

Labor Standards for Construction and Services



Guiding Principles

- The complexity of the Department's construction program requires a high degree of coordination among contractors, such as when two or more are performing construction at the same time and at the same DOE site.
- Both contracting and program personnel need to be aware of the dynamics involved in these situations.

Reference: FAR subparts 22.3, 22.4, 22.10 and DEAR 970.2204

I. Overview

This section discusses the application of labor standards for contracts involving construction and services. While the Federal Acquisition Regulations (FAR) and Department of Energy Acquisition Regulations (DEAR) provide detailed guidance for the application of these labor statutes, this chapter provides DOE's acquisition community examples of when the statutes may apply to specific situations. This guidance, along with the FAR and DEAR requirements, gives DOE personnel the kind of information needed to make decisions regarding application of relevant labor laws to Government contracts.

To assist the CO in implementing this responsibility for Management and Operating (M&O) contractors, the process set forth in Section IV, Labor Standards Determinations at DOE and NNSA M&O Contract Facilities, may be used.

II. Background

The FAR, at 48 CFR subparts 22.3, 22.4, 22.10, and the DEAR at 48 CFR 970.2204 provide guidance to Department¹ Contracting Officers (COs) for applying statutory labor

¹ For purposes of this Acquisition Guide Chapter 22.1, Department is defined as the Department of Energy (DOE) which includes the National Nuclear Security Administration (NNSA).

requirements to contracts that involve construction and services. The statutes addressed in these FAR subparts include:

- The Davis-Bacon Act (DBA);
- The Service Contract Act (SCA);
- The Contract Work Hours and Safety Standards Act; and
- The Copeland (Anti-Kickback) Act.

1. Construction under the DBA

The DBA provides that contracts in excess of \$2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works of the United States (or the District of Columbia), shall contain a Federal Acquisition Regulation (FAR) clause (FAR 52.222-6) stating, *inter alia*, that no laborer or mechanic employed upon the site of the work shall receive less than the prevailing wage rates for construction in that area as determined by the Secretary of Labor. In some cases, Congress has extended the DBA requirements to construction financed in whole or in part by federal grants, loans, loan guarantees, and other financial assistance programs by means of specific Davis-Bacon Related Acts (DBRAs).

2. Services Under the SCA

The McNamara-O'Hara Service Contract Act (SCA) applies to every contract entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services to the United States through the use of service employees. The SCA requires contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of \$2,500 to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in the collective bargaining agreement of a predecessor SCA contractor consistent with Section 4(c) of the SCA. See 22.1003-5 and 29 CFR 4.130 for a partial list of services covered by the SCA. SCA contracts must contain the FAR clauses at 48 CFR 52.222-41.

Please note that SCA coverage **does not** apply to DOE management and operating (M&O) contracts, but **does** apply to subcontracts thereunder. In the illustrations within this Guide, where work is subject to SCA, the work, when performed by M&O contractor employees, would not be covered by SCA.

III. Illustrations of work under the labor standards statutes

The following examples identify some of the contractual situations where the DBA and the SCA may or may not apply. These examples are not intended to provide conclusive labor standards determinations in particular circumstances. Such determinations can only be made by the CO, who may seek the assistance of other Department personnel such as industrial relations personnel. It is the responsibility of the CO to provide the contractor with the appropriate wage determination for the work to be performed, whether the construction contract is an M&O Contractor, or other facility operations contractor.

Additional examples of work covered by the DBA and SCA may be found in Department of Labor (DOL) materials, in particular the SCA and DBA Field Operations Handbooks, Chapters 14 and 15 available at <http://www.dol.gov/whd/FOH/index.htm>.

1. Prototypes

The construction of full-scale operating prototypes for structures, i.e., biorefinery plants, methane digesters, and photovoltaic collection systems, is covered by the DBA. In fabricating such prototypes, the assembling and fitting of components into the building(s), including installation of heat exchangers, control wiring, etc., is subject to DBA.

2. Paving

The construction of roads, including grading and repair, is generally subject to DBA. Repair includes work in roadbeds before resurfacing, the building-up of shoulders, forming ditches, culverts and bridges, and the resurfacing of roads.

However, recurring maintenance work, such as patching surfaces, filling chuck holes, patching shoulders, and resurfacing railroad crossings is not subject to DBA, but, rather, is covered by the SCA. Similarly, when performed on a recurring basis or schedule,

patch and maintenance work on a parking lot, the replacement of bumper stops, and the repainting of parking dividers are subject to SCA.

3. *Stationary boilers*

The construction, alteration and/or repair, including installation and rebuilding, of stationary boilers costing more than \$2,000 for labor and materials is subject to DBA. Maintenance that is necessary to keep the boiler in safe operating condition would be subject to SCA.

4. *Start-up and Commissioning*

If, during construction of complex facilities, a facility is turned over to the operating contractor a section at a time, issues of statutory coverage may arise and must be evaluated carefully, especially with regard to commissioning activities and start-up testing. When final testing of new construction is performed by personnel of the operating organization after acceptance of construction, the testing is not subject to the DBA. If, however, commissioning and testing is part of work done by construction personnel prior to acceptance of construction in order to demonstrate that the construction meets contract requirements, such work is properly viewed as part of the construction process.

5. *Restart of operating activity after fire or other catastrophe*

The restart of operations or rebuilding of a plant following a catastrophe, including the replacement of structural members, roof trusses, walls, roof, utility services, and process piping is subject to DBA. However, where process equipment can be restarted and/or operational activities resumed prior to or in lieu of such rebuilding, the start-up of equipment, including preliminary activity (e.g., cleaning, drying, checking, adjustment, temporary services) and temporary weather protection of equipment, is covered by the SCA, as opposed to the DBA.

6. *Painting*

Painting and decorating are specifically identified as covered work in the DBA. However, painting which is closely integrated with operation and maintenance activities and painting to color code process lines and service piping, valves and directional arrows are covered by the SCA unless such painting exceeds 200 square feet, in which case it

will be covered by DBA. Similarly, the application of various materials to localize contamination, the painting of machine tools to identify degree of contamination, and the repainting of machine tools, equipment and plant structures as part of preventive maintenance are not subject to the statutes when performed with a stable work force employed by the operating contractor.

7. Installation, rearrangement and adjustment of equipment

The installation of mechanical equipment and instruments that are necessary to permit a new facility to be utilized for its intended purpose is part of construction and covered by the DBA. For these purposes, installation includes not just the initial installation, but also the arrangement, adjustment, balancing, calibration, and checking of the instruments or equipment involved with that installation.

When, however, the installation, rearrangement or adjustment of equipment is not part of a current construction project it is not subject to DBA, unless the work itself involves substantial and segregable construction. Factors to be considered in determining whether work is DBA construction include the type of work performed by the employees installing the equipment on the project site and, specifically, the techniques, materials, and equipment used and the skills called for in its performance; the extent to which structural modifications to buildings are needed to accommodate the equipment (such as widening entrances, relocating walls, or installing wiring); and the cost of the installation work, either in terms of absolute amount or in relation to the cost of the equipment and the total project cost. **NOTE: None of these factors is dispositive and DOE personnel are encouraged to contact the Office of General Counsel (GC-63) for assistance in determining which work constitutes substantial and segregable construction.**

Thus, furnishing and installing mechanical equipment that requires alteration of the building structure or running wiring through walls would likely involve more than an incidental amount of construction. Alteration or rearrangement of existing facilities involving similar work to accommodate new or different equipment is also covered. DBA also applies to installing a security system or an intrusion detection system; installing permanent shelving, which is attached to a structure; installing air-conditioning ducts; excavating outside cable trenches and laying cable; installing heavy generators; mounting radar antenna; and installing instrumentation grounding systems, where a substantial amount of construction work is required.

8. *Maintenance contracts*

Contracts for servicing of equipment or facility or maintenance work are subject to SCA. Maintenance includes the typically scheduled, routine, recurring kind of work that is necessary to keep a facility in an efficient operating condition. Such work includes custodial services, snow removal, and routine HVAC filter changes.

However, if routine maintenance is deferred for an extended period of time, when done it may exceed what can be fairly characterized as routine scheduled maintenance work and be covered by the DBA. For example, if a railroad bridge is scheduled to be painted and checked every 2 years, but that work is delayed repeatedly for a period of nearly 10 years, the painting that is required when that bridge is eventually painted is likely to be so extensive as to exceed what can be considered maintenance and, therefore covered by DBA.

Routine upkeep of landscaping, carpet laying and installation of drapery performed as part of routine maintenance and upkeep is covered by the SCA. Where, however, such work is performed as part of a construction contract, it is generally covered by DBA.

Where a maintenance or SCA contract requires substantial and separable tasks for construction, alteration or repair, DBA will apply to those aspects of the contract.² See 29 CFR 4.116(c)(2). Many of the same factors to be considered are as set forth under installation Section 7 above, and include the type, quantity, and cost of the work at issue.

For example, if the work involves techniques, materials, equipment, and skills typically used in construction, or if structural modifications to buildings are needed to accommodate the necessary equipment (such as widening entrances, relocating walls, or installing wiring), these factors would be suggestive of DBA coverage. Moreover, DOL guidance indicates that an “[a]ctivity that generally takes more than 32 hours for repair of a particular building component” is indicative of DBA repair work. Finally, the cost of the work, either in absolute dollars or as a percentage of contract costs (or in the case of installation, as a percentage of the equipment cost) is a factor used to ascertain whether

² The reverse is not the case, i.e., that if a contract is primarily one for construction of a public building or work, there is no requirement by statute or regulation to segregate service work and apply the SCA to service work that will be performed under the Construction contract.

work involves substantial construction rising to the level requiring coverage under the DBA. **NOTE: As stated above, none of these factors are dispositive and DOE personnel are encouraged to contact the Office of the Assistant General Counsel for Labor and Pensions (GC-63) for assistance in determining which work constitutes substantial and segregable construction.**

9. Telephone and utility systems

Whether or not the performance of construction-type work in connection with Federal and Federal-assisted projects by employees of a public utility is covered by the DBA will depend upon the nature of the contracts involved and the work performed thereunder, as well as the specific requirements of any specific DBRA involved.

A contract for a central telephone system to be installed by the manufacturer and owned by the United States is subject to DBA. Relocation of utility lines to accommodate construction of a public work is subject to DBA. Similarly, if a utility company agrees to undertake a portion of the construction of a project, which by statute is covered by the DBA/DBRA, such work would be subject to the DBA/DBRA labor standards requirements of the construction contract, consistent with any specific statutory requirements.

If, however, a public utility is in effect extending its own utility system and is furnishing its own materials, such work is not subject to DBA/DBRA. Thus, contracts involving the installation of telephone systems or utilities are not subject to DBA when the work is performed by employees of the telephone or utility company supplying the services, and the material and equipment installed will be owned by the telephone or utility company. Such installation is considered to be an extension of the utility's services. The same conclusion would apply if the utility company contracts out the work.

10. Demolition, Dismantling or Removal of Improvements

Demolition, dismantling or removal of improvements is covered by the DBA where follow on construction is anticipated, even if by separate contract. Where such work does not anticipate follow-on construction activity, the work would be covered under SCA and not by DBA.

11. Decontamination and Decommissioning

Decontamination work, including washing, scrubbing, and scraping to remove contamination; contaminated soil or other materials;³ and painting or other resurfacing, is not covered by DBA, provided that such painting or resurfacing is an integral part of the decontamination activity and performed by the employees of the contractor(s) performing the decontamination.

IV. Labor Standards Determinations at DOE and NNSA M&O Contract Facilities

The Department cannot delegate labor standards coverage determinations to its contractors. While the CO must make the initial labor standards coverage determinations, the DOL ultimately has the authority to determine labor standards coverage. 5 U.S.C. 901 *et seq.* However, the DEAR provides a mechanism by which the HCA, consistent with the DEAR, may prescribe classes of work for M&O contracts to which applicability or non-applicability of the DBA is clear, and for which the HCA will require no further DOE or National Nuclear Security Administration (NNSA) determination on coverage in advance of the work (48 C.F.R. 970.2204-1-1(b)(3)).

The Department recognizes that each facility/site has differing circumstances and that it would be more beneficial if the contractor works with the CO to determine the classes of covered work. Heads of Contracting Activities (HCAs) may delegate the use of their authority to make DBA class determinations to the CO at the site, enabling the CO to make the class determinations as set forth in the DEAR. All such delegations by the HCA must be made pursuant to a signed delegation memo giving a specific CO the HCA's authorization as provided in DEAR 970.2204-1-1(b)(3).

Upon request by an M&O contractor, COs may work with the contractor, in consultation with local field counsel; the DOE or NNSA Contractor Human Resources/Industrial Relations Specialists; and the Office of the Assistant General Counsel for Labor and Pension Law (GC-63), for DOE, or the Office of the General Counsel for NNSA, to determine classes of work to which applicability or non-applicability of the DBA is clear, and for which the CO will require no further DOE/NNSA determination on coverage in advance of the work.

³ Excavation of significant amounts of contaminated soil and other materials will be subject to DBA.

Although coverage of specific classes of work may be determined by the CO, the contractor is required to continue to submit a request to the CO for an appropriate wage determination (WD) for the work to be performed for subcontracts. It is recognized that WDs are now much easier to obtain; however, FAR subpart 22.4 requires that the CO take the actions to choose the correct WD and to modify a cost-reimbursement contract to incorporate modified WDs. Absent CO or designee approval of specific WDs, the contractor would be at risk of incurring unallowable costs. The contractor may pull a WD from the DOL website www.wdol.gov and provide it to the CO or designee for approval, if the CO believes that will expedite the process.

COs should, as a facet of their normal operational awareness and systems oversight, ensure that labor standards policies, procedures and management controls are implemented by M&O contractors, which are responsible for compliance by its subcontracts (*see, e.g.*, FAR clause 52.222-11(c)). Where a CO has made determinations for classes of covered work, the CO will perform regular audits to ensure the contractor is properly classifying the work within the classes of work.

The CO is not required to make class determinations. This Section IV process for determining classes of work subject to DBA provides an option available to the M&O and CO. No changes are required to processes used by the COs and DOE or NNSA Labor Standards Committee at an M&O site/facility.

V. Section 1804 Decontamination or Decommissioning

Section 1804 of the Atomic Energy Act of 1954, as amended by Title XI of the Energy Policy Act of 1992, 42 U.S.C. Sec. 2297g-3, requires that “[a]ll laborers and mechanics employed by contractors or subcontractors in the performance of decontamination or decommissioning of uranium enrichment facilities of the Department shall be paid wages” in accordance with, and otherwise comply with the requirements applicable to, the DBA. It is important to keep the requirements of Section 1804 in mind in evaluating activities at the East Tennessee Technology Park (ETTP) and at the Portsmouth and Paducah Gaseous Diffusion Plants.

VI. DOE's Role in Construction Labor Relations

The Department is not the employer of the Department’s contractor work force. Wages, hours, and working conditions that are the subjects of collective bargaining will be left to

the orderly processes of negotiation and agreement between DOE contractor management and employee representatives with maximum possible freedom from Government interference.

Project labor agreements (PLAs) entered into by DOE contractors and covering construction on a DOE site, have been a tool for constructing Departmental facilities and accomplishing the Department's missions. It is critical that DOE contractors follow practices that experience has shown are consistent with stability of collective bargaining relationships. DOE expects its contractors to maintain positive labor-management relations and adopt labor relations policies and practices that reflect the best experience of American industry to assure successful accomplishment of DOE's programs at reasonable costs. Factors unique to a particular project (such as duration of the project, tenure of employment, housing and travel accommodations, length of regular workweek, uniformity of shift, special subsidies, etc.) are considered and addressed in project labor agreements.

VII. Headquarters Point of Contact

Any questions addressing labor standards issues as discussed herein may be referred to your assigned contact within the Office of the Assistant General Counsel for Labor & Pension Law (GC-63), or, if you do not have such an assigned contact, call Jean Stucky at 202-586-7532.