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U.S. Department of Labor

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



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MEMORANDUM NO. 168

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

FROM: KAREN R. KESSLING
Acting Administrator

SUBJECT: Guidance Regarding Exclusion of Davis-Bacon
Contract Clauses from Construction Contracts
Affected by Suspension of the Davis-Bacon Act.

By presidential proclamation of October 14, 1992, President Bush suspended the provisions of the Davis-Bacon Act in certain storm affected areas of Florida, Hawaii and Louisiana. See All Agency Memorandum No. 167. Also suspended were "the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act."

The Copeland Act anti-kickback provisions and weekly statement requirements apply to construction contracts independent of the issuance or incorporation of Davis-Bacon wage determinations. The statute -- by its plain language -- applies to contracts for construction, prosecution, completion or repair of public buildings or public works or buildings or work financed in whole or in part by loans or grants. Thus, notwithstanding the suspension of the Davis-Bacon and related Act requirements, the provisions of the Copeland Act are still applicable to the federally funded and assisted construction contracts in the hurricane affected areas.

Similarly, the Contract Work Hours and Safety Standards Act (CWHSSA) overtime provisions apply to contracts which require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia or to any other such contracts, to which the United States or any agency or instrumentality thereof, any territory, or District of Columbia is a party, and to contracts that are financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof, under any statute of the United States providing wage standards for such work. In neither case, is application of that statute dependent on the Secretary's wage determinations under the Davis-Bacon Act. Therefore, the Department has determined that CWHSSA continues to apply to contracts in the same manner as before the suspension of the Davis-Bacon provisions.

Pursuant to Department of Labor Regulations, 29 CFR Part 5, section 5.5(a), the contracting officer is required to insert in full in any covered solicitation or contract for construction the clauses listed in section 5.5. See also the Federal Acquisition Regulations at 48 CFR 22.407. Regulations, Part 5, permit modification of the contract clauses to meet the particular needs of an agency, provided, that such modifications are first approved by the Department of Labor. Therefore, with respect to those contracts affected by the presidential suspension of the Davis-Bacon and related Acts, the Department herein allows the omission of the labor standards clauses from the affected contracts with the exception of those clauses -- listed below -- which are necessary to enforce the provisions of the Copeland Act and the CWHSSA.

- 29 CFR Part 5, section 5.5(a)(2).
- 29 CFR Part 5, section 5.5(a)(3)(ii)(B)(2).
- 29 CFR Part 5, sections 5.5(a)(3)(ii)(C) and (D).
- 29 CFR Part 5, section 5.5(a)(5).
- 29 CFR Part 5, section 5.5(a)(6) modified as follows:

(6) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a) **as applied herein** and such other clauses The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all **applicable** contract clauses in 29 CFR 5.5.

- 29 CFR Part 5, sections 5.5(a)(7) through 5.5(a)(10).
- and 29 CFR Part 5, sections 5.5(b) and 5.5(c) in their entirety.

We recommend that the corresponding clauses of the Federal Acquisition Regulations be omitted or incorporated accordingly.

3 Dec 92

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for Contracting

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subject: [P] CLARIFICATION OF ACQUISITION LETTER 92-11

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FM HQDA WASH DC //SARD-PP//

TO AIG 12143

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SUBJECT: CLARIFICATION OF ACQUISITION LETTER 92-11

1. BY PRESIDENTIAL PROCLAMATION OF OCTOBER 14, 1992, PRESIDENT BUSH SUSPENDED THE PROVISIONS OF THE DAVIS-BACON ACT IN CERTAIN STORM AFFECTED AREAS OF FLORIDA, HAWAII AND LOUISIANA. SEE ALL AGENCY MEMORANDUM NO. 167. ALSO SUSPENDED WERE "THE PROVISIONS OF ALL OTHER ACTS PROVIDING FOR THE PAYMENT OF WAGES, WHICH PROVISIONS ARE DEPENDENT UPON DETERMINATIONS BY THE SECRETARY OF LABOR UNDER THE DAVIS-BACON ACT."

2. THE COPELAND ACT ANTI-KICKBACK PROVISIONS AND WEEKLY STATEMENT REQUIREMENTS APPLY TO CONSTRUCTION CONTRACTS INDEPENDENT OF THE ISSUANCE OR INCORPORATION OF DAVIS-BACON WAGE DETERMINATIONS. THE STATUTE -- BY ITS PLAIN LANGUAGE -- APPLIES TO CONTRACTS FOR CONSTRUCTION, PROSECUTION, COMPLETION OR REPAIR OF PUBLIC BUILDINGS OR PUBLIC WORKS OR BUILDINGS OR WORK FINANCED IN WHOLE OR IN PART BY

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LOANS OR GRANTS. THUS, NOTWITHSTANDING THE SUSPENSION OF THE DAVIS-BACON AND RELATED ACT REQUIREMENTS, THE PROVISIONS OF THE COPELAND ACT ARE STILL APPLICABLE TO THE FEDERALLY FUNDED AND ASSISTED CONSTRUCTION CONTRACTS IN THE HURRICANE AFFECTED AREAS. 3. SIMILARLY, THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA) OVERTIME PROVISIONS APPLY TO CONTRACTS WHICH REQUIRE OR INVOLVE THE EMPLOYMENT OF LABORERS OR MECHANICS UPON A PUBLIC WORK OF THE UNITED STATES, OF ANY TERRITORY, OR OF THE DISTRICT OF COLUMBIA OR TO ANY OTHER SUCH CONTRACTS, TO WHICH THE UNITED STATES OR ANY AGENCY OR INSTRUMENTALITY THEREOF, ANY TERRITORY, OR DISTRICT OF COLUMBIA IS A PARTY, AND TO CONTRACTS THAT ARE FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM, OR LOANS INSURED OR GUARANTEED BY, THE UNITED STATES OR ANY AGENCY OR INSTRUMENTALITY THEREOF, UNDER ANY STATUTE OF THE UNITED STATES PROVIDING WAGE STANDARDS FOR SUCH WORK.

IN NEITHER CASE, IS APPLICATION OF THAT STATUTE DEPENDENT ON THE SECRETARY'S WAGE DETERMINATIONS UNDER THE DAVIS-BACON ACT. THEREFORE, THE DEPARTMENT HAS DETERMINED THAT CWHSSA CONTINUES TO APPLY TO CONTRACTS IN THE SAME MANNER AS BEFORE THE SUSPENSION OF THE DAVIS-BACON PROVISIONS.

4. PURSUANT TO DEPARTMENT OF LABOR REGULATIONS, 29 CFR PART 5,

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SECTION 5.5(A), THE CONTRACTING OFFICER IS REQUIRED TO INSERT IN FULL ANY COVERED SOLICITATION OR CONTRACT FOR CONSTRUCTION THE CLAUSES LISTED IN SECTION 5.5. SEE ALSO THE FEDERAL ACQUISITION REGULATIONS AT 48 CFR 22.407. REGULATIONS, PART 5, PERMIT MODIFICATION OF THE CONTRACT CLAUSES TO MEET THE PARTICULAR NEEDS OF AN AGENCY, PROVIDED, THAT SUCH MODIFICATIONS ARE FIRST APPROVED BY THE DEPARTMENT OF LABOR THEREFORE, WITH RESPECT TO THOSE CONTRACTS AFFECTED BY THE PRESIDENTIAL SUSPENSION OF THE DAVIS-BACON AND RELATED ACTS, THE DEPARTMENT HEREIN ALLOWS THE OMISSION OF THE LABOR STANDARDS CLAUSES FROM THE AFFECTED CONTRACTS WITH THE EXCEPTION OF THOSE CLAUSES -- LISTED BELOW -- WHICH ARE NECESSARY TO ENFORCE THE PROVISIONS OF THE COPELAND ACT AND THE CWHSSA.

29 CFR PART 5, SECTION 5.5(A)(2).

29 CFR PART 5, SECTION 5.5(A)(3)(II)(B)(2).

29 CFR PART 5, SECTIONS 5.5(A)(3)(II)(C) AND (D).

29 CFR PART 5, SECTION 5.5(A)(5).

29 CFR PART 5, SECTION 5.5(A)(6) MODIFIED AS FOLLOWS:

(6) SUBCONTRACTS. THE CONTRACTOR OR SUBCONTRACTOR SHALL INSERT IN ANY SUBCONTRACTS THE CLAUSES CONTAINED IN 29 CFR 5.5(A) AS APPLIED HEREIN AND SUCH OTHER CLAUSES . . . THE PRIME CONTRACTOR SHALL BE

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RESPONSIBLE FOR THE COMPLIANCE BY ANY SUBCONTRACTOR OR LOWER TIER SUBCONTRACTOR WITH ALL APPLICABLE CONTRACT CLAUSES IN 29 CFR 5.5. 29 CFR PART 5, SECTIONS 5.5(A)(7) THROUGH 5.5(A)(10) AND 29 CFR PART 5, SECTIONS 5.5(B) AND 5.5(C) IN THEIR ENTIRETY.

5. THE PRECEDING PARAGRAPHS ARE EXCERPTS FROM AAM NO. 168, DATED NOVEMBER 12, 1992, ISSUED BY THE DEPARTMENT OF LABOR.

6. QUESTIONS REGARDING IMPLEMENTATION OF THESE EXCLUSIONS SHOULD BE DIRECTED TO MAJOR G. ALLAN SIRMANS AT (703) 693-4071.

BT