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MEMORANDUM NO. 165

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

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

SUBJECT: Implementation of Revisions to the Davis-  
Bacon Regulations, 29 CFR Parts 1 and 5,  
Allowing Expanded Use of Helpers

This Memorandum supplements All Agency Memoranda Nos. 154, 161, and 163, issued on January 2, 1991, January 29, 1992 and June 22, 1992, respectively. Those Memoranda described revisions in the Davis-Bacon Regulations, 29 CFR Parts 1 and 5, to allow the expanded use of helpers on contracts covered by the labor standards requirements of the Davis-Bacon and related Acts (DBRA), noted the effect of 1991 and 1992 Fiscal Year appropriation laws on implementation of the revised regulations, and described the effect of an April 21, 1992 ruling by the U.S. Court of Appeals for the District of Columbia.

The purpose of this Memorandum is to advise agencies responsible for the administration and enforcement of contracts covered by the DBRA labor standards requirements of Department of Labor (DOL) policies with respect to:

- o Application of revisions to Davis-Bacon regulations, 29 CFR Parts 1 and 5 to construction contracts; and
- o Procedures for satisfying the requirements of the labor standards clause permitting classifications of laborers and mechanics, including helpers, that are not listed in the wage determination in a covered contract, to be added in conformance with the contract wage determination.

I. Application of Revisions to Davis-Bacon Regulations,  
29 CFR Parts 1 and 5 to Construction Contracts  
Awarded Since February 4, 1991

Section 303 of the 1991 Dire Emergency Supplemental Appropriations Act prohibited the use of Department of Labor appropriated funds to implement or administer the revised "helper" regulations published in the Federal Register on January 27, 1989 (54 FR 4234). The enactment of a new Appropriations Act for Fiscal Year 1992 on November 26, 1991, without any provision prohibiting expenditure of funds to implement the "helper" regulations, superseded the proscription in the 1991 Dire Emergency Supplemental Appropriations Act that had barred the Department from implementing and administering the helper regulations.

All Agency Memorandum No. 161, issued on January 29, 1992, directed that the revised contract clauses set forth at section 5.5 of 29 CFR Part 5 should be incorporated in all contracts for which bids are solicited or negotiations concluded on or after January 29, 1992.

On April 21, 1992, the U.S. Court of Appeals for the District of Columbia invalidated section 5.5(a)(4)(iv), which provided a limit on the number of helpers that can be utilized on the job site of two helpers for every three journeymen. To comply with the Court's ruling, All Agency Memorandum No. 163, issued on June 22, 1992, directed that section 5.5(a)(4)(iv) not be incorporated in contracts awarded subsequent to its issuance.

Ongoing construction contracts for which bids were solicited or negotiations concluded since February 4, 1991, that contain the labor standards clauses in effect prior to that date, may be amended to include the revised contract clauses at section 5.5(a)(1)(ii)(A). (Consistent with the U.S. Appeals Court ruling of April 21, 1992, the contract clause at section 5.5(a)(4)(iv) should be excluded when contracts are so amended.) The contract clauses permitting the conformance of helpers where helpers prevail will be applicable to such an amended contract from the date of the modification. Additional classification requests for helper classifications on such contracts may be considered only where the contract has been modified to include the new clauses. Consequently, any requests for helper classifications and wage rates to be added to contract wage determinations in accordance with the revised helper regulations must include a statement that the helper clauses are incorporated in the contract, the contract award date, the bid solicitation date or the date negotiations were concluded (for example, after a Request for Proposals), and, where applicable, the date the contract was modified to incorporate the revised clauses.

Semi-skilled employees who performed the work of helpers -- as that term is defined in the new regulations -- throughout their employment on such a contract and who were paid the journeyman wage rate solely because the helper classification was unavailable may be reclassified as helpers pursuant to an additional classification request approved by the Department of Labor. However, such individuals may be compensated at the helper wage rates only from the date of the modification (or November 26, 1991, whichever is later), not retroactive to the first day they performed helper duties on the contract. Contracting agencies are reminded that any employee reclassified as a helper must have met and must continue to meet the regulatory definition of a helper at 29 CFR Part 5.2(n)(4). On the other hand, individuals who were classified as journeymen and performed journeylevel work on the contract cannot be reclassified as a helper and assigned semi-skilled work in the same trade.

However, no contractors or subcontractors will be permitted to benefit from the reduced wage scales by recapturing wages from employees compensated at a higher rate prior to their reclassification. Any deduction from a helper's wages to recover the difference between the helper rate and any higher rate previously paid will be viewed as an illegal deduction pursuant to Regulations 29 CFR Part 3.

With respect to the few contracts entered into pursuant to invitations for bid or negotiations concluded on or after February 4, 1991, but before November 26, 1991, that contained the revised helper labor standards, the Department interprets the Congressional prohibition as having the effect of precluding the implementation of the helper regulations during all of Fiscal Year 1991. Therefore, application of the new helper rules to open contracts that already contained the revised clauses will be effective beginning November 26, 1991, the date of the new appropriation law.

A classification of laborer or mechanic, including helpers, may be employed on a DBRA project if the classification is listed on the contract wage determination or added after award in accordance with the applicable regulatory procedures. Helpers to a particular journeylevel classification may be employed on a DBRA prevailing wage project where:

- (a) The specific helper classification and corresponding wage rate is listed on the applicable contract wage determination; or
- (b) The addition of the specific helper classification has been approved pursuant to the conformance procedure set forth in 29 CFR Part 5, section 5.5(a)(1)(ii).

In determining whether an employee is a helper for purposes of wage surveys and the conformance procedure, it is the definition of "helper" at 29 CFR 5.2(n)(4) which controls, rather than the job title utilized by the contractor.

Helpers will be listed on wage determinations based on new surveys conducted to determine prevailing wages. Wage determinations that result from prevailing wage surveys completed on or after November 26, 1991, will list helper classifications where they are found to prevail and data adequacy standards for assuring reliability of the wage determinations are met. Wage determinations based on the new surveys will specify the wage rates that are determined to prevail for helpers, which may be utilized in accordance with the definition in the regulations.

When, as a result of a prevailing wage survey, it is determined that certain helpers do not prevail, an indication on the resulting wage determination will specify that those helpers do not prevail and cannot be added by the "conformance" process described below.

Where a majority rate is recognized as prevailing for the journeyman, the practice of the contractors whose workers were paid the majority rate will also be followed in determining whether the use of helpers prevails.

## II. Addition of Helpers after Contract Award in Conformance with Contract Wage Determinations

### The Conformance Process in General

Where a contract wage determination does not list classifications that are to be used on a project, contractors may request that they be added and propose the wage rates they intend to pay the employees they will use on the project in such classifications. Such requests are subject to review by the contracting agency and approval, modification, or denial by the Department of Labor. The regulatory criteria for the approval of additional classifications and wage rates have been revised to accommodate the expanded use of helpers on projects to which Davis-Bacon wage determinations apply.

The contract clause set forth in Regulations, 29 CFR Part 5, section 5.5(a)(1)(ii), requires the responsible agency contracting officer to assure that any class of laborers or mechanics not listed in a contract wage determination, including helpers, to be employed under the contract, shall be classified in conformance with the wage determination.

In reviewing contractor requests for helper and other additional classifications, the contracting officer/agency official should consider whether the proposed additional classifications and wage rates are in conformance with the contract wage determination. Unlike the criteria established for conformance of traditional classifications, the new rules permit approval of helper classifications where the helper duties overlap with those of classifications already listed in a contract wage determination, provided they meet the "helper" definition set forth in the regulations. Like other classifications, the particular duties a helper may perform are determined by area practice. Conformance requests for classifications other than helpers will continue to be denied if their duties are performed by a classification already in the contract wage determination.

#### Prevailing Practice

The Regulations require that helpers may not be conformed unless they prevail in an area. Determinations as to whether helper classifications prevail in an area will be made by the Department of Labor.

If an additional classification for a helper is requested for a schedule of wage rates based on a survey conducted prior to November 26, 1991, the Department of Labor will, if appropriate information is not already available, conduct a prevailing practice survey to determine whether helpers prevail. Appropriate statistical techniques will be utilized to determine the extent of data collection required to make a reliable determination.

If, based on such a prevailing practice survey, it is determined that requested helpers do not prevail in the area for the relevant type of construction, addition of the proposed helper to the wage determination for that type of construction in the area will be denied. (When such a determination has been made, it will also be reflected on subsequent wage determinations for the given type of construction in the area, so that contractors and contracting officers will know that helpers may not be added to such contract wage determinations.)

If, on the basis of a prevailing practice survey, it is determined that helpers to particular journeyman classifications do prevail on the relevant type of construction in an area, such helpers can be added at a wage rate in conformance with the contract wage determination. (This will be noted on the relevant wage determination.)

#### Conformable Wage Rates

For an additional classification to be conformable to a contract wage determination, the proposed wage rate (including any bona

vide fringe benefits) must bear a reasonable relationship to the wage rates already listed in the wage determination.

Contracting agency review of contractor requests for additional classifications and wage rates for helpers and other classifications should include consideration of whether this criterion is met. If the proposed wage rate for an additional classification does not bear a reasonable relationship to the wage rates in the contract wage determination, it cannot be approved.

In evaluating whether proposed wage rates for additional classifications bear a reasonable relationship to the wage rates contained in the contract wage determination, the following guidelines will be applied:

- (a) Generally, requests for additional classifications at wage rates below the unskilled laborers' wage rate in the applicable wage determination will not be approved. This policy applies to helpers, as well as to other proposed classifications.
- (b) The addition of skilled craft classifications will not be approved at wage rates below those already listed in the applicable wage determination for other skilled crafts.
- (c) In general, addition of a proposed helper wage rate will not be approved at less than 60% of the related journeyman wage rate. Current Population Survey data indicate that helper rates, overall, are about 60% of journeyman rates.

#### Wage and Hour Review of Proposed Conformance Actions

All proposed additional classification/conformance actions must be submitted to Wage and Hour for review. Wage and Hour may approve, modify, or disapprove any proposed additional classifications.

In submitting proposed additional classifications and wage rates, including requests for helpers, agency officials should provide the following information:

- (1) A statement that the required helper clauses are incorporated in the contract;
- (2) The date invitations for bids were issued or the date on which negotiations were concluded;
- (3) The award date of the contract;
- (4) Identification of the wage determination(s) incorporated in the contract; and, if multiple wage schedules are included in the contract, the county and type of construc-

tion applicable to the work on which the classification(s) will be employed;

- (5) For each helper classification, the craft it is to assist;
- (6) Evidence that the affected employees (or their legal representative) agree to the proposed classification(s) and rate(s) or a statement that it is disputed; or if the employees have not yet been selected, a statement that the employees are not known;
- (7) Signature(s) on the request showing contracting officer and contractor/subcontractor agreement with the proposed classification and rate, or a statement that it is disputed;
- (8) In the event that the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate, the contracting officer shall refer the views of all interested parties and his or her recommendation to the Wage and Hour Administrator for a determination; and,
- (9) The date(s) that ongoing contracts were modified to include the revised helper standards, where applicable.

Pursuant to longstanding practice prior to implementation of the new regulations, for contracts which do not contain the new helper clauses, and in all contracts entered into based on invitations for bids issued or negotiations concluded prior to February 4, 1991, helper classifications and other subclassifications can be added to wage determinations only where: the use of helpers is an established prevailing practice; the duties are clearly defined and distinct from those of the journeylevel classification and from the laborers; and the term "helper" is not synonymous with a trainee in an informal training program.

Questions regarding this memorandum may be addressed to Philip Gloss, who can be reached at (202) 523-7455.

Further guidance will be issued in a fact sheet for all interested parties in the near future. In addition, guidance concerning enforcement policies with regard to implementation of the regulatory provisions that allow the expanded use of helpers will be provided in a future All Agency Memorandum.