

12. CONSTRUCTION & LABOR STANDARDS

12.1 Statutory and Regulatory Provisions

Federal (Davis-Bacon) wage requirements are made applicable to the HOME program by Section 286 of the National Affordable Housing Act of 1990 which provides, in part as follows:

- Any contract for the construction of affordable housing with 12 or more HOME-assisted units with funds made available under this subtitle shall contain a provision requiring that not less than wages prevailing in the locality, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act..., shall be paid to all laborers and mechanics employed in the development of affordable housing involved... .
- HUD regulations ([24 CFR §92.354](#)) paraphrase the statutory provision and clarify that the contract for construction must contain these wage provisions if HOME funds are used for any project costs, including construction or non-construction costs, for housing with 12 or more HOME-assisted units.

12.1.1 The Labor Laws

Every construction (rehabilitation or new) contract with 12 or more HOME-assisted units is required to comply with the following federal labor standards (note that construction projects with less than 12 HOME-assisted Units are still subject to the Fair Labor Standards Act):

- **Davis-Bacon Act** (40 U.S.C. 276(A)-(A)-5) – Ensures that mechanics and laborers employed in construction work under Federally assisted contracts are paid wages and fringe benefits equal to those that prevail in the locality where the work is performed.
- **Contract Work Hours and Safety Standards Act** (40 U.S.C. 327 - 333) – Provides that mechanics and laborers employed on Federally assisted construction jobs are paid time and one-half for work in excess of 40 hours per week and provides for liquidated damages where violations occur. This act also addresses safe and healthy working conditions.
- **Copeland Act (Anti-Kickback Act)** (40 U.S.C. 276c) – The Copeland Act 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 up any part of the compensation to which he/she is entitled under his contract of employment. The Act also requires contractors on covered projects to submit weekly a “Statement of Compliance” certifying that the contract has paid the required wages.

- **Fair Labor Standards Act of 1938**, as Amended, (29 U.S.C. 102, et. seq.) – This Act provides for minimum wages for construction workers, overtime pay (forty-hour week), recordkeeping and child labor standards.

12.1.2 Davis-Bacon Unit Threshold for HOME

HOME regulations indicate that a construction contract that includes a total of 12 or more HOME-assisted units is covered by Davis-Bacon requirements, even if the contract covers more than one HOME “project.” The Davis-Bacon “trigger” relates to the number of HOME-assisted units contained in a construction contract. It is important to recognize that the two factors are:

- The number of HOME units – there may be units that are not HOME-assisted in the contract
- The scope of the construction contract – not the “project.”

HUD also prohibits arranging multiple construction contracts within a single project for the purpose of avoiding Davis-Bacon coverage.

Once triggered, the wage provisions apply to the construction of the entire project – both HOME-assisted and non-assisted portions.

12.2 Labor Standards Procedures – Procurement

Awardees must develop a compliance and enforcement program that ensures all applicable labor standards requirements are met. In many instances the awardee, the grant administrator, and the engineer may work together to ensure compliance with Davis-Bacon and Related Acts.

The awardee must designate someone as the labor standards compliance officer with the overall responsibility to coordinate and ensure compliance with all appropriate labor standards regulations and maintenance of an accurate filing system. The final responsibility for compliance rests with the awardee.

The awardee must secure applicable wage rate decisions, include all applicable wage rate and labor standards provisions in the bid specifications and contract documents, and monitor contractor compliance. Major activities are summarized in Tasks 3 through 6 in the most typical sequence of occurrence.

To properly organize construction and labor standards documents, the awardee should establish a filing system that contains the following (as they become available):

1. Preliminary design and cost estimates.
2. Final design and cost estimates.
3. Evidence that all necessary land or easement acquisition has been completed prior to advertising for bids.
4. Wage decision(s) for project.
5. Construction bid package.

6. Approval of bid documents by authorities having jurisdiction over the project.
7. Proof of publication advertising bids. This file may also include any letters utilized to specifically solicit for minority/women contractor participation.
8. Bid opening minutes, bid tabulations.
9. Wage decision verification ten days prior to bid opening.
10. Verification of contractor eligibility.
11. Written recommendation for award of contract.
12. Executed construction contract(s).
13. Pre-construction conference minutes or evidence of meeting with contractor.
14. Notification to the Department of contract award.
15. Contractor/subcontractor weekly payrolls and evidence of review, (a copy of the first two (2) payrolls must be submitted to the Department).
16. Employee interview forms and evidence of review.
17. Verification of job site posting.
18. Other related correspondence.

12.2.1 Secure Wage Decision

The awardee may obtain the wage decision online at <https://beta.sam.gov/>. When you visit the website, you will need to click on “Selecting DBA WDs.” You will then need to enter your state, county and construction type – Building, Residential (most HOME projects fall in this category), Highway, or Heavy.

The awardee will need to contact your program to obtain a complete Construction Packet guide.

Items which are included in the Construction Packet include: “Contractors Guide to Davis-Bacon Wage Requirements and Certified Payroll Reports,” Contract Work Hours and Safety Act (**CWHSSA**), Payroll form (**WH-347**), Employee Interview Form (**HUD-11**), eleven (11) **posters** (listed in the Construction Packet) that must be displayed with the wage decision for the duration of the project in a conspicuous place accessible to all the workers, and LSE-7 – Notice of Contract Award. The packet further details the documents that must be sent to the Department for review and record keeping purposes.

The awardee will need to check weekly through the bid opening date to verify the area wage decision is current. If modifications are published prior to bid opening and/or award the awardee must secure modifications and send them as an addendum to all contractors who received the original bid package.

The area wage decision is in effect for the life of the project unless a contract is not awarded within 90 days of the bid open. In that case, a new decision is required.

12.2.2 Federal Provisions for Bid Package

The awardee must develop procedures for securing contractors and monitoring compliance with various Federal Equal Opportunity requirements. The awardee must include all applicable Equal Opportunity language, other related HOME and local terms, conditions, and procedures in the bid specifications and contract documents, obtain required documentation, and monitor compliance. These activities are to be incorporated into the contracting flow summarized below.

These terms and conditions are included in the contract & consulting attachments. These conditions must be incorporated into the bid package and awarded contract.

Bonding and Insurance Requirements Clause: Federal bonding requirements apply to contracts in excess of \$150,000. Smaller contracts must comply only with local bonding requirements.

- Flood Insurance, if applicable.
- Bonding and Insurance.
- Title VI of the Civil Rights Act of 1964 Clause.
- Age Discrimination Act of 1975, as Amended Clause.
- Section 504 of the Rehabilitation Act of 1973, as Amended Clause.
- Section 3 of the HUD Act of 1968, as amended Clause.
- Section 109 of Title I of the Housing and Community Development Act of 1974, as Amended Clause.
- Federal Executive Order 11246.
- Clean Air/Water Clause.
- Access to and Maintenance of Records Clause.
- Conflict of Interest Clause.
- Applicable Wage Decision(s).
- Federal Labor Clauses
- Federal Labor Standards Provisions (HUD-4010)

12.2.3 Attorney Review

The Department recommends the bid package be reviewed in its entirety by the awardee's attorney to ensure compliance with applicable state and local law.

12.2.4 Verification of Wage Decision

Ten days prior to bid opening date, the awardee must check online at <https://beta.SAM.gov/dol> to determine if there have been any modifications or replacement of the area wage decision previously issued. The awardee must make a note in the file that includes the wage decision number, modification number, date of the decision, date checked, and the name of the person checking decision. If the wage decision has changed, print out, include the new wage decision in the Bid Packet, and file the current wage decision. **This is important because if the wage decision has changed and the awardee has not checked for updates and notified prospective bidders (if applicable), the awardee is liable for any difference in increased wages for the project.**

12.2.5 Bid Amendments

If bid documents are amended during the advertisement period, addenda must be sent to all bidders who have received bid documents. The awardee must include the wage decision in the bid document. If modifications are published prior to bid opening, the awardee must secure modifications and send them as an addendum to all contractors who received the original bid package.

12.2.6 Verifying Contractor

Prior to award of the contract, the awardee must check to make sure the proposed prime contractor is not on federal lists of debarred, suspended or ineligible contractors. The awardee must go to <https://www.sam.gov/portal/SAM/#1> to verify the contractor is not on federal lists of debarred, suspended or ineligible contractors. The awardee must print the result of the search and retain the printout in the awardee files.

12.2.7 Contract Award Procedures

The Notice of Contract Award (Form LSE 7) must be sent to the Department within 10 days of award. The Notice of Contract Award includes the project name and location, the applicable wage decision, including verification date and date of the wage determination, the name and address 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 contracts with the awardee, LSE 7 should be submitted for each contractor.

12.2.8 Meet with Contractor

Prior to the start of construction, the awardee should meet with the principal contractor and all available subcontractors to instruct them on their responsibilities under the Labor Standards provisions (including submission of weekly payrolls) as well as the awardees role in monitoring compliance (including employee interviews); to obtain any outstanding documentation; and to provide the contractor with posters for the site (see Construction Packet for list of posters required) and a copy of the wage decision for posting.

This meeting can take place at a pre-construction conference or any other convenient time. Pertinent information as to the items discussed and attendees should be documented and kept in the awardee files.

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)
- 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

12.2.9 Additional Wage Decision Classifications

The pre-construction conference or similar meeting is an opportune time to review the wage decision to see if any additional classifications will be required. If any class of laborer or mechanic that is not listed in the wage decision is to be employed, you must submit an additional request to the Department after contract award that such laborer or mechanic be conformed to the wage decision.

Below is an example of the information to be submitted to DED if a wage determination lacks a classification of worker to be employed.

Your request must include:

1. A letter from the awarded contractor stating what is paid hourly (wages and itemized bona- fide fringe benefits) to the employees in the needed classifications (this work cannot be performed in any classification in the wage determination).
2. A description of the work to be performed for each wage classification
3. A statement on whether they are union or non-union employees.
4. Documentation that the interested parties, including the employees or authorized representatives and the contractors, agree on the proposed classification and wage rate. The wage determination and the HUD Form 4230a should both be submitted to the Department.

Upon receiving the letter from the awarded contractor, the Department will issue a temporary wage. Once the Department receives confirmation from the DOL on the wage rate, the Department will contact the awardee with DOL's decision.

12.2.10 Wage Rate Exceptions

Apprentices and trainees may work at less than prevailing wage rates only if they are registered in a bona fide apprenticeship program, which has been approved by the United States Department of Labor (DOL).

12.3 Labor Standards Procedures - Construction

12.3.1 Notice to Proceed

Following execution of the contract documents and completion of the preconstruction conference, the awardee will issue a Notice to Proceed to each prime contractor to begin the work. The Notice to Proceed must establish the construction start date, the scheduled completion date, and provide 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.

12.3.2 Payroll Verification

Once construction is underway, the awardee must obtain copies of all general contractor and subcontractor weekly payrolls, accompanied by the Statement of Compliance (form WH-348), and check them against the wage decision. The contractor should submit these within seven working days of the end date on the payroll form.

The payrolls should be examined upon receipt so that any necessary corrective action can be initiated before the problem multiplies. Payrolls should be initialed for verification of review.

Items for review include:

1. Correct classification of workers.
2. A comparison between the classification and the wage decision to determine whether the rate of pay is at least equal to the rate required by the decision.
3. A review to ensure that work by an employee in excess of 40 hours per week is being compensated at rates not less than one and one-half times the basic rate of pay; a review of deductions for any non-permissible deductions; and that the statement of compliance has been signed by the owner or an officer of the construction firm.

12.3.3 Payroll Verification Submitted to DED

The awardee must submit a copy of the first 2 (two) payrolls, from each contractor to the Department. Any discrepancies must be reported to the contractor and the Department along with steps taken or being taken to resolve discrepancies.

12.3.4 On-Site Visit/Interviews

Site visits should be made to confirm that posters and the correct wage decision are posted at the construction site in clear view of all employees throughout the duration of the construction project. The required posters should all have been downloaded and on display.

The awardee must also conduct on-site interviews of construction workers using form HUD-11, Record of Employee Interview (<https://www.hud.gov/sites/documents/11.PDF>). Awardees may choose to target on-site interviews to projects, contracts, and/or employers where violations are suspected, and the interview data can be most useful.

Targeting may mean that no interviews are conducted on certain contracts where remote monitoring (such as payroll reviews) indicates full compliance so that more interviews may be conducted where problems are indicated. However, conducting a minimum of 3 visits and interviews throughout each project, regardless of any concerns, is encouraged. For more information about Record of Employee Interview please view the information at <https://www.hud.gov/sites/documents/11.PDF>

All information received from the on-site interviews must be compared to the information contained in the applicable contractor's payrolls and correction of any discrepancies undertaken immediately. The reviewer must sign and date the interview form for proper verification of review. At completion of the project, the awardee must also prepare and submit to the Department a Final Wage Compliance Report (LSE 9).

12.3.5 Construction Management

During construction, the awardee is also responsible for construction management. This may be done by the architect/engineer, and if so, should be included in the scope of services identified in the professional services contract. Construction management must include inspection and general supervision of construction to check the contractor's work for compliance with the

drawings and specifications and quantity and quality control. Written inspection reports must accompany the contractor's requests for partial payment.

- General Supervision must include monitoring construction to alert the awardee as to need for adjustments in design as dictated by actual field conditions and the preparation of contract amendments affecting alignment, detail or dimensions shown on drawings must include revised drawings.
- Quality Control must include quality tests as necessary to verify conformance with technical specifications concerning minimum quality requirements.
- Quantity Control must include verification of in-place quantities and other records reflecting the as-built facility.
- Certification of Pay Estimates - Inspection reports, copies of field measurement notes, and test results used to verify contractor's periodic pay estimate for partial payment should be attached to and filed with the periodic estimate for partial payment.
- General construction management may include other responsibilities, include but not limited to providing horizontal and vertical control in the form of benchmarks and base lines to be used by the contractor in staking the construction, review and approval of shop drawings, and project coordination.

12.3.6 Change Orders

Change orders must be prepared by the construction inspector and/or architect/engineer. Change orders are generally permissible under state law. The cumulative cost of all such orders should not exceed 25 percent of the original contract price and these changes are not to constitute a major alteration of the original scope of work.

Each change order must be accompanied by a supporting statement which describes why the change is necessary, cost estimates, and any needed plans and specifications. The awardee must approve and authorize change orders before they are given to the contractor. Change orders should be kept to an absolute minimum.

12.3.7 Acceptance of Work

Before final payment approval, the contractor must complete the conditions in the bid contracts. The contractor may request an acceptance of work from the Awardee that indicates the work has been completed according to contract. The awardee must place the acceptance of work form in the contract file. Change orders and receipts for project payment must be filed. The files must be reviewed by the awardee for completeness before the acceptance of work form is approved. The contractor must file an as-built plan with the awardee to receive project approval. The awardee can then issue an acceptance of work and final payment less any funds retained after the contractor has completed the project and files are complete.

The contractor should file the acceptance of work from the awardee at the designated location. The awardee should require the contractor to submit lien waivers from all subcontractors, if any. The lien waivers must be submitted from the materials and labor subcontractors to the contractor prior to filing an acceptance of work form.

The subcontractor lien waivers must be placed in the awardee's contract files after the filing of the acceptance and upon submission of a clean lien certificate by the contractor, the awardee may release the funds retained to the contractor. If any claims or liens remain, the awardee must take appropriate action for disposition of funds retained and all claims against the bonds in accordance with state law.