract held by the same prime contractor.

29 CFR 5.5(a)(2)

- 64) Can a contracting agency use accrued funds withheld from a contractor for payment of wages be used to resolve other contract claims against the contractor?

NO. The wages due underpaid employees have priority over any competing claims against the contractor.

## INTERVIEWS

- 65) How often should employee interviews in a compliance inspection of an employer be conducted by the contracting agency?

Employee interviews should be conducted at a frequency and number sufficient to establish the degree of adequacy and accuracy of the records, and the nature and extent of any violations. They should also be representative of all classifications of employees on the project under investigation. In doubtful compliance situations, interviews with former employees may be appropriate.

29 CFR 5.6 (a)(3)

- 66) An employee has been underpaid. What steps should be taken to resolve the issue?

The contracting agency may withhold funds sufficient to pay the unpaid employees. Considering the violation is a breach of contract, the contract may be termination, and/or the contractor or subcontractor may be debarred from obtaining any type of federally-funded contract for up to 3 years.

- 67) Are employee interviews intended to be confidential from the contractor?

Yes, employee interviews are intended to be private from their employer. Each employee should be informed that the information given is confidential, and that his/her identity will not be disclosed to the employer without the employee's written permission.

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- 68) Do the prevailing wage rate requirements apply to all Recovery Act contracts?

YES. The first sentence of ARRA Section 1606 states in part: "Notwithstanding any other provision of law and in a manner consistent with other provisions of this Act . . ." This language explicitly overrides any limitation to Davis-Bacon coverage that may be contained in other Davis-Bacon related Acts. Specifically, the Highway Acts exclusion of highways functionally classified as local roads and rural minor collectors and limitation of applicability to projects located within the right-of-way does not apply to Recovery Act projects. For additional information, refer to the ARRA Guidance and the all agency memorandum AAM No. 207 – "Applicability of Davis-Bacon to Federal and federally-assisted construction work funded by the American Recovery and Reinvestment Act of 2009."

- 69) Who is responsible for assuring that the contractor has included the appropriate wage determination(s) in the contract?

The contracting agency is responsible for assuring that the appropriate wage determination is included in the contract.

29 CFR 1.6(b)

- 70) Who is responsible for compliance with the DBA labor standard provisions in a construction contract?

The prime contractor has overall responsibility for compliance with the DBA labor standard provision in a construction contract.

29 CFR 5.5(a)(6)

## **POSTERS**

- 71) What Davis-Bacon Act notice or poster must be displayed on Federal-aid funded construction projects?

Covered contractors and subcontractors are required to display the "Rights Under the Davis-Bacon Act" notice (WH-1321) on the job site in a prominent and accessible place where it can be easily seen by the workers. The applicable wage determination must be similarly posted.

WH-1321. "Employees Rights Under the Davis-Bacon Act"  
WH-1321sp. "Derechos Del Empleado Bajo La Ley Davis-Bacon"

- 72) Where can contractors and subcontractors obtain the workplace notices or posters required for Federal-aid funded construction projects?

The notices or posters required on Federal-aid funded constructions projects are available at no cost in electronic and printed form from the Department of Labor. For assistance in complying with federal workplace notices or posters requirements, see DOL Poster Compliance Assistance.

Where can I find workplace posters?  
Job Site Posters

- 73) Where should contractors and subcontractors display workplace notices or posters required on Federal-aid funded construction projects?

Workplace notices or posters must be displayed at all times by the contractor and subcontractors at the site of the work in a prominent and accessible place where they can be easily seen by the workers.

Where should I post the required federal posters?  
29 CFR 5.5(a)(1)(i)

- 74) What is FHWA's position for displaying notices or posters on short-term projects when there is not a job office location?

When a job office is not established due to the nature of the work and/or the length of the contract, the contractor and subcontractors must display all notices or posters at their home offices where hiring is conducted and each employee must be provided copies of all the notices or posters and sign a statement acknowledging they received and understood the content of all the notices or posters.

- 75) Can the required workplace notices or posters be placed in a binder that is accessible in a supervisor's or foremen's vehicle when a job office has not been established for a covered Federal-aid construction project?

NO. Placing the required workplace posters in a binder does not meet the requirement for displaying or posting in a conspicuous place where they are easily visible to all employees — the intended audience.

Can I put the required posters in a binder that I put on the wall?