

**DBA/DBRA/CWHSSA
WITHHOLDING
AND
DISBURSEMENT**

WITHHOLDING OF FUNDS

PRIORITY OF WITHHELD FUNDS

DISPOSITION OF WITHHELD FUNDS

**WITHHOLDING REQUEST LETTER
(DBA/DBRA/CWHSSA)**

VERIFICATION OF WITHHOLDING LETTER

WITHHOLDING OF FUNDS

- ◇ The labor standards clauses require the proper classification and payment of wages to:
 - ◇◇ Laborers and mechanics on construction projects subject to the DDBA, DBRA, and CWHSSA.

- ◇ To protect the rights of covered workers, these Acts and related Department of Labor (DOL) regulations provide for remedies when compliance with the prevailing wage requirements is in question. An important element is the withholding of contract funds sufficient to satisfy alleged wage underpayments pending resolution of a wage dispute. The contracting agency may withhold funds on its own initiative or at the direction of DOL.
 - ◇◇ The relevant statutory and regulatory provisions are 40 U.S.C. § 3142(c)(3), 40 U.S.C. § 3702(d), and 29 C.F.R. § 5.5(a)(2) and 5.5(b)(3).

- ◇ The withholding of contract funds is a very effective enforcement tool in DBA/DBRA/CWHSSA cases.
 - ◇◇ It ensures the availability of monies for the payment of the back wages if a contractor refuses to make restitution when back wages are found due to covered workers.
 - ◇◇ It ensures that when federal agencies, states and local communities have benefited from the work performed by the contractor's employees, funds will be used to pay the employees the applicable prevailing wage and overtime compensation.
 - ◇◇ The prime contractor is responsible for compliance on the contract, will be liable for payment of the back wages not paid by a subcontractor, and may decide to withhold payments from the subcontractor until the back wage issues are resolved.

- ◇ Ensuring that the proper wages are received by covered workers on government contracts lies with representatives of the contracting agency and/or DOL.
 - ◇◇ A contracting officer should withhold funds when he/she believes that a back wage violation exists.

- ◇◇ In addition, contracting officers shall withhold funds upon written request from DOL. Contracting officers should respond immediately confirming that the funds have been withheld.
- ◇◇ Additionally, if the request has been made by DOL, it is imperative that the agency preserve the withheld funds until notified in writing by DOL regarding final disposition of the withheld funds.

◇ **Davis-Bacon and CWHSSA contract clauses**

- ◇◇ The contract clause language set forth at 29 C.F.R. § 5.5(a)(2) states:

Withholding - The federal agency or the loan or grant recipient shall upon its own action or upon written request of an authorized representative of DOL withhold or cause to be withheld from the contractor under this contract or any other federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay ... the full amount of wages required by the contract.

[and, further:]

In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, ... all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

- ◇◇ 29 C.F.R. § 5.5(b)(3) is a similar provision concerning the withholding of contract funds to satisfy overtime pay obligations and liquidated damages determined to be due because of CWHSSA violations.
- ◇◇ The comparable FAR contract clause language “Withholding of Funds” is at 48 C.F.R. § 52.222-7 and “Contract Work Hours and Safety Standards Act – Overtime Compensation” is at § 52.222-4. (The FAR guidance for applying the DBA/DBRA/CWHSSA contract clauses is at 48 C.F.R. §§ 22.403-3, 22.403-4, 22.407(a)(2), and 22.305.)

- ◇◇◇ FAR guidance regarding the “Withholding from or suspension of contract payments” at 48 C.F.R. § 22.406-9(a) states:
 - (a) *Withholding from contract payments.* If the contracting officer believes a violation exists (see 22.406-9), or upon request of the Department of Labor, the contracting officer must withhold from payments due the contractor an amount equal to the estimated wage underpayment and estimated liquidated damages due the United States under the Contract Work Hours and Safety Standards Act. (See 22.302.)
- ◇◇◇ Continuing, the FAR guidance, at 48 C.F.R. § 22.406-9(a)(2), states:
 - (2) If subsequent investigation confirms violations, the contracting officer must adjust the withholding as necessary. However, if the DOL requested the withholding, the contracting officer must not reduce or release the withholding without written approval of the Department of Labor.
- ◇◇◇ At 48 C.F.R. § 22.406-9(a)(3) the FAR further requires that the withheld funds are to be used to satisfy assessed liquidated damages and (unless the contractor makes restitution) validated wage underpayments. (See also 48 C.F.R. § 22.406-9(c), “*Disposition of contract payments withheld or suspended*” and 48 C.F.R. § 406.10 “*Disposition of disputes concerning construction contract labor standards enforcement.*”)
- ◇◇◇ Cross-withholding provisions under the Davis-Bacon and related Acts give DOL and contracting agencies some recourse in collecting back wages in situations where the contract on which the violations occurred has been paid off by the contracting agency. Where funds remaining on the contract under which the violations occurred are insufficient to cover the back wages due, the contracting agency may withhold funds from other contracts subject to DBA/DBRA/CWHSSA or any other federal contract held by the same prime contractor. (See 29 C.F.R. § 5.5(a)(2) and 29 C.F.R. § 5.5(b)(3). For FAR guidance see 48 C.F.R. § 22.406-9(a)(1).)

PRIORITY OF WITHHELD FUNDS

- ◇ DOL's position is that accrued funds withheld for payment of wages may not be used or set aside for other purposes until such time as the prevailing wage issues are resolved. To give contracting agency reprocurement claims priority, for example, would essentially make the employees unfairly pay for the breach of contract between their employer and a federal agency or grant recipient.
- ◇ It is the Department's position that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. DOL believes that to hold otherwise would be inequitable and contrary to public policy since the affected employees have already performed the work subject to a contractual obligation to fulfill the labor standards requirements.
- ◇ It is also the Department's position that employees' wage claims for underpayment have priority over:
 - (1) An Internal Revenue Service levy for unpaid taxes;
 - (2) Reprocurement costs of the contracting agency after a contractor's default or termination for cause;
 - (3) Any assignee of the contractor ... including assignments made under the Assignment of Claims Act; and
 - (4) Any claim by a trustee in bankruptcy.

DISPOSITION OF WITHHELD FUNDS

- ◇ WHD Regional Offices (RO's) are responsible for directing the processing of back wage disbursements. After completion of administrative processes (and timely litigation, if any) in a DBA, DBRA and/or CWHSSA case, the WHD RO will request the contracting agency to transfer withheld funds due for underpayment of prevailing wages and overtime pay on DBA and DBRA projects to WHD for disbursement. The DOL/WHD request for release of monies to be disbursed to the workers will include information identifying the contractor(s) and contract(s) on which funds in question were withheld, describe the final determination preceding a request, and identify the amount of withheld funds to be transferred to WHD for disbursement to workers for work performed on the covered contract(s). Such requests for the release of withheld funds to WHD shall be made:
 - ◇◇ When a contractor agrees to distribution of contract funds to the covered workers (whether or not they have been subject to a formal withholding process); or
 - ◇◇ When a contractor (the prime contractor or subcontractor) does not request a hearing pursuant to 29 C.F.R. § 5.11(b); or
 - ◇◇ Following the issuance of administrative law judge decisions (including decisions approving settlement agreements); or
 - ◇◇ Following Administrative Review Board decisions; or
 - ◇◇ Subsequent to final resolution of further litigation.

- ◇ **Direct Davis-Bacon contracts**
 - ◇◇ On November 21, 2013, President Obama signed into law Public Law No. 113-50, the "Streamlining Claims for Federal Contractor Employees Act."
 - ◇◇◇ This new law transfers the authority to pay wages found due laborers and mechanics and withheld under direct DBA contracts from the Comptroller General to the Secretary of Labor. (It replaces two references to the Comptroller General with references to the Secretary of Labor at 40 U.S.C. § 3144(a)(1) and 40 U.S.C. § 3703(b)(3).)

- ◇◇◇ The disbursement of back wages due laborers and mechanics on contracts subject to the Davis-Bacon Act itself, previously a process handled by the Comptroller General's Claims Office, is now a responsibility of DOL. The WHD regional offices are responsible for managing the disbursement process for funds withheld by the federal contracting agencies under both DBA and CWHSSA requirements in such contracts.

◇ **Sending Funds to DOL for Disbursement in DBA, DBRA, and/or CWHSSA**

- ◇◇ AAM No. 215, dated March 10, 2014, provides contracting agencies with directions to follow in submitting refusal-to-pay and debarment cases to the WHD regional offices. It further discusses how contracting agencies are to send WHD withheld funds due covered laborers and mechanics for underpayment of prevailing wages and overtime pay for disbursement. These procedures apply to both direct DBA-covered contracts and DBRA-covered contracts. (The same procedures also apply to forwarding funds withheld for underpayment of wages due service employees on contracts subject to the SCA and/or CWHSSA.)
- ◇◇ When appropriate, WHD will send a written request to the contracting agency to transfer withheld funds to WHD for disbursement. The procedures here also apply to the processing of funds in cases in which a contractor authorizes the contracting agency to apply contract funds to back wages due covered workers.
- ◇◇ In cases other than the refusal-to-pay cases, when the agency has not sent the case file to WHD and, as a result of the agency's enforcement of DBA, DBRA, and/or CWHSSA requirements, a contractor authorizes the agency to use contract funds to cover back wages due or the agency forwards other funds collected to cover the back wages due, the agency should provide the appropriate WHD RO with the names, current addresses, social security numbers (if available), and back wage amount due each worker when it forwards such funds to WHD.
- ◇◇ Before contracting agencies forward withheld funds to WHD, they should contact the WHD regional government contracts enforcement coordinator for guidance on the information needed for the transfer. Regional coordinators are identified at:

<http://www.dol.gov/whd/govcontracts/regions.htm>

◇◇ WHD disbursement of the withheld monies is by two methods:

◇◇◇ Incoming wire deposits will be processed by the Federal Reserve Bank of New York City (TREAS NYC) and must include the following information:

Bank Name:	TREAS NYC
ABA Routing Number:	021030004
Agency Location Code:	16010002
BETC (collections):	COLL
TAS:	16X6507
Case ID Number:	WHD WHISARD case ID number (if available)
Case Name:	Employer/Company name
If there is no WHD Case ID:	
Submitting Agency	_____
Agency contact & phone	_____

◇◇◇ Paper check deposits should include the name of the contractor and the contract number(s) for the contract(s) on which the work was performed on the check or a separate letter transmitting the check, made payable to WHD, and should be mailed to:

U.S. Department of Labor
WAGE AND Hour Division
Room S-3502-HOLD for WHD
200 Constitution Avenue, N.W.
Washington, D.C. 20210

◇ **Sample letters for withholding request and verification**

◇◇ Below is a sample withholding request letter used by WHD and a sample verification of withholding letter that may be used by agencies to provide WHD confirmation that the funds have been withheld.

WITHHOLDING REQUEST LETTER (DBRA)

Ms. Contracting Officer
U.S. Federal Agency
Anywhere, USA 00000

Dear Ms. Contracting Officer:

Re: Name of prime contractor
Contract number and location
Our file number: 98-000-00000

Our Wage and Hour District Office has conducted an investigation of the above-referenced contractor under the Davis-Bacon and related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA).

The investigation has disclosed monetary violations resulting from failure to pay the required prevailing wage rates. DBRA back wages due have been computed in the amount of \$_____.

The contractor has not agreed to pay the back wages found due. Therefore, in order to protect the interests of the Federal government and the affected employees, and in accordance with Department of Labor Regulations, 29 C.F.R. § 5.5(a)(2), and as provided for in the Federal Acquisition Regulations at 48 C.F.R. § 52.222-4(c) and 52.222-7, it is requested that the aforementioned sum be withheld from contract payments due the prime contractor.

<1-Optional> If there are insufficient funds to withhold on this contract, cross-withholding of funds from any current Federal contract with the same prime contractor or from any federally-assisted contract with the same prime contractor which is subject to either Davis-Bacon prevailing wage requirements or Contract Work Hours and Safety Standards Act requirements, respectively, is authorized by the FAR (48 C.F.R. § 52.222-7 and/or 52.222-4(c), respectively).

<2-Optional> We request that you advise us immediately if you have any information that the prime contractor has filed bankruptcy proceedings.

Should we succeed in securing direct payments to the employees or should there be any change in the amount noted, we will advise you immediately. Thank you for your continuing cooperation in this matter. If you have any questions, please contact the Wage and Hour Regional Wage Specialist at the above address.

**U.S. DEPARTMENT OF LABOR
DAVIS-BACON RESOURCE BOOK**

**DBA/DBRA/CWHSSA
WITHHOLDING**

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Please notify us in writing of your actions on this request no later than (date) . A withholding verification form is enclosed for your convenience.

Sincerely,

Representative from the
Wage and Hour Division

Enclosure

cc: Name of Prime Contractor

VERIFICATION OF WITHHOLDING LETTER

Case Name:

File Number:

VERIFICATION OF WITHHOLDING

This is to verify that \$_____ has been withheld from funds due (name of contractor) to cover wage underpayments under Contract Number _____ as of (enter date) per section 5.5(a)(2) of Regulations, 29 C.F.R. Part 5.

Contracting Officer_____
Agency_____
Telephone Number