



DEC 2 1993

MEMORANDUM NO. 174

MEMORANDUM FOR ALL CONTRACTING AGENCIES OF THE FEDERAL  
GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: MARIA ECHAVESTE  
Administrator

SUBJECT: Prohibition on Department of Labor Implementation/  
Administration of Davis-Bacon Helper Regulations  
Pursuant to Fiscal Year (FY) 1994 Appropriation Act

On Thursday, October 21, 1993, President Clinton signed the FY 1994 Appropriations Act for the Department of Labor, Health and Human Services, and Education, and related agencies (P.L. 103-112). Section 104 of this act contains a provision that prohibits the Department of Labor (Department) from expending funds appropriated under the act to implement or administer the Davis-Bacon "helper" regulations that were previously codified at 29 CFR sections 1.7(d), 5.2(n)(4) and 5.5(a)(1)(ii). (See Federal Register, 54 FR 4234, 55 FR 50148, and 57 FR 28776). Those regulations have therefore been suspended and the former rules reinstated. (See Notice of suspension of regulations and reinstatement of former regulation published in the Federal Register on November 5, 1993 (58 FR 58954), copy attached.

As of October 21, the Department of Labor ceased activities that were related to the administration and implementation of suspended helper regulations. The discontinued activities include:

- o Issuing classifications and wage rates for helpers in wage determinations based on data yielded by new surveys.
- o Processing survey data to determine whether the use of helpers is prevailing on construction in areas where Davis-Bacon surveys are being conducted to determine prevailing wage rates for any particular type of construction.
- o Processing requests for the approval of additional classifications and wage rates for helpers pursuant to the suspended conformance procedures formerly set forth in 29 CFR 5.5(a)(1)(ii).

- o Processing requests for the reconsideration of rulings or final determinations concerning the use of helper classifications and/or wage rates.

Guidance regarding the effect of the newly enacted prohibition on contracts at various stages of the procurement process follows.

**Contracts awarded on or after October 21, 1993.<sup>1</sup>**

Contractors and subcontractors may not employ "helpers" as that term was defined in section 5.2(n)(4) of the suspended regulations on any Davis-Bacon covered contract awarded on or after October 21, 1993. Semi-skilled helper classifications and wage rates that were issued in wage determinations pursuant to the suspended regulations and that have been included in contracts awarded on or after October 21, 1993, are not valid. Moreover, the regulatory provision that allowed the consideration of additional classification actions for helpers is suspended; therefore, the Department will not consider any additional classification requests that would permit the use of helpers as defined in the suspended regulations on such contracts. Davis-Bacon general wage determinations are being modified to omit those helper classifications and wage rates that were issued pursuant to the suspended regulations.

In accordance with its prior practice, the Department will, however, recognize helper classifications that are separate and distinct classes of workers performing duties distinguished from those of journey-level workers or other classifications listed on the wage determination; whose use prevails in an area; and who are not employed in an informal apprenticeship or training capacity. As detailed in the November 5, 1993, notice, the Department will issue such helpers on wage determinations or consider additional classification requests for such helpers where these criteria are met and a specific description of duties is associated with the particular helper class. Helpers may be employed on contracts awarded after October 21, 1993, only if a

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<sup>1</sup> In the case of projects assisted under the National Housing Act, the applicable date is the start of construction or the initial endorsement of the mortgage, whichever occurs first. Similarly, in the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, the applicable date is the beginning of construction or the date the housing assistance payment contract is executed, whichever occurs first.

definition of the helper's duties establishing the helper as a separate and distinct classification is set forth in the wage determination or on the additional classification approval documents.

**Contracts awarded prior to October 21, 1993 where the contract contains the newly-suspended helper clauses and the contract wage determination contains a helper classification or a helper classification has been approved for use on the project.**

Contractors and subcontractors may continue to employ individuals in helper classifications that were issued for application to contracts or approved for use on contracts awarded prior to the suspension of the regulations. The workers must, however, be employed in accordance with the regulatory definition set forth in section 5.2(n)(4) of Regulations, Part 5, which was applicable at the time the contract was awarded, and the workers must be paid at least the corresponding wage rate for the helper classification in which they are performing.

The Department will continue to take action to ensure that workers erroneously classified as helpers are reclassified as journey-level workers or laborers in accordance with the work performed (those cases, for example, where employees perform work solely of a skilled nature, where individuals do not work under the supervision and direction of a journey-level classification, or where workers perform duties beyond the duties performed by helpers pursuant to the practice in the area). The Department will also take enforcement action against any contractor or subcontractor that fails to compensate its helpers according to the applicable wage determination rate or approved conformance wage rate. Contracting agencies are also reminded of their enforcement responsibilities under Reorganization Plan No. 14 of 1950 and encouraged to take action as may be necessary to ensure compliance in such situations.

**Contracts awarded prior to October 21, 1993 where the contract contains the newly-suspended helper clauses but the contract wage determination does not contain a helper classification and a helper classification has not yet been approved for use on the project.**

Contractors and subcontractors may not employ any classification, including helpers, on a Davis-Bacon covered project unless the wage determination contains the classification or the classification is approved pursuant to the Department's additional classification procedures. The regulations provide that the wage rates determined for unlisted classifications under the additional classification procedures shall be paid to all workers performing work in that classification from the first day on which work was performed. This regulatory provision permits retroactive application of

approved additional classifications and wage rates and, at the same time, also allows for retroactive enforcement action against a contractor or subcontractor whose proposed additional classification and/or wage rate is denied by the Department.

Clearly, the Department cannot act on conformance requests for helpers or requests for reconsideration of such conformance actions given the Congressional action. Thus, contractors or subcontractors who classify and pay individuals as helpers with the expectation that the Department will approve an additional classification request at some future point place themselves at risk of subsequent enforcement action, including the withholding of contract funds. Under these circumstances, agencies should use their enforcement discretion in determining whether withholding action is appropriate to protect the interest of employees where contractors pay individuals less than the journey-level rate during the period of the prohibition. Agencies clearly should withhold contract funds where the Department has denied a conformance request, even though the contractor or subcontractor may have or may intend to request reconsideration of the additional classification denial. Agencies should also withhold contract payments on any contracts completed or nearing completion during the suspension of the helper regulations so that any back wages potentially due employees are not lost because the contract was closed and contract funds paid out.

**Contracts awarded prior to October 21, 1993 where the contract does not contain the revised helper clauses.**

In implementing the helper regulations after the lifting of the prohibition imposed by section 303 of the 1991 Dire Emergency Supplement Appropriation Act, the Department suggested that contracting agencies modify existing contracts to include the revised helper contract clauses, thereafter permitting the addition of helper classifications through the additional classification procedures in section 5.5(a)(1)(ii) of Regulations, Part 5. However, in light of the Congressional action, that option no longer exists for contracts that were awarded without the helper contract clauses and which have not yet been modified. Contractors and subcontractors performing on such contracts may not employ helpers as those classifications were defined by section 5.2(n)(4) of Regulations, Part 5.

Prior background concerning the regulations in question is contained in All Agency Memoranda Nos. 154, 161, 163 and 165, issued on January 2, 1991, January 29, 1992, June 22, 1992, and July 24, 1992, respectively. Application of these All-Agency Memoranda is also suspended.

Agencies are reminded of the need to make appropriate changes in the procurement regulations (see especially 48 CFR 22.406-3, 52.222-6(b) and 52.222-9) and related contract documents to conform to the revised regulations.

Attachment