

## Chapter 9 - Record of Changes

Date	Description of Change	Section
2020	HUD Final Rule, Enhancing and Streamlining the Implementation of Section 3 Requirements for Creating Economic Opportunities for Low- and Very LowIncome Persons and Eligible Businesses	CPD-21-09
2022	Davis Bacon & Related Acts Checklist (Revised June 2018) was removed. Please refer to <a href="#">Davis-Bacon and Labor Standards: Agency/Contractor Guide and Contractor Addendum - HUD Exchange</a> for the most current information.	
10/2023	Davis-Bacon and Related Final Rule Provisions went into effect October 23, 2023.	
7/2024	U.S. Department of Labor final rule updates and revises the regulations issued under section 13(a)(1) of the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay requirements for executive, administrative, and professional (EAP) employees.	

# CHAPTER 9 – CONSTRUCTION AND LABOR STANDARDS

## INTRODUCTION

This chapter describes the policies and procedures that must be followed when undertaking construction projects with Community Development Block Grant (CDBG) funds, which include federal labor standards, payroll requirements, pre-construction conferences, and other requirements. Compliance with federal labor standards requires recipients, contractors, and subcontractors to meet and document compliance with the federal requirements associated with the employment of workers on construction projects. The subrecipient must appoint a Labor Standards Compliance Officer (LSCO) for oversight and to ensure compliance with the Davis-Bacon Act and other labor related laws.

A good resource for Labor Compliance Officers and contractors is Davis-Bacon Labor Standards: Agency/Contractor Guide and Contractor Addendum. This publication can be found on the HUD Exchange: [Davis-Bacon and Labor Standards: Agency/Contractor Guide and Contractor Addendum - HUD Exchange](#)

The Davis-Bacon and Related Acts were recently updated for the first time in 40 years. The Final Rule, *Updating the Davis-Bacon and Related Acts Regulations*, which includes the changes, became effective October 23, 2023. A comprehensive overview of the changes can be found on the U.S. Department of Labor’s website: [Final Rule: Updating the Davis-Bacon and Related Acts Regulations | U.S. Department of Labor \(dol.gov\)](#) or <https://www.dol.gov/agencies/whd/government-contracts/construction/rule-making-davis-bacon>. It is imperative that subrecipients review the regulations and update their Davis-Bacon and Related Acts compliance materials accordingly.

## STATUTORY PROVISIONS

The five statutory provisions that must be followed for construction and labor standards on all CDBG funded projects are as follows:

1. **Section 110, Chapter 69, Title 42, Housing and Community Development Act of 1974 (42 USC 5310)**
  - Provides that “All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter 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 (40 USC 276a-276a-5): Provided that this section shall apply to the rehabilitation of residential property only if such property contains not less than 8 units.”
2. **Davis-Bacon Act (DBA) (40 USC 276A-276A-5)**
  - Requires the payment of minimum prevailing wages determined by the U.S. Department of Labor to laborers and mechanics working on federal contracts in excess of \$2,000 for the construction, alteration, or repair, including painting and decoration, of public buildings and public works.<sup>1</sup>
3. **Contract Work Hours and Safety Standards Act (CWHSSA) (40 USC 327-333).**
  - CWHSSA provides that work in excess of 40 hours per week, which occurs on the job site, shall be compensated for at rates not less than one and one-half times the basic rate of pay.
4. **Copeland Act (Anti-Kickback Act) (40 USC 276c)**
  - Makes it a criminal offense for any person to induce, by any manner whatsoever, any person employed in the construction, prosecution, completion, or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give any part of the compensation to which he/she is entitled under his contract of employment.
5. **Fair Labor Standards Act of 1938, as Amended (FLSA), (29 USC 201, et.seq.)**
  - Establishes minimum wage, overtime pay (40-hour workweek), recordkeeping, and child labor standards.

## SECTION 1 – DAVIS-BACON ACT REQUIREMENTS

The Davis-Bacon Act (DBA), enacted by the United States Congress, covers contracts that are directly federally funded. After the DBA was enacted, Congress extended the reach of its provisions by passing Davis-Bacon Related Acts (DBRA), which cover contracts that are indirectly federally financed (or assisted) in whole or in part. The CDBG program is funded through HUD. Thus, most of the CDBG program’s construction contracts are indirectly federally funded and subject to DBRA. DBA and DBRA are basically the same in substance and purpose. This chapter will use the term DBRA to refer to the Davis-Bacon Act, Davis-Bacon requirements, prevailing wage requirements, DBA, and DBRA.

DBRA requires the payment of locally prevailing wages to laborers and mechanics for on-site construction, alteration, or repair on federally financed projects having contracts in excess of \$2,000. Locally prevailing wages are determined for specific employee classifications by the U.S. Department of Labor (DOL) and made available to the public as “wage determinations.” A contractor(s) on a CDBG project covered by DBRA must meet, at a minimum, the wage requirements set forth in the wage determination(s) applicable to the project.

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<sup>1</sup> 40 U.S.C. 3142.

## Exceptions

1. Contracts solely for demolition, when no federally funded construction (which would require prevailing wage rates) is anticipated on the site
2. Rehabilitation of a residential structure or residential properties, under one ownership, that will contain less than eight (8) units when completed
3. Construction work done by employees of the subrecipient(s) (i.e. the local government)
4. Machinery and equipment purchases, which include installation, where the cost of installation is more than an incidental amount of the total cost of the machinery and equipment
5. Employees of utilities are exempt providing they are only extending service to the property
6. The subrecipient(s) must consult DED prior to making a determination that DBRA does not apply to the CDBG project. It is important that this determination be made early in the process to ensure that any construction cost estimates reflect the full costs of the labor.

## DBRA Requirements

1. **Wage Determinations Source:** The responsibility of determining prevailing wages is delegated to the DOL. To meet this responsibility, DOL surveys contractors on construction projects to determine the minimum wages for each locality. DOL then issues wage determinations for each locality.
2. **Obtaining a Wage Determination:** A wage determination is a document listing a prevailing wage rate and fringe benefits for each classification of laborers or mechanics which DOL has determined to be prevailing in a given area for a particular type of construction. The minimum pay requirements are referred to as **prevailing wages**. Subrecipients must obtain wage rate determinations from DOL prior to bid advertisement, and these determinations must be included in bid documents and the construction contract. Subrecipients obtain the wage determinations directly from the website <https://sam.gov/>. Subrecipients must obtain the wage determination that relates to the project based on project location, construction type, and date. Include the wage rate determination in the bid document.
3. **Wage Determination(s) as Part of the Construction Contract:** DBRA requires that each prime contract over \$2,000, that is assisted by federal funds for construction, alteration, or repair of public buildings or public works, contain the applicable DOL wage determination(s). Subcontracts are also subject to DBRA by a required contractual contract containing prevailing wage provisions between the prime contractor and subcontractor(s). If any portion of a contract is subject to DBRA, then all work under that contract, including the work of subcontractors, is subject to DBRA. This is a critical requirement. All DBRA-related contract modifications must be flowed down to lower-tier subcontractors. Prime contractors and upper-tier subcontractors must flow down any contract modifications in addition to the enumerated contract clauses and applicable wage determination(s) that are included in the original prime contract.<sup>2</sup>
4. **Selecting and Downloading the Proper Wage Determination:** To obtain the appropriate type of wage determination, the subrecipient should be familiar with the four determination types. Factors to consider when choosing a wage determination type include:
  1. **Residential:** Residential construction is defined as those projects involving the construction, alteration or repair of single-family houses or apartment buildings of no more than four (4) stories in height. The definition includes all incidental items such as site work, parking areas, utilities, streets, and sidewalks, unless there is an established area practice to the contrary.

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<sup>2</sup> 29 CFR 5.5(a)(6).

2. **Building:** Building construction includes apartment buildings exceeding four (4) stories, and all other sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies, including incidental items such as grading, paving and utilities. Examples include high-rise apartment buildings, nursing homes and convalescent facilities, community centers, fire stations, commercial buildings, and dormitories.
  3. **Highway:** Highway construction includes the initial construction, alteration or repair of roads, streets, highways, alleys, parking areas, sidewalks and other similar projects not incidental<sup>3</sup> to residential, building or heavy construction.
  4. **Heavy:** Heavy construction projects are those that are not properly classified as “residential”, “building”, or “highway”. Some examples include antenna towers, canals, drainage and irrigation projects, sanitary and storm sewers, water mains and supply lines (not incidental to other construction), and storage tanks.
  5. **Multiple Types of Construction:** When a project involves work in more than one type of construction (e.g. building, heavy, highway, residential,) the contracting agency must incorporate the applicable wage determination for each type of construction involved that is anticipated to include a substantial amount of construction.<sup>4</sup>
5. **Ten Day Responsibility:** It is the subrecipient’s responsibility to ensure that the wage determination(s) is in effect 10 days before the bid opening date was part of the original bid package or becomes part of the original bid package by addendum and sent to all who obtained a bid package. The bidders are thus given the opportunity to change their bids, prior to bid opening, based on the updated wage determination.

The subrecipient searches the DOL website at <https://sam.gov/> to determine if there have been any updates and documents that wage determination was verified 10 days prior to bid opening. If there has been an update, the subrecipient must obtain (download) the updated wage determination and send a copy by addendum to all who obtained a bid package.

6. **Failure to Include or Use of Incorrect Wage Determination:** Failure to include the effective wage determinations in bid documents or contracts will not relieve subrecipients from potential liabilities or enforcement actions resulting from the payment of wages below the prevailing wage rates. In cases of an incorrect determinations or failure to include a determination, the subrecipient must either terminate and re-solicit the contract with the valid determination or ensure that all parties sign a supplemental contract to the contract that makes the effective wage determination retroactive to the beginning of construction.
7. **Retroactive:** If the subrecipient fails to include the wage determination, or for any reason the wrong wage determination is included in the contract, the applicable wage determination reflecting the proper rates must be incorporated into the contract and be retroactive to the beginning of the construction. The recipient can either terminate and re-solicit or incorporate the wage determination by change order, provided the contractor is compensated for any increases in wages resulting from the change.

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<sup>3</sup> For example, the repair of streets and parking areas in a residential area that is performed independent of any other construction work is subject to highway wage rates. However, streets, parking areas and sidewalks installed during the new construction of residential apartments would be considered incidental to the residential construction work and would be performed pursuant to the residential wage decision applicable to the project.

<sup>4</sup> 29 CFR 1.6.(b)(1).

8. **Contract Award Delays:** If a wage determination has been issued, and if a contract has not been awarded within 90 days of bid opening, the recipient should check <https://sam.gov> website to determine if the wage determination is still prevailing and if there have been any modifications issued.
9. **Noncompliance:** Noncompliance with the labor standards contract provisions may result in withheld funds, sanctions, or contract termination.

For more information about Davis Bacon, refer to [Davis-Bacon and Labor Standards: Agency/Contractor Guide \(hudexchange.info\)](https://hudexchange.info)

## SECTION 2 – THE COPELAND "ANTI-KICKBACK" ACT

The Copeland Anti-Kickback Act (18 U.S.C. §874 as implemented in 29 CFR Part 3) makes it a criminal offense for any person to induce, by any manner whatsoever, any person employed in the construction, reconstruction, completion, or repair of any public building, public work, or building, or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he/she is entitled under his/her contract of employment. The Act also provides for the submission of weekly certified payroll reports (CPRs) by all contractors and subcontractors. All contracts for construction, reconstruction, or repair over \$2,000 on federally assisted projects must include the following prohibition:

“No contractor or subcontractor shall induce, by any means, any person employed in such publicly funded construction, reconstruction or repair to give up any part of the compensation to which he is otherwise entitled except for authorized payroll deductions.”

Subrecipients should conduct confidential interviews with employees to assure compliance with the terms of this law, and the contractor is required to maintain payroll records, and to submit weekly certified payrolls documenting compliance. The Copeland Anti-Kickback Act requires that payment to employees must be made at least once a week without subsequent deductions or rebate on any account except "permissible" payroll deductions. The recipient must obtain payrolls and a Statement of Compliance from contractors and subcontractors weekly. Subrecipients must check these payrolls for accuracy. Each employer and the subrecipient must maintain the basic records supporting the payrolls.

## SECTION 3 – CONTRACT WORK HOURS & SAFETY STANDARDS ACT (CWHSSA)

The Contract Work Hours and Safety Standards Act (CWHSSA), (40 U.S.C. §327 et seq.), applies to federally financed (in whole or in part) contracts over \$100,000, and provides that workers be paid at least one and one-half times their basic rate of pay for any time worked in excess of 40 hours weekly. In the event of violations, the contractor or subcontractor shall be liable to any affected employee for his unpaid wages as well as to the United States for liquidated damages computed at \$29.00 per day for each employee who worked overtime and was not paid overtime wages. Funds may be withheld from contractors and subcontractors to satisfy unpaid wages and liquidated damages.

Contractors and subcontractors must be advised in writing that, if they are aggrieved by the withholding of a sum of liquidated damages, they have the right to appeal within 60 days. A written appeal must state the reason for liquidated damages and should be addressed to DED.

## SECTION 4 – THE FAIR LABOR STANDARDS ACT (FLSA)

The Fair Labor Standards Act (FLSA) contains federal minimum wage rates, overtime requirements, and child labor requirements. These requirements generally apply to any labor performed (with or without federal assistance) and are generally pre-empted (or superseded) by other federal standards, such as the DBRA and related prevailing wage requirements and Contract Work Hours and Safety Standards Act overtime provisions. Only the DOL has the authority to administer and enforce FLSA. HUD will refer to the DOL any possible FLSA violations found on HUD projects.

## SECTION 5 – SECTION 110, CHAPTER 69, TITLE 42, HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974 (42 USC 5310)

The HCD Act of 1974 created the CDBG program. The CDBG program provides that “[a]ll laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter 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 (40 USC 276a-276a-5): Provided that this section shall apply to the rehabilitation of residential property only if such property contains not less than 8 units.”

## SECTION 6 –GENERAL LABOR REQUIREMENTS

DOL guidelines include additional requirements as listed below. Subrecipients should note that they are responsible for ensuring compliance by contractors and subcontractors. Inclusion of appropriate clauses in contracts, as well as monitoring by the recipient, is therefore very important. Labor standards contract clauses and wage determinations are effective by “operation of law” meaning they are incorporated even when they have been omitted by a covered contract.<sup>5</sup>

### Compliance Responsibility

The prime contractor<sup>6</sup> is responsible for compliance by any subcontractor or lower tier subcontractor with all labor provisions and other federal or State requirements. Subcontractors communicate through the prime contractor. The subrecipient will consider the prime contractor to be the sole point of contact regarding contractual matters.

### Record Availability

The contractor must make records available for review and permit on-the-job interviews of employees. Contractors must maintain all job-related files and documents for three years after completion of project.

### Monitoring

DED encourages the labor compliance officer or another appropriate person to visit the construction site a minimum of three (3) times to conduct the employee interviews from a representative sample of trades. The employee interviews should be compared to the applicable payrolls for the date the interview was conducted to determine if there are any discrepancies. Depending on the length of the contract period, whether subcontractors are used, or whether different workers are utilized over the life of the contract, it may be appropriate to conduct interviews on multiple occasions to

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<sup>5</sup> 29 CFR 5.5(e)

<sup>6</sup> Includes any person or entity that enters a contract with an agency (regardless of whether they consider themselves to be a developer/owner or general contractor). The definition also includes the controlling shareholders or member of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractors that has been delegated responsibility for overseeing all or substantially all the construction anticipated by the prime contract. All these entities may be held liable under the regulatory provision at 29 CFR 5.5(a)(6), which states that prime contractors are responsible for the compliance of all subcontractors on the contract. 29 CFR 5.2

ensure the samples are representative. A suggested Record of Employee Interview Form (HUD-11) is made available in English and Spanish on the HUD website. The recipient may use this form or a facsimile to gather the required information.

## Contractor Eligibility

Prior to awarding any prime contract, subrecipients must verify the eligibility of all contractors/subcontractors and document in the file. Contractor/subcontractors eligibility must be checked on-line at [www.sam.gov](http://www.sam.gov) and the Limited Denial of Participation (LDP) list at

[https://www.hud.gov/program\\_offices/general\\_counsel/limited\\_denial\\_participation\\_hud\\_funding\\_disqualifications](https://www.hud.gov/program_offices/general_counsel/limited_denial_participation_hud_funding_disqualifications)

## Apprentices

The contractor must furnish a certification from the DOL Bureau of Apprenticeship and Training or a Bureau of Apprenticeship and Training recognized state apprenticeship agency for each apprentice employed on the project. All apprentices and trainees must be identified in each payroll submission.

The ratio of apprentices to journeymen must not exceed the approved ratio under their respective program, and their wage rate must not be less than prescribed under those programs.

## Volunteers

Exceptions to the labor requirements are made for volunteer services on a case-by-case basis. Subrecipients should contact DED for approval.

## Helpers

Federal labor standards do not recognize the “helper” classification. A contractor must re-classify any employee listed as a helper on weekly payrolls with a classification listed on the appropriate wage determination.

## Required Postings

The wage determination and any additional wage classifications labor posters must be posted at the site of the work, in a prominent and accessible place where it may be easily seen by employees and easily readable. The [elaws Poster Advisor](#) can be used to determine which poster(s) employers are required to display at their place(s) of business. Posters, available in English and other languages, may be downloaded free of charge and printed directly from the Advisor.

Federal Posters (<https://www.dol.gov/general/topics/posters>)

- Wage Determination(s)
- Additional requested and approved wage classification(s)
- Notice to All Employees WH-1321
- Job Safety and Health Protection OSHA 3165\*  
*\*The OSHA 3165 poster also contains Whistleblower protections that must also be posted*
- Equal Employment Opportunity
- Employee Polygraph Protection Act
- Uniformed Services Employment and Reemployment Rights Act
- E-Verify Participation
- Right to Work
- FMLA

State Posters (<https://dol.nebraska.gov/LaborStandards/Compliance/RequiredPosters>)

- “Notice to All Employees” – Nebraska Department of Labor
- Discrimination in Employment Housing, Public Accommodations is Prohibited by State Law
- Unemployment Insurance Advisement of Benefit Rights
- 3-in-1 State Labor Law Poster

## SECTION 7 – BID OPENING

### Bid Opening and Bid Tabulation

All bids received must remain sealed and in a safe place until the bid opening. All bids received should be logged in with the time, date of receipt, name of offeror, and procurement number.

The public bid opening should be conducted in a business-like manner. The bids should be read aloud during the bid opening meeting. The apparent low bidder will be determined during the bid opening. However, the bids also must be reviewed for both technical and legal responsiveness. In addition, the bidders must be evaluated as having the capacity to furnish products and/or services required. Minutes of the bid opening, a tabulation of the bids, and copies of all bids received should be placed in the contract file.

### When Bids are Higher than Cost Estimates

#### Negotiation Procedures

When the lowest bid exceeds the amount allocated for the project, the subrecipient may negotiate with the low bidder in accordance with Nebraska statutes to bring the contract within the available funding level. The subrecipient can reject all bids or provide needed funds from other sources or through reallocation of CDBG funds. If the subrecipient has reason to believe available funds are likely to be inadequate for the full scope of work proposed, the subrecipient should request deductible alternatives in the bid document so that the project can proceed in a timely fashion and not require a second solicitation.

#### Deductible Alternatives

If deductible alternatives are requested, the bid document must specify the method and order in which alternatives will be applied in determining the low bid. Drawings also must clearly show the alternative. For example, if the project was for 1,500 linear feet of street construction, sidewalks, street lighting, and replacement of sanitary sewer lines, 300 linear feet of sidewalks might be a deductible alternative. The desirability of using this method when cost estimates are very close to the amount of available funds (or if cost estimates are based on roughly comparable projects) cannot be overestimated. Failure to do so may require modification of bid packages and a repetition of the entire process with delays in project implementation.

If this method is not used and the bid exceeds the amount allocated, the subrecipient can provide the additional funds from other sources.

## SECTION 8 – CONTRACT AWARD

#### Citation

- Code of Federal Regulations 2 CFR 200 Chapter 300 Procurement, 2 CFR 200.326 (Bonding Requirements)
- Code of Federal Regulations 2 CFR 200.318 (i) (Retention and access requirements for records)
- HUD CPD 570.502(a)(7) (Retention of Records)



## Verifying Contractor

Prior to award of the contract, the subrecipient must check the System for Award Management ([sam.gov](https://sam.gov)) to make sure the proposed prime contractor and subcontractors are not on the federal list of debarred, suspended, or ineligible contractors. The subrecipient must check the company, as well as the owner of the construction company. The subrecipient must print the result(s) of the search with the date searched and retain in their files.

As identified in Section 4.1 of the agreement between DED and the subrecipient, any such subrecipient or contractor of the subrecipient must be authorized to transact business in the State of Nebraska. All subrecipients and contractors are expected to comply with all Nebraska Secretary of State and Department of Revenue registration requirements, including any registration requirements pertaining to types of business entities.

**\*\*Construction contractors are expected to meet all applicable requirements of the Nebraska Contractor Registration Act and provide a current valid certificate of registration to the Subrecipient for the Subrecipient's records.**

## Contract Award Procedures

The contract must be awarded to the lowest responsible bidder. The successful bidder must have employees who will perform activities on the project. If the contract is awarded to other than the low bidder, the subrecipient must prepare a written statement explaining why each lower bidder was deemed non-responsible or nonresponsive. To be responsive, the bidder must have submitted a written plan, if the contract equals or exceeds \$100,000<sup>7</sup>.

Following award of the contract, the contract documents and applicable bonding and insurance must be completed and executed. Contract documents include all the items contained in the bid package, as well as the executed contract, bid proposal, contractor certifications, and bond and insurance forms.

## The Notice of Contract Award (LSE 7) Must Be Sent to DED Within 10 Days of Award

The Notice of Contract Award includes the project name and location, the number of the applicable wage determination, the name of the business awarded the contract, the contract amount, and the name of the person identified by the municipality as responsible for labor standards compliance. If there are multiple general "prime" contractors with the subrecipient, a separate LSE7 must be submitted for each general contractor.

## Pre-Construction Conference

Following contract award, it is highly <sup>8</sup>recommended that the recipient hold a pre-construction conference with the prime contractor and any subcontractors. The purpose of the pre-construction conference is to apprise the contractor and subcontractors of labor standards, equal opportunity, and other contract obligations and responsibilities. The conference allows an opportunity to obtain any outstanding contract documents and provide the contractor with posters for the construction site. It also provides an opportunity for the engineer to discuss construction related issues. Place written documentation of this meeting in the file.

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<sup>7</sup> 24 CFR Part 135,

<sup>8</sup> [CDBG Chapter \(hud.gov\)](https://www.hud.gov/cdbg)

Below is a list, not all-inclusive, of items to be discussed:

- Davis Bacon (including submission of weekly payrolls)
- Employee interviews, using the HUD-11 Form (Spanish or English)
- Determine if additional wage determinations will need to be requested
- Posters for the job site including, but not limited to the Employee Rights Under the Davis-Bacon Act (WH1321), Job Safety and Health Protection (OSHA 3165), and Equal Opportunity Employment, other posters as required by the Department of Labor
- Copy of the wage determination and additional classification approvals, which MUST be posted at the job site
- Written contract(s) between prime contractor and all subcontractors
- Written contract(s) between subcontractors and subcontractors and any independent contractors

## Notice to Proceed

Following execution of the contract documents and completion of the preconstruction conference, the subrecipient will issue a “Notice to Proceed” to each prime contractor to begin work. The Notice to Proceed must establish the construction start date, scheduled completion date, and the basis for assessing liquidated damages. The construction period and basis for assessing liquidated damages must be consistent with these sections of the contract documents.

## SECTION 9 – WEEKLY PAYROLL REQUIREMENTS

### Payroll Terminology, Requirements, and Review Procedures

DOL provides a sample payroll form along with instructions at: [Instructions For Completing Payroll Form, WH-347 | U.S. Department of Labor \(dol.gov\)](#)

### Responsibility of Prime Contractor Regarding Subcontractors

The prime contractor on a project is responsible for proper payment to all laborers and mechanics employed by the prime, employed under a subcontract to the prime, or employed under any lower tier subcontract. The construction contract between the subrecipient and the prime contractor must require all subcontracts to contain clauses imposing the Federal Labor Standards Provisions. If the required provisions are not included in a subcontract, the prime contractor is responsible for underpayments and liquidated damages of subcontractors.

When labor standards violations occur, whether at the contractor or subcontract level, the subrecipient will require corrections via the prime contractor. It is the prime contractor's responsibility to ensure corrective action by the applicable subcontractor.

### Weekly Payroll Submission Requirements and Payroll Numbering

It is the responsibility of each contractor to submit the weekly payrolls (each week) to the subrecipient from the time work begins on the project until the work is completed. If no work is performed on the project during a given workweek the contractor may do one of the two options: 1) submit a payroll that states “no work” for each week or 2) the contractor submits in writing to the subrecipient the period of time that no work will occur on the project, once work resumes, contractors should use the next consecutive number.

Payrolls of subcontractors are to be submitted via the prime contractor. The prime contractor will review the subcontractor’s payrolls and may require corrections. The prime contractor forwards the subcontractor’s payroll(s) to the subrecipient. Payrolls may be collected by the project engineer for submission to the subrecipient; however, this does not relieve the prime contractor of responsibility for review of payrolls.

## Payroll Forms

Contractors may use the payroll form, DOL publication WH-347. This form is available on DOL's website at [PAYROLL \(dol.gov\)](https://www.dol.gov). The signature page of WH 347, where a contractor certifies wages and fringes, if any, is commonly called the Statement of Compliance and must be attached to each payroll. The Statement of Compliance must be a component of each weekly payroll and must be signed by the contractor. A contractor may use his own payroll form or other computer-generated form if all required items are included, but the wording of the Statement of Compliance must be verbatim.

## Addresses and Social Security Numbers

Effective January 18, 2009, payrolls shall not report employee addresses or full social security numbers (SSNs). Instead, the first payroll on which each employee appears shall include the employee's name and an individually identifying number, usually the last four digits of the employee's SSN. Afterward, the identifying number does not need to be reported unless it is necessary to distinguish between employees, e.g., if two employees have the same name.

Employers (prime contractors and subcontractors) must maintain the current address and full SSN for each employee and must provide this information upon request to the contracting agency or other authorized representative responsible for federal labor standards compliance monitoring. Prime contractors may require a subcontractor(s) to provide this information for the prime contractor's records. DOL has modified Form WH-347, Payroll, to accommodate these reporting requirements.

## Signature on the Statement of Compliance

The Statement of Compliance must be signed by an owner or designated employee of the contractor for each weekly payroll. In cases where a designated employee signs, the contractor must submit written authorization signed by the owner of the company. The written authorization documentation must include the company name, owner's name, the employee being designated, and the date the authorization occurred. For example, "I Jane Doe owner of ACME company, designate Joe Jones, Job Title, to complete the Statement of Compliance for LMN project as of date."

## Prompt Submission of Payrolls

The subrecipient should require that all original payrolls, from the prime contractor and subcontractor, be submitted by the prime contractor to the subrecipient within seven working days after the payroll ending date. Payrolls must be examined promptly by the subrecipient so that any problems discovered can be corrected early, while contractors are still on the job. Particular attention should be given to payroll review during early stages of construction to ensure that the prime contractor understands and is fulfilling his/her responsibilities concerning payrolls. If acceptable payrolls are not submitted in a timely manner, the subrecipient may withhold contractor payment until acceptable payrolls are submitted.

## Concurrent Jobs

The payrolls must show only the regular and overtime hours worked on the CDBG project. If an employee performs work at job sites other than the project for which the payroll is prepared, those hours should not be reported on the payroll. However, the gross pay from all job sites must be shown on the payroll.

## Wage Rates and Proper Classification

Payrolls must be checked against the applicable wage determination(s), engineer's inspection reports (if available), employee interview forms (if available), and actual work done or in progress to determine if prevailing wage requirements regarding rates and proper worker classifications<sup>9</sup> were met. The proper calculation of straight time rates

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<sup>9</sup> *Ratio of laborers to mechanics.* Except for concrete, landscaping and similar trades, the ratio of laborers to mechanics should not exceed 1:1. A higher ratio of laborers to mechanics normally indicates misclassification. That is, the workers classified and paid as laborers are, instead, performing

and time-and-a-half rates for overtime hours must be checked as well as mathematical accuracy of calculations pertaining to wages and deductions. The subrecipient must review all payroll documentation.

## Employees Performing Work in More Than One Classification

A person employed as a laborer or mechanic and performing work in more than one job classification must be paid at least the required rate for the actual hours spent in each classification. Payrolls may be kept according to the hours spent in each classification. Such payrolls, called split payrolls may be used to apportion hours worked at more than one classification in a workday according to the hours worked in each classification.

## Working Foreman Requirements

A working foreman who devotes at least 20% of his time to laborer or mechanic duties is covered under DBRA and must be classified according to work performed. Such a classification, for example, an electrician, must come from the applicable wage determination. The working foreman, if paid a flat salary with salary designated on the payroll, must be making at least the minimum rate and fringe for his classification. The amount of the salary must be stated on each payroll. If there is a considerable amount of overtime being worked on a particular project having a salaried working foreman, additional research may be necessary to determine that amounts paid meet DBRA and CWHSSA requirements.

## Classifications

Only the exact classifications appearing on the federal wage determination or additional classifications requested are to be used on payrolls. Generic classifications are not specific enough to allow the reviewer to determine if DBRA were met. For example, equipment operator is a generic classification; however, backhoe operator is on the wage determination and would be a proper classification.

If, after obtaining the wage determination, it is found that a class of laborer or mechanic not listed in the wage determination is to be employed on the project, the subrecipient must request an additional wage classification. The additional wage classification request should identify the classification needed, recommend a wage rate, and include supporting documentation and statements from both the contractor and the employee agreeing to the proposed wage rate. The request is sent to DED who then submits to USDOL.

In general, additional classifications and wage rates can be approved if:

1. The requested classification is used by construction industry in the area of the project. (The area is usually defined as the county where the project is located.) Classifications requested must identify the specific trade and should not involve generic titles such as operator, mechanic, or installer. The work that will be performed by the requested classification is not performed by another classification already on the applicable wage determination.
2. The proposed wage rate and any fringe benefits bear a reasonable resemblance to the rates on the wage determination.
3. The workers that will be employed in the added classification or the worker's representatives, if applicable, must agree with the proposed wage rate.

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the work of a mechanic which requires a wage higher than that of a laborer. Therefore, these workers are underpaid. The false information on the Certified Payroll Report (CPR) may be limited to the classification of work. ([HUD Handbook 1344.1 Rev 2, Appendix III-1](#))

## Fringe Benefits

The DBRA requirement payment of prevailing wages to laborers and mechanics working on federally funded or assisted construction projects.<sup>10</sup> The DBRA prevailing wage is the combination of the basic hourly rate (BHR) and any fringe benefits for the applicable classification listed in a DBRA wage determination.<sup>11</sup> Prevailing wages, including fringe benefits, must be paid on all hours worked on the site of work.<sup>12</sup>

### *Compliance*

A contractor's obligation to pay at least the prevailing wage determination can be met by:

- (1) paying each laborer and mechanic the applicable prevailing wage (including the fringe benefits) entirely as cash wages OR
- (2) providing a combination of cash wages and contributions to or incurred costs for bona fide fringe benefits

The required rate of contribution or cost for fringe benefits for the applicable classification listed in the wage determination is ordinarily an hourly rate. Under the DBRA, cash wages paid *in excess* of the BHR may be used to offset the fringe benefit portion of a contractor's prevailing wage obligation.<sup>13</sup>

### Bona Fide Fringe Benefits

Bona fide fringe benefits generally include those benefits which are common in the construction industry. They include medical care, compensation for injuries or illness, and pensions for retirement or death, as well as insurance. To be considered bona fide, the benefits must also be provided pursuant to a plan, fund, or program which is legally enforceable and meets certain criteria, such as the requirements of the Employee Retirement Income Security Act (ERISA), laws and regulations enforced by the Internal Revenue Service (IRS) and state insurance laws.<sup>14</sup>

### Annualization Principal

Annualization is a computation method to determine the hourly rate of contribution or costs incurred for bona fide fringe benefits that is creditable toward meeting a contractor's or subcontractor's prevailing wage obligation.<sup>15</sup> DBRA credit for contributions made to fringe benefit plans is allowed based on the effective annual rate of contributions or costs incurred for hours worked during the year by an individual.

Annualization limits the DBRA credit to an amount equal to the hourly cost of the fringe benefit averaged over all hours an individual laborer or mechanic works during a year or other representative period (including both DBRA and non-DBRA hours). This method ensures that DBRA work is not used as the sole or disproportionate source of funding for a fringe benefit plan that provides benefits or coverage to an employee for all hours (both Davis-Bacon and non-Davis-Bacon hours) that the employee works. The amount of credit a contractor may claim as an offset against the prevailing wage obligation can be as significant in determining DBRA compliance as whether a particular fringe benefit plan is a bona fide fringe benefit plan under the DBRA.<sup>16</sup>

See also the Wage and Hour Division of the U.S. Department of Labor's Fact Sheet #66E: The Davis-Bacon and Related Acts – Compliance with Fringe Benefit Requirements at <https://www.dol.gov/agencies/whd/fact-sheets/66E-DBRA-compliance-fringe-benefit-requirements>. This Fact Sheet provides additional information regarding how a contractor may satisfy its prevailing wage obligation, funded vs. unfunded plans, fringe benefits and apprenticeships, and more.

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<sup>10</sup> <https://www.dol.gov/agencies/whd/fact-sheets/66E-DBRA-compliance-fringe-benefit-requirements>

<sup>11</sup> *Id.*

<sup>12</sup> 40 USC §3141(2); 29 CFR 5.53

<sup>13</sup> <https://www.dol.gov/agencies/whd/fact-sheets/66E-DBRA-compliance-fringe-benefit-requirements>

<sup>14</sup> 40 USC §3141(2)(B); 29 CFR 5.29

<sup>15</sup> 29 CFR 5.25

<sup>16</sup> 29 CFR 5.29

## Overtime<sup>17</sup>

The federal overtime provisions are contained in the Fair Labor Standards Act (FLSA). Unless exempt, employees covered by the Act must receive overtime pay for hours worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay. There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, unless overtime is worked on such days.

## Deductions

A deduction is an amount subtracted from a worker's gross wages. Deductions must be reviewed to determine if they are permissible. Permissible deductions by law include court ordered deductions, Federal Insurance Contributions Act (FICA), and federal or state income taxes. Deductions<sup>18</sup> not required by law, such as union dues or uniforms, may be made only with the permission of the employee. The employer cannot benefit, for example earn interest, from the employee's deductions on the payroll. The employee must sign a statement that authorizes deductions. The statement should include reason for deduction and length of time the deduction will occur.

## Payroll Certification of Self-Employed Contractor<sup>19</sup> Who Works Alone

A self-employed laborer or mechanic (or group of working partners) who has no other employees working on the job is not authorized to sign his/her own payroll and Statement of Compliance. Instead, such a person, often called a working subcontractor, must be listed on the prime contractor's (responsible employer's) payroll.

**Example.** Joe's Backhoe Service has one backhoe and no other workers other than the owner. Joe cannot sign his own payroll while on a CDBG project. In contrast, if Joe hires at least one employee to help on that project, he could certify his own wages as well as the employee's wages.

The minimum information needed on the responsible employer's payroll regarding the working subcontractor are name, address, classification(s), hours worked, estimated hourly pay, and estimated gross pay. Deduction amounts for social security and federal taxes of the working subcontractor are not the responsibility of the prime contractor and such amounts may be unknown to the prime contractor; therefore, deduction listings are not required. The Statement of Compliance should indicate box 4c for the working subcontractor as an exception to the way fringe benefits may have been paid for regular employees. The explanation for box 4c may read something like, "Working sub, lump sum contract, fringes and deductions not applicable."

Sometimes it may be confusing for a prime contractor to list a working subcontractor on his payroll in addition to his regular employees. In such case, the prime contractor may prepare a separate weekly payroll listing only one person, the working subcontractor.

Whatever method of compensation is utilized, such as piece work or a weekly contract draw for performance, the amount of estimated weekly compensation divided by the actual hours of work performed for that week must result in an "effective" hourly wage rate that is not less than the prevailing hourly rate for the type of work involved.

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<sup>17</sup> [Overtime Pay | U.S. Department of Labor \(dol.gov\)](https://www.dol.gov)

<sup>18</sup> HUD Handbook 1344.1 Rev 2, Appendix II - 4, page 14-16

<sup>19</sup> Also known as sole proprietors.

## Liquidated Damages

Liquidated damages are a predetermined amount that is paid as a penalty for failure to meet a specified requirement. Liquidated Damages, relative to the review of payrolls in the CDBG Program, is the penalty amount calculated for overtime violations under the CWHSSA. The pre-determined penalty is \$29 per worker, per day for overtime violation(s). Please note that penalty amounts paid for overtime violations to a specified government entity as liquidated damages are separate and distinct from wage restitution paid to workers. Liquidated damages are paid in addition to any restitution.

## SECTION 10 – JOB SITE VISITS AND EMPLOYEE INTERVIEWS

The subrecipient is required to conduct visits to the construction site to verify applicable DOL posters and the wage determination are posted. The labor standards requirements include periodic job site interviews with workers. The purpose of the interviews is to capture observations of the work being performed and to get direct information from the laborers and mechanics on the job regarding the hours they work, the type of work they perform, and the wage they receive.

Interviews should occur throughout the course of construction and include a sufficient sample of job classifications<sup>20</sup> represented on the job, as well as workers from various companies to allow for a reasonable judgment as to compliance. Information gathered during an interview is recorded on the Record of Employee Interview (HUD-11).

The interview should be conducted on the job site and privately as a one-on-one process. The interviewer should observe the duties of workers before initiating interviews<sup>21</sup>. Employees of both the prime contractor and subcontractors should be interviewed. To initiate the interview, the authorized person shall:

- Properly identify himself/herself
- Clearly state the purpose of interview
- Advise the worker that information given is confidential, and his/her identity will not be disclosed to the employer without the employee's written permission

When conducting employee interviews, the interviewer should pay particular attention to:

- The employee's full name
- The employee's permanent mailing address
- The last date the employee worked on that project and number of hours worked on that day. The interviewer should make it clear that these questions relate solely to work on the project and not to other work.
- The employee's hourly rate of pay. The aim is to determine if the worker is being paid at least the minimum amount required by the wage determination.
- The interviewer should be sure the worker is not quoting their net hourly rate or take-home pay

If it appears the individual may be underpaid, the interviewer should closely question the worker by:

- Asking for any records
- Arranging to re-interview the employee
- Enter the worker's statement of his/her classification
- Observed duties and tools used. Be specific on the duties and tools used

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<sup>20</sup> See previous footnote on "Ratio of laborers to mechanics"

<sup>21</sup> When describing the duties observed, be specific, for example they were using a shovel to move dirt into the drainage, they were operating a backhoe. Do not write "general laborer stuff."

If worker's statements and observations made by the interviewer indicate the individual is performing duties conforming to his classification, indicate the following on the Record of Employee Interview Form.

- If there are discrepancies, detailed statements are necessary
- Enter any comments necessary
- Enter date interview took place
- The HUD-11s must be compared to the corresponding contractor and subcontractor payroll information
- If no discrepancies appear, "None" should be written in the comment space of the Record of Employee Interview Form and it should be signed by the appropriate person
- If discrepancies do appear, appropriate action should be initiated. When action has been completed, the results must be noted on the interview form
- If there are wage complaints, the interviewer should complete the Federal Labor Standards Complaint Intake Form (HUD Form 4731<sup>22</sup>). The complaint must be investigated and resolved. Contact DED, which may engage HUD or DOL if necessary.

## SECTION 11 – PAYROLL REVIEW AND RESTITUTION FOR UNDERPAYMENT OF WAGES

Payrolls that are incomplete, such as those which lack classifications or rates of pay, will trigger the need for the contractor to provide a corrected payroll and Statement of Compliance that lists the required information.

### Handwritten Corrections of Payroll by Reviewer Not Allowable

The subrecipient's Labor Compliance Officer, when reviewing a payroll, is not allowed to make corrections on the face of a payroll or on the Statement of Compliance. Such documents are designed to be sufficient as evidence in a legal proceeding, and corrections by multiple sources often do not allow the reader certainty as to who made the corrections. If the subrecipient wishes to provide written clarification of a minor payroll item, a note with the reviewer's initials and date may be attached.

### Notice to Contractor When Restitution is Involved

Payroll errors due to underpayment of wage may involve restitution. Underpayment may result from either DBRA violation(s), CWHSSA overtime violation(s), or both. The subrecipient must promptly notify the prime contractor in writing that payment of back wages is required. This notice should identify the name of the prime contractor and the applicable subcontractor, the underpaid workers, the correct job classification and wage rate, dates of underpayment, and the amount of underpayment owed. The contractor must be notified of the need to make restitution by using a Certified Correction Payroll, as discussed below.

If overtime violations under CWHSSA exist, the notice to the contractor should also identify a calculation of Liquidated Damages and inform the contractor of two choices regarding Liquidated Damages—pay or request a waiver.

### Certified Correction Payroll

A **payroll** that reflects restitution paid under DBRA or CWHSSA is called a Certified Correction Payroll. Such a payroll will always be prepared by the employer and the Statement of Compliance will be signed by the employer. The signature on the Statement of Compliance designates the payroll a Certified Correction Payroll. A Certified Correction Payroll will only list those workers to whom restitution is paid. A Certified Correction Payroll may cover one week at a time. Optionally, a Certified Correction Payroll may also cover multiple weeks and must specify the weeks covered. The monetary amounts listed, wages, and deductions reflect restitution amounts paid, and should not indicate amounts paid and listed on past payrolls.

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<sup>22</sup> [https://www.hud.gov/program\\_offices/davis\\_bacon\\_and\\_labor\\_standards/olrform](https://www.hud.gov/program_offices/davis_bacon_and_labor_standards/olrform)



Payroll problems that require the employer to prepare a Certified Correction Payroll may include the following:

- Wage rates on the payrolls do not meet DBRA.
- Wage rates on the payrolls do not meet CWHSSA requirements.
- Worker classifications are wrong, incomplete, or not in accordance with the applicable wage resulting in restitution due.
- Calculations are in error and result in underpayment of wages.

A Certified Correction Payroll will record the difference between amount paid and the required amount which should have been paid. The deficiency would be multiplied by the applicable number of hours worked at the lower-than-allowable rate.

**Example.** If a worker was paid \$10 per hour and should have been paid \$11 per hour for 100 hours during three different non- overtime weeks, the amount of restitution payment as recorded on the Certified Correction Payroll

The contractor may submit a Certified Correction Payroll for each applicable workweek or for multiple workweeks. A Certified Correction Payroll, if prepared for multiple weeks, should indicate the weeks for which it pertains, such as Weeks Two through Eight, and 11. A Certified Correction Payroll, if prepared for one week at a time, must be numbered the same as the original payroll for that workweek, but must indicate the appropriate revision number, such as Payroll Eight, Revision One.

In most cases, the Statement of Compliance, as part of the Certified Correction Payroll, will be sufficient to demonstrate that restitution was made. Cancelled checks, employee initials, or an employee statement are no longer routinely required as additional proof of payment of restitution. If problems are suspected, additional proof may be required by DED or another reviewing agency.

### Use of Corrected Payrolls to Demonstrate Restitution

Some contractors may wish to provide corrected payrolls with a newly signed Statement of Compliance. A corrected payroll differs from a Certified Correction Payroll in the following ways:

- A corrected payroll is for one weekly period whereas a Certified Correction Payroll may cover multiple weekly periods.
- A corrected payroll lists all workers who worked on a project during a weekly period, whereas a Certified Correction Payroll lists only workers to whom restitution was paid.
- A corrected payroll lists the total hourly rate received from original pay rate plus the restitution rate, whereas the Certified Correction Payroll will list only the restitution pay rate.

If a contractor wishes to provide a corrected payroll to demonstrate restitution rather than a Certified Correction Payroll, such a provision is acceptable; however, a Statement of Compliance having a later signature date must accompany the corrected payroll. The corrected payrolls should be numbered the same as the original incorrect payrolls such as Payroll Two, Revision One.

### Calculation of Liquidated Damages<sup>23</sup>

Assuming there was restitution due that involved not only DBRA, but also overtime violation(s) under CWHSSA, overtime rates must be paid at 150% of the basic hourly rate. This is commonly referred to as time-and-a-half. Under CWHSSA, liquidated damages are computed at the rate of \$29 per worker for each calendar day the worker was required or permitted to work in excess of 40 hours in a week without payment of overtime rates.

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<sup>23</sup> Civil Money Penalty Inflation Adjustments (<https://www.dol.gov/agencies/whd/resources/penalties>)

DED must be informed immediately upon the occurrence of any of the above infractions.

**Example.** If workers worked six days a week for twelve hours per day and were paid straight time for 72 hours, there would be three days of violations. Overtime pay should have started on day four and continued on day five and day six. The liquidated damages calculation would be \$87 per worker. Liquidated damages would be calculated in addition to the payment of wage restitution.

## Steps in Calculation, Assessment, Payment, or Appeal of Liquidated Damages

The subrecipient calculates restitution and liquidated damages due, and notifies the contractor by traceable correspondence (e-mail, fax, or letter). The contractor, having received notification, must make restitution via a Certified Correction Payroll (or corrected payroll with certification), and agree to either pay or request a waiver<sup>24</sup> for liquidated damages. The contractor is to notify the subrecipient of the choice by traceable correspondence.

If payment is the contractor's choice, the contractor must use a wire transfer to make payment. Please contact the DED Representative for instructions regarding a wire transfer<sup>25</sup>. Such procedures involve filling out certain forms, some of which are sent to HUD to enable a receiving account to be established. The contractor will be notified when the wire transfer can be received by an active account at HUD. The contractor will use a financial institution to conduct the wire transfer using a form prescribed by HUD. After the wire transfer and proper notification/documentation of such payment to all parties concerned, the contractor's responsibility for payment of liquidated damages will have been met. The financial institution may charge the contractor a fee for making the wire transfer.

If the contractor chooses to request a waiver (or reduction in penalty amount), the contractor is to send the subrecipient written communication explaining the reasons why a waiver is requested. There are two reasons for HUD to grant a waiver:

- The error was unintentional although due care was exercised.
- A mathematical mistake was made.

The subrecipient will forward the letter to DED, who will send the letter to HUD. Following HUD's response, the DED Representative will communicate HUD's response to the subrecipient by traceable correspondence. The subrecipient is to communicate the response to the contractor(s) by traceable correspondence.

If HUD approves the request for the waiver of the payment of liquidated damages, labor standards requirements regarding liquidated damages will have been met. If HUD does not approve the request for the waiver, call the DED Representative for further instructions. The contractor will have 60 days to appeal the notice from HUD.

## Use of Corrected Payrolls Where Restitution Is Not Due

A corrected payroll may be used to reclassify workers, correct math errors, clarify monetary amounts, revise improper dating, etc. Each corrected payroll is for one week only. The weekly numbering of the corrected payroll should be for the same weekly number as the original incorrect payroll, such as Payroll Four, Revision One. A new signature on a Statement of Compliance must be provided. The contractor will prepare a new Statement of Compliance, signed and dated, for any week with a corrected payroll.

<sup>24</sup> HUD Handbook 1433.1, Rev 2, Chapter 5, Page 20

<sup>25</sup> (HUD-4733) - Wire Transfer Instructions for Labor Standard Deposit Accounts

**Example.** A laborer worked 48 hours in one work week. He was paid \$10 per hour for 48 hours and time and one-half for overtime. The wage determination calls for \$11 per hour with no fringe benefits. Most payroll clerks would immediately know that \$52 or restitution is due; however, some may not realize the proper classification of each of the components of restitution. The proper classification would be \$48 under Davis-Bacon and \$4 under CWHSSA.

$48 \times \$1 \text{ plus } 8 \times 0.50 = \$52.$

Some payroll clerks may incorrectly classify \$40 under Davis-Bacon and \$12 under CWHSSA. When reporting components of restitution, the proper method is indicated in the previous paragraph.

## Supplementary Statements

A supplementary statement from the contractor may be obtained to clarify minor issues. Situations where a supplemental statement would be acceptable include an incorrect employee name. The supplementary statement should be dated, signed by the authorized payroll signatory, and identify the relevant payroll number(s). A Statement of Compliance does not accompany a supplementary statement.

## Reporting Requirements

The Final Wage Compliance Report must be submitted to DED as the last item regarding labor standards.

## Reporting Restitution Under DBRA and CWHSSA

In reporting restitution on the Final Wage Compliance Report, it is important to correctly classify restitution. The DBRA component of restitution will involve an underpayment rate for each hour worked at the deficient rate. The CWHSSA component of restitution will involve the payment of one-half of the hourly deficiency for each overtime hour worked.

## Withholding Funds Based on Noncompliance With Labor Standards

If violations regarding restitution have not been corrected within thirty calendar days from the date of the first notice of underpayment, the subrecipient may withhold funds due the prime contractor. DED must be notified immediately of any violations requiring restitution. Only an amount considered necessary to ensure payment of underpaid wages (and Liquidated Damages, if applicable) may be withheld. If it is necessary to estimate the withholding amount, prompt action must be taken to determine an exact amount and disburse any applicable excess to the prime contractor according to invoices presented for payment. The subrecipient must notify the prime contractor of the withholding and provide the second notice of underpayment. The subrecipient must, again, specify the identity of underpaid workers, correct job classifications and wage rates, dates when underpayments occurred, and the amounts of underpayments owed. If restitution is not made within 30 days of the second notice of underpayment or if there is disagreement regarding the finding of wages owed, DED must be notified immediately.

If DED determines it appropriate, the subrecipient will be notified to disburse wages owed from the withheld funds to the respective workers to whom they are due. Should such an occasion arise DED must be contacted for information on the proper procedure for disbursement of funds.

## Withholding Funds Based on Noncompliance With CDBG Requirements

If a Labor Standards violation(s) does occur that results in the subrecipient not being in compliance with the approved CDBG program, DED may suspend payment on the next Payment Request (drawdown or Request for Funds). For example, if the subrecipient fails to ensure the timely submission of contractor payrolls by the prime contractor (and any lower-tier subcontractor), then the subrecipient may be considered as being in noncompliance with CDBG program requirements.

## Unfound Workers

If all affected workers cannot be located and restitution made, either by the contractor directly or through use of withheld funds, enough funds must be reserved in the special account to pay those workers the wages owed. Efforts should continue to be made to locate workers; however, if they have not been located by the time of grant close-out, the subrecipient must return the withheld funds to DED. A check made payable to the State of Nebraska, and covering the remaining withheld funds must be submitted to DED before the grant will be closed.

## Falsification

If intentional falsification by a contractor is suspected, the subrecipient Labor Compliance Officer must not return the payroll to the contractor for correction and resubmittal. DED must be informed of the suspected falsification.

## Payroll Retention

Payroll records must be retained by the subrecipient for a period of ten years from the date of the letter indicating “Certificate of Completion” of the CDBG program relative to the construction project. The payroll records must be available at all times during the retention period for inspection by representatives of DED, HUD, and DOL.

## Finalizing Labor Compliance

The Final Wage Compliance Report must be approved by the DED Representative before the grant can be closed out. If there are unresolved labor compliance problems at that time, the DED Representative will assist the subrecipient in determining how to correct such problems.

# SECTION 12 – PROGRESS INSPECTIONS, CHANGE ORDERS, FINAL INSPECTION

## Change Orders

It is not uncommon for circumstances to require modifications to various construction contracts. The architect/engineer or project inspector usually prepares change orders; however, the subrecipient must approve and authorize change orders before they are given to the contractor and executed. The proposed change should also be verified and/or recommended for approval by the project engineer, architect, or other technical support personnel. The subrecipient should compare such change orders to the project stated in the bid document and procurement procedures to select the contractor.

NOTE: If the change order would cause any change in a budget line item, scope of project, or change in beneficiaries, the subrecipient must request an agreement amendment from DED. The subrecipient may approve such a change order only after DED approves an agreement amendment. The total CDBG funds will not be increased for the agreement. This requirement is enacted to ensure that the project does not risk becoming ineligible or result in the subrecipient not achieving its required overall income targeting.

All change orders must contain a unit price and total for each of the following items:

- All materials with cost per item
- Itemization of all labor with number of hours per operation and cost per hour
- Itemization of insurance cost, bond cost, social security, taxes, workers' compensation, employee fringe benefits, and overhead costs
- Inspections

The architect/engineer must conduct periodic inspections of the contractor's work for compliance with specifications, drawings, and conditions of the contract. These inspections must be documented in writing and kept in the CDBG project files. Comparing inspection reports to payrolls is also a good way to monitor labor standards. Prior to approval of progress payments to contractors, the subrecipient must make sure all work is completed as stated; all payrolls have been submitted and are accurate and complete; wage violations are corrected and any restitution paid; and all charges are allowable.

## Retainage

Subrecipients may withhold at least 10% of each progress payment until the end of the project to ensure funds are available to address any unanticipated issues (e.g., payroll issues, insufficient progress, etc.).

## Final Payment Review

When construction work has been completed, the contractor must certify completion of work to the subrecipient and submit a final request for payment. Before work is accepted and final payment is made to the contractor, the subrecipient should verify that:

- All payrolls have been received and checked, and any necessary restitution has been made
- All other required Equal Opportunity and Labor Standards provisions have been satisfied
- All claims and disputes involving the contractor have been resolved
- Files are complete
- As-built plans have been filed with the recipient, if applicable

## Recordkeeping

Contractors and subcontractors on DBRA-covered projects must keep records required under DBRA, including under the Copeland Act and Contract Work Hours and Safety Standards Act.<sup>26</sup>

1. Designation of a local Labor Standards Compliance Officer
2. Request for Wage Determination
3. Wage determinations, modifications, and additional classifications
4. Federal Labor Standards Provisions
5. Evidence the wage determination was checked 10 days prior to the bid opening
6. Verification of contractor eligibility
7. Evidence of Bid Opening (tabulation and minutes)
8. Meeting minutes demonstrating the subrecipient has awarded the contractor
9. Notice of Contracts Award issued by the subrecipient to the contractor
10. Notice of Contract Award (LSE7) submitted to DED
11. Contractor's License Forms
12. Notice to Proceed
13. Notice of Pre-construction Conference (minutes) – these are optional
14. Contractor's and subcontractor's certified weekly payrolls and Statements of Compliance signed by an officer of the company
15. Evidence of apprenticeship/trainee registration and certification that apprentice or trainee rates were paid
16. Payroll deduction authorizations
17. Employee interviews
18. Evidence indicating that the federal wage determination and the Labor, Equal Opportunity, and Safety posters were posted
19. Evidence of restitution, if any
20. Complaints from workers, if any, and actions taken

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<sup>26</sup> 29 CFR Parts 3 and 5.

21. DBRA contracts and related documents
22. Worker telephone numbers and email addresses
23. Final Wage Compliance Report

All required records must be retained for at least 3 years after all the work on the prime contract is completed.<sup>27</sup>

A contractor's failure to submit required records upon request may, in addition to providing grounds for the suspension of contract payments and debarment, preclude the contractor from introducing such records as evidence in an administrative proceeding.<sup>28</sup>

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<sup>27</sup> 29 CFR 5.5(a)(3)(ii) and (iii), 5.5(c).

<sup>28</sup> 29 CFR 5.5(a)(3)(iv)(B)

## CONSTRUCTION & LABOR STANDARDS FREQUENTLY ASKED QUESTIONS

### Does using municipal or county employees trigger DBRA wages and other Labor Compliance items?

CDBG requires compliance with DBRA. If the local government makes use of “forced labor” (e.g., city employees), this would be in compliance and does not require procurement or DBRA wages. If forced labor is used, you must maintain complete records, including timesheets showing hours worked on the project.

### What wage determination modification should be used?

The lock in wage decision is based on when the date of the addendum/change order is executed.

### CDBG funding is only applied to a portion of the project, does DBRA apply to the other non-CDBG portion?

Even if funding is allocated only to a portion of the construction of a project, prevailing wage requirements generally will still apply to all construction work on the project.

### What DBRA clauses need to be include?

Funding recipients and their sub-recipients must ensure that the Davis-Bacon labor standards clauses in 29 CFR 5.5 and the applicable wage determination(s) are included in all construction contracts for projects assisted in whole or in part under a Related Act. Funding recipients must also advise prime contractor(s) that they must include Davis-Bacon labor standards clauses and applicable wage determination(s) in all subcontracts.

### What is the Funding Recipient Obligations?

Funding recipients should advise contractors regarding the application of wage determinations and the scope of worker classifications contained in the wage determination(s).

### What if the project has overlapping funding from both federal and state how do prevailing wages apply?

Where a construction project receives both federal and state or local funding, the project may be subject to both Davis Bacon prevailing wage requirements and state or local laws that similarly require payment of prevailing wage rates set by the state or locality. Where both federal and state or local prevailing wage requirements apply, contractors must pay whichever prevailing wage rate is higher for each classification, and meet whichever requirements are more protective of workers.

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# BID PACKAGE REQUIREMENTS



# ATTACHMENT 1: BONDING AND INSURANCE REQUIREMENTS

## 2 C.F.R § 200.326 Bonding Requirements.

### Community Development Block Grant Regulations

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold<sup>29</sup>, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

- (a) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- (b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.
- (c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

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<sup>29</sup> 41 U.S.C.A. § 134 indicates the simplified acquisition threshold at \$250,000.

## **ATTACHMENT 2: CIVIL RIGHTS AND EQUAL OPPORTUNITY PROVISIONS**

### **Public Law 88-352, Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000(d), et. seq.) (24 CFR part 1).**

The law provides that, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

### **Section 109 of the Housing and Community Development Act of 1974, As Amended.**

The law requires that, “[n]o person in the United States shall on the ground of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.] or with respect to an otherwise qualified handicapped individual as provided in section 794 of Title 29 also shall apply to any such program or activity.”

### **Age Discrimination Act of 1975, As Amended (42 U.S.C. 6101, Et, seq.).**

The law provides that, “no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”

### **Section 504 of the Rehabilitation Act of 1973, As Amended (29 U.S.C. 794).**

“Section 504 provides that no otherwise qualified individual with a disability shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

### **Section 3 of the Housing and Urban Development Act of 1968, As Amended (12 U.S.C. 1701u).**

The law provides that, “to the greatest extent feasible, recipients of HUD funds (and their contractors and subcontractors) provide jobs and other economic opportunities to low-income persons, particularly public housing residents. Section 3 helps create employment for low-income persons and contracting opportunities for businesses that are owned by low-income people or that provide employment to low-income people.”

**ATTACHMENT 3A:  
CERTIFICATION OF BIDDER REGARDING SECTION 3 AND  
SEGREGATED FACILITIES**

\_\_\_\_\_  
**Name of Prime Contractor**

\_\_\_\_\_  
**Project Name and Number**

The undersigned hereby certifies that:

- (a) Section 3 provisions are included in the contract.
- (b) A written Section 3 plan was prepared and submitted as part of the bidding proceedings (if bid equals or exceeds \$100,000).
- (c) No segregated facilities will be maintained.

\_\_\_\_\_  
**Name & Title of Signer (Print or Type)**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

## ATTACHMENT 3B: CONTRACTOR

### Section 3 Plan

\_\_\_\_\_ agrees to implement the following specific affirmative action steps directed at increasing the utilization of lowest income residents and businesses within the Village/City/County of \_\_\_\_\_.

- A. To ascertain from the locality's CDBG program official the exact boundaries of the Section 3 covered project area and where advantageous, seek the assistance of local officials in preparing and implementing the affirmative action plan.
- B. To attempt to recruit from within the city the necessary number of lower income residents through local advertising media; signs placed at the proposed site for the project; and community organizations and public or private institutions operating within or serving the project area, such as Service Employment and Redevelopment (SER), Opportunities Industrialization Center (OIC), Urban League, Concentrated Employment Program, Hometown Plan, or the U.S. Employment Service.
- C. To maintain a list of all lower income residents who have applied either on their own or on referral from any source, and to employ such persons, if otherwise eligible and if a vacancy exists.
- D. \*To insert this Section 3 plan in all bid documents, and to require all bidders and subcontracts to submit a Section 3 affirmative action plan that includes utilization goals and the specific steps planned to accomplish these goals.
- E. \*To ensure that subcontracts (typically let on a negotiated rather than bid basis in areas other than Section 3 covered project areas), also are let on a negotiated basis, where feasible, when let in a Section 3 covered project area.
- F. To formally contact unions, subcontractors and trade associations to secure their cooperation for this program.
- G. To ensure that all appropriated project area business concerns are notified of pending sub contractual opportunities.
- H. To maintain records, including copies of correspondence, memoranda, etc., that document all above affirmative action steps have been taken.
- I. To appoint or recruit an executive official of the company or agency as Equal Opportunity Officer to coordinate the implementation of the Section 3 plan.

\*Loans, grants, contracts and subsidies for less than \$100,000 will be exempt.

## **ATTACHMENT 4:**

### **SPECIAL EQUAL OPPORTUNITY PROVISIONS**

- A. Activities and Contracts Not Subject to Executive Order 11246, As Amended  
(Applicable to Federally assisted construction contracts and related subcontracts \$10,000 and under)

During the performance of this contract.

- (1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor shall take affirmative action to ensure that applicants for employment are employed, and that employees are treated during employment, without regard to their race, color, religion, or national origin. Such action shall include, but not be limited to: employment upgrade, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay, or other forms of compensation; and selection for training, including apprenticeship.
- (2) The contractor shall post in conspicuous places, available to employees and applicants for employment, notices to be provided by contracting officer setting forth the provisions of the nondiscrimination clause. The contractor shall state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.
- (3) Contractors shall incorporate foregoing requirements in all subcontracts.

- B. Executive Order 11246 (contract/subcontracts above \$10,000)

1. SEC. 202. Except in contracts exempted in accordance with Section 204 of this order, all Government contracting agencies shall include in every government contract hereafter entered into the following:

During the performance of this contract:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to: employment upgrade, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay, or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.
- (2) The contractor will, in all solicitations or advancements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

- (3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining contract or other contract or understanding, a notice, to be provided by the [Contract Compliance Officer], advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and the rules, regulations, and relevant orders of the U.S. Secretary of Labor.
- (5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to their books, records, and accounts by the [Department] and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract, or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- (7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor *will* take such action with respect to any subcontract or purchase order as may be directed by the [Department and the] Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction [by DED Department], the contractor may request the United States to enter into such litigation to protect the interests of the United States [*italics added*]."

## **ATTACHMENT 5: ACCESS TO AND MAINTENANCE OF RECORDS**

The Consultant/Contractor agrees to maintain such records and follow such procedures as may be required under HUD Community Planning and Development (CPD) subpart J, 570.502 (paragraph a. 16.) and 2 CFR 200.318(i) and any such procedures that DED may prescribe. In general, such records will include information pertaining to the contract, obligations and unobligated balances, assets and liabilities, outlays, equal opportunity, labor standards (as appropriate), and performance.

All such records and all other records pertinent to this contract and work undertaken under this contract shall be retained by the Consultant/Contractor or Subrecipient for a period of three years after the final audit of the Subrecipient's CDBG project, unless a longer period is required to resolve audit findings or litigation. In such cases, the Subrecipient shall request a longer period for record retention.

The Subrecipient, DED and duly authorized officials of the state and federal government shall have full access and the right to examine any pertinent documents, papers, records and books of the Consultant/Contractor involving transactions to this local program and contract.

### **Conflict of Interest**

From 2 CFR 200.318(c)(1)., no officer, employee or agent of the Subrecipient who will participate in the selection, the award, or the administration of this grant, may obtain a personal or financial interest or benefit from the activity or have an interest in any contract, subcontract or contract with respect thereto, or the proceeds thereunder either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter. It is further required that this stipulation be included in all subcontracts to this contract. Upon written request, exceptions may be granted on a case-by-case basis when it is determined that such an exception will serve to further the purposes of the Act and the effective and efficient administration of the recipient's program or project. These exceptions are granted by the Department.

## **ATTACHMENT 6: CLEAN AIR AND WATER ACTS – REQUIRED CLAUSES**

This clause is required in all third-party contracts involving projects subject to the Clean Air Act (42 U.S.C. s/s 7401 et seq. (1970)), the Federal Water Pollution Control Act (33 U.S.C. 1251 et. seq.), and the regulation of the Environmental Protection Agency with respect to 40 CFR32 as amended. It also should be mentioned in the bid document.

During the performance of this contract:

- (1) The CONTRACTOR will certify that any facility to be utilized in the performance of any nonexempt contract or subcontract is not listed on the List of Violating Facilities issued by the Environmental Protection Agency pursuant to 48 CFR 9.40 and 40CFR32.20.
- (2) The CONTRACTOR agrees to comply with all the requirements of Section 114 of the Clean Air Act, as amended, (42 U.S.C. 7414) and Section 308 of the Clean Water Act, as amended (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports, and information, as well as all other requirements specified in said Section 114 and Section 308, and all regulations and guidelines issued thereunder.
- (3) The CONTRACTOR agrees that as a condition for the award of the contract, prompt notice will be given of any notification received from the Director, Office of Federal Activities, and Environmental Protection Agency, indicating that a facility utilized, or to be utilized for the contract is under consideration to be listed on the Environmental Protection Agency List of Violating Facilities.
- (4) The CONTRACTOR agrees that it will include or cause to be included the criteria and requirements in Paragraphs (1) through (4) of this section in every nonexempt subcontract and require every subcontractor to take such action as the government may direct as a means of enforcing such provisions.