BONNEVILLE PURCHASING INSTRUCTIONS
APPENDIX 10-A

LABOR LAWS AND PROCEDURES

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SECTION 1 INTRODUCTION.

This Appendix sets forth procedural matters relating to BPA's implementation of the Service Contract Act and the Davis Bacon Act. For policy and related guidance, Part 10 of the BPI should be utilized.

SECTION 2 SERVICE CONTRACT ACT PROCEDURES.

2.1 Definitions.

"Act" or "Service Contract Act," as used in this subpart, means the Service Contract Act of 1965, as amended.

"Contractor," as used in this subpart, includes a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

"Notice," as used in this subpart, means Standard Form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice," and SF 98a "Attachment A." The term "Notice" is always capitalized in this subpart when it means Standard Forms 98 and 98a.

"Service contract," as used in this subpart, means any Government contract, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted under section 7 of the Act (41 U.S.C. 356), or any subcontract at any tier thereunder.

"Service employee" means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Part 541 of Title 29, Code of Federal Regulations.

"Wage and Hour Division" means the unit in the Employment Standards Administration of the Department of Labor to which functions of the Secretary of Labor are assigned under the Act.

"Wage determination" means a determination of minimum wages or fringe benefits made under sections 2(a) or 4(c) of the Act (41 U.S.C. 351(a) or 353(c)) applicable to the employment in a given locality of one or more classes of service employees.

2.2 Authorities of the Secretary of Labor.

Under the Act, the Secretary of Labor is authorized and directed to enforce the provisions of the Act, make rules and regulations, issue orders, hold hearings, make decisions, and take other appropriate action. The Department of Labor has issued implementing regulations on such matters as--

(a) Service contract labor standards provisions and procedures (29 CFR Part 4, Subpart A);

(b) Wage determination procedures (29 CFR Part 4, Subpart B);

(c) Application of the Act (rulings and interpretations) (29 CFR Part 4, Subpart C);

(d) Compensation standards (29 CFR Part 4, Subpart D);

(e) Enforcement (29 CFR Part 4, Subpart E);

(f) Safe and sanitary working conditions (29 CFR Part 1925);

(g) Rules of practice for administrative proceedings enforcing service contract labor standards (29 CFR Part 6); and

(h) Practice before the Board of Service Contract Appeals (29 CFR Part 8).

2.3 Some Examples of Contracts Covered.

The following examples, while not definitive or exclusive, illustrate some of the types of services that have been found to be covered by the Act (see 29 CFR 4.130 for additional examples):

(a) Motor pool operation, parking, taxicab, and ambulance services.

(b) Packing, crating, and storage.

(c) Custodial, janitorial, housekeeping, and guard services.

(d) Food service and lodging.

(e) Laundry, dry-cleaning, linen-supply, and clothing alteration and repair services.

(f) Snow, trash, and garbage removal.

(g) Aerial spraying and aerial reconnaissance for fire detection.

(h) Some support services at installations, including grounds maintenance and landscaping.

(i) Certain specialized services requiring specific skills, such as drafting, illustrating, graphic arts, stenographic reporting, or mortuary services.

(j) Electronic equipment maintenance and operation and engineering support services.

(k) Maintenance and repair of all types of equipment, for example, aircraft, engines, electrical motors, vehicles, and electronic, telecommunication, office and related business and construction equipment.

(l) Operation, maintenance, or logistics support of a Federal facility.

(m) Data collection, processing and analysis services.

2.4 Secretarial Exemptions.

(a) In addition to the statutory exemptions cited in BPI Subpart 10.3.2, the Secretary of Labor has exempted the following types of contracts from all provisions of the Act:

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly-scheduled runs of the trains, airplanes, buses, and vessels over regularly-established routes and accounts for an insubstantial portion of the carrier's revenues.

(2) Contracts for the carriage of freight or personnel if such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act.

(3 Contracts principally for the maintenance, calibration, or repair of the following types of equipment, subject to the restrictions in paragraphs (b) and (c) below:

(A) Automated data processing equipment and office information/word processing systems.

(B) Scientific equipment and medical apparatus or equipment if the application of micro-electronic circuitry or other technology of at least similar sophistication is an essential

element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, "Medical Diagnostic Equipment;" Class 6525, "X-ray Equipment;" FSC Group 66, Class 6630, "Chemical Analysis Instruments;" and Class 6665, "Geographical and Astronomical Instruments," are largely composed of the types of components hereunder).

(C) Office/business machines not otherwise exempt pursuant to paragraph (a)(3)(A) above, if such services are performed by the manufacturer or supplier of the equipment.

(b) The exemption set forth in subparagraph (a) above shall apply only under the following circumstances:

(1) If the items of equipment are commercial items which are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

(2) If the contract services are furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of such commercial items.

(3) If the contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for equivalent employees servicing the same equipment for commercial customers.

(c) Determinations of the applicability of the Secretarial exemption shall be made by the CO before contract award. In determining that the exemption applies, the CO shall consider all factors and make an affirmative determination that all of the above conditions have been met.

(d) If the Department of Labor determines after contract award that any of the requirements for exemption have not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Department of Labor determination.

2.5 Wage Determinations Based on Prevailing Rates.

Contractors performing on service contracts in excess of $2,500 to which no predecessor contractor's collective bargaining agreement applies shall pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in Section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206).

2.6 Wage Determinations Based on Collective Bargaining Agreements.

(a) Successor contractors performing on contracts in excess of $2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract. This requirement will not apply if the Department of Labor determines as a result of a hearing that the wages and fringe benefits are substantially at variance with those which prevail for services of a similar character in the locality, or that they have not been reached as a result of arm's length negotiations.

(b) Subparts in this Section 2 which deal with this statutory requirement and the Department of Labor's implementing regulations are at 2.8(b), concerning applicability of this requirement and the forwarding of a collective bargaining agreement with a Notice (SF 98, 98a); 2.8(c), concerning notification of purchase dates to contractors and bargaining representatives; 2.11(b), explaining when a collective bargaining agreement will not apply due to late receipt by the CO; and 2.14,

explaining when the application of a collective bargaining agreement can be challenged due to a variance with prevailing rates or lack of arm's length bargaining.

(c) BPA or other interested parties may request a hearing on an issue involving the review of a wage determination based upon a collective bargaining agreement. To obtain a hearing for BPA, the CO shall submit a request through the HCA to the DOL, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210, with sufficient data to support a prima facie showing that the rates at issue vary substantially from those prevailing for similar services in the same locality. The request shall also include (1) the number of the wage determinations at issue, (2) name of contracting agency, (3) status of the acquisition and any estimated acquisition dates (e.g., proposal receipt, award, and commencement of performance), and (4) names and addressees, if known, of interested parties.

(d) Unless the DOL determines that extraordinary circumstances exist, they will not consider requests for a hearing unless received before the commencement date of the contract or the follow-up option period, as the case may be.

2.7 Blanket Wage Determination.

A Blanket determination is one which covers more than one contract and is used for situations where efficiency can be gained by avoiding the repetitive requesting of determinations for single contracts. While determinations for single contracts is the normal mode authorized by the DOL, an experimental program is underway for agencies to utilize the Blanket approach. The Blanket approach is initiated by the submission of Standard Forms 98 and 98a as usual, except that the request should specify the wage rates needed for all contracts and geographic areas to be covered. The Blanket would have to be updated at least every two years. DOL may require renewal every year. The use of the Blanket determination approach for contracts where there is a collective bargaining agreement has not been authorized by DOL.

2.8 Requesting Wage Rate Determinations.

(a) The CO shall submit Standard Form 98 and 98a, "Notice of Intention to Make a Service Contract and Response to Notice" and "Attachment A" (both forms hereinafter referred to as "Notice"), together with any required supplemental information to the DOL, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210, for the following service contracts:

(1) Each new solicitation and contract in excess of $2,500 where a Blanket determination is not utilized.

(2) Each contract modification which brings the contract value above $2,500, in which a Blanket determination is not being utilized, and which--

(A) Extends the existing contract pursuant to an option clause or otherwise; or

(B) Changes the scope of the contract whereby labor requirements are affected significantly.

(3) Each multiple-year contract in excess of $2,500, not covered by a Blanket determination, upon option exercise.

(b) Successorship with Incumbent Contractor Collective Bargaining Agreement.

(1) Early in the acquisition cycle, the CO shall determine whether section 4(c) of the Act involving successorship affects the new acquisition. The CO shall determine whether there is

a predecessor contract and, if so, whether the incumbent prime contractor or its subcontractors, and any of their employees, have a collective bargaining agreement.

(2) Section 4(c) of the Act provides that a successor contractor must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) to service employees at least equal to those agreed upon by a predecessor contractor under the following conditions:

(A) The services to be furnished under the proposed contract will be substantially the same as services being furnished by an incumbent contractor whose contract the proposed contract will succeed.

(B) The services will be performed in the same locality.

(C) The incumbent prime contractor or subcontractor is furnishing such services through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements.

(3) The application of section 4(c) of the Act is subject to the following limitations:

(A) Section 4(c) of the Act will not apply if the incumbent contractor enters into a collective bargaining agreement for the first time and the agreement does not become effective until after the expiration of the incumbent's contract.

(B) If the incumbent contractor enters into a new or revised collective bargaining agreement during the period of the incumbent's performance on the current contract, the terms of the new or revised agreement shall not be effective for the purposes of section 4(c) of the Act under the following conditions:

(i) BPA receives notice of the terms of the collective bargaining agreement after award, provided that the start of performance is within 30 days of award ; and

(ii) The CO has given both the incumbent contractor and its employees' collective bargaining agent timely written notification of the applicable acquisition dates.

(4) If section 4(c) of the Act applies, the CO shall obtain a copy of any collective bargaining agreement between an incumbent contractor or subcontractor and its employees. Obtaining a copy of an incumbent's contractor's collective bargaining agreement may involve coordination with the CO responsible for administering the predecessor contract. (The clause at 10-3, Service Contract Act of 1965, requires the incumbent prime contractor to furnish the CO a copy of each collective bargaining agreement.) The CO shall submit a copy of each collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under each agreement with the Notice.

(5) Section 4(c) of the Act will not apply if the Secretary of Labor determines after a hearing that the wages and fringe benefits in the predecessor contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a similar character in the same locality, or that they are not the result of arm's length bargaining.

(6) If the services are being furnished at more than one location and the collectively bargained wage rates and fringe benefits are different at different locations or do not apply to one or more locations, the CO shall identify the locations to which the agreements apply.

(7) If the collective bargaining agreement does not apply to all service employees under the contract, the CO shall separately list on the SF 98a the service employee classifications (1) subject to the collective bargaining agreement and (2) not subject to any collective bargaining agreement.

(c) Notification to Interested Parties Under Collective Bargaining Agreements.

(1) The CO should determine whether the incumbent prime contractor's, or its subcontractors', service employees performing on the current contract are represented by a collective bargaining agent. If there is a collective bargaining agent, the CO shall give both the incumbent contractor and its employees' collective bargaining agent written notification of:

(A) The forthcoming successor contract and the applicable acquisition dates (issuance of solicitation, opening of offers, commencement of negotiations, award of contract, or start of performance, as the case may be); or

(B) The forthcoming contract modification and applicable acquisition dates (exercise of option, extension of contract, change in scope, or start of performance, as the case may be); or

(C) The forthcoming multiple-year contract anniversary date (annual anniversary date or biennial date, as the case may be).

(2) This written notification must be given at least 30 days in advance of the earliest applicable acquisition date or the applicable option exercise date in order for the time-of-receipt limitations to apply. The CO shall retain a copy of the notification in the contract file.

2.9 Preparation of SF 98a.

(a) The SF 98a shall contain the following information concerning the service employees expected to be employed by the contractor and any known subcontractors in performing the contract:

(1) All classes of service employees to be utilized.

(A) If a wage determination is to be based on a collective bargaining agreement (CBA) use the exact title shown in the CBA.

(B) For other than subdivision (a)(1)(A) of this subsection--

(i) Use the exact title shown in the Wage and Hour Division's Service Contract Act Directory of Occupations (see paragraph (b) of this subsection).

(ii) Provide an appropriate job title and job description if the Directory cannot be used.

(2) The estimated number of service employees in each class; and

(3) The wage rate that would be paid each class if employed by the agency and subject to the wage provisions of 5 U.S.C. 5341 or 5332

(b) If the purpose of the Notice is to obtain a wage determination for the purpose of exercising an option, an extension to the contract term, a change in scope, or the anniversary date of a multiple year contract, the CO shall fill in Box 2 of the SF 98 as follows:

(1) In the "Estimated solicitation date" subbox, indicate, as appropriate: "Mod-Exercise of Option;" "Mod-Extension;" "Mod-Change in Scope;" "Annual Anniversary;" or "Biennial Anniversary;" and

(2) In the "month/day/year" subbox, indicate the date the wage determination is required.

(3) The date that performance will begin shall be entered in box 4.

(c) If the contract action is for a recurring or known requirement, the CO shall submit the Notice not less than 60 days (nor more than 120 days, except with the approval of the Wage and Hour Division) before the earlier of (1) issuance of any Request for Offer, (2) commencement of negotiations, or (3) issuance of modification for exercise of option, contract extension, or change in scope..

(d) If the contract action is for a non-recurring or unknown requirement for which the advance planning described in paragraph (c) above is not feasible, the CO shall submit the Notice as soon as possible, but not later than 30 days before the contracting actions in paragraph (c) above. The CO should indicate on the Notice that the requirement is non-recurring or unknown and that advance planning was not feasible.

(e) If exceptional circumstances prevent timely submission, as required by paragraphs (b) and (c) of this subsection, the CO shall submit the Notice and the required supplemental information with a written statement of the reason for delay as soon as practicable.

(f) In an emergency situation requiring an immediate wage determination response, the CO shall contact the Wage and Hour Division by telephone for guidance before submitting the Notice.

2.10 Department of Labor Action.

The Wage and Hour Division will mark, date, and sign the section of the SF 98 titled "Response to Notice" and return the signed original together with appropriate additional material (wage determination, position/classification descriptions, etc.). The Wage and Hour Division will take one of the following four actions:

(a) Issue and attach applicable wage determination(s); or

(b) Indicate that no wage determination is in effect for the locality of contract performance; or

(c) Indicate that the Service Contract Act is not applicable based on information submitted; or

(d) Return the Notice for additional information.

2.11 Late DOL Response to a Timely Notice.

(a) Late response to timely submission of Notice, not involving a collective bargaining agreement, will be handled as follows:

(1) If the CO has not received a response from the Department of Labor within 60 days (or 30 days if a non-recurring or unknown requirement), the CO shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected.

(2) A revision of a wage determination received by BPA after award of a new contract or an applicable modification shall not be effective provided that the start of performance is within 30 days of the award or the specified modification. If the contract does not specify a start of

performance date which is within 30 days of the award or the specified modification, and if contract performance does not commence within 30 days of the award or the specified modification, the Department of Labor shall be notified and any revision received by BPA not less than 10 days before commencement of the work shall be effective.

(b) Late response to a timely-submitted notice, involving a collective bargaining agreement will be handled as follows. A wage determination or revision based on a new or changed collective bargaining agreement shall not be effective if notice of the terms of the new or changed collective bargaining agreement is received by BPA after award of a successor contract or an applicable modification provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award of the contract or of the specified modification, or if contract performance does not commence within 30 days of the award of the contract or of the specified modification, any notice of the terms of a new or changed collective bargaining agreement received by BPA not less than 10 days before commencement of the work shall be effective for purposes of the successor contract under section 4(c) of the Act.

(c) If the Department of Labor is unable to provide the wage determination or revision by the most recent date needed to maintain the acquisition schedule, the solicitation/contract action should proceed according to the following instructions:

(1) If a Successorship/same locality/incumbent collective bargaining agreement situation exists, the CO shall incorporate in the solicitation the wage and fringe benefit terms of the collective bargaining agreement, or the collective bargaining agreement itself.

(2) The terms of a new or changed collective bargaining agreement, negotiated by the predecessor contractor during the period of performance of the predecessor contract, will not apply to the successor contract under the conditions set forth in paragraphs (a), (b), and (c) of this subsection.

2.12 Response to Late Submission of Notice.

If the CO has not filed a timely Notice, there is no applicable bargaining agreement involved and the CO has not received a response from the Department of Labor, the following applies. If a successorship/same locality/incumbent collective bargaining agreement situation does not exist, the CO shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected. If the Department of Labor is unable to provide the wage determination or revision by the latest date needed to maintain the acquisition schedule, the CO shall use the latest wage determination or revision, if any, incorporated in the existing contract. If any new or revised wage determination is received later in response to the Notice, the CO shall include it in the solicitation or contract within 30 days of receipt. If the contract has been awarded, the CO shall equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating the wage determination or revision. The DOL, Wage and Hour Division, may require retroactive application of the wage determination for a contractual action over $2,500 using more than five service employees. These provisions are not intended to alter the CO's responsibility to make timely submissions.

2.13 Response to Late Notice--with Collective Bargaining Agreement.

If the CO has not filed the Notice within the time limits in 2.9(c), has not received a response from the Department of Labor, and a successorship/same locality/incumbent collective bargaining agreement situation exists, the CO shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected. If the Department of Labor is unable to provide the wage determination or revision by the latest date needed to maintain the acquisition schedule, the CO shall incorporate in the solicitation the wage and fringe benefit terms of the

collective bargaining agreement, or the collective bargaining agreement itself. If the contract has been awarded, an equitable adjustment following receipt of the wage determination or revision will not be required, since the wage determination or revision will be based on the economic terms of the collective bargaining agreement.

2.14 Review of Wage Determination.

(a) Based on incumbent collective bargaining agreement.

(1) If wages, fringe benefits, or periodic increases provided for in a collective bargaining agreement vary substantially from those prevailing for similar services in the locality, the CO shall consider instituting the procedures in 2.6(c).

(2) If the CO believes that an incumbent or predecessor contractor's agreement was not the result of arm's length negotiations, the CO shall contact the HCA to determine appropriate action.

(b) Based on other than incumbent collective bargaining agreement. Upon receiving a wage determination not predicated upon a collective bargaining agreement, the CO shall ascertain:

(1) Whether the wage determination does not conform with wages and fringe benefits prevailing for similar services in the locality; or

(2) Whether the wage determination contains significant errors or omissions.

If either subparagraph (b)(1) or (b)(2) of this section is evident, the CO shall contact the Department of Labor to determine appropriate action.

2.15 Delay of Acquisition Dates Over 60 Days.

If any award was delayed, for whatever reason, more than 60 days from the date indicated on the submitted Notice, the CO shall contact the Wage and Hour Division to determine whether the wage determination issued under the initial submission is still current. Any revision of a wage determination received by the CO as a result of that communication, or upon discovery by the Department of Labor of a delay, shall supersede the earlier response.

2.16 Discovery of Errors by the Department of Labor.

If the Department of Labor determines, either before or after a contract award, that a CO made an erroneous determination that the Service Contract Act did not apply to a particular acquisition or failed to include an appropriate wage determination in a covered contract, the CO, within 30 days of notification by the Department of Labor, shall include in the contract the clause at 10-3, Service Contract Act of 1965, and any applicable wage determination issued by the DOL. If the contract is subject to section 10 of the Act (41 U.S.C. 358), the DOL may require retroactive application of that wage determination. The CO shall equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating a wage determination or revision.

2.17 Notification to Contractors and Employees.

The CO shall take the following steps to ensure that service employees are notified of minimum wages and fringe benefits.

(a) As soon as possible after contract award, inform the contractor of the labor standards requirements of the contract relating to the Act and of the contractor's responsibilities under these requirements, unless it is clear that the contractor is fully informed.

(b) At the time of award, furnish the contractor Department of Labor Publication WH-1313, Notice to Employees Working on Government Contracts, for posting at a prominent and accessible place at the worksite before contract performance begins. The publication advises employees of the compensation (wages and fringe benefits) required to be paid or furnished under the Act and satisfies the notice requirements in paragraph (g) of the clause at 10-3, Service Contract Act of 1965, As Amended.

(c) Attach any applicable wage determination to Publication WH-1313.

2.18 Additional Classes of Service Employees.

(a) If the CO is aware that contract performance involves classes of service employees not included in the wage determination, the CO shall require the contractor to classify the unlisted classes so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between the unlisted classifications and the classifications listed in the determination (see paragraph (c) of the clause at 10-3, Service Contract Act of 1965, As Amended). The contractor shall initiate the conforming procedure before unlisted classes of employees perform contract work. The contractor shall submit Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate. The CO shall review the proposed classification and rate and promptly submit the completed SF 1444 (which must include information regarding the agreement or disagreement of the employees' representative or the employees themselves, together with BPA's recommendation) and all other pertinent information to the Wage and Hour Division. Within 30 days of receipt of the request, the Wage and Hour Division will (1) approve, modify, or disapprove the request when the parties are in agreement or (2) render a final determination in the event of disagreement among the parties. If the Wage and Hour Division will require more than 30 days to take action, it will notify the CO within 30 days of receipt of the request that additional time is necessary.

(b) Some wage determinations will list a series of classes within a job classification family, for example, Computer Operators, level I, II, and III, or Electronic Technicians, level I, II, and III, or Clerk Typist, level I and II. Generally, level I is the lowest level. It is the entry level, and establishment of a lower level through conformance is not permissible. Further, trainee classifications may not be conformed. Helpers in skilled maintenance trades (for example, electricians, machinists, and automobile mechanics) whose duties constitute, in fact, separate and distinct jobs may also be used if listed on the wage determination, but may not be

conformed. Conformance may not be used to artificially split or subdivide classifications listed in the wage determination. However, conforming procedures may be used if the work which an employee performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title. (See 29 CFR 4.152.)

(c) Sub-minimum rates for apprentices, student learners, and handicapped workers are permissible in accordance with paragraph (q) of the clause at 10-3, Service Contract Act of 1965, As Amended.

2.19 Seniority Lists.

If a contract is performed at a Federal facility where employees may be hired/retained by a succeeding contractor, the incumbent prime contractor is required to furnish to the CO, no later than 10 days before contract completion, a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract, together with anniversary dates of employment. (See paragraph (n) of the clause at 10-3, Service Contract Act of 1965, As Amended.) At the commencement of the succeeding contract, the CO shall provide a copy of the list to the successor contractor for determining employee eligibility for vacation or other fringe benefits which are based upon length of service, including service with predecessor contractors if such benefit is required by an applicable wage determination.

SECTION 3 CONSTRUCTION CONTRACT PROCEDURES.

3.1 Definitions.

"Laborers or mechanics," includes --

(a) Apprentices, trainees, helpers, watchmen and guards;

(b) Working foremen who devote more than 20 percent of their time during a workweek performing duties of a laborer or mechanic, and who do not meet the criteria of 29 CFR Part 541, for the time so spent; and

(c) Every person performing the duties of a laborer or mechanic, regardless of any contractual relationship alleged to exist between the contractor and those individuals. The terms exclude workers whose duties are primarily executive, supervisory (except as provided in paragraph (c) of this definition), administrative, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR Part 541 are not deemed to be laborers or mechanics.

"Public building" or "public work," means building or work, the construction, prosecution, completion, or repair of which, as defined in this section, 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.

"Site of the work," is defined as follows:

(a) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it is completed, and nearby property, as described in paragraph (b) of this definition, used by the contractor or subcontractor during construction that, because of proximity, can reasonably be included in the "site."

(b) Except as provided in paragraph (c) of this definition, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are parts of the "site of the work"; provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

(c) The "site of work" does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a contractor or subcontractor whose locations, and continuance in operation, are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial supplier or material handler which are established by a supplier of materials for the project before proposals are received and are not on the project site, are not included in the "site of work." Such permanent, previously-established facilities are not a part of the "site of the work," even if their operations may for a period of time, be dedicated exclusively, or nearly so, to the performance of a contract.

"Wages," means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide

any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal State, or local law.

3.2 Davis-Bacon Act Wage Determinations.

(a) The DOL is responsible for issuing wage rate determinations for construction reflecting prevailing wages, including fringe benefits. The wage determinations apply only to those laborers and mechanics employed by a contractor upon the site of the work. Determinations are issued for different types of construction, such as building, heavy, highway, and residential (referred to as rate schedules), and apply only to the types of construction designated in the determination.

(b) The determinations contain prevailing wage rates for the types of construction designated in the determination, and are used in contracts performed within a specified geographical area. They contain no expiration date and remain valid until modified, superseded, or canceled by a notice in the Federal Register by the DOL. Once incorporated in a contract, a wage determination normally remains effective for the life of the contract. Modifications which may be issued do not apply to ongoing contracts unless specifically directed by the DOL.

(c) Determinations are published weekly in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts." Notices of General Wage Determinations are published in the Federal Register.

(d) Subscriptions to this Government Printing Office publication may be obtained through the BPA Library. BPA's service area is covered by Volume III-West.

(e) On or about January 1 of each year, an annual edition will be issued. Modification to that edition will be issued throughout the year by the DOL.

3.3 General Requirements.

(a) The published wage determinations shall be incorporated into applicable solicitations with their most current modification received by BPA. Inclusion by reference is not permitted. Wage determination modifications received by BPA later than 10 days prior to the solicitation's release are not required to be incorporated prior to award, and must then be incorporated only if they require significant increase to applicable labor rates. If incorporated, an equitable adjustment, if appropriate shall be made to the contract.

(b) The CO shall ensure that only the appropriate wage determinations are incorporated in solicitations and contracts. When multiple sites are included, or only a portion of the contract is for construction, the CO shall indicate the work to which each wage determination or part thereof applies.

(c) If the wage determination contains more than one rate schedule, the CO shall either include only the rate schedules that apply to the specific types of construction (building, heavy, highway, etc.) or include the entire wage determination and clearly indicate the parts of the work to which each rate schedule shall be applied.

(d) The following general guidelines for use in selecting the proper schedule(s) of wage rates shall be used:

(1) Building construction is generally the construction of sheltered enclosures with walk-in access, for housing persons, machinery, equipment, or supplies. It typically includes all construction of such structures, installation of utilities and equipment (both above and below grade level), as well as incidental grading, utilities and paving, unless there is an established area practice to the contrary. It includes BPA's maintenance complexes, headquarters buildings and fish hatcheries.

(2) Residential construction is generally the construction, alteration, or repair of single-family houses or apartment buildings of no more than four (4) stories in height, and typically includes incidental items such as site work, parking areas, utilities, streets and sidewalks, unless there is an established area practice to the contrary.

(3) Highway construction is generally the construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, parking areas, and other similar projects that are not incidental to "building," "residential," or "heavy" construction.

(4) Heavy construction includes those projects that are not otherwise classified as either "building," "residential," or "highway," and is of a catch-all nature, such as, construction of BPA substations, transmission lines and access roads. Such heavy projects may sometimes be distinguished on the basis of their individual characteristics, and separate schedules issued (e.g., "dredging," "water and sewer line," "dams," flood control," etc.

(5) When the nature of a project is not clear, it is necessary to look at additional factors, with primary consideration given to locally-established area practices. If there is any doubt as to the proper application of wage rate schedules to the type or types of construction involved, guidance shall be sought before incorporation. (Further examples are contained in DOL All Agency Memoranda Numbers 130 and 131.)

3.4 Award of Contract Without Required Wage Determination.

If it is discovered after award that the wrong wage determination or rate schedules were specified, the CO shall modify the contract to incorporate the corrected wage determination, specifying it effectivity retroactive to the date of award, and if appropriate, equitably adjust the contract price.

3.5 Posting Wage Determinations and Notice.

The contractor is required to keep a copy of the wage determination (and any approved additional classifications) posted at the worksite in a prominent place where it can be easily seen by the workers. The CO shall furnish the contractor with Department of Labor Form WH-1321, Notice to Employees Working on Federal and Federally Financed Construction Projects, to be posted with the wage rates. The post shall include the name, address, and telephone number of the BPA person responsible for the administration of the contract, to inform workers to whom they may submit complaints or raise questions concerning labor standards.

3.6 Wage Determination Appeals.

The Secretary of labor has established a Wage Appeals Board which decides appeals of final decisions made by DOL concerning Davis-Bacon Act wage determinations. BPA, or other interested parties, may file a petition for review under the procedures in 29 CFR Part 7 if reconsideration by the DOL has been sought pursuant to 29 CFR 1.8 and denied.

3.7 Additional Classifications.

(a) If any laborer or mechanic is to be employed in a classification that is not listed in the wage determination applicable to the contract, the CO, pursuant to the clause at 10-7, Davis-Bacon Act, shall require that the contractor submit, Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate to the CO. Along with other pertinent data, this form contains the proposed additional classification and minimum wage rate including any fringe benefits payments.

(b) Upon receipt of the SF 1444, the CO shall review the request to determine whether it meets the following criteria:

(1) The classification is appropriate and the work to be performed by the classification is not performed by any classification contained in the applicable wage determination.

(2) The classification is utilized in the area by the construction industry.

(3) The proposed wage rate, including any fringe benefits, bears a reasonable relationship to the wage rates in the wage determination in the contract.

(c) If the criteria in paragraph (b) of this section are met and the contractor and the laborers or mechanics to be employed in the additional classification (if known) or their representatives agree to the proposed additional classification, and the CO approves, the CO shall submit a report (including a copy of SF 1444) of that action to the DOL, Wage and Hour Division, for approval, modification, or disapproval of the additional classification and wage rate (including any amount designated for fringe benefits); or

(d) If the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the CO do not agree on the proposed additional classification, or if the criteria are not met, the CO shall submit a report (including a copy of SF 1444) giving the views of all interested parties and the CO's recommendation to the DOL, Wage and Hour Division, for determination of appropriate classification and wage rate.

(e) Within 30 days of receipt of the report, the DOL, Wage and Hour Division, will complete action and so advise the CO, or will notify the CO that additional time is necessary.

(f) Upon receipt of the Department of Labor's action, the CO shall forward a copy of the action to the contractor, directing that the classification and wage rate be posted in accordance with paragraph (a) of the clause at 10-7, Davis Bacon Act, and that workers in the affected classification receive no less than the minimum rate indicated from the first day on which work under the contract was performed in the classification.

3.8 Apprentices and Trainees.

(a) The CO or COR shall review the contractor's employment and payment records, when received, for apprentices and trainees to ensure that the contractor has complied with the clause Apprentices and Trainees.

(b) If a contractor has classified employees as apprentices or trainees without complying with the requirements of clause 10-10, Apprentices, Trainees and Helpers, the CO shall reject the classification and require the contractor to pay the affected employees at the rates applicable to the classification of the work actually performed.

3.9 Subcontracts.

(a) In accordance with the requirements of the clause at 10-11, Subcontracts (Labor Standards), the contractor and subcontractors at any tier are required to submit a fully executed SF 1413, Statement and Acknowledgment, upon award of each subcontract.

(b) In order to ensure that the requirements of the clause at 10-11, Subcontracts (Labor Standards), are understood, the CO will send a copy form SF 1413 to the prime contractor upon award of each contract.

3.10 Payrolls and Statements.

(a) Contractor and subcontractors are required to submit payrolls only if required by Contracting Officer, typically when compliance is challenged or the contractor has a record of labor violations. When the Contracting Officer requires submission of a payroll, the contractor must submit or cause to be submitted payrolls and basic records described in clause at 10-9, Payrolls and Basic Records.

(b) The CO, or his or her representative, shall examine the payrolls and payroll statements to ensure compliance with the contract and any statutory or regulatory requirements. Particular attention should be given to --

(1) The correctness of classifications and rates;

(2) Fringe benefits payments;

(3) Hours worked;

(4) Deductions; and

(5) Disproportionate employment ratios of laborers, apprentices, trainees, and journeymen.

(c) Fringe benefits payments, contributions made or costs incurred on other than a weekly basis shall be considered as a part of weekly payments to the extent they are creditable to the particular weekly period involved.

(d) Disclosure of payroll records: Contractor payroll records in BPA's possession must be carefully protected from any public disclosure which is not required by law since payroll records may contain information in which the contractor's employees have a privacy interest as well as information in which the contractor may have a proprietary interest that the Government may be obliged to protect. Questions concerning release of this information may involve the Freedom of Information Act (FOIA).

3.11 Site Compliance Checking.

(a) The CO or his or her representative shall investigate as necessary to ensure compliance with the labor standards requirements of the contract. As stated, submission of weekly payrolls is not required unless specified by the CO.

(b) When submitted, compliance checks should be performed and should include the following activities:

(1) Employee interviews to determine correctness of classifications and rates of pay, fringe benefits payments, and hours worked (see SF 1445).

(2) On-site inspections to check type of work performed, number and classification of workers, and fulfillment of posting requirements.

(3) Payroll reviews of prime contractors and subcontractors to ensure that the payrolls they submitted are on time and complete, as well as in compliance with contract requirements.

(4) Comparison of the information in this paragraph (b) with available data, including daily inspector's report and daily logs of construction, to ensure consistency.

3.12 Investigations.

BPA is responsible for conducting labor standards investigations when available information indicates such action is warranted. In addition, The DOL may conduct an investigation or request BPA to do so.

(a) BPA shall conduct an investigation if a compliance check indicates that violations that are substantial in amount, willful, or uncorrected may have occurred. The investigation shall include all aspects of the contractor's compliance with contract labor standards requirements, and shall not be limited to specific areas raised in a complaint or uncovered during compliance checks. The investigation should be made by personnel familiar with labor laws and their application to contracts. If oral or written statements are taken from employees during an investigation, the statements, or excerpts or summaries thereof, shall not be divulged to anyone other than authorized Government officials without the prior signed consent of the employee. Investigators may use the investigation and enforcement instructions issued by, and available upon written request from, the DOL, Wage and Hour Division. Any available DOL files pertinent to an investigation may be obtained upon written request to the DOL, Wage and Hour Division. None of the material obtained from DOL files, other than computations of back wages and liquidated damages and summaries of back wages due, may be disclosed in any manner to anyone other than responsible federal officials charged with administering the contract, without obtaining the permission of the DOL.

(b) The CO shall review the investigation report upon receipt and make preliminary findings regarding the contractor. Adverse findings normally require more corroborating evidence than employee statements. However, if the investigation establishes a pattern of possible violations based on employees' statements that have not been authorized for disclosure, the pattern itself may constitute a suitable basis for a finding of noncompliance.

(c) The CO shall take the following actions upon completing the review:

(1) Provide written notice to the contractor concerning the preliminary findings and proposed corrective actions, along with a statement of the contractor's right to request that the basis for the findings be made available, and to submit written rebuttal information within a reasonable period of time.

(2) Upon request from the contractor, make the basis for the findings available. However, the contractor will not be permitted to examine the investigation report. Also, the CO shall not disclose the identity of any employee who filed a complaint or who was interviewed, without the prior consent of that employee.

(3) If the contractor submits a rebuttal, reconsider the preliminary findings based on the information it contains and notify the contractor of the final findings. If no rebuttal is submitted within a reasonable time, the preliminary findings shall be considered final.

(4) Request the contractor to make restitution for underpaid wages and liquidated damages determined by the CO to be due, whether or not the violation is considered willful. If the

request includes liquidated damages, it shall also contain a written statement that the contractor may request relief from such assessment, within 60 days.

(d) After implementing those actions prescribed above, the CO shall prepare and forward a report of violations, including findings and supporting evidence, to the HCA. Standard Form 1446, Labor Standards Investigation Summary Sheet, shall be completed and attached as the first page of the report. The CO shall take further action as prescribed by the HCA.

3.13 Withholding From or Suspension Of Contract Payments.

(a) Suspension of contract payments. If a contractor or subcontractor fails or refuses to comply with the labor standards clauses of the Davis-Bacon Act and Related Statutes, BPA may suspend or cause to be suspended any further payment, advance, or guarantee of funds until, upon its own action or acting upon a written request from the DOL, the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

(b) Upon final administrative determination, if restitution has not been made by the contractor or subcontractor, the CO shall forward to Commercial Accounts Payable Standard Form (SF) 1093, Schedule of Withholdings Under the Davis-Bacon Act (40 U.S.C. 276a). The CO shall include with the SF 1093 a listing of the name, social security number, and last known address of each affected employee; the amount due each employee; employee claims, if feasible; and a brief statement of the reason for requiring restitution. Also, the CO shall indicate if restitution was not made because the employee could not be located. Underpaid employees may be assisted in the preparation of their claims. The disbursing office shall submit the SF 1093 with attached additional data, and effect payment to the Comptroller General (Claims Division) in accordance with their procedures..

(c) Returning of withheld funds to contractor. When funds withheld are no longer necessary or exceed the amount required to satisfy validated wage underpayments and assessed liquidated damages, these funds shall be paid the contractor in an expeditious manner.

(d) Limitation on forwarding or returning funds. If the withholding was requested by DOL or if the findings are disputed, the CO shall not forward the funds to the Comptroller General, Claims Division, or return them to the contractor without approval by DOL.

3.14 Disposition of Disputes Concerning Contract Labor Standards Enforcement.

(a) The areas of possible differences of opinion between COs and contractors pertaining to construction contract labor standards enforcement include

(1) Misclassification of workers;

(2) Hours of work;

(3) Wage rates and payment;

(4) Payment of overtime;

(5) Withholding practices; and

(6) The applicability of the labor standards requirements under varying circumstances.

(b) Generally, these differences are settled administratively at the project level by the contracting agency. If necessary, these differences may be settled with assistance from DOL.

(c) When requesting the contractor to take corrective action in labor violation cases, the CO shall inform the contractor of the following:

(1) Disputes concerning the labor standards requirements of the contract are to be resolved by the DOL, not by the Disputes clause of the contract.

(2) The contractor may appeal the CO's findings or part thereof by furnishing the CO a complete statement of the reasons for the disagreement with the findings.

(d) The CO shall promptly transmit the CO's findings and the contractor's statement to the DOL, Wage and Hour Division.

(e) The DOL, Wage and Hour Division, will respond directly to the contractor or subcontractor, with a copy to BPA. The contractor or subcontractor may then appeal the DOL's findings in accordance with the procedures outlined in Labor Department Regulations (29 CFR 5.11). Hearings before administrative law judges are conducted in accordance with 29 CFR Part 6, and hearings before the DOL Wage Appeals Board are conducted in accordance with 29 CFR Part 7.

(f) The DOL, Wage and Hour Division, may institute debarment proceedings against the contractor or subcontractor if the DOL finds reasonable cause to believe that the contractor or subcontractor has committed willful or aggravated violations of the Contract Work Hours and Safety Standards Act or the Copeland (Anti-Kickback) Act, or any of the applicable statutes listed in 29 CFR 5.1 other than the Davis-Bacon Act, or has committed violations of the Davis-Bacon Act that constitute a disregard of its obligations to employees or subcontractors under section 3(a) of that Act.

3.15 Contract Terminations.

If a contract or subcontract is terminated for violation of the labor standards clauses, BPA shall submit a report to the DOL, Wage and Hour Division, Department of Labor, and the Comptroller General. The report shall include --

(a) The number of the terminated contract;

(b) The name and address of the terminated contractor or subcontractor;

(c) The name and address of the contractor or subcontractor, if any, who is to complete the work;

(d) The amount and number of the replacement contract, if any; and

(e) A description of the work.