U.S. Department of Labor

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

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MEMORANDUM NO. 133

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

FROM: WILLIAM M. OTTER
Administrator

SUBJECT: Revisions of Regulations, 29 CFR Part 1; Part 3; and Part 5, Subpart A

On May 28, 1982, the Department of Labor issued the above final regulations, which substantially revise a number of provisions regarding the administration and enforcement of the Davis-Bacon and Related Acts. Copies of the revised regulations, which include a discussion in the preamble outlining the major changes, are attached.

The purpose of this memorandum is to highlight these major changes and to supplement the information contained in the regulatory text and preamble sections, in order to assure that contracting agencies are aware of their obligations as well as DOL operating policies under the Davis-Bacon and Related Acts. In this regard, agencies will need to make appropriate changes in their procurement regulations and contract documents to conform to these revisions to the regulations.

Each major regulatory change is summarized below, followed by explanatory material where necessary.

29 CFR PART 1

Effective Dates

The provisions of this Part are effective with respect to wage surveys concluded on or after July 27, 1982, except for the provisions of section 1.6, which are applicable to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after July 27.

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.

Section 1.3 - Wage Data Considered

Section 1.3 now provides that wages paid on projects subject to the Davis-Bacon Act will not be considered in developing wage determinations for "building" and "residential" construction projects unless the Department finds that there is not sufficient data from privately financed projects of a character similar to determine prevailing wages.

Under this revision, the Department will continue to collect information on wages paid in all types of construction work. However, parties submitting data regarding wages paid in "building" and "residential" construction must now indicate whether or not such wages were paid on projects subject to Davis-Bacon prevailing wage determinations.

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.

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.

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 incorporated 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.

Section 1.6(c) - "90-Day Rule"

Section 1.6(c) 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.

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.

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.

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).

Section 1.7(b) - Scope of Consideration

This section prohibits the use of wage data from projects in metropolitan areas in making wage determinations for rural areas, and vice versa.

Section 1.7(d) - Helpers

Under the terms of this section, the Department will issue wage determinations containing rates for semi-skilled classifications of helpers when such classifications are "identifiable" in the area. This increased recognition of helper classifications will reflect the widespread industry practice of employing semi-skilled workers on construction projects. (See also the discussion of related changes in 29 CFR Part 5 regarding the use of helpers.)

29 CFR PART 3

Effective Date

This revised regulation is effective with respect to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after July 27, 1982.

Section 3.3(b) - Submission of Wage Payment Information

As discussed in the summary of changes in 29 CFR 5.5(a)(3)(ii) and (iii), the revised regulations no longer require that contractors and subcontractors submit weekly a copy of all payrolls. As a result, Optional Form WH-347 used for submission of payroll information has been eliminated. However, the requirement for weekly filing of statements certifying compliance with the provisions of the Davis-Bacon and Copeland Acts has been retained. To reflect these changes, section 3.3(b) now incorporates the actual statements of compliance to which contractors and subcontractors must certify.

29 CFR PART 5

Effective Dates

The provisions of sections 5.2 and 5.5 of this part are effective with respect to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after July 27, 1982 (except sections 5.5(a)(1)(ii), 5.5(a)(1)(iv), and a portion of 5.5(a)(3)(i), which contain information collection requirements which are under review at OMB), Provided, however, that section 5.5(a)(3)(ii) requiring submission of a weekly "Statement of Compliance" will be effective July 27, 1982 with respect to existing contracts if the contracting agency and the contractor agree to amend

the contract to delete the clause contained in current section 5.5(a)(3)(ii) requiring weekly submission of payrolls, and incorporate revised section 5.5(a)(3)(ii) and (iii) in its place. (This provision is discussed below in greater detail under the heading "Submission of Wage Payment Information.") The revisions to sections 5.1 and 5.6 through 5.17 are procedural or administrative in nature and are effective on July 27, 1982.

Section 5.2(l) - Definition of "Site of Work"

The regulations now 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.

Sections 5.2(n)(4), 5.5(a)(1)(ii)(A), and 5.5(a)(4)(iv) - Use of Helpers

Section 5.2(n)(4) defines "helper" as a semi-skilled worker (rather than a skilled journeyman mechanic) who, under the direction and supervision of a journeyman, performs a variety of duties to assist the journeyman. The helper may use the tools of the trade to perform such duties, the scope of which varies according to area practice.

Section 5.5(a)(1)(ii)(A) provides that where a helper rate is not listed on an applicable wage determination, such a rate may be established through the conformance process, if helpers are utilized in the area, without regard to the requirement (applicable to all other conformance actions) that the work performed by the conformed class may not be work performed by a class listed in the wage determination.

Section 5.5(a)(4)(iv) provides that helpers may be used in a ratio of two helpers for every three journeymen employed by the contractor or subcontractor on the job site. (The application of this ratio is illustrated by a chart contained in the preamble to 29 CFR Part 5.) However, as also explained in the preamble, in order to assure that the 2:3 ratio does not disrupt existing local practices in areas where wage determinations currently contain helper classifications without restrictions on the number which may be used, interested parties - including contracting agencies - may, prior to bid opening, request an appropriate variance from the 2:3 ratio in accordance with section 5.14 of the regulations, showing that there was a practice in the area of utilizing such helpers on Davis-Bacon projects in excess of a ratio of two to every three journeymen in the classification.

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.

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.

Sections 5.5(a)(3)(ii) and (iii) and 5.6(a)(3) - Submission of Wage Payment Information

As discussed in the summary of changes in 29 CFR 3.3(b), these sections have been revised to eliminate the requirement that contractors and subcontractors submit weekly a copy of all payrolls. These sections continue the requirement that such payrolls be kept by the contractor. The regulations now require only a weekly submission certifying compliance with the Davis-Bacon and Copeland Acts. The regulations also require contractors to submit such payrolls upon request of contracting agencies or DOL. Agencies are authorized to make such requests as part of a specific compliance check or enforcement action.

As discussed above under the Effective Dates heading, the preamble to Part 5 provides that effective July 27, 1982, the contracting agency and the contractor may agree to delete from existing contracts the clause set forth in current section 5.5(a)(3)(ii) requiring weekly submission of payrolls, and substitute in its place revised section 5.5(a)(3)(ii) requiring only submission of a weekly "Statement of Compliance."

However, the preamble contains a clerical error and should have stated that both revised section 5.5(a)(3)(ii) and revised section 5.5(a)(3)(iii) regarding examination of records and submission of payrolls upon request must be substituted in place of current section 5.5(a)(3)(ii). The Department will publish a notice in the Federal Register in the near future to correct this error. In addition, as a matter of policy, the Department will allow contracting agencies to amend solicitations issued prior to July 27, 1982 which have not yet resulted in contract award in order to provide for the above-described deletion and substitution, provided, that no such action may be made effective until July 27.

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.

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.

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.

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 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, unless the investigation was initiated at the request of the Department of Labor, in which case a full report is required to be submitted.

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 have been met, the concurrence of the Department of Labor in such reduction or waiver must be sought only if the amount of the damages exceeds $500.

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.

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.

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.

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