Chapter 7 DAVIS-BACON AND RELATED ACTS INTERPRETATION AND APPLICATION - DBRA

7-1 INTRODUCTION. This chapter provides additional guidance involving Interpretations of DBRA administration and enforcement issues which frequently arise.

7-2 FORCE ACCOUNT

1. Definition.

Under most Davis-Bacon statutes, only employees of contractors or subcontractors are subject to Davis-Bacon wage requirements. In some instances, rather than contracting or subcontracting out construction work, a grant recipient performs the construction inhouse, with its own "force account" employees. Such force account work is not subject to Davis-Bacon wage requirements under statutes that cover only employees of contractors or subcontractors. Furthermore, the Department of Labor does not consider a State or local government to be a contractor, even if it enters into a contract to perform construction work (see 29 CFR Section 5.2(h)). However, under the Housing and Community Development Act of 1974, a private firm that receives federal assistance funds indirectly from a recipient pursuant to a written procurement contract or subgrant agreement that provides for the performance of construction work is considered a contractor or subcontractor, and the force account exception does not apply to construction activity performed by employees of such a firm.

2. U. S. Housing Act of 1937, as amended.

Laborers and mechanics employed by a local or State agency (PHA) even though not employed by a contractor are subject to DBRA when performing development work financed by the U. S. Housing Act of 1937, as amended. DBRA prevailing wage requirements are not applicable where such employees are utilized in work defined as non-routine maintenance pursuant to 24 CFR Part 968.3 and Part 968.9(h), which constitute project operation rather than development.

7-3 WORKING SUBCONTRACTORS

Contractual relationships between contractors and alleged subcontractors (who perform mechanic's work) which are formed for the purpose of evading the application of prevailing wage

requirements are expressly prohibited and may provide a basis for debarment. Where there is any doubt as to the bona-fide nature of a self-employed subcontractor who has no other employees, the following must be checked:

1. Does the subcontractor have a registered trade name and is there a telephone listing under that name?

2. Does the subcontractor have a license?

3. Does the subcontractor have liability insurance or a subcontractor's bond?

4. Federal Tax Identification Number.

Any of these criteria in conjunction with a signed contract containing HUD Federal Labor Standards Provisions from each such subcontractor should be sufficient to establish that he or she is a bona-fide subcontractor. Such a subcontractor will submit payrolls indicating only that he/she is the owner, the hours worked and the classification. The phrase "self-employed owner" shall be written under the name, address, and Social Security Number (See Column 1 on the Optional Form WH-347). Nonbona-fide self employed subcontractors must be carried as employees on the payroll of the contractor who engaged him/her, and must be paid the prevailing wage rate for the classification of work performed.

7-4 CLEANING. Cleaning performed during construction is subject to prevailing wage provisions. In the absence of a specific wage rate for the cleaning classification, or if DOL disapproves a conformance request, the cleaners must be paid the predetermined wage rate for laborers. Cleaning performed after the completion of construction in order to prepare the premises for occupancy which is not being done under the construction contract is not subject to the prevailing wage requirements.

7-5 DEMOLITION. Demolition work, which is not related to construction, is not subject to the prevailing wage requirements of DBRA. For example, the demolition of a

building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished as a phase of a construction project subject to DRRA, the demolition would also be covered, as in the case of demolition performed to permit construction of a new building.

7-6 DETERMINING PROPER CLASSIFICATIONS FOR VARIOUS WORK. Questions as to the proper classification of a laborer or

mechanic for various types of work are resolved by making an area practice determination. In determining the proper classification for work performed on a project, it is immaterial whether the contractor is union or nonunion.

On projects where the prevailing wage rates for classifications in question on the applicable wage decision are based on negotiated rates, the prevailing practice concerning work performed in those classifications is that practice observed on projects built by contractors who are signatory to the collective bargaining agreements. Therefore, unless there is a jurisdictional dispute between the crafts, the duties ascribed to any job classification will be the same as those outlined in the appropriate collective bargaining agreements or, if the collective bargaining agreements are silent on this issue, the local unions involved must be consulted.

Conversely, in areas where open shop (nonunion) rates are determined to prevail for the classifications in question, those prevailing job practices followed on projects by open shop contractors in the same area become area practice.

7-7 HELPERS. The use of helpers who use tools in assisting mechanics and who are paid below the minimum rates for mechanics is ordinarily not proper, since the apprentice or trainee is recognized as the individual who is to perform the less skilled craft work during his/her training period. Helpers are not recognized on a DBRA contract unless they are contained in the wage determination or a conformable rate is approved by the Department of Labor.

7-8 RELATIVES. There are no exceptions made in the enforcement of DBRA on the basis of family relationship for relatives who are performing the work of laborers or mechanics. They must be paid the prevailing wage rate for the classification of work performed and be included on the certified payrolls.

7-9 EMPLOYEES OF A GOVERNMENTAL BODY. The Department of Labor has taken the position that the prevailing wage requirements do not apply to employees of a State or political subdivision of a State, but shall apply to employees of a private contractor who is subcontractor of the State or political subdivision. This rule does not apply to PHA employees under the U. S. Housing Act of 1937 (See Subparagraph 7-2 (2)). Employees of utilities are exempt providing they are only extending existing service to the property.

7-10 EMPLOYEES PERFORMING WORK IN MORE THAN ONE CLASSIFICATION. A person employed as a laborer or mechanic employed on a contract subject to DBRA and performing work in more than one classification may be paid not less than the predetermined rate for the actual

hours spent in each classification, provided the work performed is capable of separation into more than one classification, and provided that the time records are kept in accordance with the actual hours spent in each classification. Work which is normally performed as part of the mechanic's craft is not separable.

7-11 LABORERS AND MECHANICS - DEFINITION. The terms "laborers" and "mechanics" are construed to include at least those workers whose duties are manual or physical in nature as distinguished from mental or managerial. Since the classifications of laborers and mechanics to whom specified wage rates are payable are identified in the DBRA wage determination, there is ordinarily no need to distinguish between laborers and mechanics. However, generally, mechanics are considered to include any worker who uses tools, or who is performing the work of a trade.

7-12 PRECUTTING OF PARTS AND PREFABRICATION OF ASSEMBLIES. The precutting of parts and/or the prefabrication of assemblies are not covered unless conducted in connection with and at the site of the project, or in a temporary plant set up elsewhere to supply the needs of the project and dedicated exclusively, or nearly so, to performance of the contract or project.

7-13 SUPPLY AND INSTALLATION CONTRACTS. The manufacture or furnishing of materials, articles, supplies or equipment is not subject to prevailing wages unless conducted in connection with and at the site of the project, or in a temporary plant set up elsewhere to meet the needs of the project. If a supply contract, not otherwise covered, requires the supplier to install the product, the installation portion of the contract is subject to prevailing wage requirements except that if the installation involves not more than an incidental amount of construction activity, it is not subject to prevailing wage requirements. Contracts for the supply and

installation of window shades, venetian blinds, and traverse rods and draperies involve only an incidental amount of construction activity, and therefore are not subject to prevailing wage determinations. The installation of an elevator or boiler is an example of work that is subject to prevailing wage rates. Questions concerning the coverage of installation activity should be referred to HUD Headquarters for determination.

7-14 START OF CONSTRUCTION. "Start of Construction" as that term is used in connection with labor standards and prevailing wage requirements, means the beginning of initial site clearance and preparation, provided those activities are pursued diligently and are followed without appreciable delay by other construction activity.

7-15 SITE OF WORK. The "site of work" is limited to the physical

place or places where the construction called for in the contract will remain when work on it has been completed, and to other adjacent or nearby property used by the contractor in such construction which can reasonably be said to be included in the "site" because of proximity. Operations of a commercial supplier or materialman established in the proximity of but not on the active site of work prior to the opening of bids are not covered by the Act even if dedicated exclusively to the Federal project for a time.

7-16 FRINGE BENEFITS - FUNDED PLANS. A contractor may credit contributions for "bona fide" fringe benefits regardless of whether the Department of Labor has found the particular benefits to be prevailing in the area. Such fringe benefits must be "bona fide." Ordinarily, bona fide benefits are those common to the construction industry and are paid directly to the employee in cash or into a fund, plan, or program on the employee's behalf. Contractors may take credit for contributions made under such conventional plans without requesting approval of the Department of Labor.

7-17 FRINGE BENEFITS - UNFUNDED PLANS. Where fringe benefit plans are not of the conventional type, it will be necessary for the Department of Labor to determine if the benefits are "bona fide." Contractors seeking approval of unfunded plans must obtain approval from the Department of Labor.

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7-18 FRINGE BENEFITS - GENERAL

1. Contributions to funded plans must be made at least quarterly.

2. When the cash paid and the per hour contribution for benefits do not equal the total rate set forth in the wage determination, the difference must be paid to employee in cash.

3. Fringe benefits must be paid for straight time and overtime; however, fringe benefits are not included when computing the overtime rate.

4. Employees who are excluded from funded plans for whatever reason must be paid fringe benefits in cash.

5. Vacation and sick leave plans are generally unfunded, paid from the contractor's own account, and require Department of Labor approval before a contractor takes credit toward meeting the fringe benefit obligation.

6. In determining the cash equivalent credit for fringe benefits payments, the period of time to be used is the period covered by the contribution. For example, if an

employer contributes to a plan on a weekly basis, the total hours worked each week (federal and non-federal) by each employee should be divided into the contribution made by the employer.

7-19 SUMMER YOUTH EMPLOYMENT. Youth who are bona fide students and part of a bona fide "Youth Opportunity Program" may be employed on Davis-Bacon projects on a temporary basis during the summer months and paid below the predetermined Davis-Bacon rates. Department of Labor All Agency Memoranda #71 and #96 provide policy guidance in this area. HUD requires that the following stipulations be met before summer youth (16-22 years old) may be employed at less than Davis-Bacon rates:

(1) Youth must be sponsored by a responsible employment and training organization such as the National Alliance of Business and similar organizations as part of a bona fide "Youth Opportunity Program";

(2) The youth must be bona fide students employed on a temporary basis for the summer months;

(3) Where collective bargaining agreements representing workers performing similar or related activities at the worksite to which youth are outstationed exists, the union or unions representing those workers must provide concurrence as to the design of the employment project and the use of the youth;

(4) Such employment must be provided in accord with statutory safety and minimum wage requirements (both State and Federal);

(5) Competent supervision must be provided to all youth employed on the project worksites. Ratios of youth to such supervisors should be no greater than four to one.

In order to ensure that the administration of summer youth employment complies with Department of Labor policies and regulations, requests for exceptions to the application of DBRA must be made to the HUD Field Office Labor Relations Staff. Such requests must adhere to the above stipulations. The HUD Field Office Labor Relations Staff will advise the requesting contractor of its decision. The specific provisions of the agreement (between management and labor) or the plan of employment must be submitted to the Department of Labor, Wage and Hour and Public Contracts Division, for enforcement purposes. The HUD Field Office Labor Relations Staffs will send such plans to the Headquarters Office of Labor Relations.

7-20 NON-COVERED JOB CLASSIFICATIONS. Workers performing the normal duties of the following job classifications are not subject to DBRA prevailing wage requirements:

(1) Project Superintendent

(2) Project Engineer

(3) Project foreman, as distinguished from a working foreman. (A working foreman is one who devotes more than 20 percent of his/her time during a workweek to mechanic or laborer duties, and who must be paid the applicable rate for the hours so worked).

(4) Watchman

(5) Water carrier

(6) Messenger, clerical workers

7-21 FINANCING OF CONSTRUCTION WORK - CDBG. Except for the rehabilitation of residential property of less than 8 units or construction contract of $2,000.00 or less, laborers and mechanics employed by contractors and subcontractors on construction work financed in whole or in part with Title I assistance are subject to Davis-Bacon wage rates under Section 110 of Title I.

The following are examples in which construction work is financed through the use of Title I funds and where Davis-Bacon wage rates shall thus apply: construction loans or grants; payment for construction materials; payment of interest (or part of interest) on a construction loan; payment of construction loan origination fees; provision of a Title I funded permanent loan, mortgage, or grant on a structure constructed with a private construction loan when the parties contemplate such ultimate Title I financing at the time of construction; Title I funded "Collateral" or "default" accounts established with the lending bank which receive no interest or less than the interest payable on demand accounts.

Questions as to whether the use of Title I funds constitute financing of construction work shall be referred to the HUD Field Labor Relations Staff; if necessary, they will refer the matter to the Headquarters Office of Labor Relations.

7-22 CONTRACT AWARD. A contract shall be deemed awarded (this is not relevant for mortgage insurance or coinsurance) in accordance with the following guidelines:

(1) Public Housing (Conventional). The date of the

registered letter making the award.

(2) Public Housing (Turnkey). The date of the Contract of Sale as given in the first paragraph of the contract.

(3) All other programs. The date of the adoption of a resolution or ordinance authorizing the award or, where the award is conditioned on HUD approval, then the date of HUD's letter or telegram concurring in the award.

7-23 TECHNICAL/MAINTENANCE WAGE RATES - PUBLIC HOUSING. Section 12 of the U. S. Noising Act of 1937 requires that wages prevailing in the locality shall be paid to all architects, technical engineers, draftsmen and technicians employed in the development, and all maintenance laborers and mechanics employed in the operation of the project. Such wages are determined or adopted by HUD.