

DAVIS-BACON LABOR STANDARDS

Introduction

The Davis-Bacon Act requires the payment of prevailing wage rates (which are determined by the U.S. Department of Labor) to all workers on Federal government (in our case, CDBG) construction projects in excess of \$2,000.

Some activities financed by CDBG are not “construction work” and do not trigger Davis-Bacon requirements; e.g., real property acquisition, architectural and engineering fees, other services (legal, accounting, construction management), and other non-construction items (furniture, business licenses, real estate taxes, tenant allowances for such items). If Davis-Bacon wage rates apply to a CDBG project it is because of a labor provision contained in one of HUD's "Related Acts" such as the U. S. Housing Act of 1937, the National Housing Act of 1949, the Housing and Community Development Act of 1974, and the National Affordable Housing Act of 1990, as amended.

The *Related Acts* are often referred to as the **Davis-Bacon and Related Acts** or **DBRA**. This chapter offers a brief description of the laws and regulations associated with Federal labor standards administration and enforcement and discusses both what's in your contract that requires Davis-Bacon compliance and your responsibilities. It also deals with labor standards and payroll reporting requirements. Lastly, it discusses what can happen in the event there is a dispute about the wage rates that should be (or have been) paid and any back wages that may be due. Upon receipt of the environmental review clearance and plans and specifications clearance from the Texas Commission on Environmental Quality (TCEQ), the Contractor Locality may proceed with those steps necessary for compliance with labor standards regulations. Acquisition of all lands, rights of way and easements necessary to carry out the project must be completed before construction. Acquisition of real property must conform to the procedures outlined by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, which are outlined in

Objectives of Davis-Bacon

The Office has identified five key labor standard objectives---the basics of what must be accomplished in order to administer and enforce Davis-Bacon requirements and protect workers' rights. The Office has also identified all of the policies, procedures and paperwork involved in Davis- Bacon enforcement, including those done by the state and those imposed on Contractor Localities. In order to maximize the effectiveness of the labor standards program, paperwork requirements that were not statutory or regulatory and that did not contribute to one or more of the identified objectives were eliminated.

Objectives for Davis-Bacon Labor Standards Compliance

1. Apply Davis-Bacon requirements properly.
2. Support Contractor Locality compliance with labor standards through education and advice.
3. Monitor Contractor Locality performance.
4. Investigate probable violations and complaints of underpayment.
5. Pursue debarment and other available sanctions against repeat labor standards violators.

Responsibility of the Contractor Locality

The following responsibilities have been accepted by Contractor Localities as a condition for receiving a CDBG contract. Contractor Localities have agreed to administer and enforce Davis-Bacon requirements by signing the CDBG contract.

Designate appropriate staff (the Labor Standards Officer, or LSO) should be designated before the start of construction to ensure compliance with all applicable labor standards requirements and to act for and in liaison with the Office.

The LSO is responsible for the proper administration and enforcement of the Federal labor standards provisions on contracts covered by Davis-Bacon requirements. This term represents the person (or persons) who will provide labor standards reconstruction advice and support to the Contractor Locality and other project principals (for example, the owner, sponsor, architect), including providing the proper Davis-Bacon wage decision and ensuring that the wage decision and contract clauses are incorporated into the contract for construction. The LSO also monitors labor standards compliance by conducting interviews with construction workers at the job site and reviewing payroll reports, and oversees any enforcement actions that may be required.

The LSO could be an employee of a city or county or a private consulting or engineering firm. Some CDBG projects are administered directly by local staff, where the Labor Standards Officer will be someone on the locality's staff. But many CDBG projects are administered by contracting with a consulting firm. In either case, the guidance for the Contractor Locality remains as follows:

- **Establish a construction contract management system** which makes certain that labor standards, including Davis-Bacon prevailing wage rates, are applied where required. Ensure that any exemptions or exceptions are identified. Set up the labor standards enforcement filing system to include all documentation to show labor standards compliance.
- **Observe contractor performance** to ensure that all bid documents, contracts and subcontracts for Davis-Bacon covered work contain Federal labor standards provisions and the applicable Davis-Bacon wage decision.
- **Ensure that no contract is awarded to a contractor that is ineligible** (e.g., debarred) for federally-assisted work. Prime contractors and subcontractors should be cleared by the Office.
- **Conduct on-site inspections including interviews with laborers and mechanics** employed on the construction project. Ensure that the applicable Davis-Bacon wage decision and the Department of Labor's "Notice to All Employees" are posted at the job site.

- **Review certified payroll reports** and related documentation and identify any discrepancies and/or violations. Ensure that any needed corrections are made promptly.

Procedures for Labor Standards Compliance

A construction project covered by Federal labor standards requires a series of specific actions by labor standards personnel **prior to the actual start of construction**.

STEP 1 Obtain an applicable Wage Decision for the project

A wage decision is a listing established by the U.S. Department of Labor (DOL) of different work classifications, such as Carpenter, Electrician, Plumber, Laborer, and other construction work classifications and the minimum wage rates (and fringe benefits, where prevailing) that people performing work in those classifications must be paid. General wage decisions are categorized into four groups (Heavy, Highway, Building, and Residential Construction) and apply to specific geographic areas, usually a county or group of counties. Wage decisions are modified from time to time to keep them current.

WAGE RATE CLASSIFICATION

Generally construction projects are classified as Building, Heavy, Highway or Residential. Below are descriptions of these classifications with an illustrative listing of the kinds of projects that are generally included within the classification. Please note that the description and illustrations are guides. The advertisement and contract specifications should identify as specifically as possible the segments of work to which the schedules will apply.

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

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

Building Construction – Building construction generally is the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction such as structures, the installation of utilities and installation of equipment, both above and below grade level, as well as incidental grading, utilities and paving. Additionally, such structures need not be “habitable” to be building construction. The installation of heavy machinery and/or equipment does not generally change the project’s character as a building.

Residential Construction – Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.

The LSO should obtain the applicable wage decision by visiting <http://www.gpo.gov/davisbacon/>. A copy of the *Wage Decision* must be retained in the contract file.

STEP 2 Include the wage decision (and any modifications) in the bid documents (where there is competitive bidding). The most common method of construction procurement is competitive, with public advertising and bid opening.

STEP 3 Ensure that the wage decision for any contract or work is current 10 days before bid opening. The LSO is expected to confirm that the wage decision in the bid specifications is still current for the bid opening date. The LSO should call the Office Labor Standards Specialist within ten days of the bid opening to “lock-in” the wage decision. A record of this “Ten Day Call” should be retained in the local files with other labor standards documentation.

STEP 4 Check the prime construction contractor for eligibility status. The LSO is expected to verify that all prime contractors (and subsequently, their subcontractors) are not listed as “debarred” by the Excluded Parties List System (EPLS) prior to executing the construction contract. Verification can be obtained by visiting <http://www.epls.gov/>. A copy of the *Verification Form* should be retained in the local files. The company/firm must be verified **prior to the contract execution or the cost of the construction could be disallowed.**

If the Contractor Locality wishes to award the construction contract immediately after opening bids without allowing time to clear the contractor, the meeting minutes may include language that the “award approval is contingent upon contractor clearance.”

STEP 5 Award the construction contract. Include appropriate labor standards provisions and the wage determination in the construction contract. Each contract subject to Davis-Bacon labor standards requirements must include contract provisions containing labor standards clauses and a Davis-Bacon wage decision. These documents are normally bound into the contract specifications.

The labor standards clauses describe the responsibilities of the construction contractor concerning Davis-Bacon wages and obligate the construction contractor to comply with the labor requirements. The labor standards clauses also provide for remedies in the event of violations, including withholding from payments due to the construction contractor to ensure the payment of wages or liquidated damages which may be found due. These contract clauses (see checklist below) enable the LSO to enforce the Federal labor standards applicable to the project.

In most cases the wage decision included in the construction contract is “locked-in” once the contract is awarded or when construction begins; no future modifications are applicable to the contract or project involved. A retainage of ten percent is recommended on most contracts: five percent to ensure that the performance and quality of work being performed is satisfactory and five percent to ensure compliance with labor standards. Contracts in excess of \$250,000 must enter the retainage in excess of five percent into an interest bearing account. A retainage of less than 5 percent should not be held.

Final payment of the retainage should not be paid until all programmatic requirements are met, all claims and disputes have been settled, all warranties have been received and all liens have been released.

CHECKLIST OF CONTRACT PROVISIONS

to be included in the Contract

- Activity
- General Contract Conditions, Part I, including:
 - Certification of Compliance with Clean Air and Water Acts (Contracts in excess of \$100,000).
 - Equal Employment Opportunity provisions (Executive Order 11246 compliance) (if employer has 15 or more employees and/or bid/contract is over \$10,000).
 - Section 504 non-discrimination clause for handicapped persons regarding project benefits and employment (if employer has 15 or more employees).
 - Section 3 compliance (local labor/businesses) (if bid exceeds \$100,000).
 - Section 109 clause (non-discrimination) (if employer has 15 or more employees).
 - Lead-Based Paint Hazards-conditions.
- General Contract Conditions, Part II, including:
 - Federal Labor Standards Provisions (if bid exceeds \$2,000).
 - Insertion of appropriate Prevailing Wage Rate Determination(s) (if bid exceeds \$2,000).
- General Specifications, Part III, Special Conditions (including a minimum of five percent (5%) retainage until project completion/final inspection).
- General Specifications Schedule, to have a State-registered architect or engineers' seal affixed to same (if applicable). Not necessary for repair and demolition contracts.
- Certifications, to include the following:
 - Certificate of Owner's Attorney.
 - Bidder's Certification Regarding Equal Employment Opportunity (if bid equals or exceeds \$10,000).
 - Contractor's (Bidder's) Certification Concerning Labor Standards and Prevailing Wage Requirements (if bid exceeds \$2,000).
 - Section 3/Prohibition of Segregated Facilities Certification (if bid equals or exceeds \$100,000).
 - Section 3 Plan (if bid equals or exceeds \$100,000).
 - Non-Collusion Affidavit of Prime Bidder.
- Statement of Bidder's Qualifications (instructions).
- Bid Forms (listed to correspond to same numbers as in the technical specifications), including:
 - Additive Alternates (if applicable)
 - Deductible Alternates (if applicable)

STEP 6 Hold a preconstruction conference to explain labor standards.

A preconstruction conference should be held with the engineer/architect, prime contractor, subcontractor(s), inspector(s), labor standards officer, and all applicable utility companies prior to the start of construction. During this conference, all parties should be advised of their responsibilities and obligations on a federally funded or federally assisted project. The applicable federal, state, local, and program guidelines should also be discussed.

Preconstruction conference minutes outlining the required federal/state labor requirements, included as, and a list of attendees must be documented and retained by the Contractor Locality. The preconstruction conference should cover all construction details, time frame of project, payment requirements, and labor standards. All bonds and certificates of insurance should be delivered to the Contractor Locality at this time. All necessary General Wage Decisions, labor posters, and any additional classifications must be given to the contractor along with instructions that will assist in completing the project. The forms and posters must be posted by the contractor at the site of work in a prominent and accessible place where the workers can easily read them. These posters are available from the Office Labor Standards Specialist.

On occasion, the applicable Davis-Bacon wage decision does not contain all of the work classifications and wage rates needed to complete the construction work. The LSO should request an additional classification and wage rate. This process is usually simple and should be started as soon as the construction contract has been awarded. The request should represent what the employer (prime contractor or subcontractor) wants to pay workers performing a particular set of duties.

The proposed additional classification and wage rate needs to satisfy only three criteria set forth in Department of Labor (DOL) regulations:

1. that the work to be performed by the additional classification is not performed by a classification already on the applicable wage decision;
2. that the classification is used by the construction industry in the area of the project; and
3. that the proposed wage rate and any fringe benefits bear a reasonable resemblance to the rates on the wage decision.

If these criteria are met, the request should be made by the LSO in writing through the *Request for Additional Classification and Rate*. The Office Labor Standards Specialist will review the requested classification and wage rate to determine whether the request meets US DOL rules. The Office Labor Standards Specialist will give preliminary approval on the request and refer it to US DOL for final approval. If the Labor Standards Specialist does not think the request meets the rules and if agreement can't be reached on the proper classification or wage rate for the work described, the Specialist will *not* approve the request, and will send the request to US DOL with an explanation as to why the request should not be approved. US DOL still has final decision authority. The LSO will receive a copy of the final determination letter once US DOL has reviewed the request. Once the Office Labor Standards Specialist or the US DOL approves the request, the prime contractor must post the approval notice on the job site with the wage decision. If US DOL *does not* approve the request, the LSO will be notified about what classification and wage rate should be used for the work

in question. The LSO will also receive instructions about how to ask for US DOL reconsideration if the Contractor Locality would like to pursue the issue further.

STEP 7 Submit the *Start of Construction Notice*. The LSO must submit a *Start of Construction* on each prime contractor awarded a construction contract over the amount of \$2,000 under the Texas CDBG Program. A separate notice must be submitted for each prime contractor and should reflect all subcontractors listed under that prime. **The *Start of Construction Notice* must be submitted before any construction dollars are reimbursed from the CDBG contract for that particular construction contract.**

STEP 8 Review project payrolls during construction. The LSO or other inspector must visit the project site and interview some of the workers concerning their employment on the project. In addition, the LSO must periodically review payrolls and related submissions, comparing the interview information to the payrolls, to ensure that the labor standards requirements have been met. The LSO will notify the Contractor Locality if these reviews find any discrepancies or errors and will provide instructions about what steps must be taken to correct any problems.

On-site Interviews. Every employer (contractor, subcontractor, etc.) must make their employees available for interview at the job site with the LSO, Office representative, or HUD or DOL representative. The interviews are confidential and the employee will be asked about the kind of work they perform and their rate of pay. Every effort will be made to ensure that these interviews cause as little disruption as possible to the ongoing work. The interviewer (usually the LSO) will record the interview information on the *HUD-11*.

Project payroll reviews. The LSO will compare the information on the interview forms to the corresponding payrolls to ensure that the workers are properly listed on the payrolls for the days, work classification, and rate of pay. The LSO will also review the payroll submissions to make certain that the payrolls are complete and signed; that employees are paid no less than the wage rate for the work classification shown; apprentice and trainee certifications are submitted (where needed); employee authorizations for other deductions are submitted (where needed); etc.

STEP 9 Submit construction completion reports. Upon completion of the construction contract, a final inspection must be conducted and all parties must agree that the work is acceptable.

The LSO must submit a *Final Wage Compliance Report* for each public works construction contract over \$2,000 that is subject to Davis-Bacon. A separate report must be submitted for each prime contractor documenting that all Davis-Bacon requirements have been met.

A *Certificate of Construction Completion* must be submitted for each construction contract documenting acceptance of the project. The *COCC* and *FWCR* must be submitted before the CDBG contract is closed.

Errors and Non-Compliance

Typical Payroll Errors and Required Corrections

The following paragraphs describe common payroll errors and the appropriate corrective steps.

Inadequate payroll information. If the alternate payroll (such as a computer payroll) does not contain all of the information that would be on the DOL optional form WH-347, the employer will be asked to resubmit the payrolls on an acceptable form.

Missing addresses and Social Security Numbers. If the first payroll on which an employee appears does not contain the employee's address and Social Security Number, the employer will be asked to supply the missing information. A short note providing the information is all that is needed.

Incomplete payrolls. If the information on the payroll is not complete, for example, if work classifications or rates of pay are missing, the employer will be asked to send a corrected payroll.

Classifications. If the payrolls show work classifications that do not appear on the wage decision, the employer will be asked to reclassify the employees in accordance with the wage decision *or* the employer may request an additional classification and wage rate as described above. If reclassification results in underpayment (the wage rate paid on the payroll is less than the rate required for the new classification, the employer will be asked to pay wage restitution to all affected reclassified employees. (See Section 7.4.2 for instructions about wage restitution.)

Wage Rates. If the wage rates on the payroll are less than the wage rates on the wage decision for the work classification reported, the employer will be asked to pay wage restitution to all affected employees.

Apprentices and trainees. If a copy of the employee(s) registration or approved program ratio and wage schedule is not submitted with the first payroll on which an apprentice or trainee appears, the employer will be asked to submit a copy of each apprentice's or trainee's registration and/or the approved program ratio and wage schedule. If the ratio of apprentices or trainees to journeymen on the payroll is greater than the ratio in the approved program, the employer will be asked to pay wage restitution to any excess apprentices or trainees. Also, any apprentice or trainee that is *not* registered in an approved program must receive the journeyman's wage rate for the classification of work they performed.

Overtime. If the employees did not receive at least time and one-half for any overtime hours worked on the project, the following will occur:

1) If the project is subject to *CWHSSA overtime* requirements, the employer will be asked to pay wage restitution for all overtime hours worked on the project (overtime hours worked at other projects are not subject to CWHSSA). The employer may also be liable to the United States for liquidated damages computed at \$10 per day per violation.

Or,

2) If the project is *not* subject to CWHSSA, the employer will be notified of the possible *FLSA overtime* violations. Also, the Labor Relations staff may refer the violations to the DOL for further review.

Computations. If the payroll computations (hours worked times rate of pay) or extensions (deductions, net pay) show frequent errors, the employer will be asked to take greater care. Wage restitution may be required if underpayments resulted from the errors.

Deductions. If there are any "Other" deductions that are not identified, or if employee authorization isn't provided, or if there is any unusual (very high, or large number) deduction activity, the employer will be asked to identify the deductions, provide employee authorization or explain unusual deductions, as necessary.

Fringe benefits. If the wage decision contains fringe benefits but the payroll does not indicate how fringe benefits were paid [neither 4(a) nor 4(b) is marked on the payroll form], the employer may be asked to submit corrected payrolls and will be required to pay wage restitution if underpayments occurred. However, if the basic hourly rates for the employees are at least as much as the total wage rate on the wage decision (basic hourly rate *plus* the fringe benefit rate), no correction is necessary.

Signature. If the payroll is not signed or is missing, the employer will be asked to submit a signed Statement of Compliance for each payroll affected.

On-site interview comparisons. If the comparison of on-site interviews to the payrolls indicates any discrepancies (for example, the employee does not appear on the payroll for the date of the interview), the employer will be asked to submit a corrected payroll report.

Restitution for Underpayment of Wages.

Where underpayments of wages have occurred, the employer will be required to pay wage restitution to the affected employees. Wage restitution must be paid promptly in the full amounts due, less permissible and authorized deductions.

Notification to the prime contractor

The LSO will notify the prime contractor in writing of any underpayments that are found during payroll or other reviews (see sample letter below). The notice will describe the underpayments and provide instructions for computing and documenting the restitution to be paid. The prime contractor is allowed 30 days to correct the underpayments. Note that the prime contractor is responsible to the LSO for ensuring that restitution is paid. If the employer is a subcontractor, the subcontractor will usually make the computations and restitution payments and furnish the required documentation through the prime contractor.

----city letterhead-----

Notice of Payroll Violation

Dear Company Payroll Clerk:

As Labor Standards Officer for _____ project in the city of XXX (CDBG Contract #XXX), I have reviewed the payrolls that were submitted for this project. It appears that XXX Construction violated the Davis- Bacon and Related Act when ## of workers were not paid the specified wage rate that applies to this project. In my review, I found the following discrepancies:

Payroll #4 --- SAMPLE

Mr. John Doe is classified as a Common Laborer and is being paid \$6.00 per hour. The Wage Decision shows the rate as \$6.50 for this classification. Mr. Doe is due back wages of \$20.00 for this error in classification. (Original amount paid: \$240.00; Amount required to be paid: \$260.00; Difference: \$20.00)

Please respond within 30 days and provide the corrected payroll(s) to me to show restitution for underpayment of wages. Also, canceled check(s) or other acceptable evidence that the worker received restitution should be provided.

Sincerely,
Elected Official

Computing wage restitution

Wage restitution is simply the difference between the wage rate paid to each affected employee and the wage rate required on the wage decision for all hours worked where underpayments occurred. The difference in the wage rates is called the *adjustment rate*. The adjustment rate times the number of hours involved equals the gross amount of restitution due.

Overtime and underpayment. Overtime hours are defined as all hours worked on the site of the work in excess of 40 hours in any work week. Overtime hours must be paid at no less than one and one half times the regular rate of basic pay plus the straight-time rate of any required fringe benefits. If the employees did not receive at least time and one-half for any overtime hours worked on the project, the following will occur:

- If the project is subject to *CWHSSA overtime* requirements, the employer will be asked to pay wage restitution for all overtime hours worked on the project.
- The employer will also be liable to the United States for liquidated damages computed at \$10 per day per violation.
- Once the overtime violation dollar penalty (referred to as liquidated damages) is computed, the prime contractor will be notified in writing of the fine and wage restitution owed (see sample letter below). A check (payable to the Office) in the amount of the liquidated damages should be forwarded to the Office Labor Standards Specialist to be processed for HUD.

Notice of Determination to Assess Liquidated Damages

Date

Construction Company

Address

Dear _____ :

A review of payrolls submitted for the above Texas Community Development Block Grant Program contract indicates your firm has violated the Contract Work Hours and Safety Standards Act (CWHSSA).

CWHSSA requires that employees be compensated at the rate of one and one-half times the general wage rate, as established by the Department of Labor (DOL), for all hour required or allowed to work in excess of 40 hours a work week. Failure to comply with CWHSSA compels the assessment of liquidated damages at the rate of \$10.00 per day per worker for each overtime violation.

During construction for this CDBG contract, your company failed to compensate ## employees for hours worked in excess of 40 hours per week on ## occasions. These violations make your company liable, to the United States, for liquidated damages in the amount of \$\$\$\$\$. A check made out **the Office of Rural Community Affairs** for this amount may be mailed to our agency for processing.

However, under Sec., 104(c) of CWHSSA (40 U.S.C. 330(c)), 29 C.F.R. 5.8, and the U.S. Department of Housing and Urban Development (HUD) Handbook 1344.1, REV-1, CHG-1 Sec. 3-4f(3), a request for waiver or reduction for the determined amount of liquidated damages can be submitted. It must be made within sixty (60) days of the date of this letter or the determination will be final. The only grounds for requesting a waiver or reduction are the following: (1) the computation of liquidated damages is incorrect, or (2) the violation occurred inadvertently notwithstanding the exercise of due care. If such a request is filed based on one or both of these grounds, a written statement explaining why a waiver or reduction is justified must be included in the request. Written notice with the final determination on the request for waiver or reduction will be forwarded to you by HUD or DOL. If you do not intend to contest the liquidated damages determination, please notify me in writing within ten (10) days of receipt of this letter.

If you have any questions or need to request additional information concerning this matter, please contact , Labor Standards Officer for this project, at (555) 555-5555.

Sincerely,

Mayor or Judge

cc: Labor Standards Officer

Correction payrolls

The employer will be required to report the restitution paid on a correction certified payroll. The correction payroll will reflect the period of time for which restitution is due (for example, Payrolls #1 through #6; or a beginning date and ending date). The correction payroll will list each employee to whom restitution is due and their work classification; the total number of work hours involved (daily hours are usually not applicable for restitution); the adjustment wage rate (the difference between the required wage rate and the wage rate paid); the gross amount of restitution due; deductions and the net amount to be paid.

Employee signature

Each employee who has received restitution signs the correction payroll as evidence of their receipt of the payment.

Review of correction payroll

The contractor administrator will review the correction payroll to ensure that full restitution was paid. The prime contractor shall be notified in writing of any discrepancies and will be required to make additional payments, if needed, documented on a supplemental correction payroll within 30 days.

Unfound workers

Sometimes, wage restitution can not be paid to an affected employee because, for example, the employee has moved and can't be located. In these cases, at the end of the project the prime contractor will be required to place in a deposit or escrow account an amount equal to the total amount of restitution that could not be paid because the employee(s) could not be located. The LSO will continue to attempt to locate the unfound workers for 3 years after the completion of the project. After 3 years, any amount remaining in the account for unfound workers will be credited and/or forwarded by the LSO to HUD.

Labor Disputes

Even in the best of circumstances, things can go wrong. In a Davis-Bacon context, "things going wrong" usually means there's a difference of opinion - a dispute - about whether and to what extent underpayments have occurred. These disputes are usually between the LSO and one or more employers (the prime contractor and/or a subcontractor). The dispute may involve something simple such as an additional classification request that is pending before the DOL; or something as significant as investigative findings following a complaint of underpayment.

Administrative Review on Labor Standards Disputes

A dispute about labor standards and compliance can arise for a number of reasons. The labor standards clauses in the CDBG contract and DOL regulations provide for administrative review of issues where there is a difference of views between the LSO and any employer. The most common circumstances include:

Findings of underpayment. Compliance reviews and other investigations may result in findings of underpayment. The primary goal in every case and at every step in this process is to reach agreements about who may have been underpaid and how much wage restitution may be due and, of course, to deliver restitution to any underpaid workers. The LSO will usually work informally with the employer to reach such agreements. The employer will have an opportunity to provide additional information to the LSO that may explain apparent inconsistencies and/or resolve the discrepancies.

Withholding. The LSO may cause withholding from payments due to the prime contractor to ensure the payment of wages which are believed to be due and unpaid, for example, if wage underpayments or other violations are not corrected within 30 days after notification to the prime contractor. Withholding is considered to be serious and is not taken unless warranted. Very often, the amount kept in retention is sufficient to cover any back wage liability so withholding from payments is not considered necessary. However, if withholding is deemed necessary, the employer will be notified in writing. Only the amounts necessary to meet the employer's liability shall be withheld.

Deposits and Escrows

In every case, the Office attempts to complete compliance actions and resolve any disputes before the project is completed and final payments are made. Sometimes, corrective actions or disputes continue after completion and provisions must be made to ensure that funds are available to pay any wage restitution that is ultimately found due. In these cases, the Office allows the project to proceed to final closings and payments *provided* the prime contractor deposits an amount equal to the potential liability for wage restitution and liquidated damages, if necessary, in a special account. The deposit or escrow account is controlled by the LSO. When a final decision is rendered, the LSO makes disbursements from the account in accordance with the decision. Deposit/escrow accounts are established for one or more of the following reasons:

- Where the parties have agreed to amounts of wage restitution that are due *but* the employer has not yet furnished evidence that all of the underpaid workers have received their back wages. The deposit is equal to the amount of restitution due to workers lacking payment evidence. As proper documentation is received, amounts corresponding to the documentation are returned to the depositor. Amounts for any workers who can not be located are held in the escrow account for three years and disbursed as described under the paragraph on restitution on underpayment of wages.
- Where underpayments are suspected or alleged and an investigation has not yet been completed. The deposit is equal to the amount of wage restitution and any liquidated damages, if applicable, that is estimated to be due. If the final determination of wages due is less than the amount estimated and placed in the escrow account, the escrow will be reduced to the final amount and the difference will be returned to the depositor. If the parties agree to the investigative findings, the amounts due to the workers will be disbursed from the escrow account in accordance with the schedule of wages due. Amounts for unfound workers will be retained as described above. If the parties *do not* agree and an administrative hearing is requested, the escrow will be maintained as explained earlier.
- Where the parties are waiting for the outcome of an administrative hearing that has been or will be filed contesting a final determination of wages due. The deposit shall be equal to the amount of wage restitution and liquidated damages, if applicable, that have been determined due. Once a final decision is rendered, disbursements from the escrow account are made in accordance with the decision.

Debarment

Contractors and/or subcontractors that are found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of the Davis-Bacon and Related Acts (DBRA) will be ineligible (debarred) to participate in any DBRA or Davis-Bacon Act contracts for up to 3 years. Debarment includes the contractor or subcontractor and any firm, corporation, partnership or association in which the contractor or subcontractor has a substantial interest. Debarment proceedings can be recommended by the LSO or can be initiated by the DOL on its motion. Debarment proceedings are described in DOL regulations 29 CFR 5.12.

Exemptions

The following contracts and activities are exempt from Davis-Bacon except where indicated:

- Construction contracts of \$2,000 or less;
- Construction contracts of \$100,000 or less are exempt from CWHSSA only;
- Rehabilitation of residential property designed for fewer than eight families;
- Demolition and/or clearance activities (for example, debris removal), unless related to construction (demolition and clearance as independent functions are not considered construction);
- Labor/installation charges on equipment or materials purchases, if that portion of the contract is thirteen percent (13%) or less of the total cost of the item(s) purchased; Construction work performed by the employees of the Contractor Locality (force account) that may be engaged on an otherwise covered project; and
- Construction work performed by a public utility extending its own utility system within the boundaries of its Certificate of Convenience and Necessity.
- Once the public utility has entered into an agreement with Contractor Locality to complete the improvements, the public utility company may perform the work either by furnishing its own materials and labor or by contracting out the work.
- If the public utility performs the construction work but will not own or maintain the improvements once complete, this exception to Davis-Bacon will not apply.
- The Contractor Locality must notify the Office if pursuing this method. The Office may request documentation prior to authorizing payment that the price charged by the public utility is less than the price that would be anticipated if the construction had been procured by sealed bids. With the exception of the situations listed in this section, all workers employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under CDBG program shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended.

Recordkeeping Requirements

The Contractor Locality must maintain a file with the following documentation for each construction contract:

- Appointment of Labor Standards Officer*
- Copy of Wage Rate Request(s)*
- Additional Classification request(s)*
- Bid Document(s) with Labor Standards Provisions included
- Contract Document(s) with Labor Standards Provisions included
- Actual Advertisements for Bids (either full page or with publisher's affidavits) or evidence of quotes/estimates received (for small purchase procurement)
- Ten-Day Call Confirmation Letter(s)
- Bids Received
- Bid Tabulation Sheet(s)
- Contractor Eligibility Verification(s) (for each prime and/or subcontractor) *
- Pre-construction conference minutes and sign-in sheet(s)
- Start of Construction Notice(s)*
- Payrolls, with evidence of compliance review
- Employee interviews

- Wage violations (amount of restitution, number of hours and days)*
- Final Wage Compliance Report(s)*
- Interim inspection reports
- Certificate(s) of Construction Completion*
- As-built Plans
- Change orders*

*Must be submitted to the Office

Laws and Regulations

7.7.1 Laws Regarding Labor Standards

HOUSING AND COMMUNITY DEVELOPMENT ACT - SECTION 110

- Requires payment of prevailing wage rates for every contract price over \$2,000 (financed by federal funds).
- Requires all laborers employed by contractors or subcontractors on construction work financed in whole or in part with assistance received under the Act will be paid wages at rates not less than those prevailing in accordance with the Davis-Bacon Act.
- Requires that construction contracts of \$2,000 or over financed by federal funds will be covered under the Davis-Bacon Act. Exemptions include: force account construction work done by state or local governments, and rehabilitation of structures where fewer than eight **units will bere habilitated or a group of** structures to be rehabilitated under one contract or as one activity (as long as the structures are intended for separate ownership).

DAVIS-BACON ACT

- Requires payment of prevailing wage rates for every contract price over \$2,000 (financed by federal funds).
- Requires employees to be paid not less than once a week.
- Requires posting of scale of wages to be paid (in a prominent place at site of work).
- Requires withholding of payments to contractors for violations of the prevailing rate provisions.
- Requires termination of the contract for failure to pay required wages.
- Permits direct payments to laborers and mechanics from withheld funds.
- Requires 3 years debarment for disregard of responsibility under this Act.
- Includes the right of action or intervention against contractor by laborer (where payments withheld were insufficient).

CONTRACT WORK HOURS & SAFETY STANDARDS ACT

- Provides that work in excess of 40 hours per week shall be compensated for at rates not less than one and one-half times the basic rate of pay.
- Violation of this provision makes the contractor and any subcontractor liable to the affected employee for their unpaid wages and to the United States for liquidated damages.
- Permits the city/county to withhold funds determined to be necessary to satisfy any liabilities.

- Includes the right of action and intervention against contractors and sureties (where withheld funds were insufficient).
- Authorizes direct payments by the federal government to laborers.
- Includes sixty days right of contractors to appeal.
- Authorizes review of appeal by Secretary of Labor (Secretary decision shall be final).
- Includes the right of contractors to file a claim with the wage appeals board within 60 days after a decision has been rendered.
- Requires liquidated damages to be computed at the rate of \$10 per day for each calendar day an employee is permitted to work in excess of 40 hours per week.

COPELAND (ANTI-KICKBACK) ACT

- Prohibits the payment of any fee, commission, compensation or granting of any gift or gratuity as an inducement for award.
- Authorizes recovery of such payments by setoff of monies owing to contractor. Such action can be taken by prime contractor, federal government, or appropriate court of the U.S.
- Authorizes the withholding of funds.
- Gives power to GAO to inspect and audit to ascertain whether such payments were made.
- Provides basis for termination of contract and could result in criminal prosecution by the federal government pursuant to 18 U.S.C. 874.

FAIR LABOR STANDARDS ACT

- Sets basic minimum wage and overtime pay standards.
- Regulates the employment of minors.

DAVIS-BACON REGULATIONS

The Department of Labor has published rules and instructions concerning Davis-Bacon and other labor laws in the Code of Federal Regulations (CFR). These regulations can be found in **Title 29 CFR Parts 1, 3, 5, 6 and 7. CODE OF FEDERAL REGULATIONS, TITLE 29, PART 1**

- Deals essentially with the method of determining prevailing wage rates.

CODE OF FEDERAL REGULATIONS, TITLE 29, PART 3

- Details conditions under which authorized permissible deductions are permitted from employees' wages.
- Requires contractors, subcontractors, and lower-tier subcontractors to file weekly payroll statements.

CODE OF FEDERAL REGULATIONS, TITLE 29, PART 5

SUBPART A: GENERAL CONTRACT PROVISIONS AND RELATED MATTERS

Includes:

- Request for wage determinations.
- Use and effectiveness of wage determination.
- All construction contracts including subcontractors and lower-tier subcontractors, must contain labor standards provisions.
- Provisions on apprentices and trainees.
- Responsibility of federal agencies for enforcement measures.

- Examination of payrolls.
- Interview of employees.
- Investigation of wage compliance status of contractors.
- Withholding of insurance pending correction of violations.
- Supervision of restitution payments and referral for criminal or debarment action.
- Reports to HUD, Dept. of Labor and investigation by Dept. of Labor.

**CODE OF FEDERAL REGULATIONS, TITLE 29, PART 5 - SUBPART B:
INTERPRETATION OF THE FRINGE BENEFITS PROVISIONS OF THE DAVIS-
BACON ACT**

Includes:

- Fringe benefits requirements and wage determinations.
- Funded and unfunded fringe benefit plans.
- Meeting wage determination obligations.
- Overtime payments.
-

CODE OF FEDERAL REGULATIONS, TITLE 29, PART 7

Includes:

- Appeals to DOL's wage appeals board.
- Review of wage determinations issued.
- Review of other proceedings and related matters.

DOL Regulations are available on-line:

<http://www.dol.gov/dol/esa/public/regs/cfr/whdcfr.htm>.

Appointment of Labor Standards Officer

Contractor Locality: _____ Contract No: _____

I, _____ hereby appoint _____
(Print Mayor/County Judge) (Print Name)

as the Labor Standards Officer for the aforementioned contract. The appointed Labor Standards Officer is assigned to oversee the labor portion of the contract and will be responsible for assuring compliance with all requirements under **Chapter 7 of the Community Development Block Grant Program Project Implementation Manual.**

Appointed Labor Standards Officer: _____
(Print Name)

Address: _____

City: _____ State: _____ Zip: _____

Telephone Number: () - Fax Number: () -

I acknowledge the appointment and duties of Labor Standards Officer.

Signature: _____ Date: _____
(Labor Standards Officer)

Appointed by: _____ Title: _____
(Print Mayor/County Judge)

Signature: _____ Date: _____
(Mayor/County Judge)