



Davis Bacon Overview



Contract Coverage

DBA Coverage

- Applies to contracts in excess of \$2,000 to which the Federal Government or the District of Columbia is a party for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works
- Does not apply to work performed in foreign countries or the U.S. territories

Coverage – Contract for Construction

- Is the agreement a “contract for construction” to which the Federal Government or District of Columbia is a party?
- “Construction” includes all types of work done on a particular building or work at the site thereof, as defined in the regulations (section 5.2(j)(1)).
- A contract is “for construction” if “more than an incidental amount of construction-type of activity is involved in the performance of the government contract.”

Coverage – Public Building or Work

- Is the “contract for construction” a contract for construction of a public building or public work of the U.S. or the District of Columbia?
- A “public building” or “public work” – includes “a building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.” 29 CFR 5.2(k)

SCA Maintenance vs. DBA Repair

- SCA Maintenance – Work is typically
 - Scheduled, regular and recurring maintenance activities
 - Routine to keep something in state of continuous utilization
 - Examples: custodial service, routine HVAC filter changes, snow removal

DBA Repair Work

- Typically covers activities such as restoration of facility
 - One time fix to something not functioning
 - Restoration, alteration or replacement of fixed components
 - Examples: building structural repair, renovation, roof shingling, paving repairs, etc.

Contracts Requiring SCA and DBA

- SCA and DBA both apply to contracts “principally” for services that:
 - Contain specific requirements for substantial amounts of construction, alteration, or repair work
 - Physically or functionally separate from other work called for by the contract

DBA Contract Requirements on PCA Contracts

- If a PCA (supply) contract involves a substantial amount of construction work on a public building or work (exceeding the monetary threshold for DBA application), it is also subject to the DBA if the construction work is physically or functionally separate from, and is capable of being segregated from, the other work required by the contract.

Leases as DBA Contracts for Construction

AAM No. 176

- AAM No. 176, issued on June 22, 1994, provides guidance on:
 - “Application of the Davis-Bacon Act to Buildings and Works Constructed and/or Altered for Lease by the Federal Government.”
- If a lease calls for construction, alteration, and/or repair:
 - Apply AAM No. 176 guidance to determine whether DBA requirements need to be in the lease.

Davis Bacon Related Acts

- Davis-Bacon (DB) requirements extend to numerous “related Acts” that provide federal assistance by
 - Grants
 - Loans
 - Loan guarantees
 - Insurance

Davis Bacon Labor Standards/Contract Stipulations

- The term “labor standards” means the requirements of:
 - The Davis-Bacon Act
 - The Contract Work Hours and Safety Standards Act
 - The Copeland Act
 - Prevailing wage provisions of the Davis-Bacon and “related Acts”; and
 - Regulations, 29 C.F.R. 1, 3, and 5



Wage Determinations

Types of Wage Determination

- Davis-Bacon WDs specify the prevailing wages, including fringe benefits, which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character in the localities specified therein
- Two types of wage determinations: general and project

Selecting the Correct Category of Wage Determination

- Selecting and incorporating the appropriate general wage determination for the project type
 - Building
 - Residential
 - Heavy
 - Highway
 - Guidance provided in AAM 130
- Multiple wage determinations may apply where there are separate construction types and the different type of construction is at least 20 percent of the project cost or exceeds \$2.5 million – guidance provided in AAM 131 and 236.

Selecting the Correct Wage Determination Modification

Incorporate most current WD:

- Negotiated contracts (“RFPs”) – Time of award.
- Competitively bids contracts: In effect 10 days or more before opening of bids
- Exceptions
- If the contract is not awarded within 90 days of bid opening, any modification to the WD must be incorporated unless the federal agency requests and obtains an extension to the 90 day period

Interpreting General Wage Determinations

Useful information contained in a general wage determination:

- State and county
- Type of construction with description
- Record of modifications
- List of classifications and rates
- Basis for rates – Identifiers
 - Union Identifiers
 - Union Weighted Average Identifiers
 - SU Identifiers

Wage Determinations

Contracting Agency Responsibilities

- Ensure proper wage determination (WD) is identified and applied
- Advise contractors which schedule of rates applies to various construction items; and
- Advise contractors regarding the duties performed by various crafts in the WD



Conformances

Conformance Requirement

- **Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29CFR 5.5 (a) (1) (ii)).**

Criteria for Conformance Actions

- **The work to be performed by the proposed classification is not performed by a classification already in the wage determination (WD);**
- **The proposed wage rate must bear a reasonable relationship to WD rates; and**
- **The proposed classification is utilized in the area by the construction industry.**

“Reasonable Relationship”

- When determining whether a proposed rate bears a “reasonable relationship” to wage rates in the wage determination:
 - Determine the category of the classification in question (skilled craft, laborer, equipment operator, or truck driver)
 - Determine whether the majority of the rates in that category are union or non-union rates
 - Consider the entirety of those rates and determine whether the proposed rate is reasonable in light of those rates
 - Do not automatically use the lowest rate in the category



Covered Workers

Laborers and Mechanics

- Workers whose duties are manual or physical in nature;
- Includes apprentices, trainees and helpers; and
- For CWHSSA, includes guards and watchmen.
- Does not include workers such as timekeepers, inspectors, architects, engineers, or bona fide executive, administrative, and professional employees as defined under FLSA
- Working foremen are generally non-exempt:
 - must be paid the Davis Bacon (DB) rate for the classification of work performed if not 541 exempt.

Apprentices

- Are laborers and mechanics; not listed on WDs.
- Only includes persons individually registered in a bona fide apprenticeship program registered with DOL's Employment Training Administration (ETA) Office of Apprenticeship (OA) or a State Apprenticeship Agency recognized by OA.
- Individuals in their first 90 days of probationary employment as an apprentice in such a program.
- Regulations: 29 C.F.R. §§ 5.2(n)(1) and 5.5(a)(4)(i).

Apprentice Ratios

- Apprentices must be employed within the allowable ratio specified in approved program for the number of apprentices or trainees to journeymen.
- “The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program.” 29 CFR 5.5(a)(4)(i).
- Compliance with the ratio is determined on a daily, not a weekly basis.

Apprentice Rates

- Apprentices individually registered in an approved program and employed within the allowable ratio may be paid less than the journeyworker wage when they are:
 - Paid the percentage of hourly rate required by the apprenticeship or training program required for each apprentice's level of training;
 - Paid the fringe benefit's specified in approved program; if the program is silent, the full amount of fringe benefit's listed on the WD



Payment of Prevailing Wage Rates

Prevailing Wage Payments

- All laborers and mechanics employed or working upon the site of work must be paid at least the applicable prevailing wage rate for the classification of work performed as listed in the applicable wage determination or a rate approved in accordance with the “conformance process” set forth at 29 C.F.R. § 5.5 (a)(1)(ii), without regard to skill
- The laborers and mechanics working on the site of work must be paid weekly unless the fringe benefits are paid into a bona fide FB plan and then contributions must be paid no less often than quarterly

Base Hourly Wage Rates and Fringe Benefit Rates

- Under DBA, FBs are a component of the DBA “prevailing wage”
- The prevailing wage obligation may be satisfied by:
 - Paying the base hourly rate (BHR) and FB in cash (including negotiable instruments payable on demand)
 - Contributing payments to a bona fide plan; or
 - Any combination of the two
- Cash wages paid in excess of BHR may count to offset or satisfy the FB obligation (unlike under SCA); however, the regular rate for overtime cannot be less than the BHR

Prevailing Wages for Multiple Classifications

- Laborers and mechanics who perform work in more than one classification may be paid the different applicable rates for the work they actually perform if the employer keeps an accurate record of the time spent working in each classification and pays accordingly.
- If in a single workweek an employee works in more than one classification for which different non-overtime rates of pay have been established, the overtime pay generally should be computed based on the weekly average rate.

Determining Worker Classifications

- There are no nationwide standard classification definitions under the DBA.
- To determine proper classifications for workers employed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**.
- Contracting agencies are responsible for advising contractors regarding the duties performed by various crafts in the WD

Determining Local Area Practice

- If, in the applicable wage determination, the rates listed for the classification(s) that may perform the work in question are union rates:
 - any question will be resolved by examining the practice(s) of union contractors in classifying workers who have been performing the duties in question in the area.
- If, in the applicable wage determination, the rates listed for the classification(s) that may perform the work in question are non-union rates:
 - any question will be resolved by examining the practice(s) of non-union contractors in classifying workers who have been performing the duties in question in the area.

Permissible Deductions

- 29 CFR 3.5 lists deductions that an employer can make from the prevailing wage rate without the approval of the Secretary of Labor.
- Examples include Social Security and federal or state taxes, certain court-ordered payments, bona fide pre-payments of wages, certain payments of union dues, and voluntary charitable donations.

Deductions Requiring Approval

- 29 CFR 3.6 generally provides that the Secretary may approve other deductions whenever all of the following conditions are met:
 - The contractor does not profit directly or indirectly from the deduction
 - The deduction is not otherwise prohibited by law
 - Either the employee voluntarily consented to the deduction in writing in advance of the time that the work was performed or the deduction is under the terms of a collective bargaining agreement
 - The deduction serves the convenience and interest of the employee
- Requests for approval must be made annually in writing, as described at 29 CFR 3.7, and may be sent to dbadeductions@dol.gov.



Fringe Benefits

Funded Fringe Benefit Plans

- Contractors may take credit (without prior approval from DOL) for bona fide FB fund contributions made to third-party trustees or insurers that:
 - Are *irrevocably* paid; and
 - Are made regularly, not less often than *quarterly*
- Credit is for payments made for individual workers eligible to participate in the plan, program, or fund.

Unfunded Fringe Benefit Plans

- Costs for an “unfunded” FB plan count towards WD obligation if specific criteria are met:
 - The contributions reasonably anticipate the cost to provide a bona fide FB
 - Contributions are made pursuant to an enforceable commitment
 - That is carried out under a financially responsible plan; and
 - The plan has been communicated in writing to affected workers
- Contractors must submit a written request for DOL approval of unfunded plans, as required by 29 CFR 5.5(a)(1)(iv), prior to claiming fringe benefit credit.

Eligibility and Participation

- Employers may not take credit for contributions for employees who are not eligible to participate in the fringe benefit plan.
- Employers may take credit for contributions made on behalf of employees who will likely become participants in a plan but are not yet eligible to receive benefits (for example, a health insurance plan with a 30 day waiting period for new participants)

Administrative Expenses

- The administrative expenses incurred by a contractor or subcontractor in connection with the administration of a bona fide fringe benefit plan are not creditable towards the prevailing wage under the DBA.

Annualization Principle

- Davis-Bacon credit is based on the effective annual rate of contributions for all hours worked in a year (both Davis-Bacon and non-Davis-Bacon work).
 - Davis-Bacon work may not be used as the exclusive or disproportionate source of funding for a benefit in effect during both covered and non-covered work.
- Determine the hourly rate of contribution that is creditable towards a contractor's Davis-Bacon prevailing wage obligation by dividing the total annual contributions by the total annual hours worked (both Davis-Bacon and non-Davis-Bacon work).



Recordkeeping and Certified Payrolls

Payroll and Basic Records

- Payrolls and related basic records shall be maintained by the contractor during the course of the work and for three years thereafter for all laborers and mechanics working at the site of the work.
- Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. 29 CFR 5.5(a)(3)(i)

Certified Payroll Clauses

- Two separate contract clause requirements apply to “certified payrolls” for a project:
 - The contractor shall submit weekly for any week in which any contract work is performed a copy of all payrolls, which must contain the information that the contractor is required to maintain under § 5.5(a)(3)(i). 29 C.F.R. § 5.5 (a)(3)(ii)(A)
 - Each weekly payroll submitted must be accompanied by a “Statement of Compliance”. 29 C.F.R. § 5.5 (a)(3)(ii)(B)

“Statement of Compliance”

- Must be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages. 29 C.F.R. § 3.3(b).
- Each weekly statement must be delivered or mailed by the contractor or subcontractor, within seven days after the regular payment date of the payroll period, to a representative of a Federal or State agency contracting for or financing the building or work. 29 C.F.R. § 3.4(a).

Certified Payrolls & Signatures

- The signature on each weekly “Statement of Compliance” may be either an original handwritten or an electronic signature.
- A contracting agency or prime contractor may permit or require contractors to submit the weekly payrolls, each with the accompanying “Statement of Compliance” through an electronic system.

Falsification of Certified Payrolls

- The importance of the “Statement of Compliance” requirement is clear in that:
 - “The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.”

29 C.F.R. § 5.5(a)(3)(ii)(D),
reiterated at FAR 48 C.F.R. § 52.222-8(b)(4).



Investigations and Remedies

Investigations

- **DOL Functions/Responsibilities:**
 - Determining “prevailing wages”
 - Issuing regulations and standards to be observed by contracting agencies; and
 - Perform oversight function and has independent authority to conduct investigations
- In addition to including the contract stipulations and correct wage determinations, contracting agencies also have the authority to conduct investigations

Investigative Process

- Initial conference with contractor
- Examine certified payrolls
- Examine basic payroll records
- Check for compliance with apprenticeship and/or trainee requirements
- Interview employees
- Determine if a conformance is necessary
- Compute back wages and liquidated damages, if any
- Final conference to discuss results of the investigation

Employee Interviews

- Are essential to the investigation.
- Information provided is confidential.
- Interview statements should contain:
 - Place and date of interview;
 - Name and address of employer/employee;
 - Information about employment status and classification; and
 - Alleged violations.

Withholding

- DBA and CWHSSA provide for withholding of contract funds to satisfy alleged wage underpayments pending resolution of a wage dispute
 - 40 U.S.C. § 3142 (c)(3); 40 U.S.C. § 3702 (d)
- Withholding of contract funds is an effective enforcement tool in DBA/DBRA/CWHSSA cases
 - It protects the rights of covered workers to wages due them

Withholding of Contract Funds

FAR (48 C.F.R. Part 22)

- FAR guidance in 48 C.F.R. Part 22 instructs that if the contracting officer believes a violation exists, or upon request of the Department of Labor:
 - the contracting officer must withhold from payments due the contractor an amount equal to the estimated wage underpayment and estimated liquidated damages due under the CWHSSA. 48 C.F.R. § 22.406-9 (a)

Withholding of Contract Funds

FAR (48 C.F.R. Part 22, cont'd.)

- If subsequent investigation confirms violations, the contracting officer must adjust the withholding as necessary
- If DOL requested the withholding, the contracting officer must not reduce or release the withheld funds without written approval by DOL
- The withheld funds are to be used to satisfy:
 - assessed liquidated damages; and
 - unless the contractor makes restitution, validated wage underpayments

Debarment

- Occurs when a contractor is declared *ineligible* for future contracts due to:
 - Violations of the DBA in disregard of its obligations to employees or subcontractors
 - Aggravated or willful violations under the labor standards provisions of the related Acts
- Period of ineligibility is 3 years for DBA and up to 3 years for DBRA
- The debarment process is provided at 29 C.F.R. § 5.12 (b)

Debarment Criteria

- Debarment is considered when a contractor has:
 - Submitted falsified certified payrolls
 - Required “kickbacks” of wages or back wages
 - Committed repeat violations
 - Committed serious violations
 - Misclassified covered workers in clear disregard of proper classification norms; and/or
 - As a prime contractor, failed to ensure compliance by subcontractors

AAM Guidance – Referral to WHD Refusal-to-Pay & Debarment Cases

- AAM No. 215, dated March 7, 2014 provides contracting agencies with guidance regarding:
 - Referral of refusal-to-pay and debarment cases to the WHD regional offices; and
 - Procedures for contracting agencies to use when sending withheld funds due covered laborers and mechanics to WHD for disbursement

Internet Sites

- Wage Determinations – <https://sam.gov>
- Wage and Hour Division - <http://www.dol.gov/agencies/whd/government-contracts>
- Resource Book - <https://www.dol.gov/agencies/whd/government-contracts/prevaling-wage-resource-book>
- Office of the Administrative Law Judges Law Library - <http://www.oalj.dol.gov>
- Administrative Review Board - <http://www.dol.gov/arb>

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