Memorandum

U.S. Department
of Transportation

Federal Highway Administration

Subject: **INFORMATION**: Applicability of Prevailing Wage Rate Requirements to Federal-aid Construction Projects

Date: June 26, 2008

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Reply to
Attn. of: HIPA-30

To: Directors of Field Services
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Over the years, a number of questions have been brought to our attention concerning the prevailing wage rate requirements under 23 U.S.C. 113. Generally, 23 U.S.C. 113 requires all laborers and mechanics employed for construction work on Federal-aid highways shall be paid wages at rates not less than those prevailing wages as determined by the Secretary of Labor under the Davis-Bacon Act. In addressing these questions, this office has issued a number of memorandums, e-mails and letters to communicate the decisions regarding these questions. As a result, the FHWA's guidance on the applicability of 23 U.S.C. 113 is contained in various different sources. The purpose of this memorandum is to consolidate and briefly restate existing guidance and policies concerning the applicability of the prevailing wage rate requirements under 23 U.S.C. 113.

The US Department of Labor's (DOL) regulation in 29 CFR Parts 1, 3 and 5 provides the applicable policy for the implementation of prevailing wage rate requirements on federally funded construction projects. Congress extended these requirements to Federal assistance programs through a series of related acts. For the Federal-aid highway program, the related act is found in 23 U.S.C. 113 - "Prevailing rate of wage." Thus, Section 113 serves as the source statute for applicability determinations in the Federal-aid highway program while the DOL's statutes, regulations and directives provide the appropriate policy for implementing Section 113 prevailing wage rate requirements whenever these requirements apply to a Federal-aid highway project.

Section 113(a) states:

> The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the construction work performed on highway projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of

work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with sections 3141-3144, 3146, and 3147 of title 40.

First, we have determined that the phrase:

- "Construction work performed on highway projects on the Federal-aid highways" means any construction project that takes place in the right-of-way of a Federal-aid highway is subject to 23 U.S.C. 113. This would include work that may not appear to be highway construction (construction of wetlands, landscaping, etc.) but is an otherwise eligible project under Title 23. Thus, any Federal-aid construction project (regardless of Federal-aid funding source) physically located within the right-of-way of a Federal-aid highway is subject to 23 U.S.C. 113 requirements. See Mr. Anthony R. Kane's February 13, 1992 memorandum titled: "ISTEA of 1991 – Construction and Maintenance Requirements."

- The term "Federal aid highway" is defined in 23 U.S.C. 101 as "... a highway eligible for assistance under this chapter other than highways classified as local roads or rural minor collectors." Therefore, 23 U.S.C. 113 requirements are applicable to Federal-aid construction projects on highways functionally classified as arterials and collectors but not applicable to projects located on highways functionally classified as local roads or rural minor collectors. In addition, 23 U.S.C. 113 requirements are not applicable to Federal-aid construction projects that are not located within the right-of-way of a Federal-aid highway. In certain circumstances, 23 U.S.C. 113 requirements apply to a Federal-aid construction project not located on a Federal-aid highway if the project is linked to or dependent upon a Federal-aid highway project. Examples include: a project required by an environmental document for a Federal-aid highway project or a project for the construction of a traffic control center that monitors traffic on one or more Federal-aid highways. In both cases, the project would not exist without the Federal-aid highway project. See Mr. David R. Geiger's July 28, 1994 memorandum titled: "Applicability of Davis-Bacon for Transportation Enhancement Projects."

Second, 23 U.S.C. 113 requirements are applied on a:

- "Contract basis" as such, contracting agencies need to be aware that the use of Federal-aid funding for any portion of a construction contract invokes 23 U.S.C. 113 requirements for all work under the contract, regardless of the amount of Federal-aid participation or the use of nonparticipating items of work. It should be noted that minor construction activities necessary to provide a connection to a Federal-aid highway would not invoke 23 U.S.C. 113 requirements for a project not located on a Federal-aid highway. Examples of minor construction activities include: the placement of advance construction signs, approach paving, curb returns, or drainage modifications on the right-of-way of a Federal-aid highway.

Third, for projects funded with emergency relief funding:

- Contract work for emergency repairs: All contract work for emergency repairs performed by contractors or subcontractors within the right-of-way of a Federal-aid

highway is covered by 23 U.S.C. 113 requirements. The term emergency repair is defined in 23 CFR 668.103 as "Those repairs including temporary traffic operations undertaken during or immediately following the disaster occurrence for the purpose of: (1) Minimizing the extent of the damage, (2) Protecting remaining facilities, or (3) Restoring essential traffic." While contracting agencies are empowered to begin emergency repairs immediately, they must comply with 23 U.S.C. 113 requirements so that properly documented costs will be eligible for reimbursement once the FHWA Division Administrator makes a finding that the disaster is eligible for emergency relief funding.

- Contract work for debris removal only: 23 U.S.C. 113 requirements do not apply where emergency contract work is only for the removal of debris and related clean up, which is not considered to be a "construction" activity. Since 23 U.S.C. 113 only applies to "construction work," 23 U.S.C. 113 prevailing minimum wage requirements do not apply to debris removal under the emergency relief program. However, debris removal performed in conjunction with construction, alteration, and repair work (such as highway resurfacing, re-grading, significant earthmoving, bridge repairs, etc.) is covered by 23 U.S.C. 113. See DOL's August 25, 2006 letter to Mr. Horne.

- Work by public agency forces: 23 U.S.C. 113 requirements do not apply to State or local government agency employees who perform emergency repairs or construction work on a force account basis because government agencies (such as States or their subdivisions) are not considered contractors or subcontractors. See 29 CFR 5.2 (h). However, 23 U.S.C. 113 requirements do apply to contracts let by State or local government agencies using an alternative procurement procedure that has been approved through the force account approval process.

Fourth, for railroad and utility relocation or adjustment projects:

- Work done by railroads or utilities: 23 U.S.C. 113 requirements do not apply to work performed by railroads, utility companies or work performed by a contractor engaged by a railroad or utility company. Payment for relocation work performed by the utilities and railroads is considered to be compensation for a relocation in order to accommodate highway construction. See Mr. Dowell H. Anders' May 15, 1985, legal opinion titled: "Utility and Railwork – Wage Rate and EEO Requirements."

- Work done by highway construction contract: 23 U.S.C. 113 requirements apply when utility or railroad relocation work is not accomplished through its utility or railroad forces but under a highway construction contract that has been let by the contracting agency.

Fifth, for subsurface utility location services:

- Subsurface utility engineering or utility location services are considered exploratory drilling services. These contracts provide the location of utilities for engineering or planning purposes. 23 U.S.C. 113 requirements do not apply. See DOL's Field Operations Handbook, Section 15d03(b).

Sixth, for ferry boats and terminals:

- The provisions of 23 U.S.C. 113 applies to the building, alteration, and repairs of ferry boats and terminals located on or servicing a Federal-aid highway route. Wage rate determinations for ferryboat building, alteration, and repairs are issued only if the location of the contract performance is known when bids are solicited. 23 U.S.C. 113 does not apply if the location of contract performance is unknown at the time of bid solicitation. However, the contract needs to include all other applicable DOL requirements. See DOL's Field Operations Handbook, Section 15d08.

Seventh, for High Priority and other congressionally designated projects:

- These projects are subject to all Federal requirements unless the requirement is specifically waived in legislation. If the project is physically located within the right-of-way of a Federal-aid highway, then 23 U.S.C. 113 requirements apply. For rail line construction projects, if a portion of a rail line construction contract is within the right-of-way of a Federal-aid highway, 23 U.S.C. 113 requirements apply to all contract work. 23 U.S.C. 113 requirements do not apply to rail line contracts that are not located within the right-of-way of a Federal-aid highway.

Eighth, for Safe Routes to School and Nonmotorized Transportation Pilot projects:

- Congress required that States treat these projects as if they were on the Federal-aid system despite their functional classification or location outside the right-of-way of a Federal-aid highway. Therefore, 23 U.S.C. 113 requirements apply to all Safe Routes to School construction projects, even for projects not located within the right-of-way of a Federal-aid highway. See P.L. 109-59, Section 1404 (j).

Ninth, for warranty work:

- 23 U.S.C. 113 applies to warranty or repair work if this work is required in the original construction contract. This is true regardless of whether there is a pay item for the warranty work. If an employee spends more than 20 percent of his/her time in a work week engaged in such activities on the site of the original work, he/she is covered for all time spent on the site. The original contract prevailing wage rates apply regardless of when the warranty work is done. This is consistent with the DOL Wage and Hour Division Opinion Letter dated March 9, 1973, that concluded Davis-Bacon Related Act requirements applied to warranty/repair work for the construction of prefabricated housing units. The DOL determined that such work was covered because it took place at the site of the construction work and involved more than an incidental amount of construction activity.

Finally, it should be noted that other labor requirements of the DOL may apply to contracts even when 23 U.S.C. 113 is not applicable. These requirements include the Fair Labor Standards Act requirements (minimum wage, overtime pay, record keeping and child labor standards) and the

Contract Work Hours and Safety Standards Act (overtime requirements). For guidance on the application of these requirements, please visit the DOL Web site at http://www.dol.gov/esa/whd/.

If you have any questions regarding the applicability of DOL requirements to Federal-aid construction projects, please contact Mr. Edwin Okonkwo at 202-366-1558.