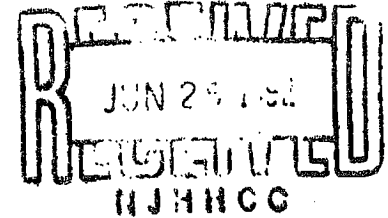




JUN 22 1992

MEMORANDUM NO. 163

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



FROM: *Karen R. Keesling*
KAREN R. KEESLING
Acting Administrator

SUBJECT: Revision of Davis-Bacon Regulations, 29 CFR Part 5

On December 4, 1990, the Department of Labor (DOL) published in the Federal Register (55 FR 50148) its notice implementing revised final Davis-Bacon regulations, 29 CFR Parts 1 and 5, governing the use of semi-skilled "helpers" on Federal and Federally-assisted construction projects subject to the Davis-Bacon and Related Acts (DBRA). The final rule, published on January 27, 1989 (54 FR 4234), became effective on February 4, 1991. All Agency Memorandum (AAM) No. 154, dated January 2, 1991, provided initial instructions for implementing these regulatory changes.

Thereafter, on April 10, 1991, the Dire Emergency Supplemental Appropriations Act of 1991, Pub. L. No. 102-27, 105 Stat. 130, 151 (1991), was enacted. Section 303 of this law prohibited DOL from spending any funds to implement or administer the helper regulations. After the end of fiscal year 1991 and the expiration of continuing resolutions, a new appropriations act was passed which did not contain the restrictive language. The Solicitor of Labor thereafter advised that the spending prohibition had expired, and that implementation of the helper regulations was legally permissible. Accordingly, on January 29, 1992, AAM No. 161 notified agencies of this advice and instructed that the revised contract clauses set forth at section 5.5 of 29 CFR Part 5 were to be incorporated in all contracts for which bids were solicited or negotiations concluded on or after January 29, 1992.

On April 21, 1992, the United States Court of Appeals for the District of Columbia issued a decision that confirmed that the 1991 appropriations' spending prohibition had only temporary effect. The court also upheld four challenged provisions of the helper regulations, but invalidated the regulatory provision setting a maximum allowable ratio of helpers to journeymen on Federal construction projects subject to DBRA. Building & Construction Trades Department, AFL-CIO v. Martin, No. 82-1631 (D.C. Cir. Apr. 21, 1992).

Specifically, the court of appeals affirmed the district court's decision upholding the regulatory provisions which provide that:

- o helper rates will be issued in wage determinations for localities where the use of helpers prevails, in accordance with a formula for determining the circumstances in which a helper classification prevails (29 CFR 1.7(d)); and,
- o helper classifications can be added through the conformance process to wage determinations where they prevail in the locality (29 CFR 5.5(a)(1)(ii)(A)(1) and (4)).

The court also reaffirmed its previous decision upholding the definition of a helper (29 CFR 5.2(n)(4)).

In addition, the court of appeals invalidated the regulatory provision (at 29 CFR 5.5(a)(4)(iv)) setting a maximum ratio of two helpers to every three journeymen. In accordance with the court's decision, section 5.5(a)(4)(iv) no longer has effect, and a notice is being sent to the Federal Register to withdraw this subsection from the Code of Federal Regulations.

Please ensure that the contract clauses at section 5.5(a)(4)(iv) are not incorporated in contracts awarded after the date of this Memorandum. Agencies are reminded of the need to make appropriate changes in the procurement regulations (see especially 49 CFR 22.406-3, 52.222-6(b) and 52.222-9) and contract documents to conform to the revised regulations. AAM Nos. 154 (January 2, 1991) and 161 (January 29, 1992) should be adhered to in all other respects.

Where helper clauses are included in contracts, as provided in AAM No. 161, helper classifications can be utilized whenever a particular helper classification is included in a wage determination issued by DOL in accordance with 29 CFR 1.7(d), or such an additional classification is obtained from DOL pursuant to the conformance procedures in 29 CFR 5.5(a)(1)(ii). Any employee listed on a payroll as a helper may be used in accordance with the definition of "helper" set forth in 29 CFR 5.2(n)(4). An employee listed as a helper who is not employed in accordance with these rules must be paid the applicable wage rate on the wage determination for the classification of work actually performed.

It is very important that you ensure that the actions specified herein are taken in a timely and consistent manner in order to both comply with the court order and achieve important regulatory savings. If we can be of any assistance or answer your questions, please contact Dr. Alan Moss or his staff, who can be reached at (202) 523-7531.