

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



MAY 20 1983

MEMORANDUM NO. 135

TO: ALL GOVERNMENT CONTRACTING AGENCIES OF
THE FEDERAL GOVERNMENT AND THE DISTRICT
OF COLUMBIA

FROM: WILLIAM M. OTTER *William M. Otter*
Administrator

SUBJECT: Revisions of the Davis-Bacon Regulations,
29 CFR Part 1 and Part 5, Subpart A

Copies of the above final Davis-Bacon regulations, which were published in the Federal Register on April 29, 1983, are attached.

BACKGROUND

On May 28, 1982, the Department of Labor (DOL) issued revised final regulations under the Davis-Bacon and Related Acts with a scheduled effective date of July 27, 1982. Memorandum No. 133 transmitted copies of the revised regulations and provided implementing instructions for contracting agencies.

However, a suit was filed against the Department in U.S. District Court for the District of Columbia seeking to prevent the implementation of the revised regulations. On July 22, 1982, the Court issued a preliminary injunction enjoining the Department from implementing certain provisions of the revised regulations pending a decision on the merits (Building and Construction Trades Department, AFL-CIO, et al., v. Raymond J. Donovan, et al., 543 F. Supp. 1282). As a result, Memorandum No. 134 was issued on July 23, 1982 which deferred the implementation of the regulations as published in the Federal Register on May 28, 1982 (29 CFR Part 1 (47 FR 23644), 29 CFR Part 5, Subpart A (47 FR 23658), and 29 CFR Section 3.3(b) (47 FR 23678)) until further notice. (See 47 FR 32070 (July 26, 1982).)

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On December 23, 1982, the Court issued a permanent injunction with respect to a number of these regulatory revisions. The injunction covered all of the issues which were preliminarily enjoined except the redefinition of "prevailing wage" in 29 CFR 1.2(a) (i.e., elimination of the "30% rule"). The Government appealed this ruling and argument was heard by the U.S. Court of Appeals for the District of Columbia on May 6, 1983.

Immediately prior to the hearing in the Court of Appeals, as indicated above, the Department republished those portions of the May 28, 1982 regulations which had not been enjoined. These regulations become effective June 28, 1983.

The enjoined sections of the May 28, 1982 regulations continue to be deferred. If the injunction is subsequently lifted as a result of the appeal, the enjoined sections will be implemented at that time.

Highlighted below are the major changes which supplement the information contained in the regulatory text and preamble sections. We offer this information so that contracting agencies will be aware of their obligations and DOL operating policies under the Davis-Bacon and Related Acts. Agencies are reminded of the need to make appropriate changes in their procurement regulations and contract documents to conform to these revisions to the regulations. For your convenience, we note that the provisions of section 1.6 (Use and effectiveness of wage determinations) of Part 1 and sections 5.2 (Definitions) and 5.5 (Contract clauses) of Part 5 are applicable to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after June 28, 1983; the remaining provisions of Part 1 are applicable to wage surveys completed on or after June 28, 1983. The revisions to sections 5.1 and 5.6 through 5.17 are procedural or administrative in nature and are effective on June 28, 1983.

29 CFR PART 1

1. Section 1.2(a) - Definition of Prevailing Wage

This section has been revised to eliminate the "30 percent rule" contained in the previous regulations. Under the new regulations, if a single rate is paid to a majority of the employees in a given classification and locality, it is adopted as prevailing. If no single rate is paid to a majority, then the weighted average of all rates paid is adopted as the prevailing wage.

2. Section 1.6(a)(1) - Expiration Date of Project Wage Determinations

This section now provides that project wage determinations are effective for 180 days from their date of issuance, unless an extension of the expiration date has been requested by an agency and approved by the Administrator.

3. Section 1.6(b) - Use of Wage Determinations

Section 1.6(b) states that contracting agencies are responsible for insuring that only the appropriate wage determinations are incorporated in bid solicitations and contracts, and for designating the work to which each wage determination applies. This provision is intended to eliminate confusion regarding the use of "multiple schedules" in certain contracts. The section also provides that questions regarding the application of wage schedules should be referred to the Administrator of the Wage and Hour Division who shall give foremost consideration to local area practices in resolving such questions.

4. Section 1.6(c) - "10-day Rule"

The revised regulations require that contracting agencies accept modifications to wage determinations received less than 10 days before bid opening unless (in the case of competitive procurements) the agency finds that there is not sufficient time to notify bidders of the change, in which case such finding must be documented in the contract file, and submitted to the Wage-Hour Administrator upon request. This change emphasizes the responsibility of contracting agencies to use wage determination modifications made before award in all cases where it will not unduly disrupt the procurement process.

5. Section 1.6(c)(3)(iv) - "90-Day Rule"

Section 1.6(c)(3)(iv) now provides that if a contract to which a general wage determination has been applied is not awarded within 90 days after bid opening, any modification published prior to contract award shall be effective unless the agency obtains an extension of the 90-day period from the Administrator.

6. Section 1.6(e) - Correction of Wrong or Erroneous Wage Determinations

This section provides that if the Department of Labor finds that a bid solicitation contains the wrong wage determination or wrong schedule, or if a wage determination is withdrawn as a result of a decision by the Department's Wage Appeals Board, notification to the contracting agency of such findings shall be effective immediately, without regard to the provisions of section 1.6(c), provided such notification is made prior to contract award.

7. Section 1.6(f) - Incorporation of Wage Determinations After Award

Section 1.6(f) requires contracting agencies to utilize a wage determination after award if the Wage-Hour Administrator finds that the agency has failed to include any wage determination in a covered contract or has used a wage determination which clearly does not apply to the contract. This is to be accomplished through either termination and resolicitation of the procurement or incorporation through contract modification or change order. However, the regulation also provides that the method of incorporation should be in accordance with procurement law, and that if the wage determination is incorporated through contract modification or change order, the contractor must be compensated for any increases in wage costs which may result.

8. Section 1.6(g) - Approval of Federal Funding After Contract Award

Section 1.6(g) contains guidelines for the application of wage determinations in situations where Federal funding or assistance is not approved until after contract award (or after the start of construction where there is no contract award).

29 CFR PART 5

9. Section 5.2(1) - Definition of "Site of Work"

The regulations now basically incorporate the Department's longstanding interpretation of the "site of work" on which Davis-Bacon prevailing wages must be paid. The definition

is essentially similar to those contained in DAR 18-701(b)(2)-(4) and FPR 1-18.701-1(b)(2), but specifies that operations of a "commercial supplier" or "materialman" established in proximity to but not on the actual site of the work prior to the opening of bids are not covered by the Act even if dedicated exclusively to the Federal project for a time.

10. Section 5.5(a)(1)(ii) - Conformance Procedures

This section has been revised to clarify the criteria which must be met before a contracting officer may approve a conformed rate, and to require that conformed rates must be agreed to by the affected employees or their representatives. It also provides that all proposed conformance agreements must be forwarded to the Department of Labor for approval, and that the Department will act upon such cases, as well as those cases where the interested parties cannot agree, within 30 days, unless it advises the agency that additional time is needed.

11. Sections 5.5(a)(2) and 5.5(b)(3) - Cross-Withholding

These sections provide that where the funds remaining on a contract under which Davis-Bacon Act or Contract Work Hours and Safety Standards Act violations are alleged to have occurred are insufficient to cover the amount of back wages due, the contracting agency shall, upon its own initiative or at the request of the Department of Labor, withhold or cause to be withheld such additional funds as may be necessary from any other Federal contract or any other Federally assisted contract subject to Davis-Bacon prevailing wage (or CWHSSA, as appropriate) requirements which is held by the same prime contractor.

12. Section 5.5(a)(3)(ii) - Submission of Wage Payment Information

This section continues the current requirement that contractors and subcontractors submit weekly a copy of all payrolls, together with a statement certifying compliance with the Davis-Bacon and Copeland Acts. While the required payroll information may be submitted in any form, Optional Form WH-347 is available for this purpose but is not a mandatory requirement.

13. Sections 5.5(a)(4)(i) and (ii) - Apprentices and Trainees

Sections 5.5(a)(4)(i) and (ii) now codify the Department's policy that if an apprenticeship or trainee program is silent with regard to payment of fringe benefits, such employees must be paid the full amount of fringe benefits for the corresponding journeyman classifications as listed on the wage determination, unless DOL determines that a different practice prevails. This section has also been revised to allow contractors to follow the ratios and wage rates (percentages) for approved apprentice and trainee programs in their "home" area rather than requiring contractors to observe the ratios and wage rates in the area where the construction project is performed.

14. Section 5.5(a)(7) - Contract Termination; Debarment

This revised section provides that a violation of the contract labor standards (29 CFR 5.5) may be grounds for termination of the contract, and for debarment in the capacity of a prime contractor as well as a subcontractor.

15. Section 5.5(a)(9) - Disputes Concerning Labor Standards

Section 5.5(a)(9) specifies that disputes arising out of the labor standards provisions of the contract are not subject to the general disputes clause of the contract, but rather to the procedures in 29 CFR Parts 5, 6, and 7.

16. Section 5.5(a)(10) - Certification of Eligibility

This section requires contractors to certify that they are not ineligible to be awarded a contract by virtue of debarment under section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1), and prohibits contractors from awarding subcontracts to debarred firms.

17. Sections 5.6(b) and 5.7(a)

Section 5.6(b) provides that the Department of Labor will submit reports of its investigations to the contracting agency where violations total \$1,000 or more, or where liquidated damages may be assessed under the Contract Work Hours and Safety Standards Act, or where debarment may be considered. In other violation cases, a letter summarizing the investigation findings will be submitted.

Section 5.7(a) requires contracting agencies to submit to DOL detailed reports of their investigations in all cases where wage underpayments total \$1,000 or more. Where the amount of violations is less than \$1,000, a factual summary will suffice if back wages have been paid and future compliance assured and if the criteria for consideration of debarment are not present. However, in the latter cases in which the investigation was initiated at the request of the Department of Labor, a full report is required to be submitted.

18. Section 5.8 - Liquidated Damages Under the Contract Work Hours and Safety Standards Act

Section 5.8 now provides that where the Agency Head finds that the criteria for a reduction or waiver of liquidated damages administratively determined to be due have been met, the concurrence of the Department of Labor in such reduction or waiver must be sought only if the amount of such damages exceeds \$500.

19. Section 5.11 - Disputes Concerning Payment of Wages

As revised, this section provides that in all cases involving a dispute concerning prevailing wage rates, overtime pay, or classification where there are relevant facts at issue, the contractor or subcontractor will be offered an opportunity for a hearing before an Administrative Law Judge in accordance with procedures set forth in proposed 29 CFR Part 6, which should be published in the Federal Register as a final rule in the near future. It also provides that debarment may be considered at such hearings where appropriate.

20. Sections 5.12 (a) and (b) - Debarment Proceedings

These sections contain revised rules for debarment proceedings. They specify that in all cases where debarment may occur, the contractor or subcontractor will be offered an opportunity for a hearing before an Administrative Law Judge in accordance with 29 CFR Part 6. As noted under section 5.11 above, such hearings will be held in conjunction with hearings on disputes concerning payment of wages, etc. where it is appropriate to do so. In addition, these sections provide that debarred persons and firms are ineligible to perform contract work as either a prime contractor or a subcontractor while on the debarred bidders list.

21. Section 5.12(c) - Removal From Debarred List

Section 5.12(c) provides that any person or firm debarred under section 5.12(a) for violations of a Davis-Bacon Related Act (but not those debarred under the Davis-Bacon Act itself) may petition the Administrator for removal from the debarment list after a period of six months. The section also sets forth the criteria to be used in deciding whether requests for removal will be granted.

22. Section 5.12(d) - Debarment of Affiliated Firms

This section contains the procedures to be used in determining whether a person or firm debarred under the Davis-Bacon Act has "an interest" in another firm, corporation, partnership, or association, and whether a person or firm debarred under 29 CFR 5.12(a) has "a substantial interest" in another firm, corporation, etc. As provided in section 3(a) of the Davis-Bacon Act and in 29 CFR 5.12(a)(1), if a debarred person or firm is found to have "an interest" or "a substantial interest", respectively, in such other firm, corporation, etc., that other firm or corporation shall also be placed on the debarment list.

Attachments