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# **A Resource Book for Contracting Officers**

## **Application and Impact of Labor Laws on Federal Contracts**

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# FEDERAL CONTRACT LABOR STANDARDS OVERVIEW

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## Resource Book Organization

This resource is designed to provide an overview of most of the labor laws and labor standards that will affect Federal Government contracts for the procurement of supplies and services, including construction contracts. It starts with a brief description and overview of each of the labor laws. It then moves into the acquisition planning and preaward activities – to provide information on the applicability of the appropriate labor standards and wage determinations for solicitations and contract awards. It finishes by providing information about ongoing contract administration requirements for the labor standards, Service Contract Act and Davis-Bacon Act in particular. The index is linked to the specific sections of the resource book and you may therefore browse the index and “point and click” on the subject of interest. The Labor Advisors hope you find the guide useful and user friendly. Feel free to send suggestions for improving it to us at the e-mail addresses on the cover page.

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## The Labor Laws: Overview

### General

Congress enacted the various labor laws at different times and during different administrations to prevent exploitation of the employees working on Government contracts, and to eliminate the wage-depressing tendencies of the federal procurement process. The laws incorporated within Navy/Marine Corps contracts afford employees of government contractors the right to receive a prescribed minimum rate subject to certain overtime requirements without subsequent rebate or “kickback.” The failure of a contractor to comply with the labor provisions, coupled with lax enforcement, results in expensive investigations which may require the withholding or suspension of payments to the contractor, imposition of penalties, termination of the contract, debarment, and, in some cases, criminal action.

Each of the statutes and their implementing regulations discussed briefly below reflect the Federal Government’s commitment to protect the individual and collective rights of contractor employees. The administration of the contract labor laws program within the Department of Defense is governed by the basic labor policy in

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FAR Part 22. The labor program has been further implemented by DFARS Part 222, NMCARS Part 5222, and some Navy/Marine Corps System Commands such as Naval Facilities Engineering Command's (NAVFAC's) Acquisition Supplement (NFAS) Part 22 and NAVFAC's Business Management System (BMS).

### **McNamara-O'Hara Service Contract Act (SCA)**

[The McNamara-O'Hara Service Contract Act](#) (41 USC 351-358) (SCA) of 1965 applies to Federal contracts for services through the use of service employees in the United States as defined in the SCA. *There is no dollar threshold for application of the SCA. However, for contracts of \$2,500 or less, no SCA-related clauses or wage determinations are required.* Service employees include all employees performing the services required by the contract except those in executive, administrative, or professional capacities as those terms are defined in Department of Labor (DOL) 29 CFR 541. The SCA requires minimum wages and fringe benefits as determined to be prevailing by the Secretary of Labor. SCA also requires compliance with "health and safety provisions." DOL has sole enforcement responsibility for this law. There are a number of statutory and administrative exemptions from SCA.

### **Davis-Bacon Act (DBA)**

[The Davis-Bacon Act](#) (40 USC 276a-a (7)) (DBA) of 1931 applies to construction contracts in excess of \$2,000 to which the Federal Government or the District of Columbia is a party. (Note: The \$2000 threshold has not changed since the DBA was enacted in 1931.) Covered DBA construction is that which is performed in the United States or the District of Columbia on a public building and/or public work. It specifies that not less than minimum wages and/or fringe benefits as determined by the Secretary of Labor be paid to the various classes of laborers and mechanics employed on a particular project based on those prevailing in the area. PL 88-349 amended the Act as of July 2, 1964, to include fringe benefits in the "prevailing rate." The day-to-day enforcement responsibility is delegated to the contracting agency and DOL has been assigned administrative and oversight responsibility. DOL [All Agency Memorandum #118](#) and reorganization plan #14 clarifies these responsibilities. There are no general "exemptions" from the law, but on occasion DBA application will be suspended by executive order following national disasters.

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## Walsh-Healey Public Contracts Act (PCA)

The Walsh-Healey Public Contracts Act (41 USC 35-45) (PCA) of 1936 prescribes minimum wages to be paid to a contractor's employees working on contracts in excess of \$10,000 for the manufacture or furnishing of materials, supplies, articles, and equipment ([FAR 22.6](#)). The Secretary of Labor is authorized to determine prevailing minimum wages. DOL, however, has not issued wage determinations under this Act for many years. Accordingly, the Fair Labor Standards Act minimum wage (currently \$7.25 per hour) generally applies. The PCA prohibits the employment of youths less than 16 years of age and convicts, except under certain conditions. Not included in convict labor are persons paroled, pardoned, or discharged from prison, or prisoners participating in a work-release program. It is also unlawful to carry out the contract work under working conditions that are unsanitary, hazardous, or dangerous to the health and safety of employees. Enforcement responsibility rests with the DOL. There are some exemptions for perishables, agricultural products, and "open market" purchases, such as those purchased as commercial items under FAR Part 12. Unique to the Navy is that work for the "construction, alteration, furnishing, or equipping of a naval vessel" is subject to PCA.

## Contract Work Hours and Safety Standards Act (CWHSSA)

[The Contract Work Hours and Safety Standards Act](#) (40 USC 327-333) (CWHSSA) of 1962 applies to contracts in excess of \$100,000 (Note: Not the SAP threshold) that will use laborers, mechanics, watchmen, and guards (such as SCA- and DBA-covered contracts) and requires that employees be paid time and one-half for all hours worked in excess of 40 per week. The CWHSSA also prohibits working conditions that are unsanitary, hazardous, or dangerous to the health and safety of the employees. See [FAR 22.3](#). Contractors or subcontractors who violate the CWHSSA may be subject to fines, imprisonment, or both. Intentional violations of CWHSSA are misdemeanors and may be punished by a fine not to exceed \$1,000 or by imprisonment for not more than six months, or both. Overtime wage violations may result in the assessment of liquidated damages in the sum of \$10 for each calendar day each employee is allowed to work in excess of a 40-hour workweek without payment of the required overtime compensation.

Failure of a contractor to comply with the CWHSSA may result in other serious contract remedies as well, such as the withholding or

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suspension of payments to the contractor, imposition of penalties, contract termination, and/or debarment.

When required in conjunction with DBA-covered work, CWHSSA is enforced by the contracting agency. However, when required in conjunction with SCA-covered work, the CWHSSA requirements are enforced by DOL.

### **The Copeland Act**

[The Copeland Act](#) (40 USC 276c and 18 USC 874) (“Anti-Kickback” Act) of 1934 applies to all contracts in excess of \$2000 for construction or repair of public buildings or public works within the United States. The “Anti-Kickback” Act makes it unlawful to induce, by force or otherwise, any person to give up any part of the compensation to which they are entitled under the contract. The Copeland Act also requires contractors and subcontractors to submit weekly certified payroll statements regarding the wages and fringe benefits paid on covered work; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work (specifies that tools, equipment, and travel pay are not wages); and proscribes the methods of payment permissible on such work. Generally, only payroll withholding taxes and deductions that are voluntarily authorized by the employee may be made from the minimum rates on the wage determination.

Since the Copeland Act is linked explicitly to DBA-covered contracts, the day-to-day enforcement is performed by the contracting agency.

### **The Miller Act**

The Miller Act (40 USC 270(a)) of 1935 requires that before any contract exceeding \$25,000 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.

Under the Miller Act, the contracting officer is required to insert FAR clause [52.228-15](#), Performance and Payment Bonds – Construction

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(or one accomplishing the same purpose) in solicitations and contracts for construction that are expected to exceed \$100,000. If the expected contract value is over \$25,000 but under \$100,000, insert the clause [52.222-13](#), Alternative Payment Procedures. When using this clause, the contracting officer must specify the payment protection selected.

Employees of prime contractors or first tier subcontractors must give written notice by registered mail to the prime contractor informing them of the failure to receive proper wages within *90 days* of the date the labor was last performed on the covered contract by the underpaid workers. The Miller Act does not protect employees working for subcontractors below the first tier subcontractors.

If an employee covered by the Miller Act complains of being underpaid, either orally or in writing, the contracting officer should explain that the government will investigate and give the employee the name and address of the contractor's surety. The employee should also be informed at that time of the 90-day deadline for filing a Miller Act claim.

### **Fair Labor Standards Act (FLSA)**

[The Fair Labor Standards Act](#) (29 USC 201) (FLSA) of 1938 provides for the establishment of minimum wage and maximum hour standards, record keeping requirements, and prohibits oppressive child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a minimum wage of currently not less than \$7.25 an hour. Overtime pay at a rate of not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek. Although FLSA is not a contract labor standard, parts of the regulations are used to interpret requirements on DBA and SCA contracts. (For example: The FLSA hours worked and the executive, administrative, and professional exemption rules are followed on DB and SCA covered contracts.) FLSA enforcement responsibilities rest with the DOL.

### **National Labor Relations Act (NLRA)**

[National Labor Relations Act](#) (29 USC 151-169) (NLRA) of 1935, amended by PL 102-354 in 1992. The NLRA gives employees the right to organize (form, join, or assist labor organizations); to bargain collectively over wages and working conditions; to engage in protected "concerted activities" (including picketing and striking); or to refrain from any of these activities. The NLRA has general

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application to all employers engaged in interstate commerce (except airlines, railroads, or agricultural establishments). The NLRA is administered by the National Labor Relations Board ([NLRB](#)), an independent federal agency. The NLRB conducts elections to determine if a majority of employees wants to be represented by a union and investigates and remedies unfair labor practices by employers or unions.

The NLRA applies to contractors and their employees. In the event of union organizing activity or a labor dispute between an employer and a labor union, Navy/Marine Corps civilian and military personnel must maintain a policy of strict neutrality. Navy/Marine Corps personnel are prohibited from engaging in any activity assisting with, interfering with or influencing the labor relations activity. Navy/Marine Corps personnel should also refrain from any attempt to conciliate or mediate a labor dispute. The services of the Federal Mediation and Conciliation Service ([FMCS](#)) or a stated mediation board are encouraged regarding any conciliation, mediation, or arbitration of such disputes.

### **Equal Employment Opportunity (EEO)**

Equal Employment Opportunity (EEO) regulations and Executive Orders provide that contractors and subcontractors will act affirmatively to ensure that all individuals have an equal opportunity for employment, without regard to age, race, color, religion, sex, or national origin. The Secretary of Labor is responsible for the administration and enforcement of prescribed parts of these Executive 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 EEO requirements are carried out within the agency, and for cooperating with and assisting the [Office of Federal Contract Compliance Programs](#) in fulfilling its responsibilities. See [FAR 22.8](#) and the EEO Section in this resource book for additional information.

### **Vietnam Era Veterans' Readjustment Assistance Act of 1974, (VEVRAA) and Jobs for Veterans Act (JVA)**

Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA) prohibits discrimination and requires affirmative action in all personnel practices for 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.

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Public Law 107-288, defined as the Jobs for Veterans Act, amends the VEVRAA, changing the VETS 100 reporting requirements for contracts entered on or after December 1, 2003. These changes raise the reporting threshold from \$25,000 to \$100,000 and modify the applicable veterans' categories.

For a new contract, the contractor must certify submittal of the VETS-100 Report. *For options, the contracting officer must verify report submittal.* To verify if a proposed contractor is current with the submission of the VETS-100 Report, the contracting officer may:

Query the Department of Labor's VETS-100 Database via the Internet at <https://vets100.vets.dol.gov/login.aspx>

Follow the process for registering and verifying contractor reporting at the VETS website

OR

Contact the VETS-100 Reporting Systems via e-mail at [helpdesk@vets100.com](mailto:helpdesk@vets100.com) for confirmation, if the proposed contractor represents that it has submitted the VETS-100 Report and is not listed in the database.

In addition, the regulations implementing VEVRAA require that covered contractors and subcontractors with a Government contract or subcontract of \$50,000 or more and 50 or more employees develop and maintain a written VEVRAA affirmative action program.

## **Worker's Compensation and Related Laws**

Laws require employers, including government contractors and subcontractors, to provide against risk for job related injury, disability, or death. Contracting Officers must ensure the appropriate clauses are included in the solicitation/contract and each offeror/contractor must factor this cost into their pricing when proposals are presented to the government. In this regard, some of the key requirements are as follows:

**1 – Worker compensation requirement.** This is commonly required by state or territorial law and compliance with it is most often satisfied by the purchase of worker's compensation insurance from carriers that insure against this risk for a fee. The rates paid and the insurance provided is often regulated by a state department or commission and therefore, rates vary depending upon the state

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or territory where the workers are employed. Not only is such insurance generally a state requirement, it is also policy for contractors to provide for it under FAR [28.301\(b\)](#). Therefore, offerors should be expected to include it in their pricing proposals accordingly. Contracts performed on Navy/Marine Corps installations may require a specific workers compensation clause, FAR 52.228-5, INSURANCE – WORK ON A GOVERNMENT INSTALLATION, as prescribed at [28.310](#).

The Workers' Compensation Law also contains an anti-retaliation provision, which prohibits an employer from retaliating against any employee because s/he has filed a claim or received benefits under the law.

For more information about state workers compensation law requirements see:

<http://www.dol.gov/esa/owcp/dfec/regs/compliance/wc.htm>

**2 – Longshore and Harbor Workers Compensation Act (LHWCA) (33 USC 18 Sec. 901-950)** is a Federal law that provides employee benefits similar to state workers compensation programs to employees engaged in maritime employment if any injury or death occurs upon navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. It provides compensation and medical care to employees disabled from injuries that occur from such work. The Act also offers benefits to dependents if the injury causes the employee's death.

To be covered by LHWCA employees must meet both of the following criteria:

- Situs – on or adjacent to navigable waters.

[Note: Situs is usually met by any shipyard or naval base adjacent to water.]

- Status – a maritime related function, i.e. building, repairing or dismantling a vessel or loading or unloading of a vessel (etc).

[Note: Status is met by an activity having a maritime related purpose]

EXAMPLES OF PROJECTS COVERED AND NOT COVERED BY US Longshore & Harbor Workers (USL&H) INSURANCE:

- Covered
  - Construction/Repair/Renovation of a facility involved in the loading and unloading a vessel; repair, building and/or dismantling of ships.

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- Not Covered
    - Facility used for clerical, restaurant, recreational, union and/or retail purposes.
    - Residential housing.

[Note: U.S. Longshore and Harbor Workers' Insurance is very expensive; therefore, it is necessary that all competing contractors include it in their bids when required. Proper application of USL&H is important: (1) In order to level the playing field for all bidders, and (2) unnecessary inclusion of this insurance in contracts significantly increases the cost to the government.]

[Note: Contractors, who fail to have LHWCA Insurance when required, are subject to a fine of \$10,000, and/or imprisonment of one year.]

**3 – Defense Base Act of 1941 (OVERSEAS CONTRACTS ONLY)** extends the protections of the Longshore and Harbor Workers' Compensation Act to U.S. workers and foreign nationals performing on overseas (outside the U.S.) contracts with the United States government, allies of the United States, including working for U.S. employers providing welfare or similar services outside of the United States for the benefit of the Armed Forces, e.g. the USO. The Defense Base Act was originally intended to cover civilians employed at overseas military bases. It was subsequently amended to cover civilians working on overseas construction projects for the United States government or its allies, and later extended to protect employees fulfilling service contracts tied to such overseas construction projects or to a national defense activity. Along with the use of contractors and their employees increasing in overseas operations (particularly those that may place contractor personnel in harms way), this requirement has become more noteworthy and costly. It is required for contracts described in FAR [28.305](#) and clauses are prescribed at FAR [28.309](#). Clause FAR [52.228-3](#) is prescribed.

Sometimes waivers may be granted by the Department of Labor if the country in which foreign workers are employed provides laws for comparable benefits which the contractor will provide under those laws. Clause FAR [52.228-4](#) is required If such a waiver has been approved.

Additional information can be found regarding this Act at:  
<http://www.dol.gov/esa/owcp/dlhwc/lbdba.htm>

**4 - War Hazards Compensation Act (WHCA)** of Dec. 2, 1942, (OVERSEAS CONTRACTS ONLY) expands Defense Base Act coverage for war-related hazards, such as injury or capture

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resulting from combat. Whereas the Defense Base Act covers injuries sustained only during the course of an employee's performance of duties, WHCA covers injuries sustained while present in a combat zone, whether or not the employee was engaged in the performance of the contract. In essence, the WHCA extends 24-hour, 7 days a week coverage to employees who are subject to war-hazards risks. The War Hazards Compensation Act also provides for government reimbursement to insurance carriers if an injury is related to a "war-risk hazard."

Additional information can be found regarding this Act at:

<http://www.dol.gov/esa/owcp/dlhwc/lbdba.htm>

**5 - Jones Act** – The Merchant Marine Act of 1920, is a Federal Act that provides for employee benefits to injured seamen. It is *not* a workers compensation law in that it does not provide for compensation irrespective of negligence and other pertinent factors. However, is an important element within the legal framework for providing “maintenance and cure” and other compensation for an injured seaman.

### **Worker Adjustment and Retraining Notice Act (WARN)**

The [WARN Act](#) helps ensure advance notice in cases of qualified plant closings and mass layoffs. The U.S. Department of Labor has issued guides to provide workers and employers with an overview of their rights and responsibilities under the provisions of the WARN Act. The WARN Act requires employers to provide written notice at least 60 calendar days in advance of covered [plant closings](#) and [mass layoffs](#). An employer's notice assures that assistance can be provided to affected workers and allows transition time to seek alternative jobs or enter skills training programs. Although the FAR does not explicitly contain requirements concerning this law, in the event of a major government contract termination or descope the law will likely require that the contractor provide WARN notice to the employees. Due to monetary payments that may be required when WARN notices are *not* provided, lack of advance information to the contractor concerning the government contract termination or descope may affect contract termination costs.

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## The Basics of Labor Law Application to Federal Government Contracts

Nearly all Federal contracts are subject to at least one of the three principal contract labor standards depending upon the nature of the procurement.

If you are about to solicit or award a contract *without* labor standards, consider whether you are justified in doing so by a specific exemption or because the contract does *not* meet the applicability criteria.

As a general rule, the labor standards will apply as follows:

- Construction or reconstruction contracts (or nonconstruction contracts that require some construction work) – Davis-Bacon Act
- Supply, commodity, manufacturing, or remanufacturing contracts – Walsh-Healey Public Contracts Act
- Services (other than those that are performed by exempt [professional, executive, administrative] employees) – McNamara-O’Hara Service Contract Act

### More Than One Labor Law in the Same Contract

Some contracts are covered by more than one of these three key labor standards. When this is so, each labor standard will apply to different portions of the contract.

These “hybrid” or mixed contracts are more common in today’s environment of complex procurements which include Government-owned Contractor-operated (GOCO) arrangements, “Base Operating Services,” “Performance Based Logistics,” and multiple awards for “technology services,” and the like. Quoting the DOL regulations: “If the principal purpose of a contract is to furnish services through the use of service employees within the meaning of the Act, the contract to furnish services is not removed from the Act’s coverage merely because, as a matter of convenience in procurement, the service specifications are combined in a single contract document with specifications for the procurement of different or unrelated items. In such cases, the Act would apply to service specifications but would not apply to any specifications subject to the Walsh-Healey Act or to the Davis-Bacon Act.”

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Therefore, carefully consider the entire nature and scope of the contract when making decisions as to which labor standard(s) apply.

Also, to the maximum extent possible, such solicitations/contracts should identify which labor standard applies to each separate part of the procurement.

### **“Other” Labor Standards**

The other labor standards such as EEO requirements, postings for NLRB rights, and others will often routinely apply (absent a specific exemption) regardless of whether the contract is a construction contract subject to DBA, a supply/manufacturing contract subject to the WHPCA, or a service contract subject to the SCA.

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## APPLICABILITY OF SCA

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### Application of McNamara-O'Hara [Service Contract Act \(SCA\)](#)

Contracting for services is not new to the Federal Government. Historically, many different kinds and types of assistance have been purchased to supplement in-house capabilities. In recent years, the level of procurement of services from outside sources has increased dramatically. Recent changes under FAR and the Federal Acquisition Streamlining Act of 1994 (FASA), plus the renewed emphasis on commercial activities studies (A-76), makes it even more important to sharpen our knowledge in this area as more and more services are performed under contracts with private industry. (See FAR [22.10](#).)

The SCA applies to all Federal contracts, the (1) principal purpose of which is to furnish services (2) in the United States (3) through the use of service employees. This includes commercial contracts and is applicable to both prime and subcontracts.

*SCA applies only* when all three criteria will be met during performance of the contract.

#### Geographic Limits

Only services performed “in the United States” require SCA coverage. For SCA purposes, the term “United States” includes the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands, American Samoa, Guam, Wake Island, the Northern Mariana Islands, and Johnston Island. On contracts performed both inside the U.S. and outside the U.S., only the portion inside the U.S. is covered.

References FAR [22.1003-1](#) and FAR [22.1001](#).

#### Principal Purpose

SCA coverage is based on a contract being principally for services. This can be established in several different ways, such as cost of the contract (over 50% of the cost is paying for services) or hours (over 50% of the hours worked on the contract are service hours). A contract principally for supplies or construction is not subject to SCA, even if there are one or more line items for services *incidental* to the other purposes of the contract. This is perhaps the most confusing of the three criteria to determine since the DOL

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regulations explicitly state that “no hard and fast rules can be laid down as to the precise meaning of ‘principal purpose.’” The DOL criteria and the history of the statute rely heavily on the fact that Congressional intent was to cover all contracts that were *not* principally for “construction” contracts subject to the Davis-Bacon Act (DBA) or *not* principally “supply/manufacturing” contracts subject to the Walsh-Healey Act (WHPCA). Therefore, any contract that is not clearly “principally for construction” or “principally for supplies/manufacturing” will routinely be viewed as subject to the SCA. See [29 CFR 4.111](#). Hybrid contracts where services and other items are furnished under a single contract and concessionaire contracts where the government is not the direct recipient of the service are also commonly subject to the SCA where the regulatory language provides that service is the “principal purpose.” See 29 CFR [4.131](#), [4.132](#), and [4.133](#). However, there are a number of exemptions and a key DOL policy providing that SCA does not apply to contracts that are performed by exempt [professional, executive, administrative] employees that must also be considered (discussed below in the “Service Employee” section). In addition to supply, construction and “professional” service contracts, generally contracts for the lease/rental of equipment and/or office space are not considered subject to SCA unless a principal component of the arrangement is for operators of the equipment or operation and maintenance of the facility. See [29 CFR 4.134](#).

**Example:** Rental of vehicles *with operators* is a contract for the services of operating the vehicle. Rental of vehicles alone is not subject to SCA, not a contract for “services.”

**Example:** Rental of building office space is not a service, even if that rental agreement includes building services to be provided to keep the offices functional and clean. However, if we contract for janitorial services separately, that contract is “principally for services” and subject to SCA.

**Example:** If the government buys washers and dryers, with a one-year warranty period, that contract is a supply contract – the warranty is not separate or distinguishable from the purchase of the item. However, if the supply contract has an option to provide maintenance services for one year or more, beyond the warranty period, that option period is both separate and distinguishable and covered by SCA.

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Contact the Navy or NAVFAC Labor Advisor for assistance regarding “principal purpose” issues specifically and SCA application questions generally. See [FAR 22.1003-7](#).

### “Service Employees”

SCA will apply to contracts “principally” for services where performance of the contract work will be done through the use of *non-exempt “service employees.”* Service employees are workers that are not exempt from the labor standards, such as maintenance classifications, technicians, clerical workers, guards, firefighters, flight instructors and other service workers, including working supervisors, shift leaders, and group leaders who spend most of their time working along with the crew and only supervise part of the time. See FAR [22.1001](#).

*Exempt employees* are executives (full-time supervisors); administrators (specialists exercising independent judgment or discretion of some magnitude); or professionals (predominantly intellectual, varied work; traditionally requiring prolonged advance learning; or original or creative work, or teaching). Exempt employees are those that meet DOL requirements of [29 CFR, Part 541](#).

Contracts that are exclusively (or nearly so) for services performed by such *exempt* employees are not subject to SCA. However, if services to be performed by non-exempt workers are a significant or substantial part of a contract for professional services, or at times even tangible items, then SCA may apply to that portion of the contract. “Substantial” is generally defined as 20% or more. For example: If a *substantial* (20% or more) portion of the services on an engineering services contract are to be performed by non-exempt service employees (survey crews, engineering technicians, draftsmen, clerks, etc.), then SCA applies to the portion of the contract performed by such workers. In these situations a wage determination for the locality where the work will be performed should be incorporated into the solicitation/contract to cover the “service employees.” If the place of performance is not known until an award is made, a notice advising prospective contractors that SCA wage determinations may be incorporated into the contract upon determining where the work will be performed. In any event the professional employees meeting DOL exemption criteria will continue to be exempt from the any wage determination requirements. See [29 CFR 4.113\(a\)\(3\)](#) for more details.

Also, important to note is that DOL does *not* require application of the SCA to contracts that are personally (individually) performed by

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the contractor and the contractor does not utilize other employees in the performance of the contract. It is therefore common that contracts for services such as test monitors/proctors, organists at religious services, and other contracts that are personally performed by the contract are *not* subject to the SCA provisions. If it is not known whether the offerors will perform the work through the use of “service employees” or whether they will individually perform the service, the SCA provisions should be incorporated. See [29 CFR 4.113\(a\)\(1\)](#) for more details.

Both the FAR and the DOL regulations include a number of examples of the types of services that are routinely subject to the SCA. See [FAR 22.1003-5](#) and [29 CFR 4.130](#)

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## SCA Exemptions

These contracts are statutorily exempt from SCA –

- Any contract for construction, alteration, and/or repair, including painting and decorating of public buildings or public works (contracts subject to DBA). See [29 CFR 4.116](#).
- Any work (work not contract) required to be done in accordance with provisions of Walsh-Healey Public Contracts Act (supply contracts). The PCA covers employees who manufacture, assemble, handle, or ship goods. This includes those that engage in the “remanufacturing” or “major modification” of an item, piece of equipment, or material as described in FAR 22.1003-6. (For example, the remanufacture of an aircraft engine would routinely be exempt work.) Also, PCA covers work for the “construction, alteration, furnishing, and equipping of naval vessels.” [29 CFR 4.117](#)
- Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect. (Note: There are few tariff rates applicable these days. Therefore, SCA *would* apply to such contracts in the absence of tariff rates.) See [29 CFR 4.118](#) and DOL All Agency Memo No. [185](#).
- Any contract for the communication of services: radio, telephone, telegraph, and cable that are subject to the Communications Act of 1934. See [29 CFR 4.119](#).
- Any employment contract providing for direct services by an individual or individuals (i.e., direct-hire government employees under Federal pay rules). See [29 CFR 4.121](#).
- Any contract for public utility services: regulated utility companies such as electric power and light, water, steam, gas. See [29 CFR 4.120](#).
- Any contract with the U.S. Postal Service to operate postal stations. See [29 CFR 4.122](#).

DOL “administrative” exemptions from SCA that will likely have application to Navy/Marine Corps contracts are:

Maintenance, calibration, or repair of the following types of equipment:

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- (a) Automated data processing equipment, office information/word processing equipment.
  - (b) Scientific equipment and medical apparatus or equipment if the application of micro-circuitry or other technology of at least similar sophistication is an essential element (for example, “medical diagnostic equipment,” “X-ray equipment,” “Chemical Analysis Instruments,” and Geographic and Astronomical Instruments.”)
  - (c) Office/business machines (other than those referenced in “a” above), if the services are performed by the manufacturer or supplier of the equipment.

Exemption for other “certain services”:

- (a) Automobile or other vehicle (e.g. aircraft) maintenance (does *not* include Government motor pool operations or operation of similar facilities).
- (b) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).
- (c) Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (does *not* include ongoing contracts for lodging on a continuing or as needed bases).
- (d) Maintenance, calibration, repair, and/or installation services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment, but *only* if awarded on a sole source basis (does not include installation which is subject to the Davis-Bacon Act under 29 CFR 4.116).
- (e) Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (does *not* include charter services).
- (f) Real estate services related to housing Federal agencies or disposing of real property owned by the Government, including real property appraisals.
- (g) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (does

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*not* include actual moving or storage of household goods and related services).

There are *very specific* conditions for usage of these exemptions detailed in FAR [22.1003-4](#), [52.222-48](#), [52.222-51](#), [52.222-52](#), and [52.222-53](#).

Remanufacturing of items, piece of equipment, or material is deemed to be work subject to the Walsh-Healey Public Contracts Act (WHPCA) and therefore exempt from SCA. This falls into two major categories as follows:

(a) Major overhaul of an item, piece of equipment, or material which is degraded or inoperable, and under which several conditions are met. The key element is that the item is completely torn down into individual components, substantially all parts are reworked or replaced, the item is completely rebuilt by restoring it to original life expectancy (or nearly so) and the work is performed at a facility owned or operated by the contractor.

(b) Major modification of an item, piece of equipment, or material which is wholly or partially obsolete, and under which several conditions are met. The key elements are similar to those in “a” above.

If this exemption appears to be viable, all criteria for the exemption found at FAR [22.1003-6](#) must be carefully reviewed to determine whether the exemption is appropriate for the contract work in question.

[Raytheon Aerospace ARB](#) case provides a good example of the application of this “remanufacturing” exemption for work that’s considered subject to Walsh-Healey PCA rather than SCA.

## **Non-Appropriated Funds**

Employees of the Government paid with Non-Appropriated Funds (NAF) usually are not contractor employees and are not subject to SCA. However, when we solicit and award contracts for services and make payment with NAF funds, those contracts are covered by SCA, and SCA provisions and wage determinations should be included accordingly. Such covered contracts include “concessionaire” contracts. See [29 CFR 4.133](#).

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## APPLICABILITY OF THE DBA

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### Application of the [Davis-Bacon Act](#)

DBA applies to contracts in excess of \$2,000 to which the United States is a party for construction, alteration, or repair, including painting and decorating, of public buildings or public works within the United States. See FAR [22.403-1](#).

### Construction, Alteration, or Repair, Including Painting and Decorating

Construction, alteration, or repair, including painting and decorating includes all utility systems within or attached to the building, i.e., heating, air conditioning, elevators, and fire suppression systems. It does not include regularly recurring, routine maintenance of public buildings and works. Alteration involves making relatively permanent improvements to a building or work. Repair goes beyond maintenance, and is usually performed to return something to use rather than operating a facility or performing preventive maintenance.

### DBA Sets a \$2,000 Threshold

DBA sets a \$2,000 threshold for coverage and is not applicable to construction contracts for less than \$2,000. All subcontracts under a prime contract of \$2,000 or more, regardless of amount of subcontract, are covered.

Indefinite quantity task orders are covered by DBA once it has been determined that the work on the contract exceeds \$2,000. For DBA to apply – individual task orders do not need to exceed \$2,000! (See DFARS [222.402-70](#))

### “Public Building or Public Work”

“Public building or public work” is only broadly defined by DOL regulation. We can consider factors such as who holds the title or who provides the financing for a project but these are not determinative. The definition largely hinges on the building or work being for the use of the government. It has nothing whatsoever to do with whether the building or facility is “open to the public” and “public” does not require that it be accessible to the public. See FAR [22.401](#).

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Public buildings include the building structure and all utility systems and other improvements to the structure. This includes plumbing, electrical, and lighting systems, fire alarm and suppression systems, heating, ventilation and air conditioning systems, elevators, material handling systems, attached antennas, etc. Public works are structures and improvements other than buildings, such as roads, runways, bike-paths, storage tanks, wells, exterior portions of utility systems, exterior pools, playgrounds, playing courts, antennas not attached to a building, etc. "Public" does not require access by the public.

Factors in deciding public building or work for DBA:

If the work is performed either under a *Navy contract*, or by *authority of*, or *with funds of the Navy* to serve the interest of the general public, it meets the coverage criteria. It does not matter whether or not the Navy will take title to the completed public building or public work. This is usually pretty simple, since most contracts will clearly meet all of the tests.

However, the courts have ruled that DBA also applies to many "lease construction" contracts under which construction is funded by third parties such as banks (DOL Memo No. 176, dated 22 Jun 94). (Note: DOL's All Agency Memos are available on the WDOL.gov in the library.) The government merely contracts to lease the completed facilities at a specified rate for a specified number of years. DBA would also apply to so-called "no cost" improvements to public buildings performed by utility companies (such as installation of energy efficient lighting, the cost of which is deducted from future savings).

**Example:** An office building, built with private funding, title in the name of the builder. Prior to construction, a government agency signs a contract with the contractor/builder agreeing to lease the building for 15 years after construction. After lease end, the contractor/builder may sign another lease with the government or may not. The court ruled the office building was a public building, DBA applied to the construction. The agency was required to retroactively apply DBA, and provide funds to the contractor/builder to pay the difference between what employees were paid and the DBA rates.

## Geographic Limits

*DBA applies only within the 50 states or Washington, D.C.* It does not apply to federal construction contracts in Guam, Puerto Rico,

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Virgin Islands or other territories, although other laws may invoke DBA requirements on certain civilian projects there. These “Davis-Bacon Related Acts” include the National Housing Act, Federal Highway Act, or the Energy Security Act, but do not directly affect Navy. See Department of Labor Field Operations Handbook (FOH) [15b01](#).

## **Some Special Situations in DBA Coverage**

### ***Demolition***

DBA applies if future construction is reasonably anticipated on that site in the relatively near future. If there will be no follow-on construction on that site, the SCA would apply to the demolition. If DBA applies, the nature of the follow-on project (building, heavy, highway, or residential) determines the type of wage determination for the contract, including the demolition work. Note that “partial demolition” is considered building alteration subject to DBA whether or not there is follow-on construction. See FAR [37.301](#) and DOL All Agency Memo [AAM] # [190](#).

### ***Asbestos and/or Paint Removal***

DBA applies, with one exception. If asbestos or paint is being removed prior to demolition, which is properly subject to the SCA then the asbestos and/or paint removal, is also subject to SCA. (Reference DOL AAM # [153](#), 6 Aug 90 for coverage. The SCA demolition exception is by informal agreement with DOL.)

### ***Environmental Cleanup***

DBA applies if the work involves substantial excavation and reclamation or elaborate landscaping activity. This may include simple removal and replacement of contaminated soil, removal and treatment of contaminated soil, or decontamination of soil in-place through installation of aquifers, etc. DBA does *not* apply to simple grading and planting of trees, shrubs, and lawn unless performed in conjunction with substantial excavation and reclamation or other construction work. (Reference DOL AAM # [155](#), 25 Mar 91 and AAM # [187](#), 18 Nov 96.)

Test water wells that are to be used for cleanup tasks or may later be converted to water wells are subject to DBA. (Reference DOL AAM # [55](#).)

### ***Carpeting***

DBA applies if carpet installation is performed in connection with a construction or general renovation project. For purchase and

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installation of carpeting not covered above, installation is considered incidental to the purchase of the carpet (neither DBA nor SCA apply). SCA only applies to installation of *government-furnished* carpet. Incidental amounts of tile or linoleum work in entryways and/or restrooms will not normally affect coverage. See DOL FOH [15d00](#).

### ***Refinishing Wood Floors or Concrete Sealant Application***

DOL considers this work renovation/repair. Refinishing includes bowling alley lanes, gymnasium floors, housing floors, etc. Sealant is usually applied to hangar and shop floors to repel spilled fluids.

### ***Removal of Rubber Deposits from Runways***

DOL considers this a repair subject to DBA.

### **Non-construction Contracts That Contain DBA Activity**

(References FAR [22.402\(b\)](#) and [29 CFR 4.116](#).) Often large, complex contracts such as environmental, research and development, architect-engineering services, installation support contracts, and information technology acquisitions contain specific elements for “construction, alteration or repair of public buildings or public works.” The construction elements within those larger procurements often require the application of the DBA. DBA requirements will apply to nonconstruction contracts (supply, service, research and development, architect-engineering, etc.) that involve some construction work (often referred to as mixed/hybrid contracts), IF:

- The contract contains *specific requirements* for construction work and the work will be performed on a public building or work. For example, a Base Operations Service contract may also include line items for any and all necessary alteration and repair work to the buildings and other facilities. AND
- The construction requirements are *substantial*. Substantial is not clearly defined, however, it must be considered within the context of factors such as: (1) the type and quantity of the construction activities, (2) the value of the construction type work standing alone, and (3) the value of the work in relation to the value of the entire contract. The DBA coverage threshold of \$2,000 is *not* applied to nonconstruction contracts. Instead Department of Labor (DOL) considers DBA to apply to such work if it is more than a “minor and incidental” amount of construction, alteration, or repair work. DOL has provided that whether

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construction activity is “substantial” as opposed to “minor and incidental” depends upon the specific circumstances of each particular case and that no fixed rules can be established which would accommodate every situation. Therefore, if the work is substantial on its own or when compared to the total value of the supply or service contract work, then DBA must be applied. Obviously, if a large construction crew and/or a lengthy period of time are necessary to complete the work, the application of DBA and appropriate wage determination(s) are needed. If only a small number of construction workers are employed and/or if the crew only works a few days (or a few weeks at most), then such work will likely be considered minor and incidental and DBA application is not necessary. If the contractor’s SCA-covered workers and/or the workers employed in manufacturing or delivery of the supplies are employed to perform the construction activities, it is more likely that such work will be considered minor and incidental. AND

- The construction work is physically or functionally *separate* from the other contract work. This is generally apparent if the prime contractor (one providing services or supplies) subcontracts to a construction contractor or performs the work with a crew dedicated to performing construction related work. The construction work is *physically and functionally separate* from and is capable of being performed on a *segregated* basis from, the other work required by the contract. In this regard it is often found that construction, alteration, or repair work is performed by a workforce that is entirely separate from the workers that provide the service or supply work required by the contract. A strong indicator of the construction work being segregated from the service/supply work is that it may be performed by a subcontractor with a workforce dedicated to performing *only* the construction, alteration, or repair work. A service (or supply) contractor may also have a separate construction trades workforce that performs the construction, alteration, repair, or remodeling work – in such case, the DBA, if applicable, would apply to that portion of the contractor’s workforce.

Note that if DBA is applied to the contract, the work that will be subject to DBA should be identified in the solicitation and contract as discussed in FAR [22.404-2\(a\)](#) which states in part: “...The contracting officer must incorporate only the appropriate wage determinations in solicitations and contracts and must designate

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the work to which each determination or part thereof applies.” Although this particular passage applies to situations where more than one DBA “general schedule” wage determination applies to the contract, it is also appropriate to use in nonconstruction contract situations where most of the work is subject to either the SCA or Walsh-Healey, but where a “substantial” portion of the contract is covered by the DBA and an appropriate DBA WD.

### **Installation Support Contracts**

(Reference DFARS [222.402-70](#).) Installation Support Contracts normally require both SCA and DBA because they usually have requirements for maintenance and other service work as well as a substantial and segregable amount of construction, alteration, renovation, painting, or repair work. Installation Support Contracts include Operation and Maintenance (O&M) and Base Operation Services (BOSC) contracts, as well as on contracts for Military Family Housing Maintenance and Civil Engineering Services. SCA is applied to contract work involving services such as custodial work, maintenance, pest control, etc. DBA is applied to construction requirements such as roofing, hardwood floor refinishing, building structural repair, paving repair, painting, etc.

Installation support services contracts involve work orders that are either maintenance services, or minor construction or reconstruction.

For any work that requires the use of construction labor classes in a mixed contract *when it is not clear* whether SCA or DBA applies, use the rule found at DFARS [222.402-70](#).

- Individual service calls or orders, which will require a total of 32 or more work-hours to perform, shall be considered to be repair work subject to the DBA.
- Individual service calls or orders, which will require less than 32 work-hours to perform, shall be considered to be maintenance subject to the SCA.
- Any painting order for 200 or more square feet shall be considered repair covered by DBA, regardless of the total work-hours required. Orders for less than 200 square feet shall be subject to SCA.

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**Examples:** Scheduled maintenance of a building's heating system is SCA, but overhaul of the same system is subject to DBA. If two faucets in different rooms were replaced on different occasions during routine maintenance, the work would be considered "maintenance" subject to the SCA. If a task order was for replacement of all faucets in a building at the same time, it would be a renovation subject to the DBA.

### **Repair vs. Maintenance**

DOL has traditionally viewed "construction, alteration, or repair" as the act of building, erecting, renovating, changing, or restoring to a sound state after decay or damage.

On the other hand, DOL considers "maintenance" to be a continuous, recurring activity of upkeep or preservation. Maintenance includes the routine, recurring type of work necessary to keep a facility in such condition that it may be continuously used at an established capacity and efficiency for its intended purpose.

SCA covers routine, regularly recurring operation and preventative maintenance of public works, buildings and building systems (electrical, plumbing, HVAC, fire suppression, etc.). DBA covers repair of these systems.

Repair work that uses construction classifications and can be segregated and performed separately from routine SCA maintenance work is subject to the DBA.

### **Federal Supply Schedule Task Orders under GSA**

Navy/Marine Corps Acquisition and Logistics professionals commonly issue task orders against General Services Administration (GSA) or other Federal Supply Schedule (FSS) agencies. Such contracts are subject to the same labor standards contracts as stand-alone contracts. Therefore, it should be determined whether administration of the labor standards and/or wage determinations has been delegated to the task ordering agencies during the FSS planning and award stages of the multiple award contracts. Close coordination with GSA or other FSS awarding agency may be necessary to determine the labor standards requirements and the impact on contract and task order pricing. Due to the variety and complexity of task orders, it is not unusual for FSS awarding officials to include language making the task ordering activity responsible for placing DBA provisions and any necessary wage determinations into the task order. Significantly, this can and often does affect pricing considerations.

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The Navy also uses DOD EMALL and SeaPort-e as electronic ordering contracts and application of labor standards must be carefully considered on these as well.

### **Supply Contracts That Contain DBA Activity**

(References FAR [22.402\(b\)](#) and [29 CFR 4.116](#) and [DOL FOH 15d10](#).) Supply contracts also often include DBA-covered portions of work. Some examples:

Information technology acquisitions that include infrastructure improvements to the facility as well as the purchase of the various computers, servers and other hardware; if there is more than a “minor and incidental” amount of construction, alteration or repair work necessary.

Purchase of expendable launch vehicles (“rockets”) that also involve construction, renovation or improvements to launch facilities for those ELVs.

Procurement of new overhead doors for aircraft hangers. The removal of the old door and installation of the new one would likely involve more than “minor and incidental” amount of installation work and therefore would be subject to the DBA.

Some other examples of situations where DBA has been required on supply contracts – installation of security or intrusion detection systems, installation of 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.

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## DBA EXEMPTIONS

There are no DBA exemptions. However, during times of natural disasters or other emergencies, the President may suspend the application of DBA to work performed under contracts in the affected area.

There are some individual employee exemptions for those employees that meet the criteria for “executive, administrative, or professional” employees under DOL’s Regulation [29 CFR 541](#). Also, the DBA provisions apply *only* to “laborers and mechanics” as defined in FAR 22.401. Briefly, those are the “hands on” construction trades workers that perform work on the site of the construction project and *not* workers that may be on-site, but do not perform construction duties that are manual or physical in nature. Some examples of those that are *not* subject to the DBA even when they are at the construction site are: air balance engineers, architects, engineers, draftspersons, guards/security personnel, inspectors, managerial and professional personnel, survey crews, timekeepers and other office personnel that may be on site or in “construction trailers” as administrative support personnel. DOL has ruled that DBA likewise does not apply to truck drivers that are owner-operators (more on truck drivers later – under the contract administration/enforcement section of this manual). More detailed information may be found at DOL FOH Section [15e](#).

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## SCA Wage Determination Administration

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### Overview

The SCA statutory language requires contracting agencies to include appropriate wage determination(s) in contracts subject to the SCA if the contract will exceed \$2,500 or if the amount of the contract is not known. See the [SCA](#) itself [Section 2(a)] and FAR [22.1002-1](#), [22.1006](#) and [22.1007](#).

FAR requires that the contracting officer incorporate the appropriate wage determinations in solicitations and contracts and designate which work each wage determination covers. *Inclusion by reference is not permitted since an affirmative determination of the exact WD and exact revision of the WD must be made to determine which WD is effective for the contract action.* (FAR [22.1007](#), [22.1008](#) and [22.1012](#))

Therefore, inclusion of only a wage determination number and an instruction to the contractor to obtain a copy is an “inclusion by reference” and does not satisfy the FAR requirement.

Now that contractors are able to obtain SCA WDs online it is even more important for the Contracting Officer to incorporate the correct WD into each required contract action so that the correct revision is used for compliance and SCA price adjustment purposes. It is recommended that the appropriate revision to the WD(s) be modified into the contract to avoid misunderstandings about what the contractor must comply with and what is appropriate to use for price adjustment purposes, even when the actual wages or fringe benefits applicable to the contract has not changed. In addition, if it becomes necessary to get a conformance approved, DOL will not approve the new class and rate if the wrong WD is incorporated into the contract.

Updated WDs are required at option, extension, and labor-significant scope changes per FAR [22.1007](#). Generally, this causes a specific WD revision to align with each new period of performance (POP) whether that POP is a base contract period, a new option, or an extension period. As a result of this regulatory scheme, once the *correct* WD(s) is placed in the contract, option period, or extension period; that specific WD(s) will control for SCA and contract purposes for that entire period of performance and should be changed *only* when the requirements at FAR [22.1007](#) require an update (i.e., recompitation, option, extension, etc.).

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Generally, due to a key provision in FAR 22.1007 and the underlying DOL regulations, WDs are updated on an annual basis. Annual wage determination updates are generally required if the contract WD(s) is not changed for one of the other reasons contained in 22.1007. For contracts subject to annual appropriations, this anniversary provision requires a WD update annually if the WD has not been updated for one of the other listed reasons. WDs in contracts that are *not* subject to annual appropriations must be updated at least every two years (bi-annual anniversary date).

These WD updates routinely and significantly affect the contract price through the SCA Price Adjustment Clause, FAR [52.222-43/44](#).

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## SCA WD Detailed Procedures and Guidance

As of October 2003, [WDOL.GOV](#) is the official Web site for all federal contracting agencies to obtain both SCA wage determinations for inclusion in contracting actions. See the [User's Guide](#). For WDs obtained via that Web site, the WDOL system identifies the "posted date" so that contracting agencies can definitively determine whether a new WD is timely and applicable (effective for a specific period of contract performance) per FAR [22.1012\(b\) & \(c\)](#).

### SCA Wage Determinations

There are five types of minimum wages for SCA contracts. The FAR refers to only two basic types of WDs, but that is an oversimplification. The FAR in [22.1008-1](#) discusses "prevailing" WDs and in FAR [22.1008-2](#) discusses "collective bargaining agreements." WD types 1, 2, and 4 shown below are considered "prevailing WDs" and must be viewed in this context. To more fully understand the correct WD necessary for any given procurement, below is a brief description of the various types of WDs issued by DOL:

#### 1. **Standard SCA Wage Determinations**

These are sometimes referred to as the "area-wide" or "locality" wage determinations or by the acronym "AWD" (area wage determination). These are the most commonly used WDs since they include a wide variety of job classifications (approximately 340 classes) and apply generally unless there is a more specific WD that is more appropriate for the contract requirement(s). These WDs are based on surveys of wages and benefits paid in the

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specific locality and are organized by major occupation groups such as “clerical and administrative,” “information and arts,” “mechanics, maintenance, and repair occupations,” “technical,” and “transportation.” The locality is usually a county or group of counties making up a specific metropolitan area, but may be a larger area such as “statewide.” All standard WDs may be obtained at [WDOL.gov](http://www.wdol.gov) by choosing the “Select SCA WD” menu and correctly answering the questions at the prompts.

## **2. Non-Standard WDs**

These WDs are also frequently used, but are not as common since they have specific application criteria based upon the type of work performed. They are issued to reflect wages and benefits in specific service industries in designated localities. For example, there are “non-standard” WDs for fast food workers, moving and storage, aircraft pilots, vessels, diving services, elevator services, barber and beauty shops, and so forth. The WDOL User’s Guide provides a complete listing and brief explanation for each non-standard WD. See <http://www.wdol.gov/usrguide/appdxa.aspx> Most non-standard WDs are available through the WDOL.gov site by selecting the correct menu options.

## **3. WDs Based on Collective Bargaining Agreements (CBAs)**

This requirement is statutory and therefore, these WDs supersede all others when the predecessor contractor’s CBA is properly controlling under Section 4(c) of the law. See Section on “SCA and Collective Bargaining Agreements” below.

CBA-based WDs are applicable when a predecessor contractor’s SCA-covered service employees are subject to the monetary provisions of a CBA signed by the contractor and a labor union. Section 4(c) of SCA requires the successor contractor to pay its employees no less than the wage rates and monetary fringe benefits required by the CBA. The CBA wages and fringe benefits are applicable to the successor’s contract base period of performance (often a year). If the successor contractor and the union cannot agree on a new CBA, the terms of the CBA will no longer be applicable for WD purposes and the standard SCA WD may be applied to the follow-on contract periods (options, extensions, etc.). Contracting officers must inquire at each contract action if the predecessor contractor has a CBA applicable to the workers performing on the contract. See FAR [22.1008-2](#). Note: the WDOL [user’s guide](#) contains some key criteria used to determine whether the predecessor contractor’s CBA will be controlling for wage determination purposes.

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#### **4. Contract Specific WDs**

There are some, unique service contracts where DOL will issue contract-specific SCA WDs. If a contracting officer determines that neither a “prevailing WD” nor a CBA-based WD is appropriate for a particular contract, then he or she must request a contract specific WD from DOL. These are rare, but important when the previously mentioned types of WDs do not apply to the contractor’s service employees. These are utilized *only* when the principal job classification required by a contract is *not* contained on the wage determinations shown above. They may be obtained *only* by submission of an “e-98” directly to DOL and are *not* available on the WDOL system. For example, if a procurement uses a “widget servicer,” as the only job class, and that job classification is not found on an appropriate WDOL WD or subject to a CBA-based WD, then a contract specific WD must be requested. Therefore, an e-98 *must* be submitted with a job description of a “widget servicer” to allow DOL an opportunity to issue a contract specific WD. The SCA requires that DOL issue such WDs when more than five (5) service employees will be utilized on the contract. A link to the e-98 may be found on the [WDOL.gov - e-98 - link](#) site.

#### **5. Fair Labor Standards Act (FLSA)**

If DOL does not issue a WD to cover the SCA employees, then the Fair Labor Standards Act (FLSA) (currently \$7.25/hour) provisions will apply to the service employees. This is the basic minimum wage, overtime requirement, and child labor restrictions applicable to most employers.

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### **Applicability of New or Revised SCA WDs or CBA**

DOL continually revises or creates new SCA Standard and Non-Standard WDs, and contractors and unions are always negotiating new or revised CBAs. When the new or revised WD or CBA is delivered to the contracting office during a solicitation or contract period, it is necessary for the contracting officer to determine whether or not that new wage determination standard is timely received and applicable to a particular contract action.

#### **Incorporating SCA WD(s) into a Solicitation**

The WDOL.GOV database contains the latest WDs developed by DOL. The SCA database is updated each Tuesday (by 1:00 pm ET) with all current revisions. The site should be accessed just prior to issuing the solicitation and then checked periodically for any updates which must be included in the contract if they are received

prior to contract award (or option/extension modification). The WDOL program allows contracting officers to sign up for an “alert service” informing them of new revisions to the WD. DOL “e-98” system likewise provides an electronic notification when new revisions are published.

Once WD(s) are properly placed into the contract at award, they apply to the contract until changed by contract modification. Generally, wage determinations in a contract are updated annually due to the specific rules requiring contracting agencies to update SCA wage determination. Specifically, agencies must place the most current WD in the contract at award and must update them *only* when “triggered” by a contract event such as an option or extension as found in [22.1007](#). Therefore, a wage determination will commonly be effective for each period of performance and for the entire period of performance. When triggered by 22.1007, the most current WD that is timely must be used. The “timeliness” rules are found at [22.1012](#) and summarized more completely in the table below.

A newly revised WD or CBA will be applicable (controlling) for wage determination purposes for a specific contract period of performance *only* if received in a timely manner. The WDOL program shows a “posted date,” which will be used when the WD is obtained *using the WDOL system*. If the WD is obtained by other means such as an e-98 or SF-98, then the date of receipt under that method must be used.

**Table: “Timeliness” Rules**

	<b>If...</b>	<b>Then...</b>
<b>Timely Receipt of Revised SCA WDs/CBAs – Sealed Bids</b>	Contract action is a <u>sealed bid</u> , and the WD/CBA revision is received 10 days or more before bid opening –	Incorporate the WD/CBA revision into advertised <i>solicitation</i> .
	Contract action is a <i>sealed bid</i> , and the WD/CBA revision is received <i>less than 10 days</i> prior to bid opening – OR See special rules if contract performance is delayed by more than 60 days – FAR <a href="#">22.1014</a>	Do not incorporate the WD/CBA revision into the solicitation (unless the contracting officer finds that there is reasonable time to notify the prospective bidders).

**Timely Receipt of Revised SCA WDs/CBAs – Other Than Sealed Bids**

If...	Then...
Contract action is <i>other than sealed bid</i> (request for proposal, or modification to exercise an option, etc.), and WD/CBA revision is received before award of contract or modification to exercise an option or extend the contract –	Incorporate the WD/CBA revision into solicitation or the existing contract to be effective on the first day of the new period of performance (option extension).
Contract action is other than sealed <i>bid</i> (request for proposal, or modification to exercise an option, etc.), and WD/CBA revision is received after award of contract or modification to exercise option/extension, <i>and performance starts within 30 days</i> –	Do not incorporate new or revised WD/CBA.  It is not timely and therefore will not apply until the next required “triggering” event to update the WD as found at <a href="#">22.1007</a> .
Contract action is other than sealed bid, and performance starts more than 30 days after award or modification –	Incorporate WD/CBA revision. <i>If</i> the revision is received no less than 10 days prior to start of performance.

Reference FAR [22.1012-1](#) and [22.1012-2](#).

The contracting officer’s determination of SCA applicability of these new or revised WDs/CBAs is important to workers who want the new wage rates, important to contractors who need to sustain a stable, qualified workforce for the duration of the contract, and important to the Navy who has to fund the contract. Therefore, the contracting officer should make these determinations carefully, consistently, and in accordance with the FAR provisions.

Myth corrected: At times contracting officers overlook the requirement to update the wage determination(s) when a contract period of performance is extended. While it is true that FAR [52.217-8](#) states in part: “...The Government may require continued performance of any services within the limits and *at the rates specified in the contract*”; it goes on to state: “These rates (contract prices) may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor.” Since FAR [22.1007](#) *requires* wage wage determination updates whenever the “term of the contract is extended by option or *otherwise*,” the wage determination must be updated when a contract is extended. The contractor will then have an opportunity to request a price adjustment under the SCA price adjustment clause, [52.222-43/44](#).

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## Multiple WDs in the Same Contract

Important note: If the contract is performed (1) at multiple locations, (2) by groups of workers subject to different standard or non-standard WDs, or (3) where some workers are subject to a CBA-based WD and some subject to a standard or non-standard WD; then multiple WDs are required. For example, a CBA will control for wage determination purposes *only* for the employees represented by the collective bargaining agent signatory to the CBA. The *bargaining unit* “service employees” must be paid no less than the wage and fringe benefits contained in the CBA. However, any other *non-bargaining unit* “service employees” will continue to be subject to any other “applicable” WD, such as a standard WD. Therefore, it is not uncommon for an SCA-covered contract to require two or more WDs, one for the CBA “bargaining unit employees” and another for those service employees not in the bargaining unit.

To the maximum extent possible, solicitations/contracts requiring compliance with multiple WDs should identify which WD applies to each specific portion of the contract or which particular classification(s) of employees. This is particularly important where a portion of the work is performed by employees subject to a CBA and another portion of the contract is subject to a “prevailing WD.”

Here are some examples of language to use:

“Wage Determination 2007-CBA-9999 applies to all service employees in the bargaining unit represented by XXX Union.”

“Wage Determination 2005-2102 applies to all other service employees (those not in the union bargaining unit) performing on the contract.”

“Service Employees” are defined in FAR [22.1001](#).

## The Contract Modification to Place WD(s) into the Contract

Wage Determination information included in contract modifications can sometimes cause confusion on the effective date of the WD change. Since there are three different dates involved: (1) the modification date, (2) the published revision date of the WD, and (3) the intended effective date; it is recommended that the modification to incorporate a WD state explicitly the effective date of the change. The revised WD is required for *only* the new period of performance (new contract, option period, extension period). Therefore, the government’s intent is that the contractor must comply with the revised WD on the first day of the new period of performance.

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Given the pricing impact that it will likely have on the contract, it is recommended that the contractor be advised in the modification that (1) a new WD is being modified into the contract and is identified accordingly, (2) the WD is applicable on the first day of the new period of performance, XX/YY/ZZ, and (3) the contractor has 30 days to request an adjustment to contract price or to request more time be given under FAR [52.222-43\(f\)/44\(e\)](#).

Any ambiguity will be cleared up by making the contract modification explicit on these issues.

## **eSF98s**

Prior to October 2003, contracting officers submitted a SF98/98a, “Notice of Intention to Make a Service Contract and Response to Notice,” to DOL requesting WDs for any SCA-covered contract (or contract action).

In October 2003, DOL announced the implementation of the Wage Determinations OnLine (WDOL) Program, <http://www.wdol.gov>, which provides contracting officers access to Standard and Non-Standard WDs.

WDOL also provides contracting officers direct access to DOL by using the “e98” link. The “[e98](#)” is used to request a WD from DOL if the contracting officer does not find an appropriate WD in the WDOL databases for Standard or Non-Standard WDs or if a CBA-based WD is *not* applicable. In other words, for those rare occasions where a contract specific WD is necessary. See more detailed discussion under “SCA Wage Determinations” above.

Contracting officers must follow the “WDOL [User’s Guide](#)” carefully in selecting their SCA WDs for contract actions. The WDOL library also provides a number of resources for use in determining the appropriate labor standard or WD for each contract action.

The general public has access to the WDOL Program for informational purposes. As always, the wage determination selected by the contracting officer and made a part of a contract is the controlling WD for that contract. That WD will remain in effect on the contract until a contract triggering event occurs per FAR [22.1007](#) (extension, option, etc.) and the contract is modified accordingly.

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## SCA Even and Odd (Previously High and Low) Fringe Levels

Presently, DOL issues two Standard WDs for each locality. When obtaining SCA WDs from the WDOL menu, this is the reason for the seemingly odd question: “Were these services previously performed under an SCA wage determination that ends in an even number? Example: 1994-2104; or 1994-2114.” [WDOL User Guide: Sec. B.5.a.\(1\)](#).

The differences in Health and Welfare (H&W) methods will often have real impact in terms of the contractor’s cost of compliance, the receipt of benefits or equivalent payments by the workers and the price of the government contract due to the SCA Price Adjustment clause. Therefore, when selecting a standard WD, the contracting officer must select the WD with the appropriate H&W method. The guidelines for selection are as follows:

- First Guideline: With the exception of the “grandfather” rule noted in the “Second Guideline” below, always select the odd-numbered WD for contracts requiring use of DOL’s standard WD.
- Second Guideline: If the previous contract contained the even-numbered WD, select the even-numbered standard WD for all following contract periods of performance and follow-on contracts (including recompetitions) for substantially the same services if they will be performed in the same locality (the locality covered by the WD). This is known as DOL’s “grandfather” rule and is intended to maintain H&W consistency for a specific group of service employees.
- Hawaii: Because Hawaii state law requires the payment of health insurance, SCA H&W rates are different in Hawaii, but the application of the two levels is the same as noted in the above paragraphs.

Note: For years DOL issued H&W rates on WDs known as the “high” fringe benefit WD and another known as the “low” fringe benefit WD. Generally DOL issued the “high” fringe benefit WD for those contracts that were expected to use a number of high-skilled labor classifications or that were to be used for A-76 competitions. The rate was historically \$2.56. This H&W method was also known as the “average cost” H&W rate because employers were permitted to provide fringe benefits to the entire pool of “service employees” costing an average of \$2.56 per hour based upon all hours actually worked by the affected pool of service employees. The cost per individual employee could vary so long as the average cost of

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providing the benefits for the entire group of service employees averaged at least \$2.56 per hour when divided by all hours worked by the affected group of workers. These “high” (average cost) WDs always ended in an even number, therefore, a convenient way to identify them was that they were “even-numbered.” The other difference in the calculation of the average cost WD is that the contractor is required to use *only* the hours actually worked by the service employees, excluding paid time off such as holidays and vacation, but including any overtime hours.

DOL also issued “low” H&W WDs and these were utilized by contracts not requiring the “high” H&W level WDs. This H&W method was also known as the “per employee” H&W rate since the contractor was required to provide benefits or make an equivalent payment to the worker that satisfied the minimum rate for each individual service employee and were prohibited from averaging the cost between different employees. These WDs always ended in an odd number, therefore, they were often referred to as “odd-numbered.” Under the odd-numbered (“per employee”) WD, the employer must pay H&W rates on all hours paid, including paid time off such as holidays and vacation, but excluding any hours in excess of 40 hours per week (2080 annually).

In 1997 Department of Labor changed its calculation method for determining H&W rates via All Agency Memo (AAM) # [188](#). At that time average cost (high) WD was at \$2.56 per hour and the per employee (low) WD was at \$.90 per hour. The DOL rule change provided that the implementation of the new calculation method would happen incrementally over 4 years. Ultimately the plan was to have a “single” benefit level when the per employee (low) H&W level equaled or exceeded the average cost (high) H&W level. However, in the meantime any contracts, including follow-on contracts that were at that time using the average cost H&W WD were required to continue with that method – the “grandfather” rule.

In June 2004, the DOL surveys indicated that the “lower” level had increased to \$2.59 per hour. DOL decided to continue issuing two separate wage determinations with identical wage *and* fringe benefit rates. See AAM # [197](#). DOL is considering a regulatory change to allow for a single H&W rate method. If and when implemented, this would achieve the original goal to have only one standard wage determination for each locality.

In the meantime, the only difference between the two wage determinations is the compliance method required for the H&W benefit. The wage determinations will have different numbers: The

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per employee benefit will always be the odd-numbered WD (94-2147); the average cost benefit will always be the even-numbered WD (94-2148).

The former “lower” H&W rate is applied on a per employee, per hour basis, for hours paid (including holiday, vacation, etc.) up to 40 per week. (See [29 CFR 4.175\(b\)](#)). Under the average cost, individual employees may receive less than the specified benefit but the contractor is in compliance with the law as long as the amount they spend averages at least the WD requirement for all SCA hours worked (excluding holiday, etc.), including overtime hours, on the contract.

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## **SCA and Collective Bargaining Agreements (CBAs)**

A collective bargaining agreement (CBA) is an agreement reached through direct negotiations between an employer and a representative of the employees (typically a labor union) that determines wages, benefits, working conditions, grievance procedures, and other employment practices, applicable for a specified period of time.

If in the preceding contract period workers were covered by a CBA *and* the CBA meets the criteria in the SCA regulations, the wages and monetary fringe benefits of that CBA are the SCA minimums for the follow-on contract period. The CBA is the SCA minimum regardless of whether the wages or benefits in the CBA are lower or higher than those found in the published SCA WD for that locality.

Contracting officers must determine whether the incumbent contractor (or subcontractor) employees are subject to a CBA at each contract action requiring a wage determination update per FAR [22.1007](#) (resolicitation, modification to exercise an option or to extend the contract or a scope of work change that significantly affects labor requirements). If the SCA employees are subject to the provisions of a CBA, signed by the contractor and labor union, the economic terms (wage rates and monetary fringe benefits) shall become the WD, if it is received in a timely manner by the contracting agency and otherwise meets the criteria in the DOL regulations limiting the use of such a CBA. Those limitations are discussed below in “Wage Determinations Based on CBAs” and are also found in the WDOL [User’s Guide](#). The CBA WD requirements are applicable *only* to those “service employees” in the bargaining unit (those represented by the collective bargaining agent). Therefore, other non-exempt service employees used on the

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contract may continue to be subject to a standard or non-standard DOL-issued WD. Some complex service contracts may require multiple CBA-based WDs with each WD covering a group of different bargaining unit employees.

### **SCA Notifications – Union and Contractor**

If the employees of the incumbent contractor are represented by a union (whether or not the union and contractor have reached a collective bargaining agreement), the contracting office *must* send a written notice to both parties informing them of the estimated date of the next contract action (Reference FAR [22.1010](#) and a sample letter at <http://www.wdol.gov/usrguide/appdxb.aspx> Issue the letter – *no less than 30 days prior to issuing such contract action.*

It is strongly recommended that contracting officers anticipate the dates that will occur at each solicitation or other contract action, and set up an electronic reminder that provides sufficient time to prepare and issue each written notification. The reminder should occur no less than 60 days prior to each contract action to provide sufficient time for the contracting officer to contact the contractor to inquire if any of the contractor or subcontractor's workers are represented by a union, and to provide sufficient time for receipt of the notice to both the incumbent contractor and the collective bargaining agent. The purpose of this provision is to provide "fair warning" to both the contractor and the union that they must conclude CBA negotiations in order to submit a "timely" CBA for SCA purposes. See FAR [22.1010](#).

Note: Issuing a "letter of intent" to exercise the option as required by FAR Part 17 does *NOT* fulfill the FAR 22.1010 notice requirement, unless the letter of intent has an explicit section for FAR 22.1010 purposes *AND* it is sent to the collective bargaining agent in addition to the contractor.

If the contracting officer fails to provide timely written notice (at least 30 days prior to the contract action under 22.1010), any new or revised CBA received prior to start of the new period of performance is applicable for SCA WD purposes. FAR [22.1012-2\(c\)](#).

### **Wage Determinations Based on CBAs**

Collective Bargaining Agreement (CBA) based WDs. The Contracting Officer will access WDOL to print the face page for the

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CBA to insert in the solicitation/contract. The electronic CBA-based WD should be updated at each follow-on contract period (options, extensions, etc.) even when there has not been a new CBA. The *Contracting Officer must examine the CBA for prohibited contingencies* (see DOL All Agency Memorandum (AAM) # 159) or to question whether rates are at variance with the rates in the local area.

To incorporate the CBA WD, the Contracting Officer must ensure that the CBA meets the conditions in the next section.

### **CBA WDs Additional Considerations**

The wages and monetary fringe benefits of the predecessor's CBA will be the SCA minimums for the successor contract period if the CBA meets the following criteria:

- The CBA is complete (including all appendices) and fully executed (signed by both parties – appropriate company officials and union officials).
- The contracting office must receive a new or revised CBA in a timely manner to be applicable to the successor contract period (Reference FAR [22.1012-2](#), and the text in the section, “Timeliness of CBA or WD Revisions”).
- Each new or revised CBA should be reviewed by the contracting office to determine whether or not there are “*contingency provisions*” – generally, a statement that the contractor is not obligated to pay the monetary provisions of the agreement until and/or unless a third party (one not a party to the signed CBA) takes a specific action. Some common examples of such unacceptable contingencies are for the CBA to make null and void the wage/benefit requirements unless (1) DOL issues a Wage Determination based upon the CBA, (2) the contracting agency includes the CBA as the controlling WD, (3) the contracting agency adequately reimburses the contractor for the impact of the increase wages/benefits. Such contingencies may indicate that the agreement was not *negotiated “at arms’ length” between the two parties.* (AAM [# 159](#).)
- Each new or revised CBA should be reviewed by the contracting office to determine whether or not the wages or monetary benefits are *significantly at variance to those paid to the same classifications employed in the locality* where the work is to be performed. If the wages and benefits in the CBA appear to be significantly in excess of those that would commonly be considered reasonable,

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contact the Navy or NAVFAC Labor Advisor. See FAR [22.1013](#) and [22.1021](#). The Navy or NAVFAC Labor Advisor may request that DOL review the CBA for allegations of lack of arms' length bargaining, or for a determination that the wages or benefits are significantly at variance to (in excess of) those rates prevailing in the locality. These challenges to CBAs must be filed prior to the start of performance of work on the contract. Therefore, the contracting office must contact the Labor Advisor immediately upon receipt of any CBA that provokes questions of validity.

- If the CBA is an initial (first agreement between the contractor and collective bargaining agent), the CBA must be effective and the employees must be paid under the terms of the CBA prior to the end of the predecessor contract (or period of performance), in order for the CBA to have standing as the effective WD for the successor contract (or next period of performance). See [29 CFR 4.163\(f\)](#). OR – If the CBA is an existing CBA, the expiration date of the CBA must “bridge” the end of the government’s contract period to be applicable to the successor contract period. If it expires prior to the end of the previous period of performance, then the appropriate prevailing standard or non-standard SCA WD will apply, not the CBA terms. *Note: A CBA may have a “perpetual renewal” (“evergreen”) article that keeps the CBA from expiring unless one of the parties provides written notice to the other of intent to terminate the agreement.*

Also, a CBA may expire and therefore cause the contract to revert back to the standard DOL-issued wage determination during a new period of performance.

*Example 1 – Initial CBA -- A new option will begin on 10/1/XX. The base period of the contract ends 09/30/XX and the contract did NOT contain a CBA-based WD. The contractor and a union representing the service employees completed a CBA on 08/01/XX and made the effective date of the CBA 09/01/XX and adopted wage and fringe benefit provisions that were already being paid as effective under the CBA. The CBA contained pay increases on 10/01/XX, the first day of the new period of performance. In this example the contract DID establish the CBA as controlling for wages and benefits in the base period of the contract and therefore, it will likewise be controlling for wage determination purposes for the new period of performance, Option Period I.*

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*Example II – Initial CBA -- The same facts as above except the contractor and the union did not make the term of the CBA effective until 10/01/XX. This would NOT establish the CBA as controlling for successor wage and benefit purposes during the base period of the contract, therefore it will NOT be controlling for SCA wage determination purposes during the first option period. The standard wage determination will continue to apply during the entire period of performance (Option Period I) and the CBA will not be controlling for wage determination purposes until the beginning of Option Period II beginning 10/01/XX + 1 year.*

*Example III – Existing CBA -- The WD in the contract for the base period of performance 10/01/XX through 09/30/XX + 1 year was based upon the contractor’s CBA. The CBA expired on 12/31/XX, however, the contractor and the union did not renew or renegotiate a new CBA to keep the required wages and benefits active. The entire base period of performance was completed and neither the contractor nor the union provided a new CBA or CBA changes prior to the exercise of Option I despite the Contracting Officer providing a “notice to interested parties (per FAR 22.1010)” that a new option period would begin 10/01/XX + 1 Year. Based on the expiration of the existing CBA and the absence of a new one, the CBA-based WD will not longer apply and instead the DOL issued standard wage determination for the locality of the work will apply for Option Period I.*

See also WDOL [User’s Guide](#) which discusses the same criteria.

## **Timeliness**

The contractor is obligated to submit a new or revised CBA to the contracting agency in a timely manner in accordance with the FAR clause at [52.222-41](#)(m). A CBA must be received in a timely manner in accordance with FAR [22.1012-2](#) in order to be controlling under the SCA clause for the follow-on contract period. For more details, see the timeliness table in the previous section, “Incorporating SCA WD(s) into a Solicitation.”

If the CBA is not received in a timely manner by the contracting agency, it should not be incorporated into the follow-on contract period. However, timely receipt of a CBA from a contractor is predicated on the contracting officer’s timely notification under FAR [22.1010](#).

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If the contracting officer fails to provide timely written notice any new or revised CBA received prior to start of the performance of the work is applicable to the follow-on contract period.

### **Inquiries Regarding CBAs**

All inquiries concerning applicability, negotiations, arms' length, variance from prevailing rates, or timeliness of receipt of collective bargaining agreement should be referred to the Navy or NAVFAC Labor Advisor.

### **Contract Reconfigurations – Consolidations or Break-outs**

As a result of changing priorities, mission requirements, or other considerations, Navy/Marine Corps may decide to restructure their support contracts. Specific contract requirements from one contract may be broken out and placed in a new contract or combined with requirements from other contracts into a consolidated contract. Care must be taken to properly administer the wage determination requirements in such circumstances.

Generally, it will be clear that the wage determination requirements follow identifiable contract work into the new procurement. However, there may be circumstances where it is not clear which wage determination applies. If the work will be performed in the same locality and either a standard or non-standard WD applies, then the same WD will continue to apply to that portion of the new solicitation/contract. The most recent revision must be used for the new procurement. If a CBA-based WD applies under the old contract, then that identifiable portion of the new procurement will continue to be subject to the CBA-based WD. If, however, there is more than one predecessor contract(or) performing the same or similar functions or work, using substantially the same job classifications and performing in the same locality, using different wage determinations (whether "prevailing" wage determinations or CBA-based WDs), then the predecessor contract which covers the greater portion of the work in such functions shall be deemed controlling for wage determinations purposes.

Decisions of this nature are necessary in order to establish a single WD at each locality for the new contract. Where it is unclear which WD applies in these "contract reconfiguration" situations, contact the Navy or NAVFAC Labor Advisor early in the procurement process for guidance or coordination with DOL.

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## DBA Wage Determination Administration

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### Overview

FAR requires that the contracting officer incorporate the appropriate wage determinations in solicitations and contracts and designate which work each wage determination covers. *Inclusion by reference is not permitted since an affirmative determination of the exact WD and exact modification of the WD must be made to determine which WD is effective for any specific contract or, when appropriate, a specific task order.* See FAR [22.402](#) (a) & (b).

Therefore, inclusion of only a wage determination number and an instruction to the contractor to obtain his/her own copy is an “inclusion by reference” and does not satisfy the FAR requirement.

Now that contractors are able to obtain DBA WDs online it is even more important for the Contracting Officer to incorporate the correct WD into each required contract action. It is recommended that the appropriate modification to the WD(s) be placed into the contract to avoid misunderstandings about what the contractor must comply with and what is appropriate to use if modifications and/or price adjustments are needed for contracts with options. In addition, if it becomes necessary to get a conformance approved by DOL (see section below, “SCA/DBA Conformance Procedures”), they will not approve the new class and rate if the wrong WD is incorporated into the contract.

There are several types or “schedules” of WDs. The criteria for determining what schedule applies to a particular project were issued by DOL under All Agency Memoranda [130](#) and [131](#). The most commonly used schedules are:

#### **Residential**

Applies to single-family housing units and apartments up to and including four stories (basements may be counted as a story – contact your Navy or NAVFAC Labor Advisor for additional information). All work on exterior utilities, streets, playgrounds, fences, etc. in residential areas falls under the heavy or highway schedule (as appropriate) rather than residential schedule, unless the work is incidental to initial construction or incidental to subsequent construction, alteration, repair, or painting of the residential units.

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The residential schedule does not apply to dormitories, or “hotel” accommodations, which are *not* self-sustaining (those that generally have cooking facilities with living, bathroom, and sleeping facilities in each unit).

“Market style” apartments (currently being used in some areas as quarters) may be considered residential. Contact your Navy or NAVFAC Labor Advisor for additional information.

### ***Building***

Applies to non-residential sheltered enclosures with walk-in access to house people, machinery, equipment, supplies, etc.

### ***Highway***

Applies to projects involving construction, alteration, repair of roads, streets, runways, taxiways, alleys, trails, paths, and parking areas, including striping, not incidental to a building, residential, or heavy construction project.

### ***Heavy***

“Heavy” applies to projects that are not characterized in the above three categories. It is a catchall category applicable to virtually all other work.

### ***Additional Heavy Schedules***

Separate schedules are sometimes issued for specific types of construction, such as dredging, water well digging, sewer and water line, etc. These schedules will appear on the state index listings under “Heavy” in WDOL.GOV.

### ***Combined Schedules***

When DOL determines that the rates on different schedules are essentially the same, they will publish them as one schedule. “Heavy and Highway” and “Building, Heavy and Highway” are the most commonly combined schedules.

### ***Mixed Projects***

Projects within residential or building schedules may include incidental work such as site preparation, parking areas for a building, streets and sidewalks for residential homes, utilities, and paving and grading work. Such incidental work will carry the same schedule as the overall project, unless the work is more than incidental. The DOL guidance is to use a second schedule if more than 20% of the project will involve work of a different character

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than the major portion of the project. However, in certain instances it may be appropriate to issue more than one schedule when less than 20% of the project is work of a different type.

For example, if a contract calls for the construction of both a base access road and a guard station at the point of entry to the road, then consideration should be given to issuing the “highway” schedule (WD) for the road construction and the “building” schedule for construction of the guard station. In any event, when more than one DBA WD schedule is issued for the same solicitation/contract, the contracting officer must designate the work to which each determination or part thereof applies. In the example above, the solicitation/contract would indicate that the building schedule WD applies *only* to the construction of the guard station and that the heavy schedule WD applies to all other DBA covered work. See FAR [22.404-2\(a\) & \(b\)](#).

In some cases such as an installation support contract that contains all the schedules, it may be appropriate to either (1) identify which WD applies when task orders are issued or (2) place all schedules in the contract and require the contractor to use the appropriate schedule in accordance with DOL All Agency Memo No. [130](#) & [131](#) based upon the work required by the task order.

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## **DBA Detailed Procedures and Guidance**

The Contracting Officer must select and insert the appropriate wage determination into the solicitation and contract.

### **DBA Wage Schedules**

As discussed in the overview section, there are several types or “schedules” of WDs. The criteria for determining what schedule applies to a particular project were issued by DOL under All Agency Memoranda [130](#) and [131](#). The contracting officer must select the appropriate schedule to place in the contract. Some contracts may require the use of more than one schedule if the project involves substantial amounts of different types of construction work on the same contract/project. In those situations, the solicitation and contract must designate and make clear the work to which each WD or portion of the WD applies. See FAR [22.404-2](#). Therefore select the correct WD(s) from the [WDOL.gov](#) menu and place them in the solicitation/contract with any clarifying information that may be needed.

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## General Wage Determinations (WD)

General Wage Determinations (WD) have no expiration date and remain in effect until modified, superseded, or withdrawn. Contracting officers and other interested parties may obtain current, official DBA General Wage Determinations (DBA WDs) from the WDOL.GOV Program, at [www.wdol.gov](http://www.wdol.gov). Modifications are considered “received” by the contracting officer as of the date the WD or modification is posted on the WDOL Web site.

Cautionary Reminder: The geographic scope of the Davis-Bacon Act is limited to the 50 States and Washington, D.C. WDOL includes WDs for Guam, Virgin Islands, Puerto Rico, and the Northern Mariana Islands because of the “Davis-Bacon Related Acts” (DBRA). Generally, Navy/Marine Corps contracts are direct Davis-Bacon Act covered work and *not* subject to these “related Acts” statutes. Therefore, do *not* use these WDs for Davis-Bacon Act contracts (Navy contracts) not covered by the DBRA statutes.

DOL will publish all DBA WD revisions for a given week on the WDOL.GOV Program database each Friday. The WDOL.GOV Program will also provide a notice of upcoming revisions to the DBA WDs. To review the WDs that will be revised, go to the WDOL.GOV home page and select “WD due to be revised” under the Davis-Bacon Act heading. Note: This page only shows what WDs are going to be revised, not what the revisions will be.

DOL issues DBA WDs reflecting prevailing wages and benefits paid by the construction industry within specific geographic localities. The DBA WDs are further classified by the nature of the construction projects performed, specifically listed as “schedules” such as residential, building, highway, and heavy construction.

General WD rates (wages and fringes) are based on surveys that DOL periodically performs. Prevailing wage determinations are based upon the data collected during the survey. Accurate and comprehensive wage determinations are dependent upon the participation of interested parties and identified contractors during the survey period. DOL *cannot* simply add or “make up” wage rates for classifications. If no roofing companies respond to the survey, no roofer classification will appear on the general wage determination.

Depending upon the circumstances, absence of a job classification needed for contract performance is handled as (1) a request for an additional classification (also known as a conformance – see “SCA/DBA Conformance Procedures” below), or (2) a request for a

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special project wage determination. If the missing classification will be only a portion of the work required under the contract, then a conformance as discussed in FAR [22.406-3](#) must be requested. A conformance process can only add the classification and rate after award, which will be applicable to that contract only. DOL *cannot* add the conformed classification to the general WD. However, if the classification missing from the wage determination is the sole or primary job classification needed for contract performance, an [SF-308](#) form requesting a project wage determination should be submitted to DOL. (See “Project Wage Determinations” below.) Without such a WD, it would be very difficult to have a competition that is fair and equitable under the labor standards, since there would be an absence of any wage/benefit standard for the critical work classification.

The general WDs contain classifications and wage rates that have been found to be prevailing based on the survey results. The classifications are basically listed in alphabetical order by identifiers\* that indicate if the rates are based on union or non-union data.

\*Classification identifiers that begin with an “SU” indicate the rates are “open shop” (not union dominant). Any identifier that begins with something other than SU indicates union dominance (i.e., CARP would indicate carpenter union, ELEC = electrical union, etc.).

The identifiers are important for two reasons.

1. Survey data “SU” rates will not change until DOL completes another survey in that area. Union dominant rates can change whenever the local unions identified as prevailing negotiate wage and fringe benefit changes with contractors and submit them to DOL.
2. The specific classification jurisdiction, what craft is required to perform what work, follows the prevailing practice of the dominant union or non-union data collected during the survey.

A general WD incorporated into a DBA construction contract is normally valid for the life of the contract (with some exceptions noted below). Contracts that have options to extend the term of the contract require wage determination updates when the options are exercised or extensions are issued. See FAR [22.404-12](#). Contracts such as indefinite quantity/indefinite delivery contracts for a particular type of work commonly require WD updates. WD updates would also be required for contracts, such as an

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installation support contract, that are primarily service contracts, but contain some DBA construction work via task orders.

Note – The contracting officer must select a clause to adjust the contractor price (or not) under FAR [52.222-30](#), 31 or 32 on such contracts.

### **Project Wage Determinations**

Project Wage Determinations are issued by DOL in response to a contracting agency request ([SF-308](#)) when there is no applicable General WD available for that work or area. This would be the case when no WD exists for the geographic area where the project will be constructed. This would also be the case when there is an existing WD for the location but it lacks the classification that will be performing the contract (i.e., a roofing contract where the local WD does not contain a roofer classification). (For a situation where the existing WD contains some but not all of the needed job classes, see “SCA/DBA Conformance Procedures” below.) The agency prepares a SF-308, Request for Wage Determination, and submits it to DOL. The Project WD may be used only for the project(s) listed on the request. It will expire 180 days after issuance if not used in a contract, unless DOL approves an extension ([29 CFR 1.6](#)). If incorporated into a contract, it is valid for the life of that contract (with the exception of contracts with options/extension as noted below in “Construction Contracts with Options.” See DOL [AAM #157](#) and [FAR 22.404-12](#)

If a project WD is needed, allow at least 45 days (60 if possible) from date of request to receipt of the WD from DOL. See FAR [22.404-3\(c\)](#).

### **Construction Contracts Where Site of Work Is Unknown**

Task order contracts such as environmental remediation requirements often do not determine the site of work at the time of solicitation or award. In this instance, the contracting officer will incorporate the most current DBA WD at the issuance of each task order, and the DBA WD will remain applicable for the life of the task order (regardless of options later exercised in the contract).

### **Application of the Wage Determination to Task Orders When the Site of Work Is Known**

The Contracting Officer should update the wage determination in the basic contract at each contract action (resolicitation,

modification to exercise an option, or significant change to the statement of work). The basic wage determination should be applied to all task orders issued in that period. Once the wage determination is assigned to the task order, the wage determination stays in effect until the task order is completed.

Reference: FAR [22.404-12](#)

**Receipt of Revised DBA WD (WD “Modification”)**

When a new or revised WD is published or received in the contracting office (i.e., available for use on WDOL), it may or may not need to be incorporated into the solicitation or contract depending on the following circumstances.

**Table: Sealed Bid and Other Than Sealed Bid Situations**

	<b>If...</b>	<b>Then...</b>
<b>Sealed Bid</b>	WD revision is received 10 days or more before bid opening –	Incorporate the revised WD and permit bidders to amend their bids.
	WD revision is received less than 10 days before bid opening and the contracting officer finds there <i>is</i> reasonable time to notify bidders –	Incorporate the revised WD and permit bidders to amend their bids.
	WD revision is received less than 10 days before bid opening and the contracting officer finds there <i>is not</i> reasonable time to notify bidders –	Do not incorporate revised WD. Contracting Officer shall place a written report of finding in the contract file.
	Revision is received after bid opening –	Do not incorporate revised WD.
	Award is <i>not</i> made within 90-days after bid opening, WD revision is published before award –	Incorporate the revised WD and permit bidders to amend their bids, unless an extension of the 90-day period is obtained from the DOL.

Reference: FAR [22.404-6\(b\)](#)

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**Other than  
Sealed Bid  
(Negotiation)**

<b>If...</b>	<b>Then...</b>
WD revision is received before contract award –	Incorporate the revised WD. An adjustment in the proposal prices shall be allowed if the revision significantly affects the proposal price.
WD revision is received after award –	Do not incorporate revised WD.

Reference: FAR 22.404-6(c)

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### **Construction Contracts with Options**

DOL regulations require that DBA WDs be updated when options are exercised to extend the term of the contract. The contracting officer must select a clause for price adjustment from those found at FAR [22.404-12\(c\)](#), prescribed by [22.407](#) (e, f, or g) and implemented by FAR [52.222-30](#), 31 & 32. Often these are required for indefinite delivery and indefinite quantity (IDIQ) contracts to provide, on an as needed basis, specific types of construction work -- an IDIQ for roofing of all buildings located on a particular installation, for example. Most of these contracts are for a base period and several option periods. Also, Base Operating Services or Military Family Housing Maintenance contracts often include some construction line items and option periods and therefore require WD updates.

The clause prescriptions at FAR [22.407](#)(e), (f), and (g) require the contracting officer to select and include *one of the three possible clauses* in solicitations and resultant contracts. All three clauses inform bidders or offerors that new wage determination(s) will be incorporated for each option period. Contract price adjustments – *if any* – depend on the specific clause incorporated.

The choices available for implementing this requirement are:

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

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

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

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During your acquisition planning, careful consideration should be given to the choice of the clause selected for the solicitation and contract since it will have ongoing impact on the contract price and the ability of the contractor to adjust wage rates within the pricing structure of the contract, either adjusting the contract price or placing the risk on the contractor to price the potential for such increases into their proposals.

Generally, the reasoning behind the choice for a DBA price adjustment clause is closely aligned with the logic found in Part 16.203 for economic price adjustments. There should be an appropriate evaluation and division of risks between the Government and the contractor due to fluctuations in labor costs. This also must be balanced against the contract administration effort required to implement the clause choice made. Generally, the -30 clause places the greatest amount of risk on each party, but is the easiest to administer. The -32 clause places the least amount of risk on each party, but is likely the most difficult and time consuming to administer. The -31 clause is somewhere in between on both risk and ease of administration.

Another key factor is the relative stability (or volatility) of the wage determination(s) for the locality where the work of each contract will be performed. As a general rule, "union dominant" wage determinations tend to change more frequently to update rates that are predicated upon collective bargaining agreements in the locality. Although these WDs change more frequently, the wage/benefit increases are generally a small percentage of the total required minimum rate and thus the WD is less volatile at each change. On the other hand, wage determinations that are based on general wage survey data (often in more rural areas) get updated far less frequently. It is not unusual for several years to pass before these WDs are updated with new survey data. Consequently, when these WDs receive an update, it can result in large percentage swings for the rates affected. Therefore, the relative volatility of these changes and the risk that it places on both the government and the contractor should be considered when selecting the contract clause for adjustment to contract price.

Here are some other key factors to consider when making this choice:

First, if your contract is a cost-reimbursable type contract, then 52.222-30 *must* be used and the adjustment to contract price will occur due to the nature of the contract without any other mechanism required to implement a price change.

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For fixed price construction contracts, carefully consider the following:

*Alternative I, 52.222.30 – Davis-Bacon Act – Price Adjustment (None or Separately Specified Pricing Method). Either:*

(a) No adjustment in contract price, since the offeror will price each option separately to include an amount to cover possible increases in labor cost, (the choice specified at FAR [22.404-12\(c\)\(1\)](#)). *Or:*

(b) Price adjustment is based on a separately specified pricing method, such as application of a fixed coefficient to an annually published unit pricing book incorporated at option exercise; agreed to at time of award for use of pricing data contained in an annually published unit pricing book (such as the U.S. Army Computer-Aided Cost Estimating System or similar commercial product), that is incorporated at option exercise, the choice specified at FAR [22.404-12\(c\)\(2\)](#).

Obviously, this may be the easiest of the three clauses to administer. That doesn't necessarily make in the *best* or *most appropriate* choice. The selection of this clause normally places 100% of the risk upon the contractor to anticipate increases in the minimum DBA wage and fringe benefit rates without any opportunity for an adjustment to contract price. The risk to the contractor is clear. If the wage determination rates used under the contract increase significantly, the contractor may face a serious financial burden. How then, could this choice be "risky" for the government? This alternative provides offerors the opportunity to bid or propose separate prices for each option period. If there is limited competition, such as on an 8(a) set aside, there would be little to prevent the contractor from including excess price increases in the out years and thereby permit profits that could be viewed as excessive when anticipated wage/benefit increases do *not* occur. Therefore, care should be taken to either (1) assure that adequate competition exists to temper such out year price excesses or (2) carefully review prices to assure that any negotiations keep such out year prices reasonable. Also, risky for both the Government and the contractor – if wage determination increases cause financial stress on the contractor, performance may suffer or fail.

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.

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Also, the alternative within the alternative on this choice is that the contractor and contracting officer may agree to a “separately stated” increase to contract prices for the option periods. An example of this may be use of annually published pricing data such as the U.S. Army Computer-Aided Cost Estimating System or similar commercial products. The price would then be adjusted by the recognized and agreed upon index. This pricing has been utilized for years on contracts such as the Air Force “SABER” contracts (Simplified Acquisition of Base Engineering Requirements), but has not commonly been used on Navy contracts.

*Alternative II, 52.222-31 – Davis-Bacon Act – Price Adjustment (Percentage Method)*

This percentage adjustment methodology allows for an adjustment based on a published economic indicator identified by the contracting officer in the contract clause such as the Employment Cost Index or Consumer Price Index published by the Bureau of Labor Statistics. This methodology also requires the contracting officer to indicate which percentage of the total contract price is considered labor and will therefore be subject to adjustment. Unless otherwise stated the clause defaults to 50% of the total contract price as being the estimated labor portion of the contract price. Upon determination of this percentage, only that portion of the contract price will be adjusted.

This alternative finds the middle ground both in terms of risk and ease of administration. It allows for a fixed method to adjust the contract price. Generally, the method chosen will allow for a relatively simple application of an index to the portion of the contract price that is deemed attributable to labor cost. It is very important for the contracting officer to fill in the percentage of contract price associated with labor and the published indexed used to adjust the labor costs, when using this clause.

Again, the middle bargain of shared risk and relatively easy administration of adjustment to contract price are generally accomplished by this choice. However, both parties must recognize that the amount of the adjustment may be less than or more than the cost actually incurred by the contractor to comply with the WD changes.

*Alternative III, 52.222-32 – Davis-Bacon Act – Price Adjustment (Actual Method)*

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This is a price adjustment method based on a specific calculation to reflect the actual (or projected) increase or decrease in wages and fringe benefits as a result of incorporation of a new wage determination with an option to extend the term of the contract. (Similar to the standard SCA price adjustment method found at FAR [52.222-43/44](#).)

This alternative is generally the least risky for both the contractor and the Government, but is likely the most time consuming and difficult to administer. Under this alternative, the contractor will receive virtually *all* of the costs of compliance with the new wage determination, but nothing more. Therefore, the contractor will neither gain nor lose in the bargain that is struck and neither will the Government. However, this alternative is very similar to the Service Contract Act price adjustment clause in that it is often very “labor intensive” for the contractor to construct its proposal for adjustment to price and likewise can be difficult and time consuming for the Contracting Officer to review, analyze, and determine whether the amount requested is correct or not. Due to the exacting nature of this alternative, if the government is guarding against risk, this is likely the best choice. This alternative is also a common choice for “hybrid” contracts that include both Service Contract Act *and* Davis-Bacon Act provisions (frequently Base Operating Services contracts). When this clause is used, the methods used to adjust the contract price for the service requirements and the construction requirements are the same.

Your Navy and NAVFAC labor advisors are working on a Price Adjustment Calculation Tool prototype (PACTp), that will help simplify analysis and approval of a contractor’s price adjustment proposal under this method of adjustment. While PACTp is a “work in progress” and is not ready for use yet, it should be soon. Ask your labor advisor about it and when it will be available, since testing is taking place now.

In summary, careful acquisition planning should be used to determine the best price adjustment clause for each Davis-Bacon Act covered contract which utilizes option periods or other means to extend the term of the contract. There are a number of factors to consider, but the best interest of the Navy and the government should be paramount in making the choice from among the alternatives laid out above. Your labor advisors can help with deciding which may be most appropriate based on the facts and circumstances of your procurement. Contact us if we can help.

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## **CONTRACT ADMINISTRATION AND LABOR STANDARDS ENFORCEMENT – SCA AND DBA**

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### **Key Differences Between SCA and DBA Contract Administration and Labor Standards Enforcement**

The government contracting officer has a number of key labor standards administration and enforcement responsibilities under the SCA, DBA and related labor standards. It is important to recognize and note some of the major differences in the CO responsibilities under these laws.

#### **SCA Enforcement Is Exclusively DOL's Responsibility**

The sole enforcement authority and responsibility for the SCA rests with the DOL. The contracting agency lacks authority to enforce labor standards requirements even though the contract provisions are placed in their contract. Under the DBA, however, the contracting agency has the primary enforcement responsibility and must perform the day-to-day enforcement of the labor requirements, including obtaining certified payroll records, reviewing those certified payroll records for wage and fringe benefit compliance, interviewing employees, performing routine and special labor checks, and resolving employee complaints. The DOL does, however, have oversight responsibilities and can and sometimes does independently conduct their own DBA compliance investigations.

As a result of these key differences, the contract administration of SCA-covered contracts and those subject to the DBA is quite different. Under the SCA, contracting agencies are primarily limited to the proper placement of the labor standards clauses and appropriate wage determinations in the contract. The responsibility then shifts to the contractor to comply with those requirements accordingly. If they do not comply, DOL has the responsibility to take the necessary enforcement action. *Any complaints or allegations of non-compliance under the SCA should be referred to DOL since they have sole enforcement authority over the SCA.*

#### **DBA Enforcement Is Primarily the Contracting Agency's Responsibility**

Under the DBA, not only must the contracting agency place the clauses and wage determination(s) into the contract, but they must also enforce them. When and if the DOL receives complaints under DBA, they often refer them back to the contracting agency for

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enforcement action. The contracting agency investigates and attempts to resolve them, but if violations remain unsettled after the contracting agency's enforcement attempts, the investigation file is forwarded to DOL for a final attempt at resolution. If that attempt fails, the case will likely result in administrative litigation. Therefore, each DBA enforcement action should be handled in a careful and well-documented manner that would support such litigation. See FAR [22.406-10](#) and [DOL All Agency Memo #118](#).

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## SCA Contract Administration

The CO responsibility for SCA administration and enforcement consist of the several key items and of some subordinate, but still important items. Specifically, the CO has these key responsibilities:

1. Place the appropriate SCA clause(s) into the contract as prescribed by FAR [22.1006](#).
2. Place appropriate WD(s) into the contract per FAR [22.1002-1](#), [22.1007](#) and [22.1008](#). This process is discussed in great detail under the SCA Wage Determination section of this resource bookl.
3. Update the WDs as required at option, extension, and labor-significant scope changes per FAR [22.1007](#). The wage determinations placed in the contract align with each new period of performance. Therefore, once the *correct* wage determination is placed in the contract, option period, or extension period; the WD(s) will control for SCA and contract purposes for that entire period of performance and should be changed *only* when the requirements at FAR 22.1007 require an update (i.e., recompetition, option, extension, etc.) Generally, due to a key provision in FAR 22.1007 and the underlying DOL regulations, WDs are updated on an annual basis. For contracts subject to annual appropriations, this anniversary provision requires a WD update annually if the WD has not been updated for one of the other listed reasons. WDs in contracts that are *not* subject to annual appropriations must be updated at least every two years (bi-annual anniversary date).
4. Adjust the contract price when appropriate per the SCA Price Adjustment Clause (FAR [52.222-43/44](#)). The WD updates discussed in item #3 above, are generally the "trigger" causing the contractor to request an adjustment to the contract price. Although the FAR provides very little guidance on the details for making such adjustments, extensive guidance is available in the Navy's SCA Price Adjustment Guide. See also the "SCA Price Adjustment" section below.

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5. Require the contractor to post SCA posters and wage determinations for the information of the service employees performing on the contract. See FAR [22.1018](#).

6. Withhold contract funds when necessary to enforce the labor standards per FAR [22.1022](#). The FAR provides contracting officers the authority to unilaterally withhold funds necessary to remedy obvious or egregious violations. However, withholding of funds is more commonly requested by DOL at the conclusion of their investigation of the contractor's SCA compliance.

Therefore, the CO should refer questions or complaints about contractor compliance to the U.S. DOL, Wage and Hour Division office as discussed in FAR [22.1024](#). Any complaints should remain confidential from the contractor to avoid any potential retaliation by the employer against the complainant(s).

The CO and program office should likewise refrain from providing advice and opinions on job classification questions. If that advice of recommended job class proves to not be correct under the DOL regulations, the contractor may incur a back wage liability. Becoming involved in such classification questions may invite equitable adjustment claims by the contractor if the classes used are determined to be incorrect.

### **Other SCA Contract Administration Responsibilities of the Agency CO**

1. The CO should obtain the employee seniority list from the incumbent contractor and provide a copy to the new contractor at least ten days before the end of the contract. The purpose of this list is primarily for vacation eligibility requirements under the SCA, which are based upon the amount of years of uninterrupted service that each employee has performed on a specific government contract including all predecessor contracts for essential the same services performed at the same locality. There are sometimes other wage and/or fringe benefit requirements that are based upon "years of service" and the seniority lists provide the incoming contractor information that is necessary to comply with all the WD requirements. The seniority list is *not* provided for bidding purposes and therefore should not be provided to all bidders. Such release would likely provide the incumbent contractor's competition with information that could compromise the incumbent's competitive position and should therefore be provided to a new successor contractor after award of the new contract, but before the end of the incoming contractor's first pay period (to allow for proper wage/fringe benefit calculations and payments). See FAR [22.1020](#).

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2. Require and/or process request for additional classification and rates. Some contracts require the use of “service employees” that are not contained on the applicable WD. COs are responsible for processing the contractor’s request to “conform” (establish an SCA minimum rate of pay) such job classification(s) that are needed for contract performance, but that are missing from the contract WD. See FAR [22.1019](#). See also the detailed section “SCA/DBA Conformance Procedures” below.

3. Review WDs and CBAs for adequacy and appropriateness prior to placing them into SCA-covered contracts. This is an important CO responsibility since it is not unusual for “prevailing” WDs or CBAs that function as WDs to contain questionable wage and/or benefit requirements. Therefore, CBAs should be carefully reviewed to determine whether the wage or benefit rates appear to be reasonable for the skill, effort, and responsibility of the job classifications necessary to perform on the contract. Likewise, DOL “prevailing” WDs may contain substantial errors or omissions that should be corrected by DOL prior to the placement of such WDs into SCA-covered contracts. Any such errors, omissions, or CBA terms that appear to be excessive should be brought to the attention of the Navy or NAVFAC labor advisors as soon as possible. See FAR [22.1013](#) & [22.1021](#).

4. Cooperation with DOL during their investigation of SCA compliance. FAR [22.1024](#) requires cooperation with DOL representatives during their review of SCA compliance. Commonly, DOL representatives will request contract information and copies of WDs or CBAs that are contained in SCA-covered contracts. Although it may be assumed that DOL representatives can obtain copies of WDs from their own agency, only the contracting agency can accurately provide the WD(s) that have actually been placed into the contract. DOL may have no way of knowing the period of performance and when a particular WD revision would be effective on a specific contract. Note also that SCA *complaints* should be forwarded to DOL officials charged with the responsibility to investigate and resolve such complaints. Such complaint information must *not* be disclosed to the employer or anyone other than Federal officials.

5. COs should check the list of debarred contractors (both individual names and company names) and refrain from awarding to those contractors per FAR [22.1025](#).

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6. The contract clause [52.222-42](#) “statement of equivalent” rates must be included in all contracts requiring a wage determination. These rates are *not* those listed in the SCA WD. The “statement of equivalent” rates is a requirement that is separate and distinct from the WD requirements. The requirement is to list job classifications and pay rates *that would be paid* if the work in question was to be performed by *direct-hire, civil service employees*. A reasonable estimation of the job classes will generally suffice for this requirement. An additional time-saving method of completing this requirement is to utilize DOL’s SCA Directory of Occupations Index. This convenient index contains most of the job classifications that are commonly used on SCA-covered contracts. The index also includes an “FGE” (federal grade equivalent) column that can be used to estimate the appropriate pay rate for most classifications. For example, if your SCA-covered contract is for aircraft maintenance and will require “aircraft mechanics,” “aircraft workers,” and “aircraft mechanic helpers,” the statement of equivalent rates section could be satisfied by listing those three job classifications in the clause *and* by listing the corresponding FGE equivalent for each such class. The SCA Directory of Occupation Index shows that the FGE grades for these classifications are WG-10, WG-08, and WG-05 respectively. Although unlikely, if any offerors inquire as to the actual pay rates that such federal direct-hire personnel would be paid; they may obtain that information at [www.cpms.osd.mil](http://www.cpms.osd.mil) or [OPM.gov](http://OPM.gov). Again, this is *not* a wage determination and the rate on the wage determination is not what is intended for completion of this clause. See FAR [22.1016](#).

### **SCA/DBA Conformance Procedures**

Conformance is required when the contract WD does not include all of the “service employee” job classifications necessary to perform the work required by the contract. The conformance process establishes the minimum enforceable wage rate and fringe benefit for classifications that are not listed on the WD. See FAR [22.1019](#) and [52.222-41\(c\)](#).

The process requires offerors to bid or propose a contract price based upon their best understanding of a wage rate that will be sufficient and support DOL’s approval after award.

Any difference between the proposed wage rate and a higher rate approved by DOL is not eligible for a contractor’s claim for an adjustment to contract price under the SCA price adjustment, FAR [52.222-43/44](#). The approved rate sets a baseline for price adjustments in *subsequent* contract years when either the conformed class is (1) added to the prevailing WD, (2) added to a

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CBA which controls for WD purposes, or (3) the contractor is required to increase the minimum wage/benefit rate under “indexing” (discussed in detail below).

A conformance is necessary *only* for non-exempt “service employees” directly performing the contractually required work. It is not appropriate to conform rates for employees that are “exempt” under DOL regulations Title [29 CFR, Part 541](#) or for employees that are “necessary to contract performance,” but are not directly engaged in the performance of the specified contract services. For example, corporate level “overhead” personnel such as a billing clerk or accounting clerk would not be subject to the wage determination and a conformance would not be necessary (see [29 CFR, Part 4.153](#)).

### ***Preparation of the SF 1444***

Conforming a wage rate is a four (4) party process involving (1) the contractor/subcontractor, (2) the affected employee(s), (3) the contracting officer, and (4) U.S. DOL. Each party is important to completion of the process and should therefore be actively involved. Generally, the process begins when the contractor recognizes that it is using a job classification for contract performance that is not listed on the wage determination and therefore requests that a minimum rate be established for this new classification. The contractor is *required* to request the additional classification based upon the SCA contract clause and section found at FAR [52.222-41\(c\)](#). The contractor is required to initiate a conformance request as soon as possible, but no later than 30 days after using the unlisted classification for contract performance. However, the contracting officer and/or DOL may also require that the contractor conform a rate if the contractor does not do so on a timely basis. See FAR [22.1019](#). The request is generally placed upon an [SF-1444](#), however, so long as all the information needed is provided, the request may be in a different format.

The *contractor/subcontractor* completes Blocks 2 through 15 (subcontractor signs Block 14, if applicable) of the [SF-1444](#), “Request for Authorization of Additional Classification and Rate”. The contractor should include/attach a description of the work to be performed by the proposed classification *and* propose a rate of pay that they believe is appropriate. The proposed rate of pay must “bear a reasonable relationship” to other job classes and pay rates contained on the wage determination. For example, if the minimum pay rate on the WD is \$10 per hour for a janitor and \$20 per hour for an aircraft mechanic, then a job requiring more skill, effort, and responsibility to the janitor; but less skill, effort, and responsibility

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than the aircraft mechanic would fall somewhere in between for rate setting purposes. As the DOL regulations state, establishing a minimum rate for unlisted SCA job classifications “cannot be reduced to a single formula.” However, it must take into account “a pay relationship ...between job classifications based on the skill required and the duties performed.” Most of the other information needed on the [SF-1444](#) may be found in the contract.

The *employee(s)* performing work of the missing classification, if present, or their designated representative, must sign Block 16 to agree or disagree with the contractor’s proposed rates and job description. Any disagreement may be accompanied by argument and recommendations. Employee “designated representative” *cannot* be the contractor (employer) personnel representative or other contractor management personnel. If employees have not been hired yet, the contractor may state that in Block 16 in lieu of employee signatures.

The *contractor* then submits the [SF-1444](#) to the contracting officer requesting DOL’s approval of a wage rate proposed for the missing classification. The contractor should pay the proposed wage and benefit rates pending response from DOL.

The *contracting officer* receives the [SF-1444](#) request and must provide written concurrence or disagreement with the contractor’s proposal. The CO should also assure that all information is included to identify themselves (name, address, phone #) and the contract. Any disagreement should be accompanied by explanation, and documentation supporting a rate other than that proposed by the contractor or providing other rationale for the COs objections. For example, the CO may object to the conformance on the basis that the duties proposed for the new classification are performed by a job classification already established by the WD. If the contractor proposes that a floor buffer job classification be established, it may be noted that such work is already contained within the portion of a janitor’s job description that reads “...sweeping, mopping or scrubbing, and polishing floors...” Therefore, a conformance would not be necessary or appropriate. (Note: The contracting officer does not have authority to “approve” or “disapprove” the conformance request.)

The [SF-1444](#) is then submitted to *DOL* for their determination and response. When the contracting office receives DOL’s response, a copy is provided to the contractor with instructions to post it in the work area along with the SCA Poster and the WD. While the conformance request is pending, the contractor is authorized to pay

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employees the rate that they have proposed for approval. If DOL approves a rate higher than the rate proposed by the contractor, the contractor must pay such rate retroactive to the start of performance of that classification on the contract. There is no contract provision to reimburse the contractor for the difference that must be paid to the worker from the start of performance by that classification. The ASBCA has ruled on several occasions that such is a risk that the contractor accepts when it prices its proposal and accepts the contract containing a WD that does not include all necessary job classifications.

For service contracts with option years, the approved rate sets a baseline for price adjustment in *subsequent* contract years.

If the contract is subject to a price adjustment clause, after the initial conformance has been established, a contractor may elect to “index” in subsequent *contract years* (including the base period of a follow-on contract). Under “indexing” (i.e., adjusting) the previously conformed rate and fringe benefit is increased (or decreased, where appropriate) by an amount equal to the average (mean) percentage increase (or decrease) between the wages and fringe benefits specified for all classifications to be used on the contract which are listed in the current wage determination, and those specified for the corresponding classifications in the previously applicable wage determination. Therefore, calculate the *unweighted average increase* (or decrease) given to *only* the WD classes being used by the contractor. That average is then applied to the conformed or indexed rate from the previous contract period.

**Example:** If the rates for *four listed WD classes* being used were changed by 0%, +4%, +5%, and -1%, the indexed average is 2% ( $0+4+5-1=8/4$ ). If the contractor conformed a rate of \$10.00 in the prior contract period, the new “indexed” rate would be \$10.20 ( $\$10.00 \times 102\%$ ). The indexed rate is then carried forward, so that for the next contract period, the indexed average will be applied to the \$10.20 rate.

See [29 CFR 4.6\(b\)\(2\)\(iv\)\(B\)](#).

### **Conformance Checklist**

- The classification must be appropriate for the contract work, and the duties are not performed by another classification on the WD.
- The contractor *cannot* create a new classification by combining job duties from two or more existing

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classifications or splitting out duties from a listed classification to create a new class at a lower rate of pay.

- The proposed classification cannot be an “apprentice,” “trainee,” or “helper” classification.
- Conformance requests should not be submitted for *exempt* classifications (executives, managerial, professional) or for those employees that are not directly engaged in performing the specified contract services.
- *On service contracts*, providing the Federal Wage Grade Equivalent rates will enhance DOL’s ability to process the request.

### SCA Price Adjustments

Government contracting officers do not have the responsibility to compute an adjustment to contract price upon incorporation of new or updated wage determinations, but must determine whether contractor proposals for such adjustments are justified and timely under FAR [52.222-43/44](#). When modifications to incorporate wage determinations at options, extensions, or labor-significant scope changes are necessary, such modifications do act as the “trigger” for the *contractor* to request an adjustment to price. *Only* the contractor is in the position to know whether compliance with the new wage determination causes it to incur additional “actual increases” (or decreases) in its cost to comply with a new wage determination.

Therefore, it is the *contractor’s* responsibility to submit a detailed proposal to adjust the contract price based upon it being “made to comply” with a modified wage determination or modified Collective Bargaining Agreement which has wage determination standing under the SCA. The contractor will have an entitlement to an adjustment to price under this clause *only* when it demonstrates that there is a causal relationship between the new or modified wage determination and the increased cost it incurs in wage and fringe benefit payments to the “service employee” performing on the contract. The contract price may also be adjusted downward as a result of such changes, but only when the actual decrease in applicable wages and fringe benefits is permitted by the wage/benefit rates on the new or modified WD *and* the decrease is “voluntarily made by the contractor.”

Such adjustments are appropriate *only* for the affected “service employees” performing on the contract as defined in FAR [22.1001](#). It is not applicable to the contractor’s exempt managerial

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(executive), professional, or professional-level “administrative” as those terms are defined in the DOL “white collar” exemptions found at [29 CFR 541](#). It also does not apply to “overhead” or corporate support personnel that are *not* directly engaged in performing the specified contract services.

The contractor must submit a timely request within 30 days of the new or modified WD incorporation into the contract, or ask for additional time per FAR [52.222-43\(f\)](#) or [52.222-44\(e\)](#). The contractor’s request should fully explain the rationale for the adjustment to price and be supported by any payroll or other supporting documentation required by the government CO per FAR [52.222-43\(g\)](#) or [52.222-44\(f\)](#).

Although rare, price adjustments may likewise be made for changes in the Federal minimum wage law known as the Fair Labor Standards Act. As with the Service Contract Act WDs, the contractor must demonstrate that the additional wage cost was incurred to comply with a new (and previously unknown) WD. For example, between July 2007 and July 2009, the minimum wage increased from \$5.15 to \$7.25 per hour. Under the price adjustment clause language, the change only affects contracts that were awarded prior to the enactment of this change – May 25, 2007. It also only affects contracts where workers were paid a rate lower than the new minimum and the contractor was “made to comply” with the higher pay rate as a direct result of the statutory change.

As discussed in the “conformance” section of this resource book, an addition to the wage determination of a new job classification and conformed minimum rate for new classes would *not* properly justify an adjustment to contract price. However, increases to that conformed rate of pay in subsequent periods of performance by addition of the new class to the WD itself (or through “indexing” as discussed above), would commonly justify such an increase.

Contractor proposals for adjustment to contract price under the SCA can often be complex and difficult to analyze. Since there is little guidance in the FAR, DFARS, or NMCARS; a “Desk Guide” on this subject has been prepared to provide detailed guidance for COs during review of such proposals and to achieve consistency of action among Navy/Marine Corps contracting activities. In addition, the Navy is working on a new tool (PACTp) to help properly calculate the price adjustment.

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The Navy's "Service Contract Act and Fair Labor Standards Act Desk Guide for Service Contract Price Adjustments" may be found at "[Guide](#)."

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## **DBA CONTRACT ADMINISTRATION**

### **Key Differences in DBA and SCA Contract Administration and Enforcement Responsibility**

The government contracting officer has a number of key labor standards administration and enforcement responsibilities under the DBA, SCA, and related labor standards. It is important to recognize and note some of the major differences in the CO responsibilities under these laws.

The primary day-to-day enforcement responsibility for the DBA rests with the contracting agency, not DOL. Therefore, the CO is responsible for enforcement of the DBA labor standards and contract WD(s) including obtaining certified payroll records, reviewing those certified payroll records for wage and benefit compliance, interviewing employees, performing routine and special labor checks, and resolving employee complaints. The DOL does, however, have oversight responsibilities and can and sometimes does independently conduct their own DBA compliance investigations. However, under the SCA, the enforcement authority and responsibility rest exclusively with DOL and complaints about contractor underpayments must be referred to DOL.

As a result of these key differences, the contract administration of DBA-covered contracts and of those subject to the SCA is quite different. Under the DBA COs have not only the responsibility to properly place the labor standards clauses and appropriate wage determinations in the contract, but also they have the responsibility to actively enforce compliance with those provisions and the WDs placed into the contract.

When and if the DOL receives complaints under DBA, they often refer them back to the contracting agency for enforcement action. The contracting agency investigates and attempts to resolve them, but if violations remain unsettled after the contracting agency's enforcement attempts, the investigation file is forwarded to DOL for a final attempt at resolution. If that attempt fails, the case will likely result in administrative litigation. Therefore, each DBA enforcement action should be handled in a careful and well-documented manner that would support such litigation. See FAR [22.406-10](#) and [DOL All Agency Memo #118](#).

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## **DBA Contract Administration and Enforcement**

### ***Preconstruction Letters and Conferences***

The CO should issue preconstruction letters informing the contractor of the labor standards requirements and explaining the requirements to contractor promptly after award of a contract and/or arrange a conference with the contractor for this purpose. FAR [22.406-1](#).

The preconstruction conference must include a review of the contractor's responsibility for Davis-Bacon compliance by the contractor and all subcontractors performing on the contract (See Attachment A, Preconstruction Conference Checklist). Any compliance issues unique to the area or otherwise troublesome, including any obvious classifications necessary for the project construction not listed on the wage determination, should be discussed with the contractor. Inform the contractor that payrolls are expected weekly, and that regular site visits will be made to interview employees. The contractor should also be reminded that [SF-1413s](#) are required for all subcontractors that will be employed on the project per FAR [22.406-5](#). This form documents that the labor standards provisions have been included in the contract between the government's prime contractor and all subcontractors, regardless of tier.

The contractor should be furnished with the required posters and the Contractor's Guide to the Davis-Bacon Act at:  
<https://acquisition.navy.mil/rda/content/download/4705/21194/file/DBAContractorGuide15Aug2007.pdf>

### ***DBA Posting***

Posting: The contractor is required to post the wage determination(s) included in the contract, the DOL form WH-1321 posters "Notice to Employees Working on Federal and Federally Financed Construction Projects" (WH-1321), National Labor Relations Act Workers Rights, and "Equal Employment Opportunity is THE LAW." The name, address, and phone number of the contracting officer should be stated on the Notice to Employees poster. These postings must be placed in a prominent location where employees can easily review them. The posters can be obtained from the DOL Web site at <http://www.dol.gov/osbp/sbrefa/poster/main.htm>

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## ***DBA Contract Administration and Enforcement Responsibility Overview***

Here is a summary of the primary CO contract administration and enforcement responsibilities under the DBA:

1. Place the appropriate DBA, Copeland Act, and other appropriate clauses into the contract as prescribed by FAR [22.407](#).
2. Place appropriate WDs into the contract per FAR [22.404](#). This process is discussed in great detail under the DBA Wage Determination section of this resource book.
3. *Only* contracts with options or requirements to “extend the term of the contract” – Update the WDs per FAR [22.404-12](#). Therefore, once the *correct* wage determination is placed in the contract, option period or extension period or a specific task order; the WD(s) will control for DBA and contract purposes for that entire period of performance and should not be changed. Contracts without options to extend the term are not affected and the WD placed into the contract at award is effective for the entire “life of the contract.”

See detailed discussion on consideration of which clause to use in “Construction Clauses with Options” section of this Resource Book.

[For more details, click here.](#)

4. Issue preconstruction letters informing the contractor of the labor standards requirements and explaining the requirements to contractors promptly after award of a contract.

The preconstruction conference must include a review of the contractor’s responsibility for Davis-Bacon compliance by the contractor and all subcontractors performing on the contract (See Attachment A, Preconstruction Conference Checklist). Prime contractors should be reminded that they are responsible for their subcontractor’s compliance with labor standards requirements, including submission of payrolls and appropriate classification and payment of employees. The prime contractor is more than a mere conduit for submission of subcontractor payrolls, they should review the content of the payrolls for any potential non-compliance and require correction for any violations prior to submission to the government. Any compliance issues unique to the area or otherwise troublesome, including any obvious classifications necessary for the project construction not listed on the wage determination, should be discussed with the contractor. Inform the contractor that payrolls are expected weekly, and that regular site visits will be made to interview employees.

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The contractor should also be furnished with the required posters and the Contractor Guide to the Davis-Bacon Act at the preconstruction conference. Link to:

Poster – English Version: [Davis Bacon Poster](#)

Poster – Spanish Version: [Davis Bacon Poster](#)

Guide: [Contractor Guide](#)

5. Require the contractor to post DBA posters and wage determinations in a prominent place where they are easily accessible to the laborers or mechanics employed on the project. See FAR [22.404-10](#). See, also the “DBA Posting” Section above.
6. Enforce compliance with the labor standards and contract WD(s) per FAR [22.406](#). This subject will be discussed in great detail in a separate section of this resource book.
7. Require unlisted job classifications to be conformed by the contractor to establish minimum rates of wages and/or benefits for those classes of work that are necessary for contract performance, but not listed on the wage determination. See FAR [22.406-3](#). This subject is discussed in greater detail in a separate section of this resource book.
8. *Only* contracts with options or requirements to “extend the term of the contract” – Adjust the contract price when appropriate per the DBA Price Adjustment Clause, if applicable under FAR [52.222-30](#), 31 or 32. The WD updates discussed in item #3 above, are the “triggers” causing the contractor to request an adjustment to the contract price. FAR [22.404-12](#) requires incorporation of the current Davis-Bacon Act (DBA) wage determination (WD) at the exercise of each option to extend the term of a contract – pursuant to an option clause or otherwise – when the contract includes DBA labor standards. The guidance amends FAR Parts 22 and 52 to implement the requirements of DOL All Agency Memorandum No. [157](#), dated 9 Dec 1992 (as clarified in the [Federal Register on November 20, 1998](#)). Contracts without options to extend the term are not affected.

See detailed discussion on consideration of which clause to use in “Construction Clauses with Options” section of this Resource Book.

[For more details, click here.](#)

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9. Cooperate with the DOL when they undertake their own independent DBA labor standards investigation(s) per FAR [22.406-12](#).

Therefore, the CO may seek the assistance of the U.S. DOL, Wage and Hour Division to enforce particularly difficult or egregious DBA investigations, but must be prepared to independently investigate violations or complaints alleging DBA violations. Any complaints should remain confidential from the contractor to avoid any potential retaliation by the employer against the complainant(s).

As a result of this “enforcement officer” role, the CO must also be prepared to answer contractor questions about the proper classification of workers and proper wage and fringe benefit rate entitlements under the WD(s) contained in the contract. This is substantially different from the SCA contract administration where such issues should be left to the contractor to determine to the maximum extent possible. Any complaints or allegations of non-compliance under the SCA should be referred to DOL since they have sole enforcement authority over the SCA.

## **DBA Enforcement**

### ***Site of Work***

The Davis-Bacon Act states, “All laborers and mechanics employed or working on the site of work will be paid unconditionally and not less often than once a week...” Consequently, there has been some controversy over what is considered “site of work.” The FAR defines it as the “physical place or places where the construction called for in the contract will remain when work on it is completed, and nearby property...used by the contractor or subcontractor during construction that, because of proximity, can reasonably be included in the ‘site.’” For more detail on “site of work” definition see FAR [22.401](#).

Mechanics and laborers who do not normally work onsite but are required to travel to the site of work to perform work that is subject to the DBA are covered for the actual time spent on the site, excluding travel.

Under some circumstances, DOL regulations also consider “secondary sites” as subject to WD requirements. The following are examples of “sites of work,” provided these areas are dedicated exclusively, or nearly so, to the contract performance and are located in proximity to the actual construction location.

- Fabrication plants

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- Mobile factories
  - Batch plants
  - Borrow pits
  - Job headquarters
  - Tool yards

The following are examples of areas excluded from the site of work definition.

- Permanent home offices
- Branch plant establishments
- The sites that are not exclusively for contract performance and those mentioned previously in this section that do not meet the criteria.

Since this area is so contentious if a contractor alleges a secondary site of work (as defined in FAR [52.222-5](#) Davis-Bacon Act – Secondary Site of the Work and FAR [22.401](#)) contact your Navy or NAVFAC Labor Advisor.

### ***DBA Wages and Fringe Benefits***

Minimum Compensation – General: DBA work must be compensated at no less than the applicable wage determination wages and fringe benefits (FBs). A contractor may elect to pay FBs into bona fide FB plans, purchase such benefits on behalf of the affected employees or provide equivalent payments directly to the worker in lieu of providing FBs. A contractor can comply with DBA by paying any combination of wages and FBs that equals or exceeds that required wages and FB minimum rates contained on the WD. Wages include only the amount paid for work performed and do not include any payments for lodging, meals, or employer-furnished vehicles, gas, tools, or materials. Repayments for these items are considered reimbursements for company business expenses initially paid by the employee.

Fringe Benefits include equivalent payments in place of FBs and irrevocable contributions (made at least quarterly) to bona fide FB plans or programs common in the construction industry (pension funds, health plans, etc.).

No credit may be taken for any benefit already required by federal, state or local law, such as:

Workers compensation insurance

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Unemployment compensation taxes  
Social security or Medicare contributions  
Health benefits required under Hawaii state law.

Benefits stated as a % are computed as a % of the hourly wage rate.

**Example:** Min. wage = \$20.00, min. FBs = “4.00 + 3%.”  
Computation:  $3\% \times 20.00 = .60$ , + 20.00 + 4.00 = \$24.60.

### ***Piecework***

Piecework payment is permitted if the average hourly rate in each week meets or exceeds the DBA wage and fringe benefit minimum. Overtime must be paid at 1 and 1/2 times the actual average hourly rate, or the contractor can establish a straight-time piece rate and an overtime piece rate. The contractor must record daily and weekly hours worked and include that information on the certified payroll.

### ***Deductions from Wages***

To guard against prohibited “kickbacks,” only deductions for certain purposes are allowed from minimum wages or equivalent FB payments made under the DBA. Authorized deductions fall into three groups, (1) those that are always permissible, (2) those that are permissible if voluntarily consented to by the employee OR as provided for in a collective bargaining agreement (CBA), and (3) those that are prohibited.

Here are illustrations for each group:

(1) Always permissible – Federal, state, or local income tax withholdings and Federal Social Security and Medicare taxes; court ordered payments; pay advances (must be well-documented).

(2) Permissible if voluntarily consented to OR as part of a CBA – health, life, or disability insurance, pension plans, savings bonds or savings plans, loan repayments to financial institutions, charitable contributions such as to United Way, union dues, voluntary purchase of tools or equipment. No credit toward compliance with the DBA required FBs payment is allowed for benefits paid by employees through such deductions.

(3) All other deductions that do not fit in group 1 or 2 above.

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The amount and type of each deduction from each employee's wages must be shown on the weekly payrolls. If the contractor lists deductions in the "Other" column on the payroll the contractor must include a description of that deduction on the payroll or attachment.

See [29 CFR 3.5-10](#) for detailed guidance.

### **Overtime Compensation**

The Contract Work Hours and Safety Standards Act (CWHSSA), rather than DBA, requires overtime. Note – The CWHSSA applies *only* to contracts that exceed \$100,000. See FAR [22.305](#).

Overtime compensation is required for *all hours worked* over 40 per week. Non-work hours such as holidays, vacation, and sick leave are not counted towards the 40 hours. No extra premium is required for night, weekend, or holiday work.

The overtime rate is 1 and 1/2 times the regular rate of pay. The regular rate of pay, for this calculation, can be no less than the applicable DBA WD wage rate. Even if the contractor is paying part of the required wage rate in fringe benefits that portion of the payment must be included in the rate for overtime calculation. However, in instances where required fringe benefits are paid in an equivalent direct payment to the worker ("cash"), the fringe benefit portion may be excluded from the overtime calculation. While fringe benefits are required to be paid on overtime hours, they may be paid at straight time for all hours, including those hours in excess of 40 per week. See 29 CFR, Part [5.32](#).

<p><b>Example:</b> If the WD wage rate is \$18.00 then the overtime rate is \$27.00 (1 and 1/2 X \$18.00). The same FBs, if any, are required for straight time and OT hours (no OT premium on benefits). See <a href="#">29 CFR 5.32</a> for additional examples.</p>
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Although guards and watchmen are not considered laborers or mechanics for DBA purposes, they should be included on the contractor payrolls with CWHSSA coverage by virtue of the express statutory language.

### **Proper Classification/Jurisdiction**

Employees must be classified by the work performed, regardless of their skill at that work or any private agreement between the contractor and employee. All DBA-covered employees must be classified in accordance with DBA "prevailing area practice."

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If the contract WD indicates the rates for a particular craft reflect the union scale (union dominance), employees must be classified as union firms in the area would classify employees for that work. The opposite is also true. If union rates are not required for a particular craft, the open-shop (non-union) classification practice determines the work activities included in the named craft.

Determination is craft-by-craft, and may vary by craft, WD schedule, and geographic area. For example, union rates may be required for building project carpenters, but not for residential project carpenters, in the same geographic area.

Employees must be classified according to the work they perform, and must be paid the wage rate for that classification. If an employee works in more than one classification, the employee must be paid not less than the minimum rate that applies to each class. The contractor's certified payrolls must document the hours spent in each separate class. The DOL regulations require that "...the employer's payroll records accurately set forth the time spent in each classification in which work is performed." The DOL regulations, therefore, do *not* permit a contractor to simply use an "average" or "blended" rate of two or more work classifications.

**Union dominance** is indicated on WDs by a four-character abbreviation at the beginning of a separate "block" for that craft. For example, union dominance carpenters rates would be listed under CARPXXXX (Xs usually indicate union local number). Classes that are *not* subject to union dominance are listed under the designation "SUZZ..." with ZZ being the state name abbreviation. For example "SUND2009A 05/04/2000" indicates survey rates in North Dakota, followed by internal DOL numbers and the date of survey. This information is critical to determining the "prevailing practice" for classifying the workers under the DBA wage schedule. This classification principle is found in DOL's FOH and reflects the decision of a landmark legal case known as "Fry Brothers."

To state this principle briefly, if the WD is based upon collectively bargained pay rates, then the work recognized as being performed by that craft within the collectively bargained environment must be paid at the journeyman rate listed on the WD for any given craft. For example, if the installation of light fixtures is work that is recognized in the "union dominant" work environment as being performed by electricians, then anyone installing light fixtures must be paid at least the WD rate for electricians. This is so regardless of whether the worker is a licensed electrician or regardless of his/her

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skill or lack thereof to perform that work duty. The duties performed will determine the minimum rate of pay owed to individual employees rather than titles, labels, or licensing. See DOL's [FOH 15f05](#) on "prevailing practice" rules and the [Fry Brothers](#) decision for more details.

### ***Employee Coverage***

Laborers and mechanics are those persons performing manual or physical labor, including workers who use tools or who are performing the work of a skilled trade. The term does not include workers whose duties are primarily administrative, executive, or clerical, rather than manual. The formal definition is found in FAR [22.401](#).

*Working Foremen* who spend over 20% of their time per week performing hands-on work as a laborer or mechanic are covered for those hours (and must be paid at least the minimum rates required by the WD for those hours and listed on the certified payroll). See FAR [22.401](#).

*Subcontractor "owners" and "partners"* may be covered by the DBA while they are performing the work of a labor or mechanic on the site of work. The DBA states that it applies to laborers and mechanics "...regardless of any contractual relationship which may be alleged to exist." Whether they are subject to the DBA WD will be dependent upon the DOL regulations for "executive" employees which allows for ownership consideration. Specifically, the DOL regulations defining exempt employees states in part "...includes any employee who own at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management." This ownership exemption is found in the DOL regulations at 29 CFR [541.101](#) and the term "management" is defined in 29 CFR [541.102](#). See also DOL "[Fact Sheet #17B](#): Exemption for Executive Employees Under FLSA."

### ***Warranty Work***

Davis-Bacon coverage applies to warranty or repair work if it is provided for in the original construction contract. This is true regardless of whether there is a pay item for the work if the worker is a mechanic or laborer employed by the contractor or subcontractor for construction. However, if the warrantee repair work is performed at the site by an employee of a material or equipment supplier, such an employee is only covered by the DBA if they are performing the work of a "laborer or mechanic" *and* they

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spend more than 20% of his/her time in a workweek engaged in such activities on the site of the original work. If so, he/she is covered for all time spent on the site. The contract minimum wage rates apply regardless of whether the work is done well after contract completion. See DOL FOH [15e15](#).

### **Truck Drivers**

Truck drivers *are covered* by the Davis-Bacon Act in the following circumstances:

- Drivers working for a contractor or subcontractor are covered for the time spent working on the site of work.
- Contractor or subcontractor drivers are covered for the time spent loading and/or unloading material and supplies on the site of work, if such time is not considered *de minimus*.
- Truck drivers transporting materials or supplies between a facility that is deemed part of the site of work and the actual construction are covered.

Truck drivers *are not covered* in the following circumstances:

- Truck drivers traveling between a Davis-Bacon covered site and a commercial supply facility while they are off the “site of work.”
- Truck drivers whose time spent on the site of work is *de minimus*, such as only a few minutes at a time merely to pick up or drop off materials or supplies.

DOL does not enforce DBA coverage on bona fide truck drivers who own and operate their own truck. This position does not apply to owner-operators of other equipment, such as backhoes, cranes, bulldozers, etc.

See DOL FOH [15e21](#) and [15e16](#) for more details.

### **Apprentices and Trainees**

Apprentices will be permitted to work at below the prevailing rate if (1) the contractor has an approved apprenticeship program and (2) the employee is individually registered in the bona fide apprenticeship program registered with DOL’s Office of Apprenticeship (formerly “BAT”) or with a state apprenticeship agency recognized by DOL. See FAR [22.401](#).

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Any worker listed on a payroll at an apprentice wage rate, who is not employed in accordance with (including approved apprentice-to-journeyman ratio) and individually registered in a bona fide apprenticeship program, shall be paid not less than the applicable wage rate and fringe benefits on the wage determination for the classification of work actually performed.

A trainee (less common than an apprentice) is a person registered and receiving on-the-job training in a construction trade, which has been approved in advance by DOL. It is similar to the apprenticeship program in that it must be approved by DOL's Office of Apprenticeship in advance of proper use under the DBA. See FAR [22.401](#).

Apprentices/trainees are paid a percentage of the journeyman rates. The percentages increase as they progress in the program. For example, it would be common for a new apprentice to begin at 50% of the journeyman wage rate for the first 1,000 hours employed in the program and then receive an increase to 55% of the journeyman rate for the next 1,000 hours in the program and so forth. The apprentice will ultimately graduate from the program and become a journeyman. Fringe benefits must be paid to the apprentices/trainees in compliance with the provisions of the apprenticeship program. If the plan is silent on how the apprentices/trainees are to be paid the fringe benefits, they must be paid in the full amount listed on the WD. See DOL FOH [15e01](#) for more detail.

Apprentice Ratios: The apprenticeship ratio limits the number of apprentices permitted on the DBA-covered project. The allowable ratio of apprentices-to-journeymen employed on the contract work site in any craft classification shall not be greater than the ratio permitted to the contractor for his entire work force under the registered program. The limitation is based on the ratio of apprentices/trainees to journeymen as specified in the approved apprenticeship program. This ratio is determined on a daily, not weekly, basis. A common ratio is 3 to 1 (one apprentice to every three journeyman, not the other way around). See DOL FOH [15e01](#) for more detail.

Note: Helpers will *not* be permitted to work at below the prevailing rate on DBA sites unless DOL has listed the established classification on the WD. That will only occur if DOL finds that: (a) use of helpers is a prevailing practice in the area; (b) the helpers have duties distinct from those of journeymen or laborers; and (c) the helper position is not a trainee.

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## ***DBA Enforcement Compliance Checks***

In accordance with Reorganization Plan No. 14 of 1950 and implemented by DOL's All Agency Memorandum #118, the primary day-to-day responsibility for enforcement of the DBA is assigned to the contracting agencies. Agencies are required to make labor law compliance checks as necessary to ensure compliance with the labor standards of the contract. These requirements are also fully implemented in the FAR at 22.406.

Compliance checks involve performing the following activities to determine status of compliance. Ideally, compliance checks should be done on every construction contract shortly after performance begins, at periodic intervals thereafter, and at the addition of each subcontractor to the project.

The contracting agency is also responsible for adequately investigating any employee complaints under the DBA. Therefore, it is job site government personnel such as CORs and COTRs should be advised to inform the CO of any complaints or comments by workers that would indicate DBA violations.

### 1. Certified Payroll Review:

- Ensure weekly payrolls are submitted on time. Payrolls must be submitted within 7 calendar days after the regular payment date of the payroll week covered. A "Statement of Compliance," signed by the contractor or subcontractor or his/her agent, shall accompany each payroll submitted. The "Statement of Compliance" certifies that the payroll information required by DBA is being maintained and that each employee under the DBA has been paid the full weekly wages earned without rebate (kickback) either directly or indirectly.
- Payrolls should be regularly examined to determine if the contractor employed a disproportionate number of laborers-to-journeymen. For example an electrical subcontractor's certified payroll record that reflects 1 electrician and 3 laborers would raise suspicion that some of the workers may be misclassified. Also, a sprinkler fitter subcontract showing 4 employees each one spending four hours per day as a sprinkler fitter and four hours per day as a laborer would likewise raise misclassification concerns.
- All apprentices listed on the payrolls shall be checked to ensure appropriate apprentice-to-journeymen ratios and

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percentage of wages are followed, and written evidence of apprentice registration is submitted with the payroll.

- Check that wages and fringe benefits (FBs) are correct for each classification. If individual employees are used in more than one job classification, the contractor must reflect the specific amount of time worked in each classification and pay the wage and FB for each class accordingly. A “blended rate” or “average” rate is not acceptable for DBA compliance.
- Crosscheck payrolls with employee interviews and daily inspection reports. Note any use of classes that are not on the WD(s) demonstrating that a conformance may be needed per FAR 22.406-3. Also note if employees interviewed at the job site do not appear on the certified payroll.
- Check on the back of the certified payroll form to determine the contractor’s method for satisfying the FB requirement (if applicable). It will identify whether the contractor is (a) making fringe benefit payments to an approved plan (such as a union fund), or (b) is making equivalent fringe benefit payments directly to the workers (“cash”), or (c) through some other means. If the contractor is making direct payments to the workers, it should be reflected in the certified payroll data. If the contractor is satisfying the FB requirements through payments to an approved plan, they should provide documentation of this if needed to satisfy the contracting officer’s compliance concerns. The certified payroll should identify in detail any other arrangement to satisfy the FB requirements.

“Automation of Davis-Bacon Act Requirements”: Recently there have been some Web-based software systems that claim they are able to electronically submit and automatically check payrolls. Any questions regarding the use of these systems should be referred to the Navy or NAVFAC Labor Advisor.

## 2. On-Site Inspections:

- Note and record whether the required posters and WDs are posted at job sites.
- At the job site, note the type of work performed, tools and equipment used, and number of employees performing work on the site (by job classification or trade, if possible). Note the time of day and progress of the project in comparison to job classes, workers, and hours reported on

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payrolls. It is also recommended that these observations be compared with daily progress reports to determine whether there are possible compliance issues. For example, if the types of workers and numbers of workers observed on daily progress reports do not match the certified payroll classifications, number and hours of employees, then a more detailed investigation may be needed.

### 3. Employee Interviews

- Interview employees to determine appropriate classification, to verify payment of proper wage rates and benefits, and to determine that all hours were counted and paid properly. Use interviews to verify payroll information, to determine the number of employees in each classification, and to identify any unlisted employees or subcontractors. An [SF-1445](#) form is a convenient means of recording your interviews, however, it may need to be supplemented or tailored to your needs as planned during your compliance check or investigation.

FAR [52.222-8\(c\)](#) and [29 CFR 5.5\(a\)\(3\)\(iii\)](#) Payrolls and Basic Records – The contractor or subcontractor shall permit the contracting officer or the Department of Labor to interview employees during working hours on the job.

#### ***Interview Techniques***

Develop skills in conducting employee interviews so that each contact yields the most accurate, complete, and reliable information as to status of compliance, with a minimal interruption of contract activities.

**Plan the interview.** Review certified payrolls and notes from site visits and inspections to identify employees to interview and the questions you want to ask. Make notes regarding inconsistencies between earlier interviews, site visits, and payrolls, which prompt questions. Refer to notes as needed during the interview, but maintain confidentiality of payroll data and other interviews. The interviewer (not the contractor or subcontractor management) should select the interviewees. The contractor's or subcontractor's job site superintendent can be asked to provide a list of the employees working on that particular day. You may then select individuals that you have noted concerns about from the certified payroll. When those selected for interviews and questions to be satisfied are planned before visiting the site, the interview process

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can then be better managed and controlled so that a clear pattern of compliance or non-compliance results from the process.

**Identify yourself and purpose.** Make it clear that you work for the agency and that your purpose is to ensure compliance with contract labor standards. Maintain neutrality regarding employee complaints on labor or other matters. *Maintain confidentiality of interviews by interviewing employees away from others, out of hearing distance.* Do not interview more than one person at a time. Interview more than one person, if possible, at each visit. This will allow some degree of cover for the source of information. Although improper to do so, contractors sometimes retaliate against employees (including firing) that they believe are the source of information showing DBA violations. Therefore, confidentiality of the interviews should be taken seriously.

**Allow employees ample time** to respond to questions in their own words. If the employee is reluctant to answer questions, or is otherwise uncooperative, repeat your purpose and offer the employee the opportunity to contact you at a later time by telephone or at your office. If the employee remains uncooperative, cease any further attempts to interview and make notes of the refusal in your file. (If all employees at a job site refuse to be interviewed, contact the Navy or NAVFAC Labor Advisor.)

**Determine appropriate classifications** by asking employees to describe the work they perform, the tools or equipment used, and where they perform the work. Ask if their work varies from day to day, and ask the names of other employees who do the same work. The interviewer should note the specific work the employee was performing just before the interview. Statements such as “on break” or “having lunch” do not help to identify the proper work classification and are no value in determining or documenting DBA compliance.

**Determine hours worked** by asking each employee what time of day they begin work (and where), the length and frequency of breaks during the day, and the time they end the workday (and where). Ask the frequency/extent of any variations from this schedule over the contract performance time. Asking whether all time they work is accurately recorded on time sheets and paid accordingly will help establish whether all hours actually worked are paid.

**Ask each employee to review the interview statement** and to make any changes they feel necessary. Emphasize to each

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employee that they should sign only the statement if it is complete and accurate.

**Answer employee questions promptly and completely** if they ask about their rights under the contract labor standards.

Do not discuss any labor violation discovered during the interview with the employee.

### ***Special Compliance Checks***

Additional compliance checks should be performed in response to receipt of a complaint alleging violations of the labor standards on a contract. Prompt, complete investigation of the complaint, and correction of any violations discovered, is a responsibility of the contracting agency.

Whenever a compliance check reveals an aggravated or willful violation of the labor standards requirements in the contract, the amount of restitution is significant or the contractor doesn't make voluntary restitution to the underpaid employees a labor standards investigation should be conducted. Significant, substantial violations, and violations not resolved voluntarily by the contractor, must be forwarded to DOL for action and adjudication. See FAR [22.406-10](#). This is also an area where seeking the advice and assistance of the NAVFAC or Navy Labor Advisor is strongly recommended.

### ***Violations***

What happens if you discover a DBA violation during your compliance checks?

If a contractor fails to pay the correct wage notify the contractor in writing of the error. Note – Any violations by subcontractors are also the responsibility of the prime contractor.

If the error is substantial or contractor/subcontractor fails to correct all violations, withhold payment in the amount needed to satisfy the wage liabilities until violations are corrected. If there are not enough funds in the contract with the violation, money may be withheld from any government contract, with the same prime contractor, that contains Davis-Bacon wage provisions.

If all issues have not been resolved, the case must be referred to DOL for action as discussed in FAR [22.406-10](#). However, first reasonable attempts should be made to resolve the violations with the contractor by requesting compliance and back wage restitution.

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Upon administrative resolution of violations, if all back wage payments have not been made and documented, then any remaining withheld funds must be disbursed as discussed in FAR [22.406-9\(c\)](#).

Falsification of certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

### ***Enforcement Reports***

In accordance with FAR [22.406-13](#) and DFARS [222.406-13](#), semiannual enforcement reports are required to be forwarded through the head of the contracting activity to the labor advisor within 15 days following the end of the reporting period.

<https://acquisition.navy.mil/rda/content/download/6468/29769/version/2/file/Labor+Standards+Enforcement+Report+Template.pdf>

Reference DOL All Agency Memo [#189](#).

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## National Labor Relations Act Overview

The National Labor Relations Act ([NLRA](#)) applies to contractors and their employees. In the event of union organizing activity or a labor dispute between an employer and a labor union, civilian and military personnel must maintain a policy of strict *neutrality*. All personnel are prohibited from engaging in any activity interfering with or influencing the labor relations activity. Only representatives of the Federal Mediation and Conciliation Service (FMCS) or a stated mediation board may conciliate, mediate or arbitrate such labor disputes. See Secretary of Navy Policy at [SECNAV 4200.36A](#).

The NLRA gives employees specific [rights](#) relating to labor unions. These rights are: to “organize” (form, join, or assist labor organizations); to bargain collectively over wages and working conditions; to engage in protected “concerted activities” such as strikes or picketing; or to refrain from any of these activities. The NLRA has general application to all employers engaged in interstate commerce (except airlines, railroads, or agricultural establishments).

The NLRA [forbids](#) employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining, or assisting a labor organization, or engaging in concerted activities, or refraining from any such activity. Similarly, labor organizations may not restrain or coerce employees in the exercise of these rights.

The National Labor Relations Board ([NLRB](#)), an independent federal agency, administers the NLRA. The NLRB conducts elections to determine if a majority of employees want to be represented by a union and investigates and remedies unfair labor practices by employers or unions.

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## Union Activities on Navy Installations

It is recognized that labor unions have a legitimate interest in organizing contractor employees and in protecting the rights of employees they represent. It is SECNAV policy to establish and maintain a good working relationship with labor unions representing employees of contractors operating on Navy and Marine Corps installations. Therefore, reasonable opportunity should be given labor union representatives to peacefully organize and to consult

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with union members, contractor-employer officials, and Navy/Marine Corps officials regarding legitimate union business.

Reference SECNAV Instruction [4200.36A](#)

When arranging the union's access to employees who are already represented by a union, the rules are different as compared to arranging for union access for organizational purposes (non-represented employees – union representative attempting to persuade employees to join a union).

It is appropriate for the Navy to sponsor union representative(s) access for organizational purposes, since there is *not* an ongoing business relationship between the union and the contractor that employs the workers they are attempting to organize. Therefore, the Navy/Marine Corps personnel in charge of base access should arrange for limited base access for the union official(s). The access should allow the union representatives to approach workers before or after work or during other non-working hours. Therefore, allowing access to the parking areas immediately adjacent to the work area at appropriate time(s) throughout the day would be an appropriate access method for organization purposes. The union representatives are *not* allowed in the work area(s) or in secure areas of the base.

On the other hand, if the union already represents a group of contractor employees located within the confines of an installation and they need access to the workers they represent, the contractor does have an ongoing business relationship with the union and it is more appropriate for them to “sponsor” the union representatives and arrange for their access to the workers and/or contractor management personnel. In this manner the Navy/Marine Corps will remain at arms-length distance from that relationship and thus maintain their neutrality. Therefore, union request for base access in these situations (even though permitted by the SECNAV Instruction) should be referred to the contractor who employs the union-represented workers.

## **Union Access**

Private sector labor union representatives have the same access procedures as the general public. They may be authorized by the installation commander to enter naval installations for the following purposes:

- To engage in peaceful organizing activities;

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- To engage in legitimate union business with their members who are working on base; or
  - To attend a scheduled meeting with contractor-employer or Navy officials on union business matters.

Private sector unions shall not be permitted installation access for activities that:

- May violate safety or security regulations;
- Disrupt base operations;
- Interfere with contract performance;
- Collect dues;
- Hold meetings with more than one contractor employee;
- Make unauthorized speeches;
- Engage in activities that are disruptive to contractor or DON operations;
- Engage in picketing activities during a strike or other labor dispute; or
- Conduct internal union business or elections.

The activities of union representatives must:

- Take place outside of the contractor's work areas, unless the prime contractor grants the union representative permission to access the contractor's work site(s). [Note: For contractual and safety purposes, we must not interfere with the prime contractor's control of the site of work] or
- Be during the employee's non-work hours.

Reference: SECNAVINST [4200.36A](#) dated August 08, 2005.

Refer all union access requests to the Navy or NAVFAC Labor Advisor.

### **Labor Disputes, Strikes, and Picketing**

Navy/Marine Corps contracting offices should be alert to the potential impact of labor disputes affecting Naval procurements. Contracts designated by the head of the contracting activity under FAR [22.101\(e\)](#) *must* include the clause [52.222-1](#) requiring notification of any actual or potential labor dispute delaying or threatening to delay timely contract performance. This clause is recommended for other important Naval contracts particularly

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where a large number of contractor employees provide services (including construction) or supplies and where it is known that the current contractor employees are represented by collective bargaining agents or where it is likely that the employees may seek collective bargaining recognition under the National Labor Relations Act.

During the course of a labor dispute, contractor's employees may stop working and go on strike. In the event of a strike, Navy/Marines Corps civilian and military personnel must adopt a policy of *neutrality*. This policy of neutrality is required not only in FAR [22.101-1\(b\)](#), but is implemented by SECNAV Instruction [4200.36A](#).

Strikes and picketing may involve construction projects, service contracts or manufacturing for weapons systems or other goods. However, strikes against contractors located on Navy/Marine Corps installations are generally limited to major construction projects or service contracts. Picketing can affect neutral parties such as other contractors or those having business on the installation when employees of other companies refuse to cross the picket line. It may also be disruptive to active duty service members and civil service personnel. This disruption can be mitigated to some extent by using a *reserve gate procedure*. See SECNAV Instruction [4200.36A](#) on setting up a reserved gate.

Under no circumstances may military or civilian employees be used to supplement the contractor's non-striking work force during a work stoppage.

During labor disputes between a contractor and a union, the contracting officer shall:

- Notify the installation commander *and* the Navy or NAVFAC labor advisor if there are indications of a potential or active work stoppage, strike, picketing, or other labor action that may affect a naval installation or contract, and
- Determine the impact of potential or actual labor disputes on their own contracts, programs or requirements over which they have responsibility. See DFARS PGI [222.101](#).
- The contracting officer shall not attempt to resolve the dispute. All government personnel shall *remain neutral* in the dispute, and shall not take any action that would indicate to either party that the government lacks neutrality in the dispute.

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- In the event of picketing, the Navy labor advisor will advise the installation commander on establishing a designated or “reserve gate” to minimize the impact of picketing. The Navy does not have any authority to direct the union, but does have the authority to direct the struck contractor to use a designated gate. NLRA rules will then compel the union to picket at the designated gate only. This allows individuals who will not cross the picket line to access the facility through the other (“neutral”) gates.
  - Contract performance will be expected by the contractor despite a labor dispute and increased surveillance of contract performance may be necessary. Standard contract clauses dealing with default, excusable delays, etc., do not relieve contractors or subcontractors from the responsibility for delays that are within the contractor’s control. However, it should be noted that if the strike could not be reasonably prevented, it would be difficult to hold the contractor accountable to the same performance expectations that existed before the strike. The contractor should be encouraged to take advantage of federal agencies charged with providing assistance in such matters such as the Federal Mediation and Conciliation Service and the National Labor Relations Board.

Reference FAR [22.101](#), DFARS [222.101](#) and SECNAVINST [4200.36A](#) dated August 08, 2005.

Contact your Navy or NAVFAC Labor Advisor at the first sign of any labor dispute, strike, work stoppage, and/or picketing.

### **Inquiries from Unions**

Requests for information from unions shall be processed in accordance with established Freedom of Information Act (FOIA) procedures.

Simple, minimal requests for copies of a wage determination in a contract or copies of the award document page should be expedited. The contracting officer should include a note in the contract file concerning the request.

If the union indicates concern about the contractor’s compliance or contract’s labor standards, the union representative should be referred to the Navy or NAVFAC Labor Advisor.

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Request for access to Navy/Marine Corps installation is discussed in detail above under “Union Activities on Navy Installation.”

### **Union Meetings**

On occasion local union officials may request meetings with the Contracting Officer and/or Installation Commander to address concerns. All requests for meetings between the Navy and unions should be coordinated with the Navy or NAVFAC Labor Advisor.

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## OTHER FEDERAL CONTRACT LABOR STANDARDS

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### Equal Employment Opportunity Regulations and Executive Orders

Executive Order 11141, February 12, 1964, declares a public policy against discrimination on the basis of age.

Reference FAR 22.9

Executive Order 11246, September 24, 1965, as amended, provides that contractors and subcontractors will act affirmatively to ensure equal employment opportunity for all persons, regardless of race, color, religion, sex, or national origin.

Reference FAR [22.8](#) and [52.222-23](#) thru 27.

Section 503 of the Rehabilitation Act, as amended, prohibits job discrimination because of disability and requires affirmative action to employ and advance in employment qualified individuals with disabilities who, with reasonable accommodation, can perform the essential functions of a job.

Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, prohibits job discrimination and requires affirmative action to employ and advance in employment qualified Vietnam era veterans, qualified special disabled veterans, recently separated veterans, and other protected veterans.

### Construction EO [11246](#)

Construction contractors that hold a nonexempt government construction contract are required to meet the contract terms and conditions for affirmative action requirements. For contracts over \$10,000, the nationwide goal for female employment is 6.9%; goals for minorities are listed by county and state in 45 FR 65976, dated 3 Oct 80. A listing that includes nearly all Navy/Marine Corps installations and the goals for those localities is available at [www.acquisition.navy.mil](http://www.acquisition.navy.mil)

**Exemptions (FAR 22.807):** There are some exemptions to all or part of the requirements of Executive Order 11246. These include:

- National security (determined by agency head); and

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- Specific contracts affecting the national interest (determined by DOL, OFFCP).

The following exemptions apply even though a contract or subcontract contains the Equal Opportunity clause:

- Transactions of \$10,000 or less.
- Work outside the United States.
- Contracts with State or local governments.
- Work on or near Indian reservations.
- Facilities not connected with contracts (determined by DOL, OFCCP).
- Indefinite-quantity contracts (when annual amount is expected to be less than \$10,000).
- Contracts with religious entities.

**United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.**

**Written Notice to OFCCP:** The contracting office shall give written notice to the regional office of OFCCP within 10 working days of award of a construction contract subject to the affirmative action requirements. Click here for a listing of OFCCP regional offices <http://www.dol.gov/esa/ofccp/contacts/ofcpkeyp.htm>

The notice shall include: Name, address and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed.

### **NonConstruction EO [11246](#)**

Affirmation Action Programs:

Contractors are required to develop *Affirmative Action Programs* for each of their establishments when they are awarded nonconstruction contracts (supply and/or service) and the

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contractor or subcontractor employs 50 or more employees and the amount of the contract or subcontract is \$50,000 or more in any 12-month period.

### **OFCCP Preaward Clearances**

If the estimated amount of a contract or subcontract is \$10 million or more, the contracting officer must request clearance from the appropriate OFCCP regional office before award of any contract or modification of an existing contract for new effort that would constitute a contract award. The contracting officer must request a preaward clearance directly from the OFCCP regional office(s). Confirm verbal requests by letter or facsimile transmission. The regional office addresses are available at:

<http://www.dol.gov/esa/ofccp/contacts/ofcpkeyp.htm>

The preaward clearance request should be submitted to the OFCCP regional office at least 30 days before the proposed award date. See [FAR 22.805\(a\)\(6\)](#).

The contracting officer does not need to request a preaward clearance if:

- The specific proposed contractor is listed in OFCCP's National Preaward Registry via the Internet at: <http://www.dol-esa.gov/preaward/>
- The projected award date is within 24 months of the proposed contractor's Notice of Compliance completion date in the Registry; and
- The contracting officer documents the Registry review in the contract file.

### **Annual EEO-1 Report Must be filed by September 30th:**

All federal contractors, who:

(1) are not exempt as provided for by 41 CFR 60-1.5;

(2) have 50 or more employees; **and**

(a) are prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to \$50,000 or more; or

(b) serve as a depository of government funds in any amount, or

(c) is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Notes.

Only those establishments located in the District of Columbia and the 50 states are required to submit Standard Form 100. No reports

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should be filed for establishments in Puerto Rico, the Virgin Islands or other American Protectorates.

## Posters

The contracting officer must provide the contractor with appropriate quantities of the poster entitled "Equal Employment Opportunity Is The Law." These posters are available at:

<http://www.dol.gov/esa/regs/compliance/posters/eeopost.pdf>

## EEO Complaints

Complaints received by the contracting officer alleging violations of the requirements of E.O. 11246 shall be referred immediately to the OFCCP regional office. The complainant shall be advised in writing of the referral. *The contractor that is the subject of a complaint shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.* See FAR [22.808](#).

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## Disabled Veterans and Veterans of the Vietnam Era

This subpart prescribes policies and procedures for implementing the Vietnam Era Veterans Readjustment Assistance Act of 1972, as amended (38 U.S.C. 4211 and 4212) (The Act); Executive Order [11701](#), January 24, 1973 (3 CFR 1971-1975 Comp. p.752); and the regulations of the Secretary of Labor (41 CFR Part 60-250 and Part 61-250) as found in FAR [22.1300](#). In this subpart, the terms "contract" and "contractor" include "subcontract" and "subcontractor."

Policy: Government contractors, when entering into contracts subject to the VEVRAA, are required to list all job openings with the appropriate local employment service office. Contractors are required to take affirmative action to employ, and advance in employment, qualified disabled veterans and veterans of the Vietnam era without discrimination based on their disability or veteran's status.

Contracts for supplies and services (including construction) of \$10,000 or more must include FAR [52.222-35](#), Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era.

Contractors must submit a report at least annually to the Secretary of Labor regarding employment of Vietnam era and disabled veterans. The contractor shall use Standard Form VETS-100, Federal Contractor Veterans' Employment Report, to submit the

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required reports. (FAR [22.1304](#)) For a new contract, the contractor must certify submittal. For options, the contracting officer must confirm report submittal. OFCCP's confirmation Internet site is: <http://vets.dol.gov/vets100/> Use the word "vets" as your validation code (without quotation marks).

For general information regarding the VET 100 government and contractors may go to a US DOL site at: <http://www.dol.gov/vets/contractor/main.htm>

Reference FAR [22.13](#), DFARS [222.13](#) and [52.222-35](#).

### **Veteran Complaints**

The contracting office shall forward any complaints received about the administration of the VEVRAA to the Veteran's Employment Service of the DOL, through the local Veteran's Employment Representative or designee, at the local State employment office, and notify the complainant of the referral. *The contractor in question shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.* See FAR [22.1308](#) and DFARS [222.1308](#).

The Deputy Assistant Secretary of Labor is primarily responsible for making investigations of complaints.

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### **Convict Labor**

Executive Order 11755, December 29, 1973, as amended by Executive Order 12608, September 9, 1987, and Executive Order 12943, December 13, 1994, states: "The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society. Meaningful employment serves to develop those skills. It is also true, however, that care must be exercised to avoid either the exploitation of convict labor or any unfair competition between convict labor and free labor in the production of goods and services." The Executive Order does not prohibit the contractor, in performing the contract, from employing:

- (1) persons on parole or probation;
- (2) persons who have been pardoned or who have served their terms;
- (3) Federal prisoners; or

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(4) nonfederal prisoners authorized to work at paid employment in the community under the laws of a jurisdiction listed in the Executive Order if –

- (i) The worker is paid or is in an approved work training program on a voluntary basis;
- (ii) Representatives of local union central bodies or similar labor union organizations have been consulted;
- (iii) Paid employment will not –
  - (A) Result in the displacement of employed workers;
  - (B) Be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or
  - (C) Impair existing contracts for services;
- (iv) The rates of pay and other conditions of employment will not be less than those for work of a similar nature in the locality where the work is being performed; and
- (v) The Attorney General of the United States has certified that the work-release laws or regulations of the jurisdiction involved are in conformity with the requirements of Executive Order 11755, as amended.

Department of Justice regulations authorize the Director of the Bureau of Justice Assistance to exercise the power and authority vested in the Attorney General by the Executive Order to certify and to revoke the certification of work-release laws or regulations (see 28 CFR 0.94-1(b)).

Reference: FAR 22.2 and 52.222-3.

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## **Whistleblower Protections**

Policy: Government contractors shall not discharge, demote, or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or to 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).

## **Whistleblower Complaint**

Procedures for filing complaints. Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in FAR [3.903](#)

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may file a complaint with the Inspector General of the agency that awarded the contract.

The complaint shall be signed and shall contain –

- The name of the contractor;
- The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- The substantial violation of law giving rise to the disclosure;
- The nature of the disclosure giving rise to the discriminatory act; and
- The specific nature and date of the reprisal.

Reference: FAR [3.904](#)

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## Overtime Policy

Per FAR [22.103](#) the federal contract policy is generally to discourage the use of overtime unless its use would allow the contractor to perform at an overall lower price. Therefore, contracts shall generally not specify contract performance or delivery schedules that may require overtime at Government expense.

This policy is also consistent with the Fair Labor Standards Act and Contract Work Hours and Safety Standards Act requirement to pay overtime premium for hours worked in excess of 40 hours per workweek. The ½ time premium “penalty” for requiring or permitting employees to work beyond 40 hours per week was legislated with an eye toward full employment of the nation’s workforce. The premium required by the overtime statutes provided an economic incentive for employers to hire additional employees rather than scheduling their existing workforce for more hours than the standard 40 hour workweek.

Outside the United States and its outlying areas, a workweek longer than 40 hours could be considered normal if the local custom, tradition, or law recognizes a different workweek standard and the hours worked beyond the U.S. standard 40 hour workweek are not compensated at a premium rates of pay.

Contracting officers shall therefore take the following actions to implement this policy:

- 1) Solicitations normally shall not specify delivery or performance schedules that may require overtime at Government expense.

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2) In negotiating contracts, contracting officers should ascertain the extent that offers are based on the payment of overtime and shift premiums and negotiate contract prices or estimated costs without these premiums or obtain the requirement from other sources.

3) Per FAR [22.103-5\(b\)](#) cost reimbursable contracts which exceed the simplified acquisition threshold must include clause [52.222-2](#), Payment of Overtime Premiums. When it becomes apparent during negotiations of such contracts that overtime will be required in contract performance, the contracting officer shall secure from the contractor a request for all overtime to be used during the life of the contract, to the extent that the overtime can be estimated with reasonable certainty.

4) Section (a) of clause [52.222-2](#) includes a “fill in the blank” section which shall be either “zero” or the amount agreed to during the negotiations mentioned in item 3 above.

5) For all time and materials contracts explicitly exercise approval of overtime under FAR [52.232-7](#).

These requirements recognize that there are situations where urgent program needs may require overtime premium to be sanctioned by the Government or situations where overtime worked by an existing workforce may permit contract performance at a lower overall cost to the Government. This would include situations where the Government’s action or administration of the program did not reasonably allow the contractor to avoid incurring overtime premiums. Therefore, these factors must be considered during administration of the general contract overtime policy. FAR [22.103-4](#) and the clause [52.222-2](#) provide explicit circumstances where approval of overtime premium at government expense may be appropriate. Otherwise overtime premium costs should be discouraged and/or denied.

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## **Professional Employee Compensation (SCA Contracts Only)**

Per FAR [22.11](#) a clause requiring offerors to provide detailed information about their proposed compensation plans for “professional” employees must be included in service contracts that are expected to exceed \$550,000 *and* will utilize a “meaningful number” of professional employees. The clause found at [52.222-46](#) allows contracting officers to evaluate the adequacy of professional compensation for such contracts.

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It is critical to fully understand the operative aspects of this clause. Specifically, two terms (“meaningful numbers” and “professional”) may need clarification and it is also important to fully understand the underlying rationale for using the clause.

The term “professional” includes all those employees that would qualify for “exempt” status as an “executive, administrative, or professional” employee as defined in DOL regulation [29 CFR, Part 541](#). This is the same criteria found in FAR 22.1001 for those employees that are *not* considered to be service employees under that FAR provision. Commonly the term would include employees such as architects, engineers, chemist, physicist, lawyers, accountants, teachers, doctors, dentists, registered nurses, and pharmacists. The term will also include other “executive” and “administrative” managerial employees that meet the DOL white collar exemptions found at 29 CFR Part 541 so long as the employees are paid a sufficient salary and meet the other criteria of the DOL regulation. Professional employee services are also discussed in the SCA “service employee” section of this resource book. “Meaningful numbers” is not specifically defined, but in the context of the professional employee compensation clause, generally means a large enough number that contract performance would be significantly effected if the professional employees performing on the contract are disgruntled about their compensation. Therefore, if there is any doubt on this issue, it is recommended that the clause be used since it would simultaneously benefit both the professional employees and the government.

The rationale for use of the clause is two-fold. First it establishes a policy that makes clear that the government’s intent is that the professional service employees will be paid fairly and properly. Although the Service Contract Act provides wage and fringe benefit protections, that Act does not apply to “exempt” professional employees performing on government service contracts. Although there are no minimum levels of compensation established, the contractor must demonstrate that its proposed salaries and fringe benefits will be adequate to attract and retain competent professional service employees. Typically, the proposed compensation levels are measured against national or regional compensation surveys or studies for the same or similar professional level positions.

Second, the policy recognizes that if compensation (salaries and fringe benefits) proposed by offerors is unrealistically low or if certain competitors attempt to lower compensation levels of

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professional staff during a recompetition, then contract performance is likely to be jeopardized, particularly over the long run. Although the contractor may be able to staff the contract, performance will likely deteriorate if professional staff members are dissatisfied with their compensation package. Therefore, all proposals for solicitations containing this clause should be evaluated “on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees.” The clause allows failure to comply with the requirements “sufficient cause to justify rejection of a proposal.”

Also, this provision goes hand in hand with the discussion below concerning recognition of uncompensated overtime that may be utilized by contractors and the policy to not encourage the use of *uncompensated overtime* on contracts for professional and technical services. Both of these policies recognize that long-term detrimental effects of below market compensation and abusive work schedules that some contractors may use in an attempt to gain a competitive advantage. These policies also recognize that abuse of the “exempt” professional status of such employees will likely lead to dissatisfaction or “burn out” of their employees and degrading of contract performance (including possible contract failure). See uncompensated overtime discussion below.

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## **Uncompensated Overtime (SCA Contracts Only)**

“Uncompensated Overtime” means hours worked in excess of a normal 40 hour workweek (inclusive of paid absences such as holidays, vacation or sick leave) by direct charge employees who are “exempt” from the Fair Labor Standards Act, but for which the employees will not receive additional compensation.

Per FAR [37.115](#) a contract clause is prescribed to implement a policy which recognizes the long-term detrimental effects of requiring professional and technical service employees to work uncompensated overtime. Therefore, FAR clause [52.237-10](#) is required in all solicitations and contracts for professional and technical services to be acquired on the basis of the number of hours to be provided if the value of the contract will be above the simplified acquisition threshold.

Offerors are required to identify uncompensated overtime hours and rates by labor category in the same level of detail as compensated hours. The offerors must also show uncompensated overtime rates. These provisions include any uncompensated overtime hours worked by personnel within indirect cost pools

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whose hours are normally charged direct and it includes all uncompensated overtime whether at prime or subcontract level.

Contracting officers are then required to consider this information when evaluating offers to assess the risk and cost realism of such offers when compared to other proposals and as more fully explained in FAR [37.115\(c\)](#). As discussed above, unrealistically low labor rates created by uncompensated overtime, particularly in key professional or technical positions, will likely lead to quality or service shortfalls.

During evaluation, it is critical to consider the “uncompensated overtime rate.” For example, an offeror that plans to use 20 hours of uncompensated overtime per professional employee per week and pay professional employees \$1200 per week salary and therefore would have a rate of \$20 per hour (\$1200 divided by 60). However, a competitive offeror does not plan to use any uncompensated overtime and if proposing the same \$1200 for a standard 40 hour workweek would have a rate of \$30 per hour (\$1200 divided by 40). If all other aspects of these proposals were equal, the second offer would be considered superior since it would not have the same risk of quality and service failure as the first offeror containing such a large amount of uncompensated overtime.

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## Disabled Workers

Per FAR [22.14](#) a contract clause is prescribed to implement a policy requiring contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities, without discriminating against such individuals based on their physical or mental disability. Specifically, FAR [22.1408](#) prescribes contract clause [52.222-36](#) for solicitations and contracts for supplies and services (including construction) that are expected to exceed \$10,000. In addition to placement of the clause in the solicitation/contract, the contracting officer must furnish and the contractor must post Department of Labor notices (EEO Is The Law poster) regarding the rights of individuals with disabilities. See FAR [22.1404](#).

Waivers from the requirements are limited, and highly restricted as more fully discussed in FAR [22.1403](#).

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## Forced Child Labor

Per FAR [22.15](#) a contract clause is prescribed and implements an aggressive policy against any use of forced child labor. The policy implementation requires contracting officers to:

- (1) include appropriate clauses in solicitations and contracts, if it is expected that the contract will exceed the micro-purchase threshold and is NOT a commercial item that includes the provision at [52.212-3](#) (Offeror Representations and Certifications – Commercial Items);
- (2) check the lists of products requiring contractor certification that they have made all reasonable efforts to avoid obtaining products manufactured with the use of forced child labor – the list is found at [www.dol.gov/ilab](http://www.dol.gov/ilab);
- (3) if the end product is included on the list, the offeror must certify that it will not supply any end product on the list that was mined, produced, or manufactured in a country identified on the list for that product OR that it has made a good faith effort to determine whether forced or indentured child labor was used and that it is not aware of any such use of child labor – [absent any knowledge that the certification is false, the contractor officer must rely on the certification in making award decisions];
- 4) take action to refer the matter for investigation if it has reason to believe that the products were produced with the use of such child labor;
- 5) invoke remedies against a contractor who provides false certification; fails to cooperate with authorities investigating allegations of the specified child labor; or furnished end products produced with such child labor – [the remedies include contract termination, suspension of the contractor and debarment in accordance with subpart FAR [9.4](#) procedures].

There are some limitations on the required use of the certifications and clause requirements found in [22.1503\(b\)](#).

See FAR [22.1505](#) for the prescribed use of the clauses found at [52.222-18](#) (Certification) and [52.222-19](#) (Cooperation with Authorities).

In addition to this mandatory policy concerning the egregious use of forced or indentured child labor, contracting officers should also be generally alert to the use of child labor by contractors, especially construction and service contractors. Although child labor enforcement is the responsibility of the U.S. Department of Labor under the Fair Labor Standards Act, any apparent violations should

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be discouraged and discussed with the Navy or NAVFAC Labor Advisors for possible remedies, including referral to DOL for investigation.

As a general rule, it is illegal for any person under 16 years of age to be employed on construction projects. There are also a number of specifically identified “hazardous occupations” within both the construction and service industries that prohibit performance by any person less than 18 years of age. Other than some very limited exceptions (such a newspaper delivery, babysitting, etc.) the FLSA minimum age for non-agricultural employment is 14, but those employees are limited in both the hours they are permitted to work and the type of work that they may perform. See additional details on [FLSA child labor restrictions](#) which will apply to most federal government contractors. Some [states](#) have child labor laws that are more restrictive and that may apply.

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## Human Trafficking

Per FAR [22.17](#) a contract clause is required to prohibit federal Government contractors from engaging in human trafficking. The requirement is general and applies to “all solicitations and contracts” and implements a “zero tolerance policy” regarding human trafficking. Some of the severe forms of human trafficking that are prohibited and defined in the regulations are “debt bondage,” “involuntary servitude,” “coercion,” and “sex trafficking.” As is obvious, these acts by a contractor would be among the most egregious of labor violations and include the use of forced labor to perform the requirements of a government contract. Such actions are illegal not only when committed by the contractor, but also by any subcontractor, or contractor/subcontractor employee. Therefore, contracting officers should remain alert for any evidence of this egregious behavior and take action if it is suspected. Since contracting officers will not typically be well-schooled in actions to remedy human trafficking, the Navy and NAVFAC Labor Advisors are available to help make the necessary referrals when appropriate. See the clause at FAR [52.222-50](#).

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## Contract Work Hours and Safety Standards Act (CWHSSA)

See the discussion of the Contract Work Hours and Safety Standards Act (CWHSSA) in the “Labor Laws: Overview” section of this resource book. See FAR [22.3](#).

Two items to note:

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1. CWHSSA applies to “laborers” and “mechanics” only. Therefore service contracts that require *only* clerical, administrative, executive, or professional level staff are not covered by the Act. For example, a contract requiring training instructors would not require application of CWHSSA. Seamen are likewise not subject to CWHSSA. However, guards, watchmen, and firefighters/fireguards are explicitly covered by CWHSSA and therefore any contracts for services of this nature that also meet the applicability criteria (including the above \$100,000 requirement) are subject to the Act. See FAR [22.300](#).

2. When CWHSSA is required in conjunction with a Davis-Bacon Act construction contract, the contracting agency (Navy/Marine Corps) is responsible for enforcement of the overtime provisions. However, when required in conjunction with a Service Contract, enforcement is the responsibility of the Department of Labor.

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## Walsh-Healey Public Contracts Act

See also the discussion of the Walsh-Healey Public Contract Act (WHPCA) under the “Labor Laws: Overview” section of this resource book.

Of the three primary Federal contract labor standards (Davis-Bacon Act, Service Contract Act, and WHPCA) the WHPCA is the easiest to administer for contracting officers because it currently does not require administration of specific wage determinations. The WHPCA is applicable to contracts for the manufacture or furnishing of supplies that exceed (or may exceed) \$10,000.

There are also exemptions from its use. Specifically,

- perishables, including dairy, livestock, and nursery products;
- agricultural or farm products processed for first sale by the original producer;
- agricultural commodities or the products thereof purchased under contract by the Secretary of Agriculture;
- public utilities services;
- supplies manufactured outside the U.S., Puerto Rico, and the Virgin Islands;

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- newspapers, magazines, or periodicals, contracted for with sales agents or publisher representatives, which are to be delivered by the publishers thereof;
  - contracts which permit purchase “in the open market” under the express language of a statute [generally commercial items – see FAR Part 12] or where immediate delivery is required by public urgency as described in FAR [6.302-2](#) for commercial services.

See FAR [22.604-1](#) and [22.604-2](#).

Regardless of these exemptions and the rather inconsequential impact of the WHPCA, it is very important to understand the role of the WHPCA as it pertains to the two other primary Federal contract labor standards. If, for example, the principal purpose of the contract is the “manufacture or furnishing of supplies” (i.e., a supply contract) *and* any services performed are *not* deemed to be the principal purpose of the contract, then the Service Contract Act does not apply despite those minor and incidental services being performed under the contract. This is due to the requirement that the “principal purpose” of the contract must be service in order for SCA to be applicable. A word of caution, however, is that the dollar value of the supplies versus the incidental services may not be the controlling factor. If in doubt as to whether SCA would apply in such circumstances, as discussed in FAR 22.1003-7, contact the Navy or NAVFAC Labor Advisor. See also the discussion of applicability of the SCA earlier in this resource book. Furthermore, it is common in today’s complex procurement environment for both supplies and services to be purchased under the same contract. When this is so, both WHPCA and SCA may apply to different portions of the same procurement. Therefore “work” that would be subject to WHPCA under such a “hybrid” contract would continue to be subject to WHPCA, but exempt from SCA under [29 CFR 4.117](#). On hybrid contracts it is therefore important to include both labor standards so that each may be properly applied to the type of work covered by that specific law. See also [29 CFR 4.131](#) and [29 CFR 4.132](#).

Similarly, contracts for the purchase of supplies that are installed by the supplier or supplier’s subcontractor may be subject to either the WHPCA or the Davis-Bacon Act (DBA) or both depending upon the facts and circumstances of the contract. If the installation of the supplies is “minor and incidental,” then DBA will not be required. However, if the installation requires more than an incidental amount of construction; DBA will likely be required for that portion of the contract performance. See FAR [22.402\(b\)](#), [29 CFR 4.116](#) and [DOL](#)

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[FOH 15d10](#). Also, see the “Pre-award – Application of the DBA” section of this guide for more examples and discussion.

Also, shipboard work for the “construction, alteration, furnishing, or equipping of a naval vessel” is work that is subject to WHPCA and therefore exempt from either SCA or DBA requirements.

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## Employment Eligibility

Undocumented workers employed by various DOD contractors has become all too common and a “media” event, whenever arrests of these undocumented workers are made. It has also become a base security issue and therefore something that we should all be aware of and strive to avoid.

Verifying the eligibility of contractor employees became a contract requirement on most new solicitations issued on or after 8 September 2009. See Navy Policy memo and DPAP notice for details at: <https://acquisition.navy.mil/rda/content/view/full/6672> Therefore such verification of employment eligibility is now not only a legal requirement for employers generally, but also a specific government contract requirement by inclusion of the contract clause, [52.222-54](#), Employment Eligibility Verification.

The requirements are applicable to *all* solicitations and contracts that exceed the simplified acquisition threshold, except (1) those that are for only work that will be performed outside the United States, (2) those that are for a period of performance of less than 120 days, and (3) those that are for commercially available off-the-shelf items [COTS] (or those that by description be COTS, if not for certain conditions. See FAR [22.1803](#).

A nexus also exists between on-base contract performance and employment eligibility. Contractors that are obligated to perform work under a government contract must do so by sponsoring employees to have access to the base. Those same contractors are also obligated under the law to employ *only* U.S. Citizens or others that are properly authorized to work in the U.S. through various programs administered by the Department of Homeland Security.

Previously, an individual simply had to complete an I-9 form and “self-certify” that he/she is eligible to work in the U.S. and to then provide documentation to prove employment eligibility (such as a Social Security card) and establish their identity (such as a driver’s

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license). However, it has been well-documented that false and fraudulent documentation is routinely used to gain such employment. Therefore, the e-verify requirements should improve the assurance that only legally employable workers will be sponsored on the Navy/Marine Corps installations. In the meantime, however, there is an interim period where some older contracts will still be under the “self-certify” rules and *only* new contracts will be under the e-verify contract requirement. Therefore, it should not be assumed that the status of such employees is assured by the “old” system of verification (the I-9 form).

In this interim period, employers (including all government contractors) are permitted to voluntarily participate in DHS’s E-Verify program which takes advantage of computer database information to supplement the I-9 process. All contractors are therefore encouraged to voluntarily participate in this program for any newly hired workers. Additional information on the E-Verify program may be obtained at [www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify) or by phone at 1-888-464-4218. Employers may enroll for the use of E-Verify at: <https://e-verify.uscis.gov/enroll/StartPage.aspx?JS=YES>

More information specifically about the E-Verify program and process for Federal contractors is available at:

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=534bbd181e09d110VgnVCM100004718190aRCRD&vgnnextchannel=534bbd181e09d110VgnVCM100004718190aRCRD>

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## SUMMARY

This resource book is intended to help contracting officers have a more comprehensive understanding of the myriad of labor laws that (1) affect their solicitations during the competitive phase of procurements, (2) affect their contracts upon award, and (3) affect their ongoing contract administration responsibilities.

We are hopeful that it will provide guidance on the how, why and when of the various labor standards provisions as compared with the bare essential language contained in the FAR.

As always, the Navy and NAVFAC Labor Advisors are available to assist you in regards to the application and administration of the labor standards requirements and in understanding how they will affect Navy and Marine Corps contracts.

Very Respectfully,

Your Labor Advisors

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## NAVY LABOR ADVISORS

Contact your Navy Labor Advisors if you have questions.

[NAVFACLaborAdvisor@navy.mil](mailto:NAVFACLaborAdvisor@navy.mil)

202-685-9138

COMNAVFACENGCOM

[NavyLaborAdvisor@navy.mil](mailto:NavyLaborAdvisor@navy.mil)

703-693-2939

RD&A / A&LM

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## **ATTACHMENT A: PRE-CONSTRUCTION CONFERENCE CHECKLIST**

### Davis-Bacon Act

- Minimum wage requirements
  - check need for additional classifications, explain procedure, furnish SF 1444
  - outline Fringe Benefits requirements
  - discuss required payroll data -
  - note authority of CO and the DOL to review payrolls and basic records
  - note authority to withhold contract earnings for non-compliance

### Apprentices and Trainees

- Registration requirement

### Violations and Under-payments

- Misclassification
  - outline labor standards compliance measures such as employee interviews and payroll checking

### Sanctions for violations

- Debarment

### Particular areas of concern

- Piece rate Workers
- Owner-Operators
- Site of work
- Subcontracts
  - report award of all subcontracts
  - furnish SF Form 1413
  - emphasize that labor standards clauses must be included in all subcontracts

### Contract Work Hours and Safety Standards Act

- Payment of overtime compensation
  - note method by which overtime premium is computed
- Liquidated damages for each CWHSSA violation

### Copeland (anti-kickback) Act

- Regulations, 29 CFR, Part 3, are part of the contract
- False statements (criminal penalties)
- Deductions from employee pay

### Fair Labor Standards Act

- Department of Labor Authority

### Notice to Government of Labor Disputes

### Convict Labor

### Equal Opportunity