Labor Standards for Construction and Services

Guiding Principles

- The complexity of the Department's construction program requires a high degree of coordination among contractors, especially when two or more contractors 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.

References: [FAR 22.3, FAR 22.4, FAR 22.10, DEAR 970.2204-1-1]

1.0 Summary of Latest Changes

This update includes administrative changes such as updating references and outdated language.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

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

To assist the Contracting Officer (CO) in implementing the Department's non-delegable responsibility for making a determination whether work is covered by Wage Rate Requirements (Construction), formerly known as the Davis-Bacon Act (DBA) and, if it is, for inserting the appropriate wage determination (WD). For Managing and Operating (M&O) contractors, the process set forth in Section IV, Labor Standards Determinations Applicable at DOE/NNSA Facilities Operated Pursuant to Management and Operating Contracts, below, may be used.

2.2 Background. The FAR, at 48 CFR subparts 22.3, 22.4, 22.10, and the DEAR at 48 CFR 970.2204-1-1 provide guidance to Department[1] CO's for applying statutory labor requirements to contracts that involve construction and services. The statutes addressed in these FAR subparts include:

- Wage Rate Requirements (Construction), formerly known as the Davis-Bacon Act (DBA);
- Service Contract Labor Standards, formerly known as the Service Contract Act (SCA);
- The Contract Work Hours and Safety Standards Act; and
- The Copeland (Anti-Kickback) Act.

The DBA is applicable to contracts in excess of $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair (including painting and decorating) of public buildings or public works of the United States (or the District of Columbia). FAR 22.407(a) prescribes that contracts involving construction valued at $2,000 or more must include the various DBA compliance requirements set out in FAR 52.222-6 through FAR 52.222-15. An M&O Contractor/and other facility contractor that performs construction with its own employees must comply with all Department of Labor DBA regulations which are incorporated into the contract through FAR 52.222-6 through FAR 52.222-15.

FAR 52.222-6, *Construction Wage Rate Requirements*, requires, among other things, 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 (DBRA's).

2.3 Services under Service Contract Labor Standards (formerly known as the Service Contract Act (SCA). SCA applies to every contract in excess of $2,500 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 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

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

increases) contained in the collective bargaining agreement of a predecessor SCA contractor, consistent with Section 4(c) of the SCA. Please see 29 CFR 4.130 for an illustrative list of services covered by the SCA. SCA contracts must contain the FAR clause 48 CFR 52.222-41.

Note: SCA coverage *does not* apply to DOE management and operating (M&O) contracts, but *does* apply to subcontracts awarded thereunder. *See* DEAR 970.5244-1(x)(4). Because of the non-applicability of the SCA to M&O contracts, in the examples that follow, when work is determined to be service work, performance of the work is not subject to the SCA if an M&O contractor's employees perform the service work. The service work is subject to the SCA if it is performed by a subcontractor to the M&O contractor.

2.4 Illustrations of Work under the Labor Standards Statutes. The following examples identify some of the more difficult contractual situations for determining whether the DBA and the SCA apply likely to be confronted in DOE practice. These examples are intended only as guidance and are not intended to provide conclusive labor standards determinations for particular circumstances. Such determinations can only be made by the CO, who may seek the assistance of other Department personnel such as contractor human resources/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 Field Operations Handbook, Chapters 14 (SCA) and 15 (DBA), available at http://www.dol.gov/whd/FOH/index.htm.

2.4.1 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 also subject to the DBA. The operation of such prototypes once construction is complete is not covered by the DBA unless those adjustments themselves involve significant construction amounting to alteration or repair or re-construction of the structure.

2.4.2 Paving. The construction of roads, including grading and repair, is generally subject to the 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 minor patching of surfaces, filling chuck holes, patching shoulders, and resurfacing railroad crossings, is not subject to the DBA, but, rather, is covered by the SCA. Similarly, when performed on a routine and recurring basis or schedule, patch and maintenance work on a parking lot, the replacement of bumper stops, repainting of handicapped parking signs on the pavement, and touchup of parking dividers are

subject to the SCA. Repainting/restripping of entire parking lots would be covered by the DBA. But note that, as in the case of painting, as discussed, below at pp. 6-7, the delay of paving maintenance work could mean that that work – when actually done – would amount to construction.

2.4.3 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 the DBA. Maintenance that is necessary to keep the boiler in safe operating condition after normal operations have begun and which does not amount to the alteration, repair, reconstruction, or rebuilding of the existing structure would be subject to SCA.

2.4.4 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 the work to be 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.

2.4.5 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 the 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, or temporary services) and temporary weather protection of equipment, is covered by the SCA, as opposed to the DBA.

2.4.6 Painting. Painting and decorating are specifically identified as covered work in the DBA. However, painting which is closely integrated with operation and maintenance activities, such as painting to color code process lines, service piping, valves or directional arrows is covered by the SCA when performed on a scheduled, recurring, and routine basis. Similarly, the application of various coating materials to localize contamination, the painting of machine tools to identify degree of contamination, and the repainting of machine tools and equipment as part of preventive maintenance are not subject to the DBA. Painting of offices and other plant structures after the original construction is complete is covered by the DBA if such painting exceeds 200 square feet.

2.4.7 Installation, Rearrangement and Adjustment of Equipment. The installation of mechanical equipment and instruments as part of a current construction project that is 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 the Assistant General Counsel for Contractor Human Resources (GC-63) or the NNSA Office of General Counsel, as appropriate, for assistance in determining whether the work constitutes substantial and segregable construction.

Thus, furnishing and installing mechanical equipment that requires alteration of the building structure or running wiring through walls which involves more than an *incidental* amount of construction is likely be covered by the DBA. Alteration or rearrangement of existing facilities involving similar work to accommodate new or different equipment is also covered.

The DBA also applies to installing a security system or an intrusion detection system; installing permanent shelving that 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, or where those adjustments themselves involve significant construction amounting to alteration or repair or re-construction of the structure.

2.4.8 Maintenance Contracts. Contracts for servicing of equipment or facility maintenance work are subject to SCA. Maintenance includes typically scheduled, routine, recurring 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 it may exceed what can be fairly characterized as routine scheduled maintenance work and would then 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 the 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 or requires the alteration of the existing structure or includes painting of offices or other space (over 200 sq.ft.), or where the landscaping work involves extensive landscaping, it is generally covered by the DBA.

Where a maintenance or SCA contract requires substantial and segregable tasks for construction, alteration, or repair, the 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 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 provides that, where an "[a]ctivity that generally takes more than 32 hours for repair of a particular building component," the length of time involved itself is indicative of DBA repair work. Similarly, the cost of the labor or the labor and materials involved, 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 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 Contractor Human Resources (GC-63) or the NNSA Office of General Counsel, as appropriate, for assistance in determining whether the work constitutes substantial and segregable construction. The determination of whether "extensive" landscaping is required is a particularly difficult issue that should be submitted to GC-63 or to NNSA GC, as appropriate, for review.

2.4.9 Telephone and Utility Systems. **NOTE: There is no DBA exemption for utility companies.** Whether employees of a public utility are covered by the DBA when performing construction-type work in connection with Federal and Federal-assisted projects, will depend upon the nature of the contracts involved, and the work to be performed, 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 the DBA. Relocation of utility lines to accommodate construction of a public work is subject to the DBA. Similarly, if a utility company agrees to undertake a portion

[2] **NOTE:** The reverse is not the case, i.e., 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 the service work that will be performed under the construction contract.

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 requested to add new transformers or extend its power lines to provide power to the DBA/DBRA covered project, and will own the new equipment/lines, such work is not subject to the DBA/DBRA if performed by employees of the utility. Thus, contracts involving the installation of new telephone systems or utilities are not subject to the 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.[3]

NOTE: The application of the DBA in these situations is fact based and DOE personnel are encouraged to contact the Office of the Assistant General Counsel for Contractor Human Resources (GC-63), or NNSA GC, as appropriate, for assistance in determining whether the utility company work is covered by the DBA.

2.4.10 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 the SCA rather than the DBA. Where construction is expected to occur at some point of time, but not in the next 2-3 years, the demolition work by itself is not covered by the DBA.

NOTE: The application of the DBA in these situations is fact based and DOE personnel are encouraged to contact the Office of the Assistant General Counsel for Contractor Human Resources (GC-63), or NNSA GC, as appropriate, for assistance in determining whether the utility company work is covered by the DBA.

2.4.11 Decontamination and Decommissioning. Decontamination work, including washing, scrubbing, and scraping to remove contamination; contaminated soil or other materials; and painting or other resurfacing, is not covered by the 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 and providing that it does not exceed 200 square feet.

[3] But, note that a different outcome pertained under Recovery Act grant situations because Section 1606 of the Recovery Act required application of the DBA to construction performed by laborers and mechanics "**employed by contractors and subcontractors** on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act. . ." (emphasis added), but not to employees of the grantee.

NOTE: The application of the DBA in these situations is fact based and DOE personnel are encouraged to contact the Office of the Assistant General Counsel for Contractor Human Resources (GC-63), or NNSA GC, as appropriate, for assistance in determining whether the utility company work is covered by the DBA.

2.5 Labor Standards Determinations Applicable at DOE/NNSA Facilities Operated Pursuant to Management and Operating Contracts. The Department cannot delegate labor standards coverage determinations to its contractors. However, pursuant to 48 C.F.R. 970.2204-1-1(b)(3), the Head of Contracting Activity (HCA) may prescribe for M&O contracts classes of work as 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. HCA's 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). The Department also recognizes that each facility/site has differing circumstances and that it may be beneficial if the contractor works with the CO to determine the classes of covered work.

Upon request by an M&O contractor, CO's 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 Contractor Human Resources (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.

NOTE: In all cases, the CO must obtain the written concurrence of the DOE or NNSA Office of General Counsel on the actual determination of coverage, prior to the submission to the contractor.

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 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. If the CO believes it will expedite the process, the contractor may pull a WD from the DOL website at www.wdol.gov and provide it to the CO or designee for approval.

CO's should, as a part of their normal operational awareness and systems oversight, ensure that labor standards policies, procedures, and management controls are implemented by M&O contractors. M&O contractors and other contractors are responsible for ensuring compliance by

their subcontractors (*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 performed under these determinations.

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 the CO. No changes are required to processes currently used by the CO and the DOE or NNSA Labor Standards Committee at an M&O site/facility.

2.6 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), the Y-12 National Security Complex and at the Portsmouth and Paducah Gaseous Diffusion Plants.

2.7 DOE's Role in Construction Labor Relations. The Department is not the employer of the Department's contractor work force. The DBA and SCA require the payment of at least the wages (including benefits) set out in the appropriate wage determination. So long as those minimum levels are met, wages, hours, and working conditions are terms and conditions of employment to be negotiated by the contractor with any labor organizations representing their employees for collective bargaining and thus should be left to the orderly processes of negotiation and agreement between the contractor and such labor organizations, with maximum possible freedom from Government interference.

Project labor agreements (PLA's) 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. 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.) may be addressed in those agreements.

It is critical that DOE contractors follow practices that experience has shown are consistent with the 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.

2.8 DOE 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 Contractor Human Resources (GC-63), or, if you do not have such an assigned contact, call Jean Stucky at 202-586-7532. For NNSA, contract Lisa Mangi in the Office of General Counsel at 202-586-2647.