CECC-C

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
Washington, D.C. 20314-1000

ER 1180-1-8

Regulation
No. 1180-1-8

1 August 2006

Contracts
LABOR RELATIONS

Table of Contents

Chapter 1. GENERAL PROVISIONS ..... Para ..... Page

Purpose 1-1 1-1
Applicability 1-2 1-1
Distribution 1-3 1-1
References 1-4 1-1
Policy 1-5 1-2
Background 1-6 1-2
Responsibilities 1-7 1-3

Chapter 2. LABOR LAWS, REGULATIONS AND CONTRACT PROVISIONS

General 2-1 2-1
The Davis-Bacon Act 2-2 2-1
The McNamara-O'Hara Service Contract Act 2-3 2-1
The Walsh-Healey Act 2-4 2-1
The Contract Work Hours and Safety Standards Act 2-5 2-1
The Copeland Act 2-6 2-2
The Fair Labor Standards Act 2-7 2-2
The Miller Act 2-8 2-2
Executive Orders 2-9 2-2
Contract Clauses 2-10 2-3

Chapter 3. PRE-SOLICITATION ADMINISTRATION AND DETERMINATIONS

General 3-1 3-1
Rates to be Included in Solicitations 3-2 3-2
Classes of Employees 3-3 3-3
Wage Determinations (WDs) 3-4 3-3
Modifications and Supersedeas Determinations 3-5 3-4
Wage Determinations OnLine Program 3-6 3-5
DBA Covered Contracts with Extensions for Time and Price Adjustments 3-7 3-6
Prospective Contractor's Compliance with VETS-100 Reporting Requirement 3-8 3-7

This Regulation supersedes ER 1180-1-8 dated 1 August 2001

Chapter 4. COMPLIANCE PROCEDURES – DAVIS-BACON AND RELATED ACTS

General 4-1 4-1
Davis-Bacon Act.....4-2 4-1
Basic Hourly Rates and Fringe Benefits.....4-3 4-1
Classification of Workers and Minimum Basic Rates.....4-4 4-2
Piece-Rate Work.....4-5 4-3
Additional Classifications and Rates 4-6 4-4
Wage Rate Posting 4-7 4-4
Site of Work 4-8 4-5
Contract Work Hours and Safety Standards Act
(40 USC 327-333).....4-9 4-6
Overtime Under Collective Bargaining Agreements.....4-10 4-9
Fair Labor Standards Act (FLSA).....4-11 4-9
Copeland (Anti-Kickback) Act 4-12 4-10
Payroll Deductions 4-13 4-10
Apprentices and Trainees 4-14 4-11
Employment of Apprentices and Trainees 4-15 4-12
Evidence of Registration 4-16 4-12
Administration and Enforcement Procedure 4-17 4-13
Helpers 4-18 4-14
Content of Payrolls and Basic Records.....4-19 4-15
Statement of Compliance, DD Form 879 .....4-20 4-16
Submission of Payrolls.....4-21 4-16
Request for Authorization of Additional Classification
and Rate – SF Form 1444.....4-22 4-17
Instruction to Contractors.....4-23 4-17
Submission and Processing Requests.....4-24 4-18
Subcontracts (Labor Standards) 4-25 4-18
Physical Inclusion of Labor Clause in Subcontracts.....4-26 4-18
Undocumented Workers 4-27 4-19

Chapter 5. APPLICABILITY OF CONTRACT LABOR PROVISIONS TO VARIOUS SITUATIONS, CONDITIONS, AND WORK ACTIVITIES

General 5-1 5-1
Survey Crews.....5-2 5-1
Owner-Operators of Construction Equipment.....5-3 5-1

Operators of Rented Construction Equipment 5-4 5-2
Equipment Repair Activities 5-5 5-3
Capacity of Trucks 5-6 5-4
Furnishing Materials and Hauling Operations 5-7 5-4
Drilling Services 5-8 5-5
Carpet Laying and Installation of Draperies 5-9 5-5
Clean-up Work 5-10 5-5
Demolition Work in Relation to Construction.....5-11 5-6
Landscape Contracting 5-12 5-6
Painting and Decorating.....5-13 5-6
Public Utility Installation 5-14 5-6
Sewer Repair Services.....5-15 5-6
Steam and Sand Blast Cleaning 5-16 5-7
Supply and Installation Contracts.....5-17 5-7
Flaggers 5-18 5-8
Logging Operations.....5-19 5-8
Crews on Towboats and Pushboats Engaged in
Transportation and Tending Services 5-20 5-8
Removal of Asbestos-Containing Materials 5-21 5-9
Ship-Building, Alteration, Repair and Maintenance.....5-22 5-10
Air-Balance Engineers 5-23 5-10
Leases Involving Construction Activity 5-24 5-10
"Working Subcontractors" 5-25 5-10
Non-Federal Work-in-Kind Performed Pursuant to
Project Cooperation Agreements 5-26 5-11

Chapter 6. LABOR DISPUTES, WORK STOPPAGES, ACTIVITIES AND COMPLAINTS OF LABOR REPRESENTATIVES

General 6-1 6-1
Action at District Office Level 6-2 6-1
Action by Contractor.....6-3 6-2
Reporting Labor Disputes and Work Stoppages.....6-4 6-2
Labor Activities.....6-5 6-3

Chapter 7. ENFORCEMENT PROCEDURE AND REPORTING

General 7-1 7-1

Preconstruction Conference.....7-2 7-1
Routine Enforcement Activities 7-3 7-2
Quality Assurance Representative's On-the-Site Activities 7-4 7-2
Corrective Administrative Action on Nonaggravated or Nonwillful Violations 7-5 7-5
Action on Aggravated or Willful Violations 7-6 7-6
Records and Reports 7-7 7-7
Withholding of Funds from Contractor's Payment Estimates – Administrative Procedures 7-8 7-7

Chapter 8. AREA PRACTICE SURVEYS

General 8-1 8-1
Trade Classification Issues 8-2 8-1
Full Scale Area Practice Surveys.....8-3 8-3
Documenting the Area Practice Survey 8-4 8-3
Determining the Appropriate Schedule of Wage Rates ..8-5 8-4

Chapter 9. LABOR STANDARDS RESOURCES, INFORMATION SYSTEMS AND REPORTS

General 9-1 9-1
WDOL Labor Standards Information Resources 9-2 9-1
Contractor Industrial Relations Sub-Community of Practice 9-3 9-2
Matter Tracking System (MTS) 9-4 9-3
Resident Management System (RMS).....9-5 9-3
Semi-Annual Labor Standards Enforcement Report.....9-6 9-4

APPENDICES

APPENDIX A.... DD Form 879, Statement of Compliance
APPENDIX B.... WH-347 Form, Payroll
APPENDIX C.... Standard Form 1444, Request for Authorization of Additional Classification and Rate
APPENDIX D.... Standard Form 1413, Statement and Acknowledgement
APPENDIX E.... Preconstruction Conference Checklist
APPENDIX F ... Standard Form 1445, Labor Standards Interview
APPENDIX G.... ENG Form 3180-R, Contractor Payroll Record
APPENDIX H ... USDOL All-Agency Memoranda 130 and 131

CHAPTER 1 - GENERAL PROVISIONS

1-1. Purpose. Inasmuch as Reorganization Plan No. 14 of 1950 places primary responsibility for the enforcement of construction labor standards upon the contracting agencies, this ER is devoted primarily to this mission. This regulation is designed to provide basic guidelines for all Corps employees tasked with the administration and enforcement of statutory and contractual labor standards on construction contracts. Its primary aim is to affect a consistent and uniform enforcement program throughout the Corps. Achieving compliance with labor standards requires the exercise of ingenuity, initiative and cooperation on the part of all personnel involved with the program. With the exception of very complex and unusual problems, this ER contains the answers to questions that most generally arise in connection with contract labor relations functions. Official acquisition policy is found in the Federal Acquisition Regulation (FAR) and its supplements. If there is any conflict between the FAR system requirements and this regulation, the current FAR system rules apply.

1-2. Applicability. This regulation is applicable to all Major Subordinate Commands (MSC), districts, laboratories, centers, and field operating activities under the jurisdiction of the Chief of Engineers.

1-3. Distribution. Approved for public release; distribution is unlimited.

1-4. References.

a. 40 USC Sections 327-333; and 3141-3148

b. 29 CFR Parts 1,3,4 and 5

c. FAR Section 1.105, Subparts 22.3, 22.4 and 52.222

d. DFARS, Part 222

e. EFARS, Part 22

f. EP 415-1-260

g. Department of Labor (DOL) All Agency Memoranda Nos. 118, 123, 125, 130, 131, 141, and 157.

h. DOL Wage Appeals Board Decision Nos. 64-3, 76-6, 80-3, 82-8, 83-7, 85-16, 86-33, 90-20, 94-01 and 94-20, and Administrative Review Board Decision Nos 96-133

and 02-086.

i. Comptroller General Decision Numbers B-148076 and B-215023

j. Solicitor of Labor Opinion Letters DB-8, 9, 12, 22, 26, 40, and 45

1-5. Policy. The development and maintenance of good relations between management, labor, and the Corps of Engineers is required for the efficient and expeditious conduct of the Corps' construction mission. Accomplishment of this objective requires a continuous effort on the part of all personnel [1] assigned to construction activities. The proper enforcement of these provisions must be given the same consideration as all other requirements of the contract and specifications. We cannot emphasize too strongly the importance of our responsibilities in the administration and enforcement of these provisions. A successful program is dependent upon you who are responsible for the labor functions at each designated level. Your efforts to ensure that labor standards deficiencies are detected promptly and addressed in a responsive manner are essential elements in our service to the public.

1-6. Background.

a. The administration of the contract labor program within the Corps of Engineers is governed by the basic labor policy of the Department of Defense in Part 22 of the FAR. The program has been further implemented by Part 222 of the AFARS and EFARS and various circulars and regulations issued by the Chief of Engineers. Additionally, the Secretary of Labor has issued regulations implementing the labor statutes which are published in Title 29, Subpart A, Code of Federal Regulations.

b. The various labor laws were enacted by Congress to prevent exploitation of labor on Government contracts. The laws incorporated within the Corps of Engineers contracts afford each laborer and mechanic employed on the contract the right to receive a prescribed minimum rate subject to certain overtime requirements without subsequent rebate or "kickback." In addition to the statutes, many regulations have been issued as provided in the law itself. These regulations are also applicable to the contractors. Failure of a contractor to comply with the labor provisions, coupled with lax enforcement, results in expensive investigations which may require the imposition of penalties, termination of the contract, debarment, and, in some cases, criminal action. It should

[1] "Wherever, the word 'man', 'men' or their related pronouns appear, either as words or as parts of words (other than when referring to a specific individual) they have been used for literary purposes and are meant in their generic sense to include both female and male sexes."

also be noted that a contractor's disregard for labor standards obligations is frequently accompanied by a disregard for the technical provisions of the contract. In essence, quality assurance is a multi-faceted task.

c. Many labor relations problems involve interpretation of law, and for this reason, questions will arise in the field that are not covered in this regulation. Such problems should be brought to the immediate attention of the District Counsel and the District Labor Advisor.

1-7. Responsibilities.

a. Contracting Officer (CO). The enforcement of labor standards provisions is the responsibility of the CO; and adequate means of assuring compliance are provided by the contract and regulations of the Secretary of' Labor.

b. Contractors. The contract labor standards provisions apply to all contractors and subcontractors, regardless of their employment policies. The contractor is responsible for: procurement, supervision, and management of all labor required for the completion of the work; compliance with Federal labor standards applicable to his contract and regulations pertaining thereto; and subcontractors' compliance with the contract labor standards provisions.

c. Administrative Contracting Officers (ACO). To enable the District Commander to accomplish his mission, ACOs and their staffs must fully understand the basic requirements and perform specific duties to accomplish program objectives. Each ACO and his staff must realize at all times that the labor provisions are a part of the contract and must be viewed in the same light and enforced just as vigorously as all other provisions of the contract. Quality Assurance (QA) Representatives cannot, of course, observe every hour of work of each laborer or mechanic employed by a contractor and his subcontractors. Even if this were possible, it would be unnecessary and undesirable. The ACOs staff shall be responsible for:

(1) The performance of all required checking of prime and subcontractor's payrolls and field operations to determine their compliance with the labor standards provisions of the contract.

(2) The implementation of the instructions contained in this regulation to assure compliance by all contractors and subcontractors.

(3) The maintenance of the records and submission of the reports prescribed in this

regulation.

(4) The appropriate delegation of functions. Although the enforcement methods and procedures in this regulation are the responsibility of the ACO office, it does not mean that there might not be advantages in varying from this outline the functions shown to be performed by the ACO office or QA Representative as to more effectively use the available personnel. It must be clearly recognized, however, that only the QA Representative at the site of the work will have the knowledge and background necessary to perform certain activities of the enforcement procedures. With respect to "detail checking of payrolls," it is strongly recommended that it be performed regularly by an employee specifically delegated this responsibility.

d. Contractor Industrial Relations Specialist (CIRS). The CIRS or the District Labor Advisor as they are sometimes known is responsible for the administration of all labor standards programs within the district. The CIRS advises, assists and instructs USACE personnel on labor standards matters during all phases of the construction mission. Based on public expectations, statutory obligations, regulatory requirements, and organizational demands, the CIRS are essential to the success of the district's mission. In other words, the CIRS is responsible for "preventive industrial relations." That is, through pro-active measures, the CIRS seeks to prevent contractor non-compliance as well as disruption of the USACE construction mission.

(1) The CIRS will conduct full-scale investigations (when applicable or when requested by higher headquarters). The CIRS's investigation will be based on the guidelines contained within All-Agency Memorandum No. 118[2]. This memo furnished the DOL's "Investigation and Enforcement Manual With Respect to Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction." Although the DOL's Enforcement Manual has not been updated and much of the material has been revised due either to statutory amendment (i.e., elimination of the daily overtime requirement under CWHSSA) or regulatory revision (site of the work changes), it nonetheless provides a useful guide for such investigations.

(2) The CIRS also serves as the point of contact for any DOL-initiated investigations. The CIRS will coordinate such investigations and apprise USACE personnel of the status and findings of these investigations.

---

[2] All Agency Memorandum No. 118 is available on the WDOL.gov Library page (http://www.wdol.gov/library.html).

CHAPTER 2 - LABOR LAWS, REGULATIONS AND CONTRACT PROVISIONS

2-1. General. Each of the statutes and their implementing regulations discussed below reflect the Federal Government's commitment to a policy of labor protection. Enacted at different times and under different administrations, these statutes sought to eliminate two destabilizing tendencies in the Federal procurement process. First, the impetus toward wage-cutting was deemed unavoidable in a system predicated upon the award of contracts through competitive bidding to the lowest responsible, responsive bidder. Second, while monopsonist[3] pressures are not as pervasive as they perhaps once were, they are nonetheless a consideration at many of the remote facilities where the Corps performs. In other words, a single buyer of service, i.e., construction, is in a position of depressing bids and by extension, wages. These statutes, therefore, were designed to remove the wage-depressing tendencies noted above by establishing a floor below which the wage rate may not fall.

2-2. The Davis-Bacon Act (40 USC 3141-48) (DBA) applies to construction contracts in excess of $2,000 to which the Federal Government or the District of Columbia is a party. It specifies that not less than minimum wages be paid to the various classes of laborers and mechanics employed on a particular project based on the wages prevailing in the area as determined by the Secretary of Labor. PL 88-349 amended the Act as of July 2, 1964, to include fringe benefits in the "prevailing rate."

2-3. The McNamara-O'Hara Service Contract Act (41 USC 351-358) (SCA) applies to Federal contracts for services in the United States in excess of $2,500 through the use of service employees. Service employees include all employees working under a contract except those in executive, administrative or professional capacities as those terms are defined in 29 CFR 541. This definition therefore includes many "white collar" employees formerly excluded prior to the 1976 amendment to the Act. The Act requires minimum wages and fringe benefits as determined to be prevailing by the Secretary of Labor. The DOL has primary enforcement responsibility for this law.

2-4. The Walsh-Healey Act (41 USC 35-45) prescribes minimum wages to be paid contractor's employees on contracts in excess of $10,000 for the manufacture or furnishing of supplies. The DOL has not issued wage determinations under the Act for many years. Accordingly, the Fair Labor Standards Act minimum wage generally applies. Enforcement responsibility rests with the DOL.

2-5. The Contract Work Hours and Safety Standards Act (40 USC 327-333) (CWHSSA)

---

[3] Monopsony is defined as the domination of a market by a single buyer (i.e., the Federal Government).

applies to both service and construction contracts in excess of $100,000 and requires employees to be paid time and one-half for all hours worked in excess of 40 per week. The Act also contains certain health and safety standards.

2-6. The Copeland Act (40 USC 276c and 18 USC 874) makes it unlawful to induce, by force or otherwise, any person employed within the United States in the construction or repair of public works (including those financed in whole or in part by loans or grants from the United States) to give up any part of the compensation to which he is entitled under his contract of employment.

2-7. The Fair Labor Standards Act (29 USC 201) provides for the establishment of minimum wage and maximum hour standards, creates a Wage and Hour Division within the DOL for purposes of interpretation and enforcement (including investigations and inspections of Government contracts), and prohibits oppressive child labor. The Act applies to all employees, unless otherwise exempted, who are engaged in (1) interstate commerce or foreign commerce: (2) the production of goods for such commerce; or (3) any closely related process or occupation essential to such production. Enforcement responsibilities lie with the DOL.

2-8. The Miller Act (40 USC 270(a)) requires that before any contract exceeding $25,000 in amount for the construction, alteration, or repair of any public building, or public work, is awarded to any person, that person must furnish payment and performance bonds to the United States. The payment bonds are for the protection of all persons supplying labor and material. This allows workers not paid prevailing rates to collect against the Surety since they have no enforceable rights against the United States and cannot acquire a lien on a public building.

2-9. Executive Orders. Federal contract standards are also established by the President through the promulgation of Executive Orders. Generally, these Executive Orders require each agency of the Federal Government to incorporate certain clauses in Federal contracts. Among the most relevant Executive Orders are those noted below.

a. Executive Orders 11246, 11375 and 12086 provide that contractors and subcontractors will act affirmatively to ensure that applicants are employed, and that employees are treated equally during employment, without regard to race, color, religion, sex or national origin. The Secretary of Labor is responsible for the administration and enforcement of prescribed parts of these Orders, and the adoption of rules and regulations necessary to achieve their intended purposes. The head of each agency is responsible for ensuring that the requirements of this subpart are carried out within the agency, and for cooperating with and assisting the OFCCP in fulfilling its responsibilities. See FAR 22.8 for additional information. Construction contractors that hold a nonexempt government construction contract are required to meet the contract terms and conditions

for affirmative action requirements. The current goal for the utilization of women is 6.9% of work hours and applies to all of a contractor's construction sites regardless of where the Federal or federally assisted contract is being performed. This goal was originally published in the Federal Register of April 7, 1978, 43 FR 14899, 14900, as Appendix A. Pursuant to a Notice published in the Federal Register of December 30, 1980, 45 FR 5750, 85751, the 6.9% goal was extended indefinitely. The current goals for the utilization of minorities were published in the Federal Register of October 3, 1980, 45 FR 65979, 65984, as Appendix B-80. Questions regarding application of these goals should be directed to the DOL's Office of Federal Contract Compliance Programs.

b. Executive Order 13201 requires contractors to post notices in their plants, offices and work sites apprising affected workers of their right to seek a refund of their union dues if the subject union expends their payments on administrative activities unrelated to collective bargaining, contract administration, or grievance adjustment.

c. Executive Order 13202 prohibits federal agencies from the award of any construction contract which would (a) require or prohibit bidders, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction projects or (b) otherwise discriminate against bidders, offerors, contractors or subcontractors for becoming or refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations on the same or other related construction projects. Executive Order 13208 amended Executive Order 13202 to allow for the "grandfathering" of existing Project Labor Agreements (PLAs) under certain conditions.

2-10. Contract Clauses. Each of the above-noted labor protective statutes is incorporated within particular contracts depending upon the nature (construction/ service/supply) of the contract. To illustrate, listed below are those clauses which are generally required for construction contracts subject to the DBA. These clauses are further identified by the accompanying FAR references.

a. Notice to the Government of Labor Disputes (FAR 52.222-1)

b. Convict Labor (FAR 52.222-3

c. Contract Work Hours and Safety Standards Act-Overtime Compensation (FAR 52.222-4)

d. Davis-Bacon Act --- Secondary Site of the Work (FAR 52.222-5)

e. Davis-Bacon Act (FAR 52.222-6)

f. Withholding of Funds (FAR 52.222-7)

g. Payrolls and Basic Records (FAR 52.222-8)

h. Apprentices and Trainees (FAR 52-222-9)

i. Compliance with Copeland Act Requirements (FAR 52.222-10)

j. Subcontracts (Labor Standards) (FAR 52.222-11)

k. Contract Termination - Debarment (FAR 52.222-12)

l. Compliance with Davis-Bacon and Related Act Regulations (FAR 52.222-13)

m. Disputes Involving Labor Standards (FAR 52.222-14)

n. Certification of Eligibility (FAR 52.222-15)

o. Approval of Wage Rates (FAR 52.222-16)

p. Labor Standards for Construction Work – Facilities Contracts (FAR 52.222-17)

q. Certification Regarding Knowledge of Child Labor for Listed End Products (FAR 52.222-18)

r. Child Labor – Cooperation with Authorities and Remedies (FAR 52.222-19)

s. Prohibition of Segregated Facilities (FAR 52.222-21)

t. Previous Contracts and Compliance Reports (FAR 52.222-22)

u. Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction (FAR 52.222-23)

v. Pre-Award On-Site Equal Opportunity Compliance Evaluation (FAR 52.222-24)

w. Affirmative Action Compliance (FAR 52.222-25)

x. Equal Opportunity (FAR 52.222-26)

y. Affirmative Action Compliance Requirements for Construction (FAR 52.222-27)

z. Notification of Visa Denial (52.222-29)

aa. Davis-Bacon Act – Price Adjustment (None or Separately Specified Method) (FAR 52.222-30)

bb. Davis-Bacon Act – Price Adjustment (Percentage Method) (FAR 52.222-31)

cc. Davis-Bacon Act – Price Adjustment (Actual Method) (FAR 52.222-32)

dd. Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (FAR 52.222-35)

ee. Affirmative Action for Workers with Disabilities (FAR 52.222-36)

ff. Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (FAR 52.222-37)

gg. Compliance With Veterans' Reporting Requirements (FAR 52.222-38)

hh. Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR 52.222-39)

Guidance as to which clauses are to be incorporated within construction contracts subject to the DBA is set forth at FAR 22.407.

CHAPTER 3 - PRE-SOLICITATION ADMINISTRATION AND DETERMINATIONS

3-1. General. The issues and duties discussed herein apply generally to the CIRS and supporting staff such as Contractor Industrial Relations (CIR) Assistants and Clerks. However, close coordination with the operating elements such as Contracting, Engineering, Construction and/or Operations is critical to the successful performance of the tasks noted below. Many of the more contentious and protracted labor matters confronting districts may be directly attributed to a failure to communicate essential informational needs in a timely and effective manner during the pre-solicitation phase. The definitions listed below relate to key elements in the determination of applicability and coverage in the pre-solicitation phase.

a. Construction. Generally includes altering, remodeling, installation (where appropriate) on the site of the work items fabricated off-site, painting and decorating, the transporting of materials and supplies to, or from, the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work.

b. Substantial Construction. The word substantial relates to the types and quantity of construction work to be performed and not merely to the total value of the contract. A determination as to whether to include the construction labor standards and clauses is keyed to the following considerations:

(1) The contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at the contract date that a substantial amount of construction work will be necessary for the performance of the contract;

(2) The construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract; and

(3) The requirements are otherwise applicable to the contract.

c. Building Construction. Includes construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment or supplies; all construction of such structures; the installation of utilities and of equipment, both above and below grade levels; as well as incidental grading, utilities and paving. Such structures need not be "habitable" to be building construction. Also, the installation of heavy machinery and/or equipment does not generally change the project's character as a building.

d. Heavy Construction. Includes those projects that are not properly classified as either "building," "highway," or "residential." Unlike these classifications, heavy construction is not a homogenous classification. Because of this catch-all nature, projects within the heavy classification may sometimes be distinguished on the basis of their particular project characteristics, and separate schedules may be issued for dredging projects, water and sewer line projects, dams, major bridges, and flood control projects.

e. Highway Construction. Includes construction, alteration or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy, construction.

f. Residential Construction. Includes the construction, alteration or repair of single family houses, apartment buildings of no more than four stories in height. This includes all incidental items such as site work, parking areas, utilities, streets, and sidewalks.

3-2. Rates to be Included in Solicitations. Wage determinations (WDs) issued by the DOL frequently contain more than one schedule of rates, i.e., such as those outlined above. When such multiple schedules are incorporated into the construction contract there is introduced an element of doubt as to the proper schedule or schedules to be used on various; phases of the work. It is necessary to eliminate any possible uncertainties with respect to the application of the wage rates prior to contract negotiations or opening of bids. Accordingly,

a. Where only one type of work such as building construction is contemplated under a given contract, include only the schedule of rates for that type (such as building) in the advertised specifications.

b. Where a proposed contract involves more than one type of work, such as both building and highway, and the applicable wage decision specifies separate schedules for these various types of construction work, the advertised specifications should identify, as specifically as possible, the schedules which will apply to the particular work items.

c. Where the proposed construction involves primarily building construction and, based on area practice, the DOL, in addition to the building schedule, also issues a schedule of rates for related incidental paving and utility work, the work to which such schedules are applicable should be clearly indicated in the advertised specifications.

d. COs should make every effort to keep informed as to area practice, not only to assure contract compliance, but also to assure fairness to all prospective bidders on contracts to be awarded. Each determination of area practice should be supported by a record of written findings and an analysis of the record leading to that determination.

e. Experience indicates that it is generally better to include an entire schedule, e.g., highway or building, rather than to select individual classifications for incorporation within the specifications.

3-3. Classes of Employees. Because of the differences in coverage of labor laws, construction employees will usually be divided into two basic groups, manual and nonmanual employees.

a. Manual Employees. The DBA applies to construction laborers and trades craftsmen (mechanics), including apprentices, trainees, and working foremen (these latter workers must be listed on the payrolls in the same manner as those they supervise (hours worked, hourly rate paid, etc.)).

b. Nonmanual Employees. The DBA does not apply to nonmanual employees, including supervisory, engineering, architectural, clerical, and administrative personnel. Also included in the nonmanual class and thus not subject to the Act are factory representatives, technical engineers, scientific workers and watchmen. It is noted, however, that although the DBA does not apply to watchmen, the Contract Work Hours and Safety Standards Act does apply to watchmen and guards for purpose of overtime compensation.

3-4. Wage Determinations (WDs). Two basic types of prevailing-wage rates are established by the DOL: general WDs, also known as area determinations, and project WDs. Less frequently issued and reflecting elements of both area and project determinations are installation WDs. It is critical that the CIRS be cognizant of the distinctions among these determinations. The differences among them extend not only to the method of obtaining the determinations but also to their use and terms of effectiveness.

a. General WDs reflect those rates determined by the DOL to be prevailing in a specific area for the type of construction described. The general WDs contain no expiration date and remain in effect until modified, superseded, or withdrawn. These determinations are usually issued whenever the wage patterns for a given location, for a particular type of construction, are well-settled and it appears that there will be a recurring need for determined rates. These determinations are available from various sources. Electronic (on-line) access to these WDs is available through the Wage Determinations OnLine system (www.wdol.gov).

b. Project WDs are issued at the specific request of a contracting agency; are applicable to the named project only; and expire 180 calendar days from the date of

issuance unless an extension of the expiration date is requested by an agency and approved by the DOL. These determinations are requested by the agency through the use of SF 308, Request for Wage Determination and Response to Request[4]. The DOL also issues installation type determinations which would be applicable to a particular installation where there is, or it is anticipated that there will be, substantial construction activity. In order to accommodate an agency's request for an installation determination, the DOL requires that the agency furnish a detailed listing of the anticipated projects for which the installation determination would be applicable.

c. It is critical that maximum effort be undertaken to anticipate the need for WDs and request them in a timely manner. It is thus recommended that the requesting officials coordinate closely with the Engineering Division.

d. The CO should be cognizant of the expiration date of project or installation determinations. New WDs should be requested if it is anticipated that a determination will expire before contract award. However, there may be unanticipated circumstances (i.e., bid protests) which preclude contract award before the expiration of the wage determination. While FAR 22.404-5 contains specific guidance in these matters, Figure 3-1, which follows Chapter 3, outlines the general procedure for extension requests.

e. If a project is contemplated in an area where problems concerning wage rates and classifications are known or may exist because they are controversial in nature (e.g., where unions claim building rates apply and contractors or contractors' associations contend heavy or highway rates apply), or where unusual circumstances prevail, a report to Headquarters, USACE, Attn: CECC-C, should be prepared giving pertinent data relating to the project, well in advance of the need for a wage determination. Such report will include all available wage data, plans, specifications, a map pinpointing the exact site location(s), and a statement as to the anticipated schedule of bid opening and award. Such report will be furnished the DOL by CECC-C so as to minimize the probability of delay due to controversy during the advertising and bid opening period.

3-5. Modifications and Supersedeas Determinations. General and project WDs may be modified by the DOL in order to ensure that prevailing wage rates are maintained. A modification may specify only the items being changed, or may be in the form of a supersedeas wage determination. It is critical that those tasked with the responsibility of furnishing WDs ensure that these modifications be forwarded to the specifications personnel. Particular attention is drawn to 29 CFR 1.6 which relate to the Agency's responsibilities regarding the effective dates of modifications. While CIR personnel should be totally cognizant of these requirements, the principal (and often, most

[4] SF 308 is available on the WDOL.gov Library Page (http://www.wdol.gov/library.html).

troublesome) requirements are outlined below:

a. "10 Day Rule" - Section 1.6(c) - requires contracting agencies to accept modifications to WDs 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 documented in the contract file, and submitted to the Wage-Hour Administrator upon request.

b. "90 Day Rule" - Section 1.6(c)(3)(iv) - 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.

c. Monitoring of DBA WD modifications to ensure compliance with the above requirements may be facilitated through the Alert Service feature of the WDOL program discussed in paragraph 3-6 below.

3-6. Wage Determinations OnLine (WDOL) Program. As a result of a collaborative e-Government initiative involving the Department of Labor (DOL), the Office of Management and Budget, the General Services Administration, the Department of Defense (DoD) and the National Technical Information Service, a single website (www.wdol.gov) has been established allowing for access to both DBA and SCA WDs. Based in large measure upon the success of the on line program managed by the Corps of Engineers Automated Legal System, the WDOL program provides even greater access to labor standards information while introducing a number of features that will facilitate contracting requirements while preserving labor standards protections.

a. Application. While the WDOL program is designed to be user-friendly in a menu-driven environment, it is strongly recommended that USACE personnel familiarize themselves with both the on line "User's Guide" as well as this ER to ensure the appropriate application of labor standards to USACE contracts. Neither the WDOL program nor its accompanying "User's Guide" relieve the CO or other program users of the requirement to carefully review the contract or solicitation, federal acquisition regulations, and/or DOL regulations related to these actions. Where the CO selects a DBA WD using the WDOL Program and DOL later determines, whether before or after contract award, that the appropriate DBA WD was not incorporated in a covered contract, the CO, within 30 days of notification by DOL, shall include in the contract the applicable WD issued by DOL (see Title 29 CFR Part 1, Section 1.6(f); and FAR Part 22, Subsection 22.404-9).

b. Alert Service Option. To ensure that the CO (or any other interested party) is

aware of revisions made by DOL to DBA WDs selected for a specific contract action, the WDOL program user may register for automatic email notification of such revisions. Upon selection of an appropriate DBA WD, the user will be offered the opportunity to request email notice of future revisions for a specific period of time, or until a specific date. USACE COs are strongly encouraged to request this automatic notification process in order to be aware of timely revisions applicable to specific contract actions.

3-7. DBA Covered Contracts With Extensions for Time and Price Adjustments. COs should also be aware of the requirement at FAR 22.404-12 which require the incorporation of certain clauses (FAR 52.222-30, 52.222-31, or 52.222-32) in DBA-covered contracts that include provisions to extend the term (length) of the contract by option, extension or otherwise. Contracts that typically require one of these clauses include indefinite delivery indefinite quantity (IDIQ), and maintenance of facilities contracts that require some construction work such as military family housing maintenance and base operating services. If the contract is for completion of a specific construction project ("build the building", "build the road", etc.) regardless of the amount of time the project will take to complete (i.e. 3-months or 3-years); then these clauses to update the wage determination(s) and to allow for the adjustment of the contract price are **not** appropriate or required.

a. If a contract with an option to extend the term of the contract has indefinite-delivery or indefinite-quantity construction requirements, the CO must incorporate the WD incorporated into the contract at the exercise of the option into task orders issued during that option period. The WD will be effective for the complete period of performance of those task orders without further revision.

b. The CO must include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of the Government, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current WD at the exercise of an option to extend the term of the contract:

(i) The CO may provide the offerors the opportunity to bid or propose separate prices for each option period. The CO must not further adjust the contract price as a result of the incorporation of a new or revised WD at the exercise of each option to extend the term of the contract. Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

(ii) The CO may include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. At the time of option exercise, the CO must incorporate a new WD into the contract, and must apply the specific pricing method

to calculate the contract price adjustment. An example of a contract pricing method that the contracting officer might separately specify is incorporation in the solicitation and resulting contract of the pricing data from an annually published unit pricing book (*e.g.,* the R.S. Means Cost Estimating System, or the U.S. Army Computer-Aided Cost Estimating System), which is multiplied in the contract by a factor proposed by the contractor (*e.g.,* .95 or 1.1). At option exercise, the CO incorporates the pricing data from the latest annual edition of the unit pricing book, multiplied by the factor agreed to in the basic contract. The CO must not further adjust the contract price as a result of the incorporation of the new or revised wage determination.

(iii) The CO may provide for a contract price adjustment based solely on a percentage rate determined by the CO using a published economic indicator incorporated into the solicitation and resulting contract. At the exercise of each option to extend the term of the contract, the CO will apply the percentage rate, based on the economic indicator, to the portion of the contract price or contract unit price designated in the contract clause as labor costs subject to the provisions of the DBA. The CO must insert 50 percent as the estimated portion of the contract price that is labor unless the contracting officer determines, prior to issuance of the solicitation, that a different percentage is more appropriate for a particular contract or requirement. This percentage adjustment to the designated labor costs must be the only adjustment made to cover increases in wages and/or benefits resulting from the incorporation of a new or revised WD at the exercise of the option.

(iv) The CO may provide a computation method to adjust the contract price to reflect the contractor's actual increase or decrease in wages and fringe benefits (combined) to the extent that the increase is made to comply with, or the decrease is voluntarily made by the contractor as a result of incorporation of, a new or revised WD at the exercise of the option to extend the term of the contract. Generally, this method is appropriate for use only if contract requirements are predominately services subject to the Service Contract Act and the construction requirements are substantial and segregable. The methods used to adjust the contract price for the service requirements and the construction requirements would be similar.

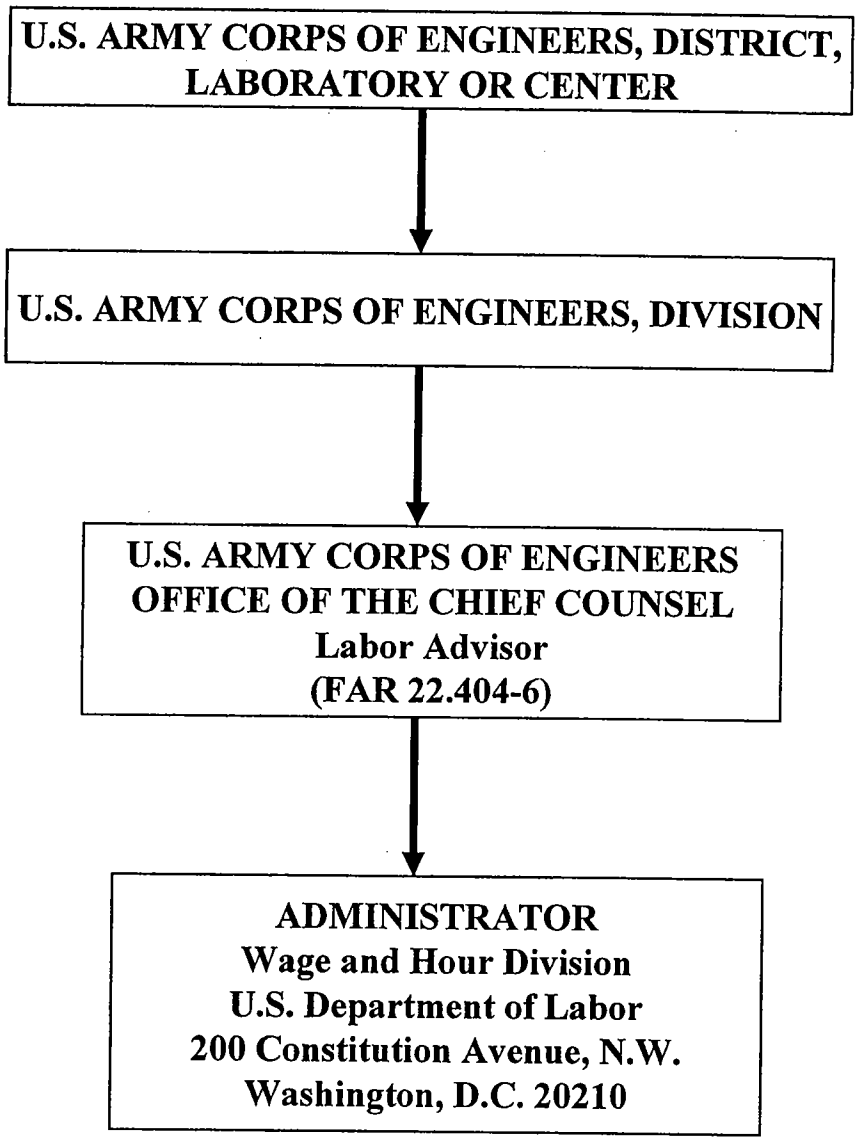
3-8. Prospective Contractor's Compliance with VETS-100 Reporting Requirement. One of the contracting agency's pre-award obligations is to ensure that prospective contractors have complied with certain Affirmative Action reporting requirements as described below.

a. Any contractor or subcontractor with a contract of $25,000 or more with the Federal Government must take affirmative action to hire and promote qualified Special disabled veterans, veterans of the Vietnam-era and any other veterans who served on

active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. Contractors and subcontractors with openings for jobs, other than executive or top management jobs, must list them with the nearest State Job Service (also known as State Employment Service) office. The requirement applies to vacancies at all locations of a business not otherwise exempt under the company's Federal contract. Qualified Vietnam-era and special disabled veterans receive priority for referral to Federal contractor job openings listed at those offices. The priority for referral is not a guarantee that referred veterans will be hired. Federal contractors are not required to hire those referred, but must have affirmative action plans. Contractors with 50 employees and a $50,000 contract must have a written affirmative action plan. They must be able to show they have followed the plans and that they have not discriminated against veterans or other covered groups. They also must show that they have actively recruited Special disabled veterans, veterans of the Vietnam-era and any other veterans who served on active duty during a war on in a campaign or expedition for which a campaign badge has been authorized and disseminated all information internally regarding promotion activities.

b. As provided by FAR 22.1308(b), covered employers must file an annual VETS-100 report, which shows the number of target veterans in their work force by job category, hiring location, and number of new hires, including targeted veterans hired during the reporting period and the maximum number and minimum number of employees of such contractor during the period covered by the report. Instructions, information and follow-up assistance is provided to employers who do not understand the reporting and other legal requirements.

c. USACE personnel tasked with ensuring prospective contractor compliance with this obligation may access the DOL's Database of contractors having filed the required VETS-100 report at http://vets100.cudenver.edu.



Reference: 29 CFR 1.6(a)(1)
29 CFR 1.6[c](3)(iv)
FAR 22.404-5

Figure 3-1. Processing a request for extension of wage determination that expires after bid opening but prior to contract award

CHAPTER 4 - COMPLIANCE PROCEDURES - DAVIS-BACON AND RELATED ACTS

4-1. General. This chapter deals with the scope and application of those contract labor provisions which affect most directly the District Commander and his staff's role in the enforcement program. It includes discussion of pertinent statutory language, rulings of the Solicitor of Labor, requirements of regulations, and violations most commonly experienced. Therefore, this chapter provides guidance for enforcement purposes. Each district should maintain a continuing effective program which shall include:

a. Training appropriate contract administration, labor relations, quality assurance, and other labor standards enforcement personnel in their responsibilities.

b. Assuring that contractors and subcontractors are informed, prior to commencement of work, of their obligations under the labor standards provisions of their contracts.

c. Adequate payroll review, on site surveillance and employee interviews to determine compliance, and prompt initiation of corrective action when required.

d. Prompt investigation and disposition of complaints.

e. Prompt submission of all reports required by FAR 22.406-8.

f. Periodic review of field enforcement activities to assure compliance with applicable regulations.

4-2. Davis-Bacon Act. Of the statutes involved, the DBA is perhaps the most controversial. Its application and certain rulings as to its coverage of some activities have generated much discussion in the construction industry in recent years. It is therefore not practicable to attempt to treat in this regulation the many situations which could arise because they involve coverage questions of a borderline nature which must be considered on a case by case basis. Such cases should be submitted to the District Labor Advisor as early as possible. The provisions of the DBA apply to contracts in excess of $2,000, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works. The Act requires that every such contract contain certain stipulations concerning the rate of wages to be paid laborers and mechanics, and requirements to be met by contractors and subcontractors with respect to the payment of wages earned.

4-3. Basic Hourly Rates and Fringe Benefits. All wage determination decisions of the Secretary of Labor set forth the minimum basic hourly rates to be paid the various classes of workers employed by contractors and subcontractors on the contract work. In

addition to such basic rates, some decisions also specify certain types of fringe benefits which must be paid. The wage decisions in each contract must be referred to because some decisions do not specify any fringe benefits, some decisions specify fringe benefits for some but not all classes of workers and some decisions specify fringe benefits for all classes of workers. Also, there is considerable variation in the type and amount of fringe benefits in wage decisions applicable to different areas as well as different kinds of construction. Therefore, each wage decision in a contract must be studied carefully with particular attention to modifications to the wage decision which may have been incorporated by amendment.

a. Payment of Basic Hourly Rates and Fringe Benefits. The DBA clause in the contract explains how the contractor may discharge his obligation to workers in any classification for which the wage decision contains only a basic hourly rate, or both a basic hourly rate and fringe benefits. The method and/or combination of methods by which a contractor discharges his obligation for payment of fringe benefits will depend upon whether or not he is obligated pursuant to approved funds, plans or programs to make payments (contributions) to funds set up and administered for purpose of the particular fringe benefits. Typical is where a contractor is signatory to labor agreements with unions and such agreements obligate the contractor to make payments to trust funds set up, for example, for pensions, health and welfare, and vacations. Some contractors (generally those who operate non-union) do not participate in plans or programs as just mentioned; however, they must still pay the fringe benefits to workers in any classification for which the wage decisions contain fringe benefits. In such cases, the fringe benefits must be paid in cash (or included in payroll check) to the workers in addition to other wages they have earned.

b. Payroll Information. For details concerning what information should be shown on contractor's weekly payrolls, and statement of compliance to be submitted with payrolls, see Paragraph 4-19.

4-4. Classification of Workers and Minimum Basic Rates. Experience has shown that the most common violation of the DBA is the improper classification of workmen. It must be stressed that the workers be classified according to, and in conformance with, the work they perform. The contractor is in violation of the Act when he pays a workman at a wage rate less than that contained in the contract. If an individual workman is utilized in performing work of more than one classification, he must be paid not less than the contract minimum rate applicable to the respective classifications. In such instances the contractor's payroll and payroll records must show clearly that the workman's total wages have been computed on the basis of not less than the respective contract minimum rates. There may be instances when a workman performs work within two or more trade classifications, each of which are performed intermittently or only occasionally. In such instances the contractor may elect to pay only one rate for all work performed. The

payment of one rate is permissible only if the workman is paid not less than the contract minimum rate applicable to the classification with the highest rate in which he works. The payment of one rate under the above circumstances is considered acceptable compliance with the minimum rate requirement of the Act; however, the payroll and payroll records must reflect the classifications of work performed.

a. Working Foremen. Experience has also shown that some contractors pay some key employees on a weekly or monthly basis and such salary is paid year-round whether they work or not. Generally, those key employees are supervisory personnel in the contractor's organization who are also experienced equipment operators or mechanics. There may be occasions when a contractor, for lack of work elsewhere, will use those regular salaried employees as operators or mechanics on Government work which is subject to the DBA. As a general rule, working foremen who devote more than 20% of their time during a workweek to mechanical or laborer duties, are laborers and mechanics for the time so spent. Accordingly, when they perform covered work, i.e., work of a laborer or mechanic, the payroll must show the classifications of work performed, daily and weekly number of hours worked, as well as all other required payroll data. It should be noted that a weekly salary is permissible and may be paid for non-manual (supervisory) work. In cases where the employee performs both covered and non-covered work in the same pay period, compliance with the DBA minimum wage rate requirement as well as weekly overtime compensation requirements can be determined only by showing the covered and non-covered work on separate lines on the payroll. Therefore, one line should show the daily hours worked and wages paid for supervisory work, and one line should show the daily and weekly hours worked as a laborer or mechanic with wages computed on an hourly rate basis.

b. Self-Employed Contractors. The statutory language of the DBA makes it clear that Congress intended that individuals performing the work of laborers and mechanics on construction sites be guaranteed the prevailing wage rate "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics... " The requirement in All-Agency Memorandum 123 for the prime contractor to list officers/owners of a subcontractor corporation, partnership, or proprietorship, who are themselves performing the work of laborers and mechanics on the prime contractor's payroll records was withdrawn by All-Agency Memorandum 125. However, as a practical matter, the prime contractor would have to be able to demonstrate in some manner that the subcontract price equaled or exceeded the applicable prevailing wage rate for the number of hours the owner/partner worked as a laborer or mechanic on a Davis-Bacon covered contract, and that the owner/partner was, therefore, paid the proper rate.

4-5. Piece-Rate Work. The payment of employees on a piece-work basis is not, of itself, contrary to the DBA. However, there have been instances where contractors have

adopted the piece-work procedure for the apparent purpose of avoiding or minimizing record keeping. This is in disregard of their contractual and statutory obligation to assure that their employees are paid not less than the amounts due them computed on the basis of the hours worked at the prescribed wage rates.

a. Contractors Responsibility. Notwithstanding any piece-work agreement with an employee, contractors subject to the DBA must keep adequate wage and hour records to demonstrate compliance with such act as well as all other labor standards provisions.

b. Advice to Contractors. During preconstruction conferences, contractors and subcontractors should be questioned as to whether they intend to employ any workers on a piece-rate basis. (Prime contractors will be advised at that time that it is their responsibility to inform all subcontractors who are not represented at such conferences of the above.) If the contractor and subcontractors state that no piece-work hiring arrangements will be used on the contract work, no detailed discussion is necessary; however, if they state that they plan to pay on a piece-rate basis or there is indication that they might, they must be advised that their piece-work hiring arrangements will have to be reported to the District Labor Relations Advisor for determination regarding compliance with all the contract labor standards provisions and particularly the maintenance of adequate basic time and payroll records. The contractors will be further advised that their reports on such hiring arrangements must identify all workers involved, describe the specific work to be performed and materials and tools to be utilized, list the piece rates to be paid, and describe how and in what form the basic time and payroll records will be maintained.

c. Field Enforcement Activities. All contract administration personnel and particularly those responsible for on-site surveillance and payroll checking, should watch for piece-work hiring arrangements. When such arrangements are found to exist and have not been reported by the contractor in accordance with the above, the contractor will be informed to do so immediately.

4-6. Additional Classifications and Rates. The DBA clause states that the CO shall require that any class of laborers or mechanics not listed in the wage decision and which is to be employed on the contract shall be classified or reclassified to conform to the wage decision. For details concerning the administrative action to be taken by contractors and government personnel see Paragraphs 4-22 through 4-24 of this regulation.

4-7. Wage Rate Posting. The contract provision requires that a copy of the wage rates be posted at the site of the work. This is mandatory by the express language of the law, which says, "... the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work... " In this connection,

frequently there are work sites where both the prime and one or more subcontractors are working. Sometimes the employees of the subcontractors work in an area on the site which is a considerable distance from the operations of other groups of employees (e.g., constructing ridges, dams, reservoirs, sodding operations) and there is no occasion for them to mix with other groups. Under such circumstances, the wage rates must be posted so as to be in a prominent and easily accessible place to them. Thus, a sufficient number of postings of wage rates on each work site will depend upon the circumstances. Display of WH Publication 1321, "Notice to Employees Working on Federal or Federally Financed Construction Projects" is a contract requirement. It is available through the DOL's website at www.dol.gov/esa/programs/dbra/wh1321.htm and should be posted with the DBA contract WD. Each poster at a job site should have printed in the space provided the name of the ACO or a member of his staff designated by him, together with the location of his office, rather than the name and address of the CO. ACO Offices should maintain a sufficient supply of posters to issue to all contractors.

4-8. Site of Work. The wage requirements of the DBA clause apply to all mechanics and laborers employed or working directly upon the site of the work. The meaning of the words "directly upon the site of the work" has been extremely contentious requiring careful consideration of the facts in each instance.

a. The DOL's implementing regulations were revised in December of 2000 to reflect the findings in three U.S. Court of Appeals decisions relating to the DOL's regulatory definition of "site of the work." In both Building & Construction Trades Dept., AFL-CIO v. United States Department of Labor Wage Appeals Board and Midway Excavators Inc., 932 F.2d. 985 and Ball, Ball and Brosamer, Inc. v. Robert Reich et al., 24 F3d 1447, the Court of Appeals for the D.C. Circuit concluded that the DOL's long-standing "functional" test for determining the "site of work" conflicted with the Act's "geographic" standard. In L.P. Cavett Company v. U.S. Department of Labor, 932 F2d 985, the Court of Appeals for the Sixth Circuit followed the D.C. Circuit in holding that the prevailing wage protections afforded by the DBA were limited to those laborers and mechanics employed directly upon the site of the work. Based on these decisions, the DOL will now limit DBA coverage of off-site, dedicated support facilities to those that are either adjacent or virtually adjacent to the construction location. The DOL in their revision of the regulations at 29 CFR 5.2, however, declined to provide either a definition of "virtual adjacency" or examples illustrating covered and non-covered projects.

b. The DOL's Definition of the "site of the work". The DOL's regulations (29 CFR 5.2(l) now define "site of the work" as follows.

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the

performance of the contract or project;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

c. "Secondary site of the work." In their December 2000 regulatory revisions, the DOL noted any other site where a significant portion of the building or work is constructed would be subject to the DBA provided that the secondary site is established specifically for the performance of the contract or project. This does not cover the manufacture or sale of construction material to be used at the site, but only actual construction that is unique and integrally related to the final building or work.

d. Coverage questions. As a result, it is recommended that questions regarding coverage of possible off-site operations should be discussed during preconstruction conferences. Contractors should be questioned about their plans regarding work to be subcontracted and how they propose to conduct operations involving features of the work which lend themselves to an off-site type of operation. All unresolved questions regarding coverage of off-site operations must be referred to the District Labor Relations Advisor together with the facts and circumstances in each case.

4-9. Contract Work Hours and Safety Standards Act (40 USC 327-333) is the Federal law applicable to Government construction contracts requiring the payment of overtime compensation to laborers and mechanics for all hours worked in excess of forty per workweek. The contract provisions apply to all laborers and mechanics, including apprentices and trainees, and watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated by the contract. Also, for purposes of the Act, the term laborers and mechanics includes workmen performing services in connection with dredging or rock excavation in any river or harbor

of the United States, but does not include any employee employed as a seaman. As stated above, watchmen and guards are included under the coverage of the Act. Thus, for purpose of enforcement of contract labor provisions, they must be paid overtime compensation, but as previously noted, watchmen and guards are not considered as laborers and mechanics within the meaning of the DBA. Consequently no such classifications or wage rates are contained in the Secretary of Labor's Wage Rate Decisions pursuant to the DBA for construction contracts. This means, as to watchmen and guards, for purposes of overtime compensation, they must be paid one and one-half times their basic or "regular" rate of pay as noted below.

a. Hours of Work - A calendar day is from midnight to midnight; a standard work week is seven consecutive calendar days.

b. Basic Rate of Pay - For purposes of computing the CWHSSA premium, the basic rate of pay is the same as the "regular" rate of pay under the FLSA (see 29 CFR 5.14 (c); also Masters v. Maryland Management Company, 493 F. 2d 1329).

c. Methods of Computing Overtime Compensation.

(1) For all overtime hours worked, covered employees must receive compensation at a rate not less than one and one-half times the basic rate of pay.

(2) There are two methods used by contractors to compute compensation for overtime work. The one most commonly used is to multiply the total regular or straight time hours by the basic or straight time hourly rate, and then multiply the total overtime hours by a rate that is one and one-half times the basic rate, the sum of which is the worker's total gross earnings. The other methods is to multiply the total of all hours worked (regular and overtime hours) by the basic hourly rate, and then multiply the total overtime hours by one half the basic rate, the sum of which is the worker's total gross earnings. Thus, either method results in the same gross earnings and satisfies the contract requirements with respect to overtime compensation.

(3) It should be noted that the DOL has ruled that the DBA requires the payment of fringe benefits for all hours, including overtime hours (WAB Case No. 83-7, G & C Enterprises).

(4) To illustrate the above, a wage decision may specify that a particular classification requires the payment of a basic hourly rate of $8.00 and fringe benefits of $4.00 for a total hourly rate of $12.00. To compute the total wages due an employee who has worked 41 hours in a week, the contractor would first multiply the total rate (basic plus fringes) by the hours worked, i.e., $12.00 X 41 = $492.00. Note that fringe benefits have been included. To compute the overtime premium due under the CWHSSA,

multiply the $8.00 basic hourly rate by one-half, i.e., $8.00 x .5 = $4.00.

d. Employment Under One or More Contracts.

(1) When an employee works for more than one employer under the same contract (e.g., the prime and subcontractors) all hours worked by the employee must be counted for purpose of computing overtime compensation even though the employers are disassociated and separate.

(2) When the employee works for the same contractor under two or more separately awarded contracts, the weekly hours worked under each contract must be combined in computing overtime compensation.

(3) Where two contracts are awarded separately to two different and completely disassociated contractors, and when an employee works not more than 40 hours per week under each contract but in excess of such weekly hours under both, overtime compensation need not be paid.

(4) As distinguished from subparagraph (3) above, if there is an arrangement between the two employers with respect to the employment, or if the contractors are under common control or direction, the combined weekly employment must be counted for the purpose of computing the required overtime compensation.

e. Detection and Reporting Violations.

(1) ACOs shall, immediately upon the detection of any violation, notify the District Labor Advisor who will make such additional investigation necessary to determine the appropriate course of action to be taken by the CO.

(2) All correspondence with contractors regarding CWHSSA violations, withholding of liquidated damages, and restitution payments resulting from violations will be initiated by the District Labor Advisor for the signature of the CO.

f. Contractor's Right of Appeal.

(1) Section 104 of the Act provides that any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages shall have the right, within 60 days thereafter, to appeal to the head of the agency for which the contract work is done.

(2) Such section also provides that the Agency Head shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination, or if it is found that the sum determined is incorrect or that

the contractor or subcontractor violated the provisions of the Act inadvertently, notwithstanding the exercise of due care on his part or that of his agents, recommendations may be made to the Secretary of Labor that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages.

g. Notification to Contractors Regarding Violations, and Assessment of Liquidated Damages.

(1) The instructions contained in FAR 22-406-8 are applicable here. As noted above, where the CO's notification to the contractor includes an assessment of liquidated damages, the contractor shall be advised that he may request relief from such assessment. If the contractor does not appeal the proposed assessment within 60 days of such notification, the liquidated damages are assessed automatically.

(2) In those cases requiring the preparation of a CO's Report with recommendations as to the disposition of liquidated damages, the report should include the CO's notification as well as the contractor's request for relief from the proposed assessment. Figure 4-1, which follows Chapter 4, is a schematic representation of the general process of CWHSSA liquidated damages notification and assessment.

4-10. Overtime Under Collective Bargaining Agreements. Many collective bargaining agreements between employers and labor organizations provide for premium pay on certain days of the week such as Saturday and Sunday and specific holidays. In some cases the premium rate is double-time after eight hours and on certain particular days. Under no circumstances will a government representative require a contractor to pay more than the overtime rate required by the contract but at the same time will not interfere with an employer paying in excess of the rate required by the contract.

4-11. Fair Labor Standards Act (FLSA). The Fair Labor Standards Act requires payment of time and one-half for work in excess of 40 hours in any one week. It is a part of the general labor law of the U. S. and it may apply to some construction contracts and other operations and business of contractors even though it is not included in the contract. Whether or not it applies depends upon the facts of each case. Since the Corps of Engineers' function is limited to enforcement of the labor provisions in the contract, it does not include any administrative duties directly related to enforcement of the Fair Labor Standards Act. Similarly, the Corps of Engineers has no authority to issue advice as to the application of this Act to a contract. The DOL is the designated government agency for administering the Fair Labor Standards Act, for making administrative rulings as to coverage, and for receiving employee complaints under the Act.

a. Due to the overtime compensation requirements of the Contract Work Hours

Standards Act included in construction contracts, there is less apt to be inquires about the applicability of the FLSA to such contracts; however, the FLSA also deals with wages, hours and other conditions and practices of employment with respect to employees other than construction workers.

b. If inquiries are received from contractors, workmen or union representatives concerning the applicability of the Fair Labor Standards Act to a contract or if protests are received from these persons concerning matters pertaining to the Act, the inquirer should be referred to the DOL's Wage and Hour Division.

c. Written notations should be made of any inquiries received on these matters. These should be kept in the project files where they will be available for inspection if needed. The notation should contain date, name of inquirer, whether contractor, employee, or labor representative, contract number, subject of inquiry and information furnished to the inquirer. If the inquirer is an employee, his permanent address should be shown; if a labor representative, the name, number, and address of the union he represents should be listed.

4-12. Copeland (Anti-Kickback) Act. The Anti-Kickback Act, as the name implies, covers the kickback of the employee's wages in any manner to his employer. The law states that whoever by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever, induces any person employed on the contract to give up any part of the compensation to which he is entitled under his contract of employment shall be fined not more than $5,000 or imprisoned not more than five years or both. The applicable contract provision requires the contractor to comply with the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) which are made a part of the contract by reference. The Secretary's regulations made pursuant to the Copeland Act are for the purpose of aiding in the enforcement of the Anti-Kickback Act which is a criminal statute. Thus it can be seen that any restricted payment to any employee is a violation, and in certain instances an offense for which there is a criminal penalty. All contractors and subcontractors are bound by the laws and regulations, and ignorance of the law is no excuse. No contract of employment between the employer and employee can diminish the rights provided the employee by law. Except for fringe benefits paid to funds, the employee must have full and actual freedom of disposition of his wage payment, whether made in cash or by check, and any restricted payment made to an employee is considered to be a deduction.

4-13. Payroll Deductions.

a. Regulations. See the Secretary of Labor's regulations in 29 CFR, Sections 3.5 through 3.10 for detailed guidance.

b. Permissible Deductions. Only those deductions described in Section 3.5 of the Secretary's Regulations may be made without application to and approval of the Secretary.

c. Deductions Which Require Approval. Deductions not permitted under Section 3.5 of the regulations require the written approval of the Secretary. A copy of the Secretary of Labor's written approval to make payroll deductions should be submitted by the contractor and/or subcontractor along with the first payroll on which the deductions are made. Refer to Sections 3.6 through 3.8 of the regulations. Deductions for the following purposes are not permissible unless approved by the Secretary:

(1) Apprentice training funds.

(2) Industry promotion funds.

d. The amount and type of each deduction from each employee's wages must be shown on weekly payrolls. Also, all payroll deductions must be described in the appropriate space on DD Form 879 (Appendix C).

e. Discussion with contractors. During preconstruction conferences contractors and subcontractors should be reminded that the Copeland Regulations are a part of the contract and that all payroll deductions must be made in accordance therewith. They should be questioned as to the type of deductions they propose to make and if any proposed deductions are not permissible under Section 3.5 of the regulations, they should make applications to the Secretary.

4-14. Apprentices and Trainees. The Secretary of Labor's Regulations, 29 CFR, Part 5, Section 5.2 (c), defines the terms apprentices and trainees as follows:

a. "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. DOL, Employment Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in his first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

b. "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the DOL's Employment Training Administration, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that Bureau.

4-15. Employment of Apprentices and Trainees. The contract provisions noted at Section 2-10 spell out the strict conditions pertaining to the employment of apprentices and trainees. If the contractor or any subcontractors intend to use either on the job, they should be reminded of the requirements during the preconstruction conference. These requirements are established by the Bureau of Apprenticeship and Training (BAT), the Federal agency responsible for the administration of the National Apprenticeship System in the United States. BAT was established by the National Apprenticeship Act of 1937, as amended, Public Law 75-308, commonly known as the Fitzgerald Act. BAT is a program office of the Office of Apprenticeship Training and Employer and Labor Services (ATELS) located in the Employment and Training Administration of the United States DOL.

4-16. Evidence of Registration.

a. The written evidence required for apprentices and trainees is described in paragraphs a and b, respectively, of the contract provision.

b. Contractors participating in such programs should have no problems in obtaining the evidence if, in fact, the programs are registered and approved by the DOL's Bureau of Apprenticeship and Training (BAT), or a state apprenticeship agency recognized by BAT. In any event, it is the responsibility of the contractor and/or subcontractor to see that the required evidence is furnished for each contract. Experience has shown that when contractors request BAT to furnish the written evidence, BAT will furnish it directly to the office administering the contract. Sometimes contractors will submit or cause to be submitted letters from unions or other sources stating that a particular person is an apprentice. Usually such letters are not acceptable because they lack proof of BAT registration and fail to furnish other required information, e.g., ratios, wage rates, and date of registration. If such letters are received, they should be forwarded to the District Labor Advisor for appropriate liaison with the local BAT office.

c. In an effort to facilitate contracting agency compliance efforts in this area, BAT has compiled a listing of apprenticeship program sponsors which are recognized and registered by BAT or a State Registration Agency (approved by BAT to serve this function). The official name of each program sponsor, along with street address, city, and state is reflected in this listing which may be accessed at www.doleta.gov/atels/sac.htm.

4-17. Administration and Enforcement Procedure.

a. Upon receipt of the required evidence, the ACO shall accept and use such ratios and rates for the purpose of checking the contractor's and/or subcontractor's compliance with the contract labor standards provisions. The evidence will be made a part of the official contract payroll files. To the extent necessary, copies of the evidence should be furnished ACO personnel for use in checking payrolls and other on-site enforcement activities. There is no requirement to furnish the Solicitor of Labor or other offices copies of the evidence.

b. Due to turnover or training experience needs of particular apprentices, there may be instances where additional apprentices will be employed on the job after the initial submission of the evidence concerning the contractor's program. In such cases, the contractor will be required to submit the required evidence for the additional apprentices along with the payroll on which the apprentice's name first appears.

c. The required wage rate for apprentices is the appropriate percentage of the journeyman wage rate which is listed in the prevailing wage determination, and not a percentage of some other journeyman's rate set by various apprenticeship committees. (WAB 80-3, Johnson Electric. 11 Apr 83)

d. Whenever a payroll shows employees classified as apprentices or trainees and the contractor has not submitted the required evidence, he will be advised by the responsible ACO that such classification of work will not be accepted until and unless he promptly submits the evidence. If the contractor does not submit such evidence, he shall be directed to pay such employees at the contract wage rate applicable to the classification of work they actually performed.

e. Similarly, if the contractor exceeds the allowable apprentice to journeyman ratio, those apprentices employed in excess of the ratio would be entitled to restitution at the applicable journeyman's wage rate for the craft work performed. For example, if an employer is permitted to employ three apprentices under his apprentice to journeyman ratio and it is disclosed that he is employing five apprentices on the project, the first three apprentices employed shall be considered within the ratio. The last two employed shall be considered improperly employed and restitution would therefore be due these two. As a practical matter, if it is impossible to determine which apprentices were first employed on the project for purposes of restitution computations, any equitable formula will be acceptable. Thus, in the preceding situation, it would be permissible to rotate three of the five apprentices each week as a solution to the problem of which of these employees were "first" employed on the project, and compute restitution for the remaining employees accordingly.

f. In the event of controversy between project personnel and the contractor concerning this matter, the facts and circumstances shall be reported to the District Labor Advisor for further action.

g. The Code of Federal Regulations now contains the DOL'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.

h. The following example illustrates the application of the ratio principle: Assume that a contractor has 100 journeymen and is allowed 10 apprentices. The ratio is thus one apprentice to 10 journeymen. Thus, for example, if he employs 11 journeymen, he will be allowed to employ two apprentices. No apprentice will be allowed unless there is at least one journeyman on the job.

4-18. Helpers.

a. Although the DOL published proposed regulations in connection with the use of semiskilled helpers in 1982, in 1987, in 1989, in 1990, and again in 1996, these regulations have been the subject of both judicial challenges and legislative prohibitions (See, for example, Building and Construction Trades Department, AFL-CIO v. Martin, 961 F.2d 269; Associated Builders & Contractors, Inc. V. Herman, 976 F. Supp. 1 (D.D.C. 1997) as well as Public Laws 102-27 and 103-112).

b. On 20 November 2000, the DOL published (65 FR 69674) a final rule that restored the DOL's policy governing the use of helpers to its pre-1982 position. As provided by the DOL's regulations at 29 CFR 5.2(n)(4), helpers will be permitted where:

(1) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

(2) The use of such helpers is an established prevailing practice in the area; and

(3) The helper is not employed as a trainee in an informal training program. A "helper" classification will be added to WDs pursuant to § 5.5(a)(1)(ii) (A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

4-19. Content of Payrolls and Basic Records.

a. Forms and Content.

(1) There is no standard form prescribed for payrolls on Corps of Engineers contracts. However, certain information is required to be shown on each payroll for all laborers and mechanics, including apprentices, trainees, watchmen, and guards [5], working at the site of the work. The payrolls must be numbered consecutively and contain the following information: Name and address[6] of each employee; his social security number; his correct classification; hourly rate of pay; daily and weekly number of hours worked; gross earnings; deductions; and actual wages paid.

(2) Some contractors use printed payroll forms and fill them in either by hand or by typewriter. Some use machine generated reports. Payrolls prepared in this manner are acceptable provided they contain the required information. Sometime a code (letter or number) is used to indicate the employee's work classification. This is also acceptable provided the contractor furnishes a complete list of the classification codes for use in checking payrolls.

(3) The payroll heading should show the name and location of the project, contract number, the name of the contractor or subcontractor and the payroll period. The last payroll should be clearly marked "Final Payroll".

b. Fringe Benefits Information to be Shown on Payrolls. (See paragraph 4 of this chapter for discussion of fringe benefits as they appear in wage rate decisions.)

(1) The Statement of Compliance, DD Form 879, (Appendix A), contains blocks wherein contractors are required to indicate the method they are using to pay required fringe benefits, i.e., whether they are paying to funds or to the employees, or a combination of both. See the instruction on the reverse of that form.

(2) Where the contractor indicates that all fringes are paid to funds (block (4)(a)), the fund must be identified as well as the amount contributed in order to ensure that the total (basic + f.b.) hourly wage obligation has been satisfied. If fringes are paid in cash to the

---

[5] Watchmen and guards are reflected on payroll records for Contract Work Hours and Safety Standards Act only.

[6] Address required one time only for each employee unless there is a change of address. The addresses may be shown on a separate list and attached to the payroll.

workers, such payments must be shown on the payroll.

(3) Overtime premium compensation is not required to be paid on fringe benefits. For this reason, as well as making it clear on the face of the payroll what basic hourly rate is actually being paid, the rate(s) of fringe benefits paid in cash should be shown separately. If the contractor uses a lump sum rate (as per the example on reverse of DD Form 879) to compute cash in lieu of all fringes, such rate must be not less than the total of all required fringe benefits.

4-20. Statement of Compliance, DD Form 879.

a. DD Form 879 is to be executed in accordance with 29 CFR, Part 3, Section 3.3(b) and submitted with each weekly payroll.

b. Some contractors use a combined payroll statement form. The statements on such payroll forms are acceptable in lieu of DD Form 879, provided the statements contain the exact language of DD Form 879, and are properly executed.

c. ACO offices should requisition the form and furnish it to all contractors and subcontractors as their needs require.

4-21. Submission of Payrolls.

a. Time of Submission. This contract provision requires that payrolls be submitted weekly to the CO and makes the prime contractor responsible for the submission of payrolls of all subcontractors. In this regard, prime contractors are to be reminded that they are more than mere conduits for the transmission of payrolls. They are obliged to ensure that all required information is furnished on such payrolls prior to their submission to the government. Submission to the ACO office within seven calendar days after the regular payment date of the payroll week covered, is considered compliance with the contract provisions. A sample payroll is attached as Appendix B.

b. Delinquent Payrolls.

(1) FAR 22.406-6(b), Withholding for Non-Submission, states that if the contractor fails to submit his or his subcontractors' payrolls promptly, the CO shall withhold approval of such amount of the progress payment estimate as he considers necessary to protect the interests of the government, or of the employees of the contractor or any subcontractor.

(2) Any action pursuant to (1) next above will be taken by the CO in accordance with contractual general provisions. If the contractor becomes delinquent and does not promptly respond to requests by the ACO to comply, the latter shall report the problem to the District

Labor Relations Advisor for further action.

4-22. Request for Authorization of Additional Classification and Rate - SF Form 1444. This form (Appendix C) is to be used to accomplish the action required by paragraph (d) of the DBA clause. ACO offices should requisition a supply of the form and furnish them to prime contractors as their needs arise. The additional classification process is outlined in Figure 4 -2 which follows Chapter 4. This process is explained in the sections that follow.

4-23. Instructions to Contractors.

a. The contractor should be furnished copies of the form and instructed regarding the processing of same as soon as it is determined that additional classifications will be required. In the interest of good administration this matter should be discussed during the preconstruction conference to determine which, if any, additional classifications will be required by the contractor or any of his subcontractors.

b. All requests must be made by the prime contractor, and where a subcontractor is to use the requested classifications, the name and address of the subcontractor will be shown in Item 10 and signed by the subcontractor in Item 14. Where no subcontractor is involved, show in Item 10 "Not applicable." Union representatives or other representatives of the class of labor are not required to sign the request. All copies of the request, in quadruplicate, are to be manually signed by the respective representatives in Items 15 and 16.

c. It is important to emphasize that the contractor's proposal be supplemented by information relating to how the proposed wage rate was developed. For example, it may be that the contractor is signatory to a collective bargaining agreement wherein the rate for the subject trade classification is established. The contractor may also identify similar construction projects in the vicinity of the Corps contract where such a classification and rate was used. In any event, the DOL requires that the contractor, the affected employees (if known) or their representatives, and the CO agree on the proposed classification and rate (including the amount designated for fringe benefits where appropriate). The DOL requires that the contractor state whether the proposed rate was developed in consultation with the employees.

d. Pending a final determination by the DOL, the contractor may tentatively classify and pay affected employees in accordance with the proposal. The contractor should be advised, however, that he may eventually be required to re-classify the affected employees and/or furnish wage restitution should the proposed additional classification and rate be denied by the DOL.

4-24. Submission and Processing Requests.

a. Requests are to be forwarded to the District Labor Advisor, and every effort should be made to submit the contractor's requests for approval by the CO prior to use of the classification on the contract.

b. The DOL has indicated that it will approve, modify, or disapprove every additional classification action within 30 days of receipt or will notify the CO within the 30-day period that additional time is necessary. Experience has shown that the DOL has encountered difficulties in processing the requests within 30 days. It is essential that the District Labor Advisor monitor delays in DOL responses. All requests which are more than 90 days delinquent or any that precludes the closeout of contracts should be reported to CECC-C for coordination with the DOL.

c. Posting - Upon receipt of the DOL's determination, the ACO shall furnish the contractor with the DOL's determination. Further, the contractor will be required to post all approved classifications and rates along with the contract wage rate decision in a place accessible to all employees at the project site.

4-25. Subcontracts (Labor Standards). The contract clause set forth at FAR 52.222-11 imposes the certain requirements upon the contractor as noted below.

a. Notice of Award of Subcontracts. This contractual provision requires that within 14 days after the award of any subcontract, either by himself or a lower tier subcontractor, the contractor shall deliver to the CO a statement setting forth the name and address of the subcontractor and a summary description of the work subcontracted. At the same time, the prime contractor is required to furnish a statement signed by the subcontractor acknowledging the inclusion in his subcontract of applicable labor clauses.

b. Form of Notice, SF Form 1413. This form (Appendix D) is prescribed for use in complying with the required notification by the prime contractor and the acknowledgment required of the subcontractor. Sufficient copies of this form should be furnished to the contractor either with the preconstruction letter or during the preconstruction conference. The executed form should be forwarded so as to reach the District Labor Relations Advisor in duplicate (both copies signed). The original copy will be filed in the official contract file, and reproduced copies as necessary should be furnished the ACO or QA Representative for contract administration purposes.

4-26. Physical Inclusion of Labor Clause in Subcontracts.

a. 29 CFR 5.5a(6) requires that such clauses be "inserted" in subcontracts, and

under the provision entitled "Subcontracts" the contractor agrees to do so.

b. For purpose of advising contractors, the following information should be included in preconstruction labor relations letters and discussed during preconstruction conferences. Physical inclusion of labor clauses is required for compliance with the General Provisions clause entitled "Subcontracts." Incorporation by reference does not constitute compliance. However, contractors who subcontract by means of purchase orders or other informal type contract forms will be considered in compliance provided they attach copies of the appropriate labor standards clauses to the subcontract form, and provided also that the subcontractor acknowledges receipt in writing.

c. The prime contractor is not required to furnish the CO any copies of his subcontract agreements. The only evidence required is the SF Form 1413 properly executed by both the prime and subcontractors.

4-27. Undocumented Workers. During routine labor standards compliance activities, USACE CIRS have identified the presence of undocumented workers (illegal aliens) performing on USACE construction contracts. The DOL has advised contracting agencies that regardless of immigration status, such workers are entitled to the minimum wage protections set forth in the DBA. In an effort to promote proper coordination in such cases, the DOL entered into a Memorandum of Understanding with the Immigration and Naturalization Service (now, the Immigration and Customs Enforcement Service on 23 November 1998 (www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm). USACE has been further advised by the DOL's Wage and Hour Division that in the event that the presence of undocumented workers is suspected on USACE contracts, CIRS are to contact the respective Wage and Hour and Bureau of Immigration and Customs Enforcement offices. A listing of the field offices for the Wage and Hour Division (www.dol.gov/esa/contacts/whd/america2.htm) as well as the Immigration and Customs Enforcement Service (www.ice.gov/graphics/investigations/contact.htm) are on line.

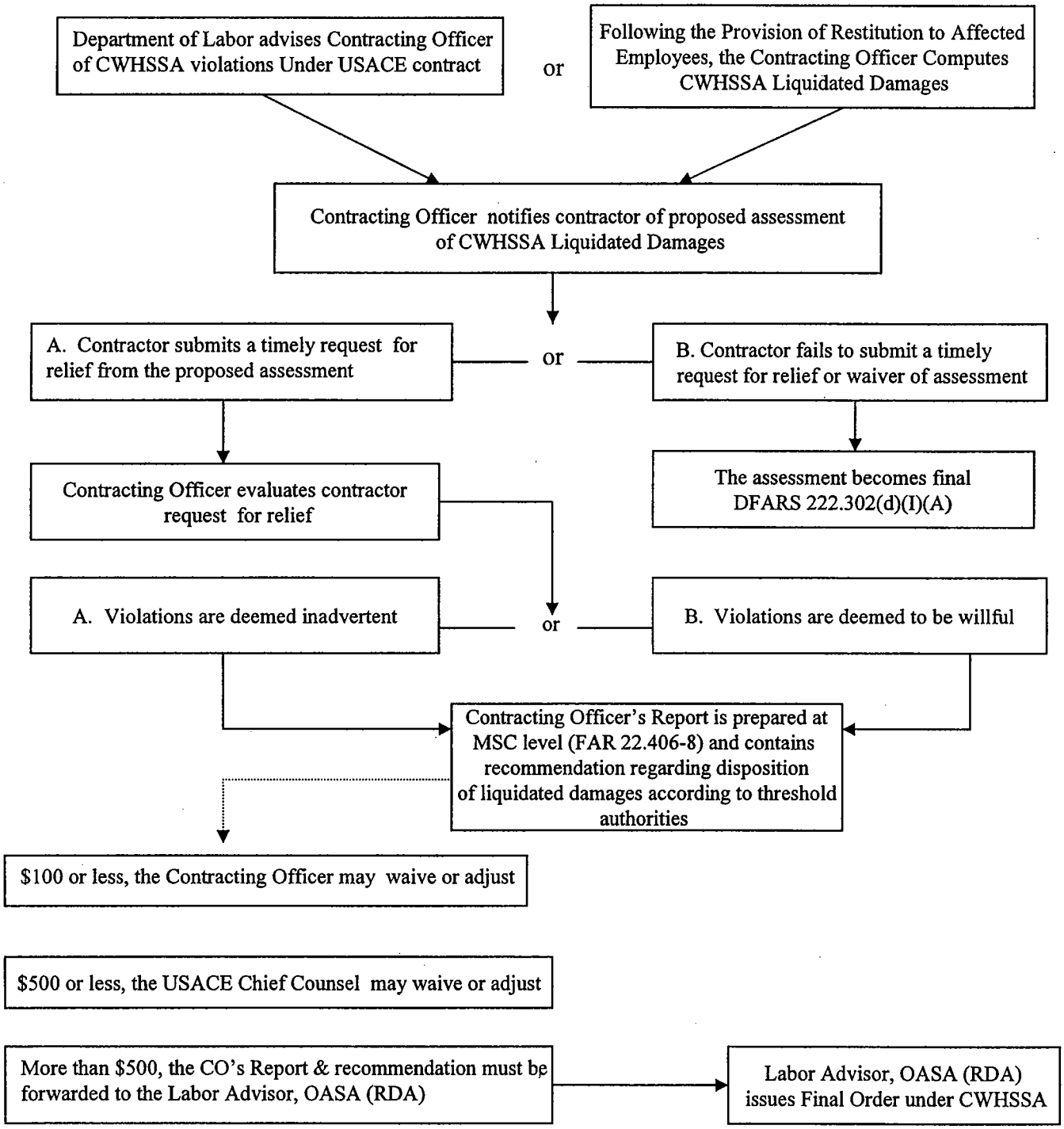


Figure 4-1. Processing of Contracting Officer Reports Relating to Contractor Violations of the Contract Work Hours and Safety Standards Act (CWHSSA) and the Assessment of Liquidated Damages

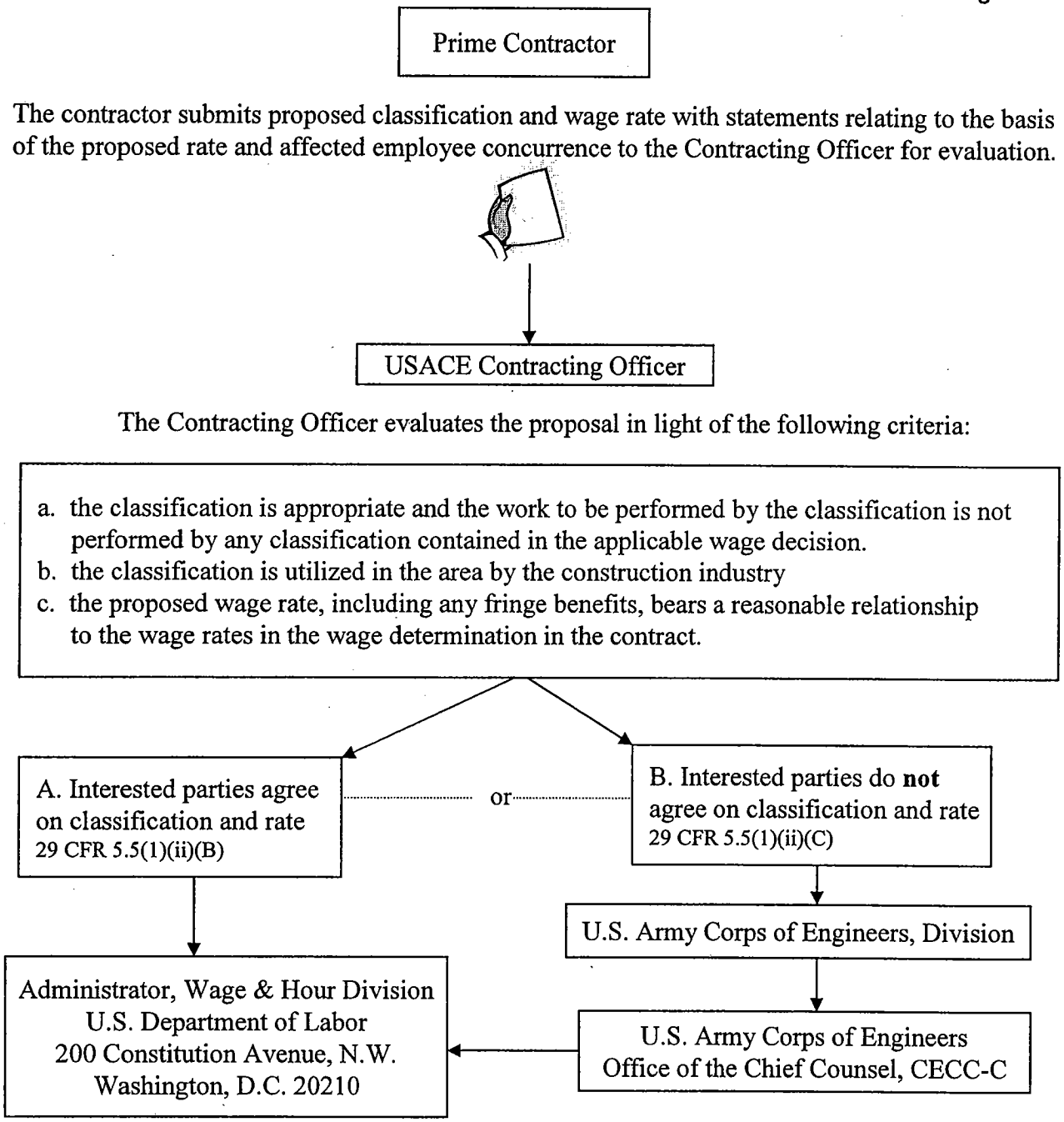


Figure 4-2. Processing of SF 1444, *Request for Authorization of Additional Classification and Rate*

CHAPTER 5 - APPLICABILITY OF CONTRACT LABOR PROVISIONS TO VARIOUS SITUATIONS, CONDITIONS, AND WORK ACTIVITIES

5-1. General. This section deals with situations, conditions, and work activities in connection with construction contracts that often involve questions with respect to determining coverage. During the past few years the enforcement activities of Federal agencies have resulted in many decisions by the DOL. The Solicitor of Labor has made public many of his decisions on coverage questions involving the DBA and related acts.[7] For purposes of this regulation it is not practicable to treat all of the Solicitor's decisions or to discuss in detail all facts and circumstances pertinent thereto. Accordingly, this part attempts only to cover situations that are most common to our construction activities. In some cases fine distinctions have been drawn; therefore, in applying the Solicitor's decisions to a particular case care must be exercised in analyzing the current case with respect to its relevant Acts and circumstances.

5-2. Survey Crews.

a. Where surveying is performed immediately prior to, after, and during actual construction, in direct support of construction crews, such surveying is considered to be construction work within the meaning of the DBA. Coverage of the individuals performing this work would further depend upon their individual status as laborers or mechanics.

b. In those cases where the work of an individual functioning in a survey crew is considered professional or sub-professional in character, (duties of instrumentmen, rodmen, and chainmen are technical in nature and are a part of the engineering process), that one so employed is not a laborer or mechanic within the meaning of the DBA. On the other hand, where individuals perform primarily manual work, such as clearing brush and sharpening stakes, they fall within the definition of the term "laborer." (DB-26, 2 Aug 62).

5-3. Owner-Operators of Construction Equipment. Except as stated below, owner-operators of equipment employed by construction contractors or subcontractors are not recognized as independent contractors. They must be carried on the employer's payroll and paid in accordance with all the contract labor provisions.

a. The exception mentioned above is as follows: The contract labor provisions will not be enforced as to "bona fide" owner-operators of trucks or other similar construction

[7] Some of the Solicitor's decisions are referred to in this part and identified by number, e.g. (DB-28).

equipment who are "independent contractors." As to such owner- operators, the payrolls must contain their names and the notation "Owner-Operator." It is not necessary to show hours worked or rates allegedly paid. The reference to "trucks or other similar construction equipment" is applicable only to the various types of equipment used exclusively for hauling, and does not cover equipment such as bulldozers, backhoes, cranes, drilling rigs, welding machines, and such (DB-9, 13 Sep 61 and DB-12, 26 Sep 61).

b. In some cases the "owner-operator" might own trucks in addition to the one he is driving. Only he, when operating his own truck, is exempt. The drivers of his other trucks are not exempt and must be paid in accordance with the contract provisions.

5-4. Operators of Rented Construction Equipment. Except the owner-operators of trucks and similar construction equipment used exclusively for hauling discussed in 5-3a(1), all operators of any type equipment rented by the prime contractor or any subcontractor for use in performing the contract work are covered by the contract provisions.

a. Method of Computing Earnings.

(1) The method of computing the earnings, i.e., per yard, ton-mile, or otherwise, does not have any effect on the status of the operator of the equipment insofar as coverage is concerned. Neither does the fact that the equipment is rented on a fixed fee per hour fully operated basis.

(2) To satisfy the requirements of the DBA, covered operators must be compensated for each hour worked at a rate per hour which is not less than the proper minimum hourly rate specified in the contract specifications.

(3) To satisfy requirements of the contract overtime compensation provisions, covered operators must be compensated at not less than one and one-half times their basic hourly rate for all hours of over-time work.

b. Payrolls.

(1) Even though an operator is providing a piece of heavy equipment as well as his labor, it is clear from the language of the DBA that individuals performing the work of laborers and mechanics must be paid not less than the aggregate of the basic hourly rates and fringe benefits regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics. Also, they must be paid overtime compensation as required by the CWHSSA. It follows that such covered operators are considered to be employees of

the contractor or subcontractor, as the case may be, and they must submit payrolls for such operators.

(2) Equipment owners furnishing operators with the equipment to perform covered work are considered to be subcontractors and must comply with all the contract labor standards provisions; however, the contract with the equipment owner for the manned equipment may provide for payment of the operators by the prime contractor or subcontractor, in which event the operators will be reported on their payrolls.

(3) The required content of payrolls and basic records is the same as for any other covered workers. Also, since payrolls and Statement(s) of Compliance pertain only to compensation for wages, no amounts for equipment rental should be included. Making deductions (withholdings) from wages which may be required by Federal or other tax laws, and labor agreements is the responsibility of the employing contractor. An employer's compliance with such withholding requirements is not within the enforcement jurisdiction of contracting officers; however, to the extent deductions are made they are subject to the contracting officer's enforcement of relevant contract labor standards provisions.

5-5. Equipment Repair Activities.

a. Repairs at Job Site by Employees of Construction Contractors and Subcontractors. Laborers and mechanics employed by such contractors and working at the site of construction repairing equipment used on the covered contract must be paid in accordance with the contract requirements.

b. Subcontractor Status of Equipment Dealers Pursuant to Lease Arrangement with Construction Contractors.

(1) This applies to situations where the equipment used by construction contractors is leased or rented from equipment dealers and the lease or rental agreement provides that laborers and mechanics employed by the equipment rental dealer are required to go upon the site of construction to repair the leased equipment. This does not apply to purchased equipment and repair work thereon pursuant to manufacturer's or dealer's written warranties and/or guarantees.

(2) The Solicitor of Labor has ruled that equipment rental dealers are subcontractors under the DBA where substantial and recurring repair work on the construction site is involved, "substantial" being defined as work exceeding 20 percent of a person's time in any work week. Accordingly, where laborers and mechanics employed by such a subcontractor perform work meeting the test, they are covered workers entitled to the benefits of the DBA as well as all other contract labor standards

provisions (WAB Case No. 64-3, Matter of Griffith Co.).

c. Repairs at Home Shop. Where the contractor has an established shop or yard used by him as a place to work on his equipment generally, including equipment used on covered and noncovered contracts, the laborers and mechanics employed therein need not be paid in accordance with the contract requirements.

5-6. Capacity of Trucks. The Secretary of Labor's wage rate decisions contain various truck driver classifications. In some decisions the minimum hourly wage rates vary according to the capacity of the trucks. Some trucks are listed by cubic yard capacity and others are listed according to ton capacity. As a result, questions may arise with respect to the proper wage rate to be applied. The Solicitor of Labor, in addressing this issue, has indicated that the controlling factor is the load carrying capacity of the vehicle, and not the rating for registration or other purposes (Solicitor of Labor Opinion letter, 21 Feb 62).

5-7. Furnishing Materials and Hauling Operations.

a. General. Usually these situations involve questions of relationship that is whether the party is a subcontractor or a bona fide materialman in relation to the prime contractor or subcontractor. The solution to such questions is dependent upon the application of the term "subcontractor," as distinguished from the term "materialman" to the activities involved. Neither the DBA nor the Secretary of Labor's Regulations, Part 5, specifically define the terms "subcontractor" and "materialman" as such.

b. Secretary of Labor's Regulations and Rulings.

(1) Regulations, Part 5, Title 29 CFR, in Section 5.2(g), say that the terms "construction," "prosecution," "completion," and "repair" mean all types of work done on a particular building or work at the site thereof, including transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work. Thus, it is clear that such employees performing such work are engaged in covered activities (DB-22, 12 Mar 62).

(2) The same regulations in Section 5.2(f) state that the terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. They further state that the manufacture or furnishing of materials, articles, supplies, or equipment is not a "building" or "work" within the meaning of the regulations unless conducted in connection with and at the

site of such a building or work. The DOL has traditionally considered the manufacture and delivery of supply items to the worksite, when accomplished by bona fide materialmen serving the public in general, as noncovered activities.

5-8. Drilling Services. The Solicitor of Labor has issued specific guidance relating to the applicability of the DBA the various types of drilling services (DB-40, 25 Jun 63; see also WAB 80-7, 22 Jul 83).

a. The Act is not applicable to exploratory drilling performed to obtain core borings for use in engineering studies and planning for a dam, where the holes themselves will presumably be abandoned or filled in.

b. Boring for soil samples is covered by the Act where the work is directly related and incidental to the actual construction process (e.g., obtaining soil samples for purposes of setting foundations). Such boring is not covered where it constitutes preliminary work (e.g., obtaining soil samples to formulate plans and specifications, or as part of site investigation).

c. Drilling holes to be used for water wells, ventilating shafts, etc., is covered.

d. The Act does cover digging of test holes which are to be converted to water wells if the tests at a hole indicate adequate yield and a production well is desired at that location. The fact that some of the holes may not be used for wells is not significant - the expectation that some of them may be so used is sufficient.

e. Plugging of oil or gas wells and removal of above-ground equipment, in connection with construction of a reservoir, is covered whether the work is regarded as demolition or drilling.

5-9. Carpet Laying and Installation of Draperies. The DBA applies to carpet laying and the installation of draperies when it is performed as an integral part of, or in conjunction with, new construction. The Service Contract Act applies to carpet laying when it is performed as part of routine maintenance, e.g., replacement of worn out carpeting in a public building or a public work where no other construction is contemplated.

5-10. Clean-up Work. Cleaning work is covered by the DBA in situations where the cleaning is performed as a condition precedent to the acceptance of a building as satisfactorily completed. For example, this would include activities such as window scraping and washing, removal of excess paint, and sweeping. Where cleaning is carried out after the construction contractor and subcontractors have finished their work, left the site, and the contracting agency has accepted the work as completed, such work would not be covered under the DBA.

5-11. Demolition Work in Relation to Construction. Demolition, standing alone, is not subject to the DBA. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished and further DBA-covered construction activity at the site is contemplated, the Act would apply (Solicitor of Labor Opinion, 20 Jun 61).

5-12. Landscape Contracting. Landscaping performed in conjunction with new construction or renovation work subject to the DBA is covered. In addition, elaborate landscaping activities standing alone such as substantial earth moving and rearrangement of the terrain may constitute construction within the meaning of the Act, without requiring that it be related to other construction work. Landscaping which is not covered by the Act is work for which the SCA may be applicable.

5-13. Painting and Decorating. The DBA provides coverage for the "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." The coverage also includes painting or re-painting of mail collection boxes, street and traffic lines, the refinishing of floors and bowling lanes, and the installation of wall covering or hanging wallpaper. Federal contracts for painting of Government-owned, privately-occupied houses, apartments, commercial properties, etc., are also covered by the Act (DB-45, 1 Jun 65).

5-14. Public Utility Installation.

a. Whether or not the employees of a public utility, who perform construction type work in connection with Federal or federally assisted projects, are covered by Davis-Bacon will depend upon the nature of the contracts involved and the work performed.

b. Where a public utility is furnishing its own materials and is in effect extending its own utility system, such work is not covered by the DBA. The same conclusion would apply where the utility company may contract out such work for extending its utility system. However, where the utility company agrees to undertake a portion of the construction of a covered project (e.g., relocation of utility lines or installation of utility lines which are to become the property of the project sponsor), such work would be subject to the DBA provisions.

5-15. Sewer Repair Services. The internal inspection of sewer lines for leakage and damage through the use of closed circuit TV inspection and the simultaneous sealing of leaks or other damage in the lines as the machine inspects the sewer line is covered by the DBA. On the other hand, if the contract is only for inspection, the DBA would not apply. However, the SCA would apply in the latter situation if the Government was a

direct party to the contract.

5-16. Steam and Sand Blast Cleaning. Steam and sand blast cleaning, as well as bird-proofing, are covered by the Act. Such cleaning operations performed on public buildings are authorized for the purpose of renewing the original appearance of these buildings and are performed for the same purpose as painting and decorating which are covered by the Act (DB-8, 17 Jul 61).

5-17. Supply and Installation Contracts.

a. Installation work performed in conjunction with supply or service (e.g., base support) contracts is covered by the DBA where it involves more than an incidental amount of construction activity (i.e., the contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work, and such work is physically or functionally separate from, and can be performed on a segregated basis from the other non-construction work called for by the contract). For example, DBA coverage has been extended to installing a security system or an intrusion detection system, installing permanent shelving which is attached to a structure, installing air-conditioning ducts, excavating outside cable trenches and laying cable, installing heavy generators, mounting radar antenna, and installing instrumentation grounding systems, where a substantial amount of construction work is involved.

b. Whether installation involves more than an incidental amount of construction activity depends upon the specific circumstances of each particular case and no fixed rules can be established which would accommodate every fact situation. Factors requiring consideration include the nature of the prime contract work, the type of work performed by the employees installing the equipment on the project site (i.e., the techniques, materials, and equipment used and the skills called for in its performance), the extent to which structural modifications to buildings are needed to accommodate the equipment (such as widening entrances, relocating walls, or installing wiring), and the cost of the installation work - either in terms of absolute amount or in relation to the cost of the equipment and the total project cost.

c. The DBA does not apply to construction work which is incidental to the furnishing of supplies or equipment, if the construction work is merged with nonconstruction work or so fragmented in terms of the locations or time spans of its performance that the construction work is not capable of being segregated as a separate contractual requirement.

d. Coverage questions which cannot be resolved in accordance with the above principles should be directed to the DOL through the appropriate channels.

5-18. Flaggers. Flaggers who direct traffic on federally funded projects but perform no manual construction work are still "laborers and mechanics" within the meaning of the Act (see All Agency Memorandum No. 141, 19 Aug 85).

5-19. Logging Operations. The cutting and removal of marketable timber by a logger or subcontractor is a part of the contract construction work and employees engaged in cutting and removal come within the purview of the DBA provisions of the construction contract. The test of coverage is: Is the work being performed by the logger or subcontractor any part of the work which the contractor is required to do to satisfy the specifications as to clearing and disposal? The fact that the contractor gives the timber to the logger in consideration of the logger's cutting and removal makes no difference with respect to coverage. When the contractor has made final disposition of the timber or debris in accordance with the contract requirements, the taking of possession and the hauling away by others is not a part of the contract work. In this connection, there may be situations where the contractor, subcontractor, or logger performs all of the felling, trimming, and sawing into log lengths or other suitable form, ready to be moved into commercial channels. All such work on the contract site is a covered activity and all workers engaged in such must be paid in accordance with the contract labor standards provisions.

5-20. Crews on Towboats and Pushboats Engaged in Transportation and Tending Services.

a. General. Some background discussion is necessary for a clear understanding of this subject. The courts have held that seamen are not laborers or mechanics; therefore, seamen are not subject to the DBA or other construction contract labor standards provisions.

b. Seamen. Pursuant to legislative history and court decisions the DOL's regulations under the FLSA state that an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels.

c. Not Seamen. (1) The question of whether or not an employee is a seaman depends on the nature of his duties rather than on the title of his occupation. (2) The regulations referred to above state that employees on "floating equipment" who are engaged in the construction of docks, levees, revetments, or other structures, and employees engaged in dredging operations or in the digging or in the processing of sand, gravel or other materials are not employed as seamen within the meaning of the

Act but are engaged in performing essentially industrial or excavation work. (3) The "floating equipment" mentioned above is that on which employees are working as laborers and mechanics and used directly in the prosecution of the construction. Such floating equipment includes piledrivers, equipment and material barges, dredges, and attendant plant. The important distinction here is that such employees, although employed on floating plant, are employed in the performance of construction work and not employed aboard a vessel used as a means of transportation. Therefore, they are laborers and mechanics and not seamen.

5-21. Removal of Asbestos-Containing Materials. Asbestos abatement projects give rise to problems relating not only with respect to the appropriate trade classification but also as to the appropriate labor standards provisions (DBA v. SCA).

a. DBA v. SCA - The DOL has advised this agency that either statute may apply to such work depending upon the nature and purpose of the asbestos removal. The SCA applies to asbestos removal performed in conjunction with demolition services (see paragraph 5-11) where no future construction is contemplated. However, where such removal is performed in conjunction with the rehabilitation of a public building or work, the DBA would apply.

b. Appropriate DBA Trade Classification - In recent years, questions have arisen as to the proper classification for workers involved in asbestos-removal projects. In addressing this issue, two considerations are critical:

(1) the location of the asbestos-containing material, i.e., mechanical systems (pipes, boilers, and ducts) and

(2) the disposition of the insulated system (will it remain in place or be scrapped?). In those contracts containing negotiated wage rates, the Fry Brothers (WAB Case No. 76-6, dated 14 June 1977) policy allows the Contracting Officer to follow negotiated (union) classification practices. In these situations, we may refer to the International Agreement (Appendix G) between the Laborers International Union of North America and the International Association of Heat and Frost Insulators and Asbestos Workers. This agreement describes specific situations for asbestos removal and identifies the proper classification for workers involved in removal work. Experience has shown that although the Agreement specifically determines the classification of workers responsible for the removal of asbestos-containing material, local trade unions may not necessarily adhere to the Agreement. In these cases as well as in contracts containing open-shop (non-union) wage rates, the District Labor Advisor must perform an area practice survey to determine the proper classification. Further information relating to area practice surveys may be found in Chapter 8.

5-22. Ship-Building, Alteration, Repair and Maintenance. The building, alteration, and repair of ships under government contracts is work performed upon "public works" within the meaning of the DBA. WDs for ship-building under the Act are issued only if the location of contract performance is known when bids are solicited. However, a government contract which calls for the construction, alteration, furnishing, or equipping of a "naval vessel" (U.S. Navy and U.S. Coast Guard vessels) is subject to the Walsh-Healey Public Contracts Act. A contract which calls for the maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel is a service contract within the meaning of the Service Contract Act.

5-23. Air-Balance Engineers. In general, air balance engineers are not considered laborers or mechanics within the meaning of the DBA. The primary function of such employees is to take measurements and to accumulate data upon which recommendations are based to advise mechanical contractors how to rectify imperfections or imbalances in heating or air conditioning systems which may become apparent after the contractor(s) have installed such systems. Generally, however, such employees do not physically make the required corrections. If, however, such employees spend a substantial amount of their time in any workweek (i.e., more than 20 percent) on the site performing manual, physical, and mechanical functions which are those of the traditional craftsmen, they would be considered laborers or mechanics for the time so spent.

5-24. Leases Involving Construction Activity. The applicability of the DBA to leases involving construction has been the subject of various Wage Appeals Board proceedings (In re Military Housing, Ft. Drum, WAB 85-16, August 23, 1985 and In re Applicability of Davis-Bacon Act to Lease of Space for Outpatient Clinic, WAB 86-33, June 26, 1987) and related litigation (Building and Constr. Trades Dept. v. Turnage, 705 F. Supp. 5 (D.D.C. 1988)). As a result of the above, the applicability of the Act to any specific lease contract can be determined only by considering the facts of the particular contract. Among the factors to be considered are the length of the lease, the extent of government involvement in the construction project, the extent to which the construction will be used for private rather than public purposes, and the extent to which the costs of construction will be fully paid for by the lease payments. Questions with respect to the applicability of the Act should therefore be referred to the District Counsel for consideration in light of these factors.

5-25. "Working Subcontractors". The statutory language of the DBA requires that all laborers and mechanics employed directly upon the site of the work be paid the predetermined wage rates "...regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and laborers and mechanics...". In 1960, the Attorney General issued a legal opinion that stated in relevant part "the gist of the Secretary of Labor's position is that the word 'employed' in

the phrase "mechanics and laborers' does not necessarily import 'employee.'" (see 41 Op. Att'y Gen 488 (1960)). Owners of subcontractor firms who are themselves performing the work of laborers and mechanics are entitled to the applicable prevailing wage rate for the classification of work performed (see In the Matter of Ray Wilson Company, ARB Case 02-086). If the subcontract price covers the applicable wage rate for the number of hours worked as a laborer or mechanic on the DBA job, the DOL considers the owner/subcontractor to have been paid in compliance.

5-26. Non-Federal Work-in-Kind Performed Pursuant to Project Cooperation Agreements. In December of 2000, the DOL advised the Assistant Secretary of the Army for Civil Works that certain Civil Works projects authorized by annual Energy and Water Resources Development Acts (such as the Water Resources Development Act of 2000) are subject to the DBA. In particular, the DOL asserted DBA coverage of non-Federal work-in-kind that is undertaken by non-Federal interests for credit or reimbursement. After extensive consideration of the Project Cooperation Agreements (PCAs) under which credit or reimbursement arrangements with non-Federal interests are addressed, the DOL concluded that all PCAs and similar type agreements that provide for prospective non-Federal work-in-kind, for which the work is "construction" within the meaning of the DBA are covered by the Act and must include references to DBA in the PCA or agreement.

CHAPTER 6 - LABOR DISPUTES, WORK STOPPAGES, ACTIVITIES AND COMPLAINTS OF LABOR REPRESENTATIVES

6-1. General. The contractor has the basic responsibility for handling labor difficulties and work stoppages. As provided in the contract General Provisions clause entitled "Notice to the Government of Labor Disputes," whenever the contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of the contract, the contractor is required to give immediate notice thereof, including all relevant information with respect thereto, to the CO.

6-2. Action at District Office Level.

a. CO and CIRS Duties. Care must be exercised not to obligate the government beyond what is compatible with law and regulations and not to intimidate either contractors or laborers. The scope of action at the District level is limited and must not involve the Corps of Engineers in the merits of labor disputes which clearly do not raise an issue or involve allegations of violations of the government contract labor standards provisions. In such cases the CO or the CIRS may assist in settlement of disputes only by advising contractors to make use of any facilities for conciliation and arbitration available in the industry or locality including the Federal Mediation and Conciliation Service, the National Labor Relations Board, state and local labor services, and arbitration machinery established by collective bargaining agreements or by labor and contractor organizations.

b. Handling Jurisdictional Disputes. Neither the CO nor the CIRS will take part in the actual adjustment of jurisdictional disputes between unions or similar disputes between labor representatives and contractors. They may, however, attempt to get the parties in dispute together so that the parties may settle their differences. On a dispute over work jurisdiction between unions within the Building and Construction Trades Department, AFL-CIO, the contractor should be advised to refer the question to the National Joint Board for the Settlement of Jurisdictional Disputes if attempts to settle the dispute locally fail. Attempts should be made to settle disputes over work jurisdiction or union representation between other organized labor groups by agreement of the local, regional, or national union leaders concerned or by the facilities offered by the Federal Mediation and Conciliation Service and the National Labor Relations Board if the parties to the dispute cannot be persuaded to settle their differences.

c. Reporting Disputes. Reports on labor disputes required by FAR 22.101-3 and instructions from Office, Chief of Engineers, will be dispatched to higher authority by the CIRS as expeditiously as the importance and impact of the situation dictates. Reporting procedures to be followed by ACO personnel are outlined in Figure 6-1, which follows Chapter 6. These procedures are set forth below.

6-3. Action by Contractor.

a. Whenever he has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of the contract work, he should immediately notify the CO and furnish all relevant information with respect thereto.

b. In some cases, labor disputes may give rise to work stoppages which cause delays in the timely performance of contracts. The CO should advise the contractor that he will be held accountable for delays that are reasonably avoidable. It should be emphasized that the standard contract clauses dealing with default, excusable delays, etc., do not relieve the contractor of delays that are not beyond his or his subcontractors' control. A delay caused by a strike which is an unfair labor practice and which the contractor could not reasonably prevent can be excused only to the extent that it does not go beyond the point at which a reasonably diligent contractor could resume the delayed performance by ending the strike by such means as:

(1) Filing a charge with the National Labor Relations Board so as to permit the NLRB to seek injunctive relief in court;

(2) Use of the National Joint Board for the Settlement of Jurisdictional Disputes, or other private Boards or organizations for the settlement of disputes.

6-4. Reporting Labor Disputes and Work Stoppages.

a. Quality Assurance Personnel. All field personnel should be on the alert for labor difficulties, and when they become aware of any actual or potential labor difficulties, such information will be given to the ACO for appropriate action. Such appropriate action will involve immediate contact with the contractor or his representative on the worksite to obtain all relevant information with respect thereto. QA personnel should make such inquiry of the contractor as is necessary to obtain all information available for reporting purposes. In the event the contractor does not have all the relevant information and representatives of the aggrieved labor group are on the jobsite, contacts with them by QA personnel should be limited to obtaining information which is pertinent to a complete preliminary report. Higher headquarters concerned should be furnished the information as soon as possible by the most expeditious means.

b. Reporting by the ACO. When a labor dispute, work stoppage, or threatened work stoppage occurs, the ACO will comply with the following procedure:

(1) Initial Report. The initial report should be forwarded by telephone, fax or e-mail

to the CIRS and the CO. The report will contain the information available as set forth at DFARS 222.101-3.

(2) Follow-up Reports. Such reports will be made in accordance with paragraph (1) above, to report information not available at the time of the initial report and to report significant changes in the situation as previously reported. Follow-up reports will be made not less often than weekly for the duration of the dispute.

(3) Final Reports. Final reports, containing all information called for and signed by the responsible official of the reporting office, will be forwarded within five days after the conclusion of the work stoppage.

6-5. Labor Activities.

a. Union and Open-Shop Contractors. Government contracting policy requires award of lump-sum contracts to the lowest responsible bidder, irrespective of his labor policies in regard to employment of "union" or "non-union" workmen.

b. Activities of Representatives of Labor Organizations.

(1) Accredited representatives of labor unions or other organizations may carry on legitimate and normal business dealings with the contractor or District Commander and will not, because of their position, be denied access to a project. The following applies to labor activities on military reservations, civil works reservations and all other contract work sites.

(2) Whenever labor representatives request permission to enter Corps of Engineers installations on which private contractor employees are engaged in contract work, to conduct union business during working hours in connection with the contract between the Government and the contractor on which union members are employed, the ACO may admit such representatives, provided:

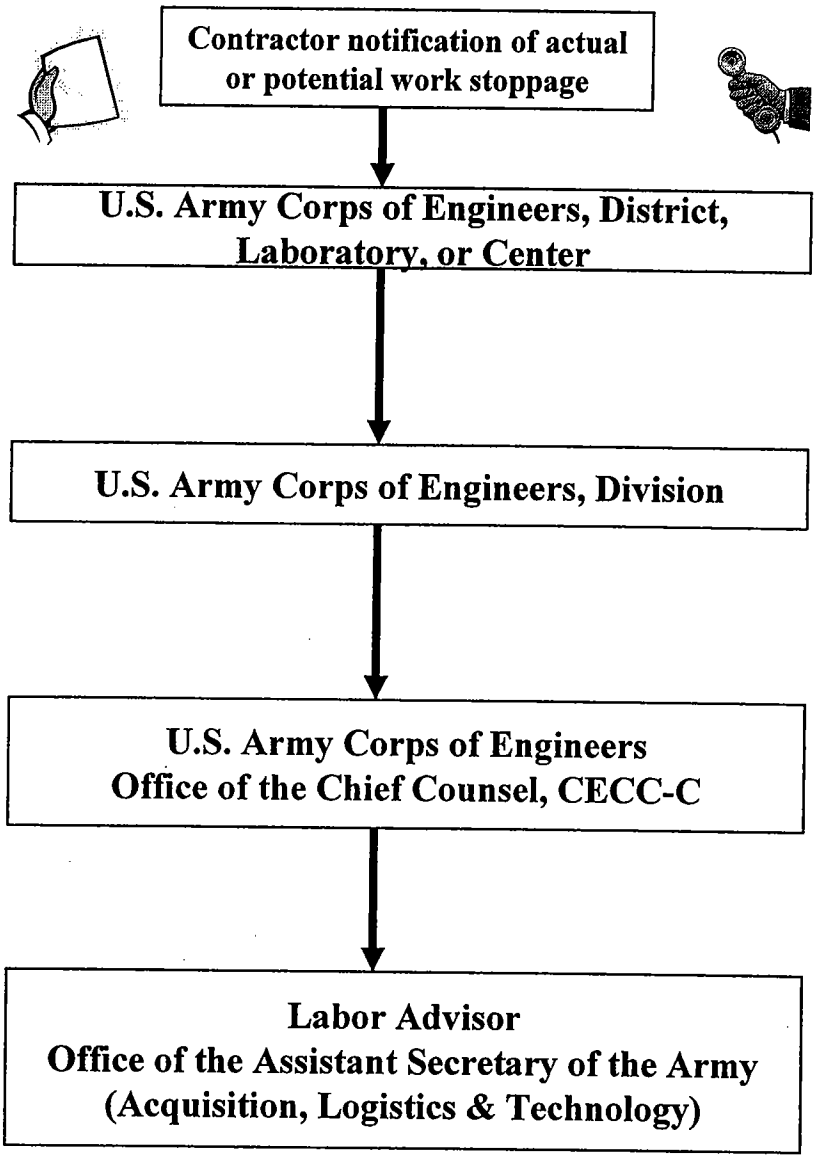
(a) the presence and activities of the labor representatives will not interfere with the progress of the contract work involved, and

(b) the entry of such representatives to the installation will not violate pertinent safety or security regulations. Labor representatives are not authorized to engage in organizing activities, collective bargaining discussions or other matters not directly connected with the government contract, on such installations. However, the ACO may authorize labor representatives to enter upon the installation for the purpose of distributing organizational literature and authorization cards to private contractors' employees provided such distribution does not:

- occur in working areas or during working times of employees concerned;
- interfere with contract performance;
- interfere with the efficient operation of the installation; or
- violate pertinent safety or security regulations.

The determination as to who is an appropriate labor representative should be made by the ACO on recommendation of the CIRS after consultation with local union officials. Business offices or desk space for labor organizations for solicitation of membership, collection of dues, or other business of the labor organization, not directly connected with the contract work shall not be permitted on the installation, except for the routine functions of the working steward whose union duties are incidental to his assigned job. In the event the ACO denies entry to a labor representative for any reason, he shall include the reasons for denial, including (1) names and addresses of representatives denied entry, (2) union affiliation of such representatives if known.

c. Complaints from Representatives of Unions, Trust Funds and Apprenticeship Programs. Complaints from such representatives, other interested parties, or contractor employees, alleging that a contractor is not complying with the fringe benefit payment requirements, or other labor requirements of the government contract provisions, are not to be regarded as "disputes" of the type discussed above. Complaints regarding nonpayment of fringe benefits involve a question of compliance with the contract minimum wage requirements which COs are responsible for enforcing. Accordingly, an investigation by the CIRS, including an interview with the complainant(s), shall be promptly conducted to determine the facts, and extent of corrective action, if any, required of the contractor.



Reference: FAR 22.101
DFARS 222.101-3

Figure 6-1. - Processing of Contractor's Notification of Actual or Potential Labor Dispute

CHAPTER 7 - ENFORCEMENT PROCEDURE AND REPORTING

7-1. General. A sound enforcement program to assure that contractors are aware of their responsibilities and that laborers and mechanics are properly paid includes: A preconstruction labor relations letter; a preconstruction conference; and an adequate review of the contractor's payroll records and field inspection of his operations. The CIRS will send a preconstruction labor relations letter to each contractor who is awarded a construction contract. This letter will provide information regarding the labor standards clauses and wage determination requirements of the contract. This letter may also include sample forms and guidance as to their submission.

7-2. Preconstruction Conferences.

a. Such conferences are required to be held with contractors to discuss what the CO expects of the contractor with respect to construction features, safety, labor relations, and contractor inspection system, and to ascertain how the contractor proposes to comply with the contract requirements. The extent of detailed discussion of labor standards requirements will depend upon the contractor's previous experience and compliance record on government contracts as well as the complexity of the construction at hand. Discussion of the contractor's proposed method of construction may disclose situations and conditions which were not anticipated. This is one of the primary purposes of such conferences, i.e., to the extent possible bring to light matters which need to be discussed and clarified. Chapter 5 contains guidance on specific subjects to be discussed at these conferences. Appendix E, Preconstruction Conference Check List, is suggested as a guide.

b. The CIRS should participate in such conferences whenever possible to assist field personnel. Contractors should be represented by a principal of the firm, or the project superintendent, together with the principal assistants who will be engaged in hiring and supervision, preparation of payrolls and payment of wages, and similar representatives of all known subcontractors. In order to avoid problems during contract performance, it may be suggested to prime contractors that they consider bringing representatives of their principal subcontractors, if known, to the preconstruction conference. The material presented to the contractor by the preconstruction letter should be emphasized during the conference. This material may be elaborated upon by reference to departmental regulations or those of the Secretary of Labor, and by other instructions contained in this regulation. The conference should also afford the contractor an opportunity to discuss such aspects of his labor relations activities as he may desire. Copies of forms, regulations, etc., should be furnished the contractor upon request.

c. The record (minutes) of the conference shall include appropriate coverage of items discussed with regard to labor standards requirements.

7-3. Routine Enforcement Activities. The ACO is responsible for ensuring that the prime contractors submit payrolls in a timely manner. The ACO's staff shall perform all required checking of the contractor's field operations, including the checking of payrolls and reporting any irregularities discovered which require further investigation or action at higher level.

7-4. Quality Assurance Representative's On-the-Site Activities.

a. General. During the course of his other QA duties, the QA Representative will observe that all posters and wage scales are properly displayed, and will familiarize himself with the overall working conditions on the job.

b. Employee Interviews. Perhaps the most effective means of detecting labor standards violations is through the conduct of labor standards interviews. These interviews are essential to the detection of employee misclassification or other common violations. Accordingly, the contract provides that the contractor will permit such interviews during working hours on the job; however, the responsible QA Representative shall, at the start of the work, inform the contractor's representative that he is required to and will conduct interviews during working hours. They should be held at such times and places as to cause the least possible interference with the performance of the employee's job and the other duties of the QA Representative. Interviews shall not be held in the presence of the employer, a supervisor, another employee, or any other person. The employee should be advised that pursuant to the Privacy Act (5 USC 552a) the information being furnished is confidential and that his identity will not be disclosed to the employer without the employee's consent.

c. Frequency and Number of Interviews.

(1) In order to obtain a representative coverage of the work force, interviews of employees working in the various trades (power equipment operators, laborers, carpenters, ironworkers, etc.) should be conducted on a periodic basis.

(2) The number of interviews during any particular week should be determined by the type of work, turnover of employees, the number of employees working, as well as the length of time required to perform the contract work. For example, on a contract where the work force is small and stable and all workers have been interviewed within a short period of time, and no labor violations have been found, interviews should be suspended when it is obvious that continued interviews would be repetitive and involve

the same workers week after week. This is not to say no further interviews are required in such a situation. To ensure continued compliance with labor provisions, interviews will be resumed and conducted at such intervals as the circumstances on the contract may dictate.

d. Reports of Interviews.

(1) QA Representatives use SF Form 1445[8], Labor Standards Interview (Appendix F) when conducting interviews. These interview reports are to be used as a check against the contractor's or subcontractor's payroll for the week; therefore, all interview reports will be attached to the payroll covering the week during which interviews were held. Any irregularities apparent as a result of the interview should be noted and called to the attention of the ACO office for such action as may be appropriate under corrective administrative procedures.

(2) The SF Form 1445 contains some questions that have not been involved on previous employee interview forms. Also, this form is to be signed by the employee. One question pertains to cash payments for fringe benefits required by the posted WD. In this regard, some WDs do not contain (require) any fringe benefits; some wage decisions contain fringe benefits for some but not all classifications of laborers and mechanics; and some WDs contain fringe benefits for all classifications. Thus, the question will not be appropriate in some cases, and it may lead to some misunderstanding on the part of the employee. In those cases where the applicable WD does not require any fringe benefits with respect to the class of worker involved, the answer to the question should be "None required" instead of checking yes or no. Regarding the employee's signature, should he decline to sign the forms the interviewer will, as a part of his comments, state the reason given by the employee for declining to sign.

e. Handling Complaints. Complaints received from employees regarding their classification and rates of pay should be brought to the immediate attention of the ACO in order that an investigation may be made. Complaints received by a QA Representative from a steward or union representative should be treated in the same manner. The QA Representative should be prepared to answer questions from employees when they request information as to the applicable contract rate or overtime provision. Under no circumstances should the QA Representative give his opinion as to whether any back wages are due any employee.

---

[8] A separate format showing the Privacy Act statement applicable to SF 1445 may be reproduced locally and attached to the SF 1445.

f. Whistleblower Protections. The CIRS should be cognizant of the "whistleblower" protections created by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994, P.L. 103-355. The implementing regulation (FAR 3.903) provides that "Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract." In this regard, upon receipt of a DBA minimum wage rate complaint that includes an allegation of retaliatory discharge, the complainant should be advised of the complaint procedures set forth at FAR 3.904.

g. Examination of Payrolls. QA Representatives shall examine payrolls submitted by the contractor to check information developed through interviews and on-site observations of the activities of the various classes of labor employed. Upon receipt of the contractor's payroll, the QA Representative will record specific payroll statement data on ENG Form 3180, Contractor Payroll Record (Appendix G). The QA Representative will assure himself that the payroll reflects the actual conditions at the work site. The following criteria will apply to the examination of the payroll:

(1) Check to see: that the names and addresses of employees are on the payroll; that they are properly classified and such classifications are descriptive of the type work or equipment involved; that they are paid not less than the contract rate for their classification as well as fringe benefits when required.

(2) Check the hours of work shown as compared to shift-hours or existing work conditions. Also, check for proper overtime hours and rates.

(3) Compare the payroll with the daily logs to see that the payroll reflects the various activities reported on the daily logs for the work week involved.

(4) Check for disproportionate use of laborers, trainees, and apprentices to journeymen, and proof of registration of apprentices and trainees.

(5) Examine the contractor's Statement of Compliance to see that it is complete, that the dates and deductions listed are consistent with those on the payroll, that no unauthorized deductions are made, and when fringe benefits are required, check the fringe benefits portion of the statement for completeness and proper execution. Upon completion of his examination, the QA Representative will so indicate by his initials and forward the payroll, statements, and interview reports to the ACO Office.

7-5. Corrective Administrative Action on Nonaggravated or Nonwillful Violations. When instances of noncompliance, discrepancies, errors, or omissions are found, the following action shall be taken:

a. General. Payrolls are not in any event to be returned to the contractor to make corrections. The custody and control of any payroll should not be relinquished by the government at any time. Minor corrections may be effected only by the contractor or his authorized representative on the payrolls in the ACO office in the presence of the QA Representative or ACO office personnel, or by the contractor's submission of amended payrolls reflecting such corrections. Corrections made directly on the payrolls should be initialed by the same person who signed the Statement of Compliance submitted with the payroll. Examples of such permissible corrections are:

(1) Correcting a wrong classification or one omitted as distinguished from a real misclassification involving underpayments; correcting dates, computations, and other figures; and such other corrections as are necessary to ensure that the payroll data is correct and complete.

(2) Corrections involving any adjustment of money must be handled by supplemental payroll and statement.

b. Overpayments. Experience has shown that contractor's payrolls occasionally reflect what appears to be an overpayment of wages to an employee. Although the net amount of pay shown for the employee appears to satisfy the contract minimum pay requirements, in some cases the payroll is incorrect on its face. Some examples of the above are: the total hours shown for the week are not supported by the daily hours, thereby raising a question as to the correctness of the daily postings or an error in computing the total; the gross pay shown is more than the total hours shown times the rates of pay which also raises the same question: the net pay is less than the gross less the deductions shown, which raises two further questions: (1) Is the net pay incorrect in itself, or (2) have the deductions been inaccurately reported. The contractor is responsible for submitting a payroll that is both correct and complete, and so long as the payroll is not correct on its face it is not an acceptable payroll. Such discrepancies as are referred to above should not be a matter for speculation by ACO personnel but should be explained by the contractor. The contractor may make such explanation by a note on the payroll or in a separate writing.

c. Underpayments Involving Overtime Pay. Payrolls reflecting any underpayments involving overtime compensation, regardless of cause, shall be given the required checking at once and dispatched immediately to the CIRS. The CIRS will compute the overtime underpayments as well as the CWHSSA liquidated damages and prepare, for signature by the ACO, written instructions to the contractor concerning proposed

corrective action and statutory appeals procedures relating to the assessment of liquidated damages.

d. Other Underpayments. At the ACO office level the contractor may be instructed to make restitution of underpayments and submit supplemental payrolls and statements in cases resulting from misclassifications (where there is no disagreement as to the proper classification) or other reasons, all of which are found not to be willful or aggravated. Correction of underpayments may also be handled on the next regular payroll, provided the payroll data clearly identifies the reason for the extra pay as well as the usual computations to support and distinguish the regular pay from such additional pay. In all cases where the contractor is instructed at this level to make restitution payments, the responsible QA Representative will ensure that the corrective action is adequate. In the event the contractor or any subcontractor does not satisfactorily and voluntarily comply with the instructions of ACO personnel, the matter shall be called to the attention of the CIRS immediately and processed in the manner set forth in paragraph 7-6 of this chapter.

e. Disputes. In cases where there is a misclassification involved and there is disagreement as to the proper classification, the ACO shall not direct any corrective action but rather forward all relevant information including the following to the CIRS: Name and address of employee; payroll classification and wage rate, dates, and hours worked on current payroll; total hours misclassified; total wages paid; brief description of duties and suggested classification; and contractor's position on the matter. The CIRS will then process the matter as prescribed by 29 CFR 5.13, FAR 22.406-10 and the contractual general provision entitled "Disputes Concerning Labor Standards." Figure 7-1, which follows Chapter 7, outlines the report process.

f. Proof of Effecting Restitution Payments. Regulations require that evidence of restitution payments be obtained and incorporated into the contract files. When the contractor is directed at the project level to make restitution payments such evidence will be obtained. Quality Assurance personnel may require the contractor to prepare payroll receipts to be signed by the employee, or furnish copies of canceled checks. Either method must be used in all cases where the employee is no longer employed on the jobsite or not available for interview by the QA Representative subsequent to the payment. If the employees are still on the job site, Corps personnel may question the employee concerning same and sign an appropriate statement, either on the supplemental payroll or separate writing, and attach it to the payroll.

7-6. Action on Aggravated or Willful Violations. In the event enforcement activities indicate the contractor or his subcontractor are in aggravated or willful violation of the labor standards provisions of the contract or if the amount of restitution wage payments to one or more employees exceeds $1000, a special investigation shall be made by the

CIRS. Under these circumstances, the QA Representative should not attempt to conduct any interviews with the contractor or his employees. However, if any employees make inquiries or complaints to any Corps personnel before a full scale investigation is started, they should be advised that an investigation will be made. All such inquiries, complaints, or evidence which an employee may present should be treated as strictly confidential and no attempt should be made to advise them whatsoever as to whether any back wages are due or action to take because of the violations by his employer. Upon completion of the investigation, the CIRS will forward an administrative report of findings to the CO for further disposition of the case as provided by applicable regulations and as outlined in Figure 7-2, which follows this chapter.

7-7. Records and Reports.

a. Payroll Record Card. A Contractor Payroll Record, ENG Form 3180-R (Appendix G), will be maintained for each contract. When all work on the contract is complete this record will be signed by the Resident Engineer or Area Engineer and attached to the final payroll.

b. Contract Completion. When a contract is nearing completion, the status of payroll submissions and any required corrections should be reviewed in order that any deficiencies may be discovered and appropriate action taken prior to the processing of final payment to the contractor.

7-8. Withholding of Funds from Contractor's Payment Estimates - Administrative Procedures.

a. When the CO believes a violation exists, he shall withhold from payments due the contractor an amount equal to the estimated underpayments, as well as any estimated liquidated damages due the United States under the CWHSSA. FAR 22.406-9) and the accompanying contract clauses (52.222-4 and 52.222-7) as well as DFARS 222.406-9) provide detailed guidance as to the procedures to be followed in withholding actions.

b. The CO's formal correspondence to the contractor initiates the withholding action by those responsible for preparing payment estimates; therefore, a copy of such correspondence must be furnished the responsible office, and a copy should also be furnished to the appropriate unit of the District Finance and Accounting Office. Whether payment estimates are prepared on ENG Form 93 or a contractor's invoice and receiving report procedure is used, the amounts withheld (for wages and liquidated damages) must be clearly identified on the payment documents (e.g., ENG Form 93, Item 15G with appropriate explanatory notes on reverse thereof). Also, such amounts

withheld must be in addition to any other deductions such as those for retained percentage and/or liquidated damages for late performance. No part of the amounts withheld for labor violations is to be released to the contractor until written clearance is received from the CO.

c. Funds withheld from the contractor's earnings to satisfy DBA/CWHSSA wage underpayments should be forwarded to the following address: U.S.

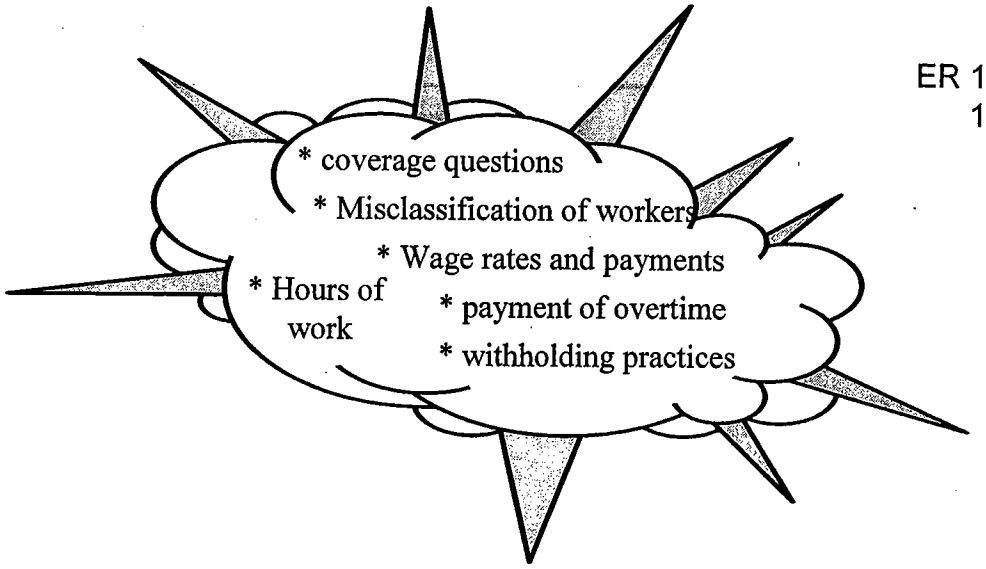
Government Accountability Office
CASO
441 G Street, NW, Room 6B40A
Washington, D.C. 20548

d. Priority of Withheld Funds. A review of DOL Administrative Law proceedings and Wage Appeals Board decisions (Quincy Housing Authority, WAB Case No. 87-32, 17 Feb 89) reveals a consistent position in which accrued funds withheld for payment of wages may not be used or set aside for other purposes until such time as the prevailing wage issues are resolved. It is reasoned that to give contracting agency re-procurement claims priority, for example, would essentially make the affected employees unfairly pay for the breach of contract between their employer and the Government. The DOL has maintained that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. The DOL's position is predicated on the view that to hold otherwise would be inequitable and contrary to public policy since the affected employees have already performed work from which the Government has received the benefit. Thus, employees' wage claims for underpayments have priority over:

(1) An Internal Revenue Service levy for unpaid taxes (T. D'Ambrosia d.b.a. Ambrosia Construction Company, B-182355, 11 Feb 76);

(2) Re-procurement costs of the contracting agency after a contractor's default or termination for cause (National Surety Corporation v. U.S. 132 Ct. Cl. 724;133 F. Supp. 381 (1955));

(3) Any claim by a trustee in bankruptcy (Pearlman v.Reliance Insurance Company, 371 U.S. 132 (1962)).



U.S. Army Corps of Engineers, District, Laboratory, or Center

↓

U.S. Army Corps of Engineers, Division

↓

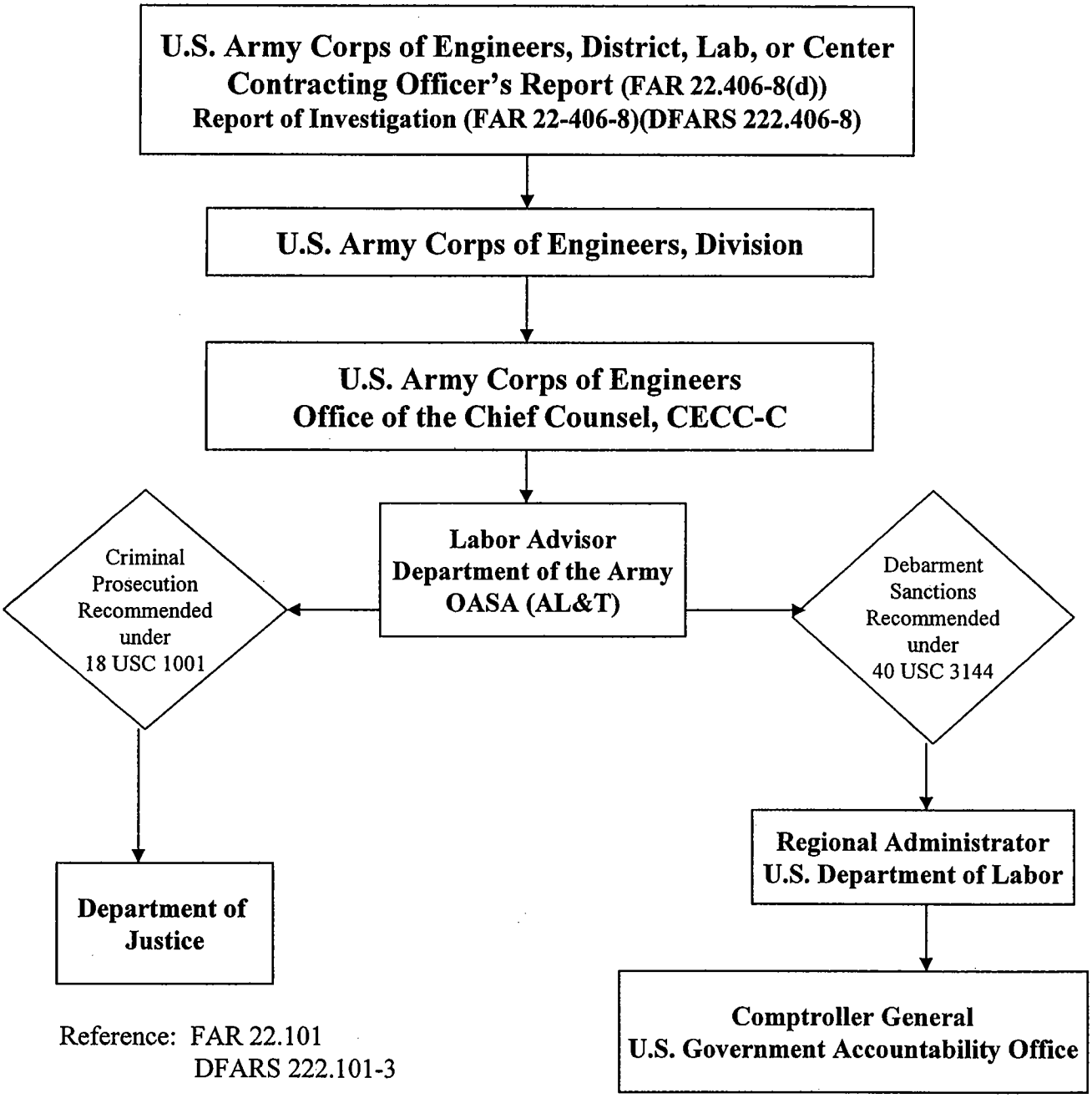
U.S. Army Corps of Engineers
Office of the Chief Counsel, CECC-C

↓

Administrator, Wage & Hour Division
U. S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Reference: 29 CFR 5.13
FAR 22.406-10
DFARS 222.406-103

Figure 7-1. - Processing of administrative matters relating to disputes between contracting officers and contractor concerning labor standards compliance



Reference: FAR 22.101
DFARS 222.101-3

Figure 7-2. Processing of reports relating to Corps of Engineers Investigations of violations of the Davis-Bacon and Related Acts

CHAPTER 8 - AREA PRACTICE SURVEYS

8-1. General. At the core of the CO's effort to ensure contractor compliance with the prevailing labor standards is the duty to be cognizant of "area practice." Whether to ensure the proper trade classification of specific workers or to ensure the application of the proper schedule of wage rates, the CIRS is frequently involved in the compilation and assessment of data relating to classification practices in the vicinity of Corps projects.

8-2. Trade Classification Issues. As has been noted previously, the most common violation of the DBA is the incorrect classification of employees. The misclassification of employees and the detection of resulting wage underpayments will sometimes be a simple or readily recognizable situation. However, there are many occasions when the distinction between trade classifications is a matter of dispute. Further, disputes may arise which involve the CO, contractors, contractor associations, contractor employees, unions and/or the DOL. All these disputes arise in an industry that is, by its nature, fragmented and secular. Thus, with the growth of open shop construction, there has been an increasing trend towards specialty or task-oriented trades (e.g., Metal-building Assemblers). This represents a diminished focus upon traditional craft classifications (e.g., Ironworker). This tendency would appear to underlie many of the additional classification requests that have been submitted to the DOL in recent years. The basis for the resolution of disputes involving these requests may be found in the Act which states in pertinent part

> "...prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the State, in which the work is to be performed,..."

Thus, when a dispute concerning the proper trade classification arises, the CIRS should contact the appropriate DOL Regional Wage Specialist. The DOL policy in classification matters was established by the Wage Appeals Board in Fry Brothers Corporation (WAB Case No. 76-6, 14 Jun 77). It was reasoned that the proper classification of work performed by workers is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination. Thus, the first step in the process of determining proper classification would be to determine the nature of the contract wage determination. In the survey of wage conditions in the applicable area, the DOL will have already determined that one of three conditions prevails. The resulting DOL wage determination will be based on 1) union negotiated, 2) open shop (non-union) wage rates, or 3) a mixed schedule (e.g., union electricians and open shop laborers). The content of the area practice survey thus depends upon which of the three conditions apply. Information relating to which of these three conditions apply may be gathered

from the "identifiers" provided by the DOL in the body of the wage determination. Above each classification (or group of classifications) listed within a particular determination, an alphanumeric "identifier" and date provide information about the source of the classification(s) and wage rate(s) listed for it. Thus, SU indicates that the rates were derived from survey data which may include union and non-union data. Any identifier beginning with characters other than SU is used where union classification(s) and wage rate(s) have been found prevailing. In each such identifier, the first four letters indicate the international union for the local union that negotiated the wage rates under that identifier. Then there is a four digit code that indicates the local union number. For example, for the identifier ELEV0101, ELEV represents the Elevator Constructors Union and 0101 represents their local union number. For purposes of determining appropriate classifications therefore, one of the following conditions may apply.

(1) If the applicable wage determination reflects union rates for the classifications involved, the unions whose jurisdiction the work may be within should be contacted to determine whether the respective union performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, each union should be asked how the individuals who performed that work were classified. The information provided by the unions should be confirmed with collective bargaining representatives of management (e.g., contractors' associations such as local chapters of the Associated General Contractors of America, the Associated Builders and Contractors, the National Electrical Contractors Association, etc.). If all parties agree as to the proper classification for the work in question, the area practice is established.

(2) If the applicable wage determination reflects open shop rates for the classifications involved, open shop contractors should be contacted and asked whether they performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, these contractors should be asked how the employees who performed this work were classified. If all contractors agree, or if a clear majority of the contractors agree, the area practice is established. If no open shop contractor performed the work at issue in the county in the time period one year prior to the beginning of construction, the CIRS should contact the DOL's Regional Wage Specialist for further guidance.

(3) If the applicable wage determination reflects a mixed schedule of rates, it is necessary to contact the unions as well as union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects in the area in the period one year prior to the beginning of construction of the project. If all

parties agree, or if a clear majority of the parties agree on the classification, the area practice is established.

8-3. Full Scale Area Practice Surveys. Whether the survey is conducted in order to evaluate a contractor's request for authorization of additional classification and rate or to identify a possible misclassification, it is essential that the CIRS document the steps undertaken in the survey. For each of the above conditions, there are many reasons why the parties may not agree (i.e., union jurisdictional disputes, management disputes with the union, or disagreement among open shop contractors). In the absence of agreement or a clear majority of parties in agreement, it becomes necessary to conduct a full scale area practice survey. In recent years, the DOL has directed contracting agencies to conduct such full scale surveys. However, there is neither regulatory guidance (i.e., CFR, FAR) nor policy directives (i.e., All-Agency Memoranda) available for such efforts. Accordingly, agencies have naturally been reluctant to assume responsibility for such surveys, maintaining that this work should only be performed by DOL personnel since they are responsible for the predetermination of prevailing rates. DOL has determined that Reorganization Plan No. 14 of 1950 tasks the CO with the responsibility of day to day enforcement of labor standards. It is argued that a prerequisite to the exercise of such responsibility is a familiarity with classification practices within the project area. Without attempting to here resolve the issue of primary responsibility for full scale surveys, it can nonetheless be stated that for those districts with the resources to conduct such surveys, classification disputes will be more expeditiously resolved when they are forwarded to the DOL with as much area practice information as can be developed by the contracting agency. Experience has also demonstrated that contractor requests for authorization of additional classifications and rates are processed more expeditiously when they are submitted with area practice information. The following section details the method of conducting a full scale area practice survey for purposes of determining the appropriate trade classification.

8-4. Documenting the Area Practice Survey. As with the survey procedures noted above, the CIRS should attempt to identify similar projects in the same geographical area as the project under investigation which were in progress during the period one year prior to the start of construction for the subject project. If no similar projects were built in the area during that time frame, it may be necessary to expand the survey in time (two or three years) and/or to contiguous counties. After establishing the framework for the survey, the following steps are to be taken:

(a) Determine what firms performed the work in question on these projects and contact those which are either open shop or union depending on the basis for the wage rates issued in the applicable wage determination. It is important to note that the existence of a classification within a collective bargaining agreement alone is not sufficient to determine the appropriate classification. It must be demonstrated that an

existing classification actually performs the work in question (More Drywall, Inc., WAB 90-20, April 29, 1991; Miller Insulation Company, WAB 94-01, May 2, 1994; and Volkman Railroad Builders, WAB 94-10, August 22, 1994).

(b) From each firm contacted, determine the week in which the greatest number of employees performed such work on these projects (i.e., "peak week") and determine how such employees were classified.

(c) Compile all information received and total the number of employees in each classification which performed the work in question. The classification which has the clear majority of employees performing the work is the proper classification. However, if it is found that only 51% to 60% of the employees in a classification performed the work in question, contact the DOL's Regional Wage Specialist for further guidance. If no common, single classification practice is found to be predominant in the area or if no project involving work of a similar nature is found, the DOL generally will not take exception to the contractor's particular classification practices.

(d) The Dictionary of Occupational Titles, published by the Bureau of Labor Statistics may be used as reference material, it cannot be relied on for resolving DBA classification questions.

8-5. Determining the Appropriate Schedule of Wage Rates.

(a) All Agency Memoranda Numbers 130 and 131 (Appendix H) give general, broad outlines of the proper categories of the various types of construction (building, heavy, highway and residential) subject to "local or area practice". For example, where a contract for a project (such as a sewage treatment plant) contains multiple wage schedules (e.g., building and heavy), it may be necessary to resort to area practice to determine which schedule of rates applies to various parts of a project.

(b) The survey is conducted in essentially the same manner as described in paragraph 8-4 above, except that the pivotal issue becomes the determination of which rates were paid on similar projects for the type of work in dispute rather than which particular classification of laborer or mechanic performed a specific task. In conducting such a survey, all projects of a character similar are generally considered. However, in the case of either building or residential construction wage schedules, whether other DBA covered projects may be included in the area practice survey must first be determined from the DOL's Regional Wage Specialist. This will depend upon whether such covered projects were included in the wage survey which served as the basis for issuing the wage rates in the applicable WD.

CHAPTER 9 – LABOR STANDARDS RESOURCES, INFORMATION SYSTEMS AND REPORTS

9-1. General. This chapter provides CIR representatives with an overview of labor standards resources, information systems and reports. The following paragraphs highlight certain resources that enhance labor standards compliance, the management information system that allows for the tracking of individual cases and the generation of specific reports that identify program trends and problems. It should be recognized that these resources and reporting systems are dynamic and are revised frequently to meet labor standards compliance assurance requirements and objectives.

9-2. WDOL Labor Standards Information Resources. The Internet provides USACE CIR representatives with access to a number of websites that serve to enhance labor standards program administration. The Library Page of the WDOL.gov site (www.wdol.gov) contains links relating to the following:

a. Applicable Regulations

(1) Code of Federal Regulations

(2) Federal Acquisition Regulation

(3) Defense Federal Acquisition Regulation Supplement

(4) Army Federal Acquisition Regulation Supplement

(5) Engineer Federal Acquisition Regulation Supplement

(6) Engineer Regulation 1180-1-8, Labor Relations

(7) Engineer Pamphlet 1180-1-1, Service Contract Act Labor Relations

b. Sites Relating to Labor Standards and Compliance Requirements

(1) Significant All Agency Memos Issued by DOL

(2) DOL Prevailing Wage Resource Book

c. Sites Relating to Contracting Agency Pre-Award Activities

(1) Listing of Debarred, Ineligible and Suspended Contractors

(2) Veterans Employment and Training Service - VETS 100 Federal Contractor Program

(3) Office of Federal Contract Compliance Programs (OFCCP) National Pre-Award Registry

(4) OFCCP's Construction Industry Goals for Minority and Female Participation

9-3. Contractor Industrial Relations Sub-Community of Practice. In addition to the above Internet resources, USACE CIRS may access the Engineering Knowledge Online (EKO™) Contractor Industrial Relations Sub-community of Practice (Sub-Cop) Portal (https://eko.usace.army.mil/usacecop/counsel/cir/) for further CIR information. . Access to this Intranet site requires an Army Knowledge Online (AKO) account which can be obtained at the AKO site, https://www.us.army.mil/suite/login/welcome.html. Among the informational resources available at this site are the following:

a. CIR Forms. This section contains a compilation of commonly used forms (e.g., SF, DD ENG forms) whose use is established by regulation and which facilitate USACE compliance activities.

b. CIR Information Letter Index. This item is a hyper-linked index to all CIR Information letters issued by the Office of the Chief Counsel, annotated with reference to subsequent developments relating to specific labor standards matters.

c. CIR Information Letters. This section contains more than 140 guidance letters relating to CIR compliance issues as well as legislative and regulatory developments.

d. CIR Letters. This section contains a collection of general CIR correspondence templates covering various recurring labor standards actions that CIRS may adopt for their particular situations.

e. Guidebooks. This section contains a collection of contract labor standards guidebooks that have been issued by the Department of Labor (e.g., Prevailing Wage Resource Book) as well as USACE (e.g. Davis-Bacon Act Guidebook for "work in kind" Program).

f. Library. This section houses a collection of background materials relating to contract labor standards

g. Opinion Letters. This section contains a collection of opinion letters issued by the DOL in connection with various labor standards coverage and classification matters

h. Training Materials – a collection of Power Point presentations relating to various labor standards matters (e.g. Reserve Gate Procedures, Withholding of Contract Funds, Project Labor Agreements).

i. CIR Roster. Contained within this section is a detailed listing of all USACE CIR Representatives which includes mailing addresses, telephone and fax numbers and e-mail addresses.

In addition to the above materials, the CIR SubCop Portal provides a forum feature allowing USACE CIR representatives to discuss critical labor standards issues. The Forum's objective is to promote knowledge management within the USCAE CIR community.

9-4. Matter Tracking System (MTS). Matter Tracking is a Windows-based system designed to track case matters for which USACE Counsel offices are responsible. MTS was deployed by the Office of the Chief Counsel to provide Counsel members with the capability to manage workloads, to produce reports, and to share information with other USACE counsel offices. MTS is organized into databases called "Notebooks" which track a broad array of matters. In particular, MTS contains a "Labor Notebook" which tracks the status of labor standards matters in four basic areas. CIR Representatives enter labor standards matters relating to full scale labor standards investigations; the assessment of CWHSSA liquidated damages; Additional Classification and Rate Disputes; and Requests for DOL Opinions under 29 CFR 5.13. The system provides USACE CIR Representatives with enhanced report generation capabilities that facilitate program management within the district. A *MTS User's Guide* and a *Quick Reference Guide on How to Enter Labor Matters into MTS* are available for members of the Legal Services Community of Practice Portal (https://hqintra1.hq.usace.army.mil/ls_cop/index.asp).

9-5. Resident Management System (RMS).

a. The Resident Management System is a Windows-based system designed to support contract construction management at USACE field offices and district headquarters offices. Of particular relevance to the USACE labor standards mission is the QCS module that provides for a systematic approach to various labor standards compliance activities. Among the activities that are addressed in the QA/QC planning phase is the ability to plan/track labor standards interviews and contractor payroll submissions. The QA/QC module enables USACE CIR representatives to acquire a detailed picture of the firms performing on a particular date as well as the types of equipment used and the number of employees performing on site. Initial deployment of

RMS system has demonstrated that this module has proven invaluable in the investigation of labor standards complaints alleging contractor non-compliance with contract labor provisions.

b. As with other systems noted above, access to RMS requires both a user identification number and password from UPASS, check with the District UPASS Administrator. Access rights to contracts and/or offices in the RMS database must be obtained from the District RMS System Administrator. USACE Representatives are encouraged to familiarize themselves with the operation of the RMS system to ensure that the labor standards capabilities are exercised to maximum effect.

9-6. Semi-Annual Labor Standards Enforcement Report.

a. DOL Regulations 29 CFR §5.7(b) require Federal agencies administering programs subject to DBA and CWHSSA labor standards to furnish a Semi-Annual Labor Standards Enforcement Report to the Administrator of the Wage and Hour Division. These reports are due to the DOL on April 30 and October 31 of each year. The information required for this report highlights two related activities: contract awards and labor standards enforcement activities. The contract award information comprises the first two data elements of the report while the labor standards enforcement data comprises the balance of the required elements. Information concerning the number of construction contracts subject to the DBA awarded during the reporting period and the dollar amount of those contracts can be retrieved from the Standard Procurement System (SPS). The District CIRS should initiate a request for assistance to the SPS Administrator for the reporting element identifying the information sought. This data call should cite the regulatory basis (29 CFR 5.7) for the information requested. Much of the information relating to compliance activities (items (4) through (14) below) can be gathered from the Labor Notebook within the Matter Tracking System.

b. USACE CIR Representatives preparing Semi-Annual Labor Standards Enforcement Reports shall follow the guidelines set forth below.

(1) Period covered. The subject period covers only contracts awarded during the reporting period. Not included in this element are contracts awarded prior to this period even though the contract may still be underway.

(2) Number of prime contracts awarded. Enter total number of prime contracts subject to DBRA/CWHSSA that were awarded during this period.

(3) Total dollar amount of prime contracts awarded. Enter the dollar amount of the contracts reported in (2) above.

(4) Number of contractors/subcontractors against whom complaints were received.

(i) Prime Contractors
(ii) Subcontractors

(5) Number of investigations.

(i) Undertaken
(ii) Completed

(6) Number of contractors/subcontractors found in violation.

(i) Prime Contractors
(ii) Subcontractors

(7) Amount of wage restitution found due under –

(i) DBA
(ii) CWHSSA

(8) Number of employees due wage restitution under –

(i) Davis Bacon Act
(ii) CWHSSA

(9) Amount of liquidated damages assessed under the CWHSSA –

(i) Total amount
(ii) Number of contracts involved

(10) Number of complaints received from

(i) labor unions
(ii) individual employees
(iii) DOL
(iv) Others

(11) Number of employees and the total amount paid/withheld under

(i) DBA
- employees

- amount

(ii) CWHSSA
- employees
- amount

(iii) Copeland Act
- employees
- amount

(12) Preconstruction activities -

(i) Number of conferences held.
(ii) Preconstruction letters sent.

(13) Number of Compliance Checks performed. This item should include the total number of on-site inspections (in which the UCASE QA Representative notes the work performed and the classifications doing the work, job site posting requirements, etc.), the number of payrolls checked and labor standards interviews conducted.

(14) Number of Employees Interviewed. Even though included in item (13) above, this item should be reported separately.

FOR THE COMMANDER:

8 Appendices
(See Table of Contents)

YVONNE J. PRETTYMAN-BECK
Colonel, Corps of Engineers
Chief of Staff