

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

Guidance to All Government Contracting Agencies of the Federal Government and the District of Columbia Concerning Application of Davis-Bacon Wage Determinations to Contracts With Option Clauses

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice.

SUMMARY: The Wage and Hour Division is publishing its guidelines concerning the circumstances in which the exercise of a contract option requires a new wage determination under the Davis-Bacon and related Acts.

FOR FURTHER INFORMATION CONTACT: Timothy Helm, Office of Enforcement Policy, Government Contracts Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3018, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone (202) 693-0064. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: In order to provide consistent enforcement and administration with respect to the Davis-Bacon and related Acts, Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix, gives the Secretary of Labor the authority to prescribe regulations, standards, and procedures which are required to be observed by the contracting agencies. The Secretary has delegated such authority to the Wage and Hour Division. This includes the authority to interpret the Davis-Bacon and related Acts and the inherent authority to issue interpretive guidelines embodied in All Agency Memoranda informing the public of the standards the Wage and Hour Division intends to apply in the administration of the Davis-Bacon and related Acts.

Pursuant to this authority, the Wage and Hour Division issued on November 9, 1992, All Agency Memorandum No. 157 (AAM 157), which clarifies the application of Davis-Bacon wage determinations to federally-funded and assisted construction contracts that contain option clauses. The Wage and Hour Division, pursuant to its normal, customary practice, endeavored to send AAM 157 to all known government contracting agencies of the federal government and the District of Columbia.

By decision in ARB Case No. 96-133, dated July 17, 1997, the Administrative Review Board (ARB), which speaks finally on behalf of the Secretary concerning matters arising under the Davis-Bacon and related Acts, directed the Wage and Hour Division to publish AAM 157 in the **Federal Register**. AAM 157 is hereby published in the **Federal Register** in order to inform the public of the circumstances in which the exercise of an option provided in a contract governed by the Davis-Bacon and related Acts requires a new wage determination.

In addition, the ARB directed the Wage and Hour Division to provide clarification to AAM 157 in accordance with the discussion that was contained in the Administrator's ruling of May 2, 1996, that was the basis for the ARB decision.

In issuing AAM 157, the Department of Labor does not assert that the exercise of an option constitutes a new contract in all cases, without consideration of the specific contract requirements. For example, the Department does not consider that a new contract has been created in situations where a contractor is simply given additional time to complete its original contractual obligations. This situation is distinguishable, however, from a situation where an option is exercised obligating a contractor to perform work for a period of time for which it was not obligated under the terms of the original contract. In such an event, the Department considers that a new contract has been created for purposes of issuing a new wage determination.

Document Preparation

This document was prepared under the direction and control of John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

Signed at Washington, DC, this 13th day of November 1998.

John R. Fraser,
Acting Administrator, Wage and Hour Division.

U.S. Department of Labor

Employment Standards Administration,
Wage and Hour Division, Washington, DC 20210

DEC. 9, 1992

MEMORANDUM NO. 157

TO: All Government Contracting Agencies of the Federal Government and the District of Columbia

FROM: Karen R. Keesling, Acting Administrator

SUBJECT: Application of Davis-Bacon Wage Determinations to Contracts with Option Clauses

This memorandum clarifies the application of Davis-Bacon wage determination to federally-funded and assisted construction contracts that contain option clauses, and to federal service contracts which have a substantial and segregable amount of construction work that require the application of the Davis-Bacon Act and which also contain option clauses. Some contracting agencies have not been incorporating a new or current Davis-Bacon wage determination in these contracts at the time an option is exercised. To ensure consistency, we are providing the following guidance on this subject.

The Davis-Bacon Act applies to "every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." (Emphasis added.)

Multi-year construction contracts that contain option provisions by which a contracting agency may unilaterally extend the term of the contract require inclusion of a current wage determination at the time the option is exercised. This requirement is consistent with the purpose of the Davis-Bacon Act to ensure that employees be paid prevailing wages, and the McNamara-O'Hara Service Contract Act (SCA) regulations governing option periods under that statute. As explained in section 4.145(a) of Regulations, 29 CFR Part 4, the exercise of such an option requires a contractor to perform work for a period of time for which it would not have been obligated—and for which the government would not have been required to pay—under the terms of the original contract if the option had not been exercised. Thus, once the option on a contract is exercised, the additional period of performance becomes a new contract.

Accordingly, every federally-funded or assisted multi-year construction contract in excess of \$2,000 that contains a provision to extend an existing contract—pursuant to an option clause or otherwise—so that the construction is performed over an extended period of time (as opposed to situations where a contractor is given additional time to complete its original contract commitment), must include a current Davis-Bacon wage determination. Similarly, just as a current SCA wage determination must be incorporated at the exercise of an option in an SCA contract, if an option in the SCA contract calls for substantial and segregable construction work, then a current Davis-Bacon wage determination must also be incorporated at the exercise of the option.

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