



# PREVAILLING WAGE SEMINARS



**WAGE AND HOUR DIVISION**  
UNITED STATES DEPARTMENT OF LABOR



# **Investigative Process, Withholding, and Debarment**

# Overview of Investigative Process

- Initial Steps in Conducting an Investigation;
- Determining Compliance; and
- Conclusion of Investigation.

# Authority for SCA and DBA Investigations

- DOL has sole enforcement authority under SCA.
- Under Reorganization Plan No. 14 of 1950, federal contracting agencies also have the authority to conduct DBA/DBRA investigations.

# Why Are Employers Investigated?

- WHD conducts investigations for a variety of reasons, and generally does not disclose the reason during the investigation
- Many investigations are the result of complaints, but all complaints are confidential, and investigators may not even disclose whether one has been received
- WHD also conducts investigations of business or industries for a variety of other reasons, such as high violation rates, employment of vulnerable workers, or rapid changes in the industry

# Compliance Issues

- An investigation will generally identify and examine the following issues:
  - Are the correct contract clauses included in contract?
  - Does contract have the correct WDs?
  - Are the poster and WD, including any conformance actions, posted at the site or made available to employees?
  - Does the WD contain necessary classifications?

# Compliance Issues (cont'd)

## ■ More investigation issues:

- Is a conformance necessary?
- Are employees properly classified?
- Are fringe benefits being properly paid?
- For DBA/DBRA, have apprenticeship and/or trainee requirements been met?
- Is “overtime” correctly paid under the FLSA or CWHSSA, if appropriate?
- Has employer kept accurate payroll records?

# Preliminary Steps in Conducting Investigations

- Obtain the following information:
  - Copy of labor standards clauses in contract(s);
  - Copy of WDs in contract(s); and
  - Employer identification number.

# Initial Employer Contact

- Initiate contact with the employer, prime contractor (if not the subject of the investigation), and contracting agency.
- Obtain:
  - Legal name and trade name of employer;
  - Officers (Name and Title);
  - Full address;
  - Federal tax identification number (FEIN);
  - Information on business (size, dollar volume, etc.).
  - Copies of all SCA/DBA/DBRA contracts, subcontracts and applicable wage determinations

# Initial Employer Contact (cont'd.)

- Inform the employer of the investigation process:
  - Scope of investigation.
  - Examine payroll records.
  - Conduct employee interviews.
  - Inspect job site.

# Examine Payroll Records

(29 C.F.R. §§ 4.6(g), 4.185, 5.5(a)(3))

- The contractor and each subcontractor must maintain adequate records for each employee for 3 years:
  - Name, address and social security number;
  - Work classification, wages and benefits;
  - Daily/weekly compensation and hours worked, and any payroll deductions;
  - Copies of certified payroll for DBA/DBRA; and
  - Length of service list of the predecessor contractor for SCA.

## Employee Interviews – 29 CFR 4.6(g)(4) and 5.5(a)(3)(iii)

- 4.6(g)(4) – “The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.”
- 5.5(a)(3)(iii) - “The contractor or sub-contractor ... shall permit such representatives [of DOL or the contracting agency] to interview employees during working hours on the job.”

# Employee Interviews

- Are essential to the investigation.
- Information provided is confidential.
- Interview Statement should contain:
  - Place and date of interview;
  - Name and address of employer/employee;
  - Employment status and classification
  - Detailed description of work performed and tools/equipment used
  - Daily and weekly hours worked
  - Pay rates
  - Other information indicating potential violations

# DBA/DBRA - Area Practice Surveys

- There are no nationwide standard classification definitions under the DBA
- To determine proper classifications for workers employed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**

# Conclusion of Investigation

- Compute any back wages or liquidated damages
- Inform contractor of investigation findings;
- Detail steps to eliminate violations;
- Consider additional evidence;
- Request payment of back wages; and
- Notify contracting agency of any liquidated damages under CWHSSA.

# Withholding of Contract Funds

- SCA, DBA, and CWHSSA provide for withholding of contract funds to satisfy alleged wage underpayments pending resolution of a wage dispute.
  - 41 U.S.C. § 352(a); 40 U.S.C. § 3142(c)(3); 40 U.S.C. § 3702(d).
- Withholding of contract funds is an effective enforcement tool in SCA and CWHSSA cases.
  - It protects the rights of covered workers to wages due them.

# Withholding of Contract Funds

- SCA, DBA, and CWHSSA contract clauses provide for withholding to ensure the availability of contract funds needed for the payment of:
  - unpaid back wages found to be due to covered workers; and
  - CWHSSA liquidated damages.
- DOL regulations address withholding in the SCA, DBA, and CWHSSA contract clauses at 29 C.F.R. § 4.6(i), 4.187, 29 C.F.R. §§ 5.5(a)(2), and 5.5(b)(3).

# Withholding of Contract Funds

- Withholding may be undertaken at the request of DOL or by the contracting agency under its own initiative, if it is determined to be necessary to secure the funds to pay wages or fringe benefits due to underpaid employees.
- It is mandatory for a contracting officer to adhere to a request from the Department of Labor to withhold funds where such funds are available.

# Withholding of Contract Funds

- Withholding may take place due to underpayments by the prime contractor themselves, or for underpayments by any of their sub-contractors
- Funds may be withheld from any contract between the same prime contractor and the federal government, not only the contract(s) upon which the underpayments occurred.

# Withholding of Contract Funds

- If subsequent investigation confirms violations, the contracting officer must adjust the withholding as necessary
- If DOL requested the withholding, the contracting officer must not reduce or release the withheld funds without written approval by DOL
- The withheld funds are to be used to satisfy:
  - assessed liquidated damages; and
  - unless the contractor makes restitution, validated wage underpayments

# Withholding of Contract Funds

- The contractor and prime contractor (if separate) will be notified in writing of the withholding and will be provided with time to provide additional information.
- Funds may be withheld prior to the institution of administrative proceedings by the Secretary. However, those funds will not be disbursed until the contractor and/or prime contractor has had an opportunity to request a hearing before the Administrative Law Judge.

# Withholding of Funds

- Wage claims have priority over other claims, including:
  - IRS tax levies
  - Agency re-procurement costs
  - Any claim by the trustee in bankruptcy
  - Any assignee of the contractor
- The government may also institute court action against the contractor, or its surety, to recover wage and fringe benefit underpayments if the accrued payments withheld under the terms of the contract are insufficient.

# Contract Cancellation

- When a violation of any labor stipulation is found, the contracting agency may cancel the contract upon written notice to the contractor.
- The contracting agency may then enter into other contracts or arrangements as needed to complete the original contract and charge all additional costs to the original contractor.
- SCA – 41 U.S.C. 352(c), 29 CFR 4.6(1); DBA – 40 U.S.C 3143, 29 CFR 5.5(a)(7)

# Debarment - SCA

- Any person or business entity found to have violated the SCA may be ineligible to receive further contracts for three years unless there is a finding of “unusual circumstances.”
- 41 U.S.C 354; 29 CFR 4.188

# Debarment - SCA

- Contracts also may not be awarded to any firm, corporation, partnership, or association in which debarred persons or firms have a substantial interest
- “Substantial interest” is determined on a case by case basis, but generally includes:
  - Any person or firm with more than 5% ownership or control
  - Officers, directors, or other shared management
  - The debarred person participated in contract negotiations, signed contract(s), or can establish, control, or manage the contract performance and/or the labor policies for a firm

# Debarment - SCA

- The burden is on the contractor to demonstrate unusual circumstances.
- A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are prerequisites, but are not the only factors that must be considered.
- Debarment relief is not appropriate where aggravated circumstances are present, such as willful, deliberate, or aggravated violations, or culpable neglect or disregard of the requirements of the labor provisions

# Debarment – DBA/DBRA

- Occurs when a contractor is declared *ineligible* for future contracts due to:
  - Violations of the DBA in disregard of its obligations to employees or subcontractors
  - Aggravated or willful violations under the labor standards provisions of related Acts
- Period of ineligibility is 3 years for DBA and up to 3 years for DBRA

# Debarment –DBA/DBRA

- Debarment is considered when a contractor has:
  - Submitted falsified certified payrolls
  - Required “kickbacks” of wages or back wages
  - Committed repeat violations
  - Committed serious violations
  - Misclassified covered workers in clear disregard of proper classification norms; and/or
  - As a prime contractor, failed to ensure compliance by subcontractors

# Removal from the Debarment List - DBRA

- Any person or firm debarred due to aggravated or willful violations under DBRA may make a written request for removal from the debarment list not sooner than six months after the date their name was published on the list
- The Administrator will determine whether the contractor has demonstrated a current responsibility to comply with the labor standards of the related acts

# Removal from the Debarment List - DBRA

- Factors considered by the Administrator in determining whether removal from the debarment list is warranted include the severity of the violations, the contractor's attitude towards compliance, and the contractor's past compliance history
- In no instance will a party be removed from the debarment list until a further investigation has been conducted to determine whether the contractor is currently in compliance with not only the labor standards set forth in the related acts, but also other applicable labor statutes providing wage protections
- Removal will not be considered where the contractor has not made full restitution of any unpaid wages

# Hearing Process (29 C.F.R. Part 6)

- A complaint is filed by WHD with DOL's Administrative Law Judge (ALJ) when a contractor:
  - Fails to pay back wages; or
  - Refuses to agree to future compliance; or
  - Debarment is recommended.

# Hearing Process (cont'd.)

- For SCA, the contractor is served with a copy of the complaint, who may file an answer within 30 days of the date of service.
- For DBA/DBRA, a registered or certified notification shall be sent to the last known address of the contractor, who may make a written request for a hearing postmarked within 30 days of the date of the letter from the Administrator.
- The Office of the Chief ALJ is responsible for scheduling administrative hearings.
- ALJ decisions may be appealed (within 40 days) to the Administrative Review Board, which makes final agency rulings.

# Debarment List

- The name(s) of the contractor and any responsible parties, along with the name of any firms in which they are known to have an interest, are placed on the list of ineligible persons or firms, which is distributed to federal agencies
- This list is searchable online at the [System Awards Management website](#)

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