

Slide 1 - Hello. My name is Rebecca Clark and I am the Regional Enforcement Coordinator for Government Contracts for the Western Region. In today's presentation I will be talking about Davis Bacon Act coverage.

Slide 2 - The Davis-Bacon Act requires that each Federal contract over \$2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings or public works shall contain the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. In addition to the Davis Bacon Act itself, Congress has added prevailing wage provisions to more than 60 laws which we call the "related Acts" under which Federal agencies assist construction projects through grants, loans, loan guarantees, and insurance.

Slide 3 - The Davis Bacon Act, passed in 1931, was the first law to govern wage standards for non-government workers. It requires the payment of locally prevailing wages and fringe benefits, as pre-determined by DOL, to laborers and mechanics employed by contractors and subcontractors engaged in Federal construction contracts.

In 1935 the Act was amended to add the requirements of the Copeland Anti Kickback Act, which regulates deductions from employees' pay and requires the use of certified payrolls.

The 1964 amendment changed the Contract Work Hours Safety Standards Act to align itself with the Fair Labor Standards Act overtime requirement of paying overtime on a weekly basis instead of a daily basis.

Slide 4 - The Act applies to contracts in excess of \$2,000 to which the Federal Government or the District of Columbia is a party for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works.

The \$2,000 threshold applies to the prime contract.

Davis Bacon does not apply to Federal construction contracts in Guam, Puerto Rico, the Virgin Islands, or other territories. However, some "related Acts" that authorize Federal assistance to local governmental bodies in the territories do require the payment of Davis-Bacon prevailing wages. Davis Bacon does not apply to work performed in foreign countries.

Slide 5 - Criteria for considering Coverage:

Is the agreement a "contract for construction" to which the Federal Government or District of Columbia is a party?

"Construction" includes all types of work done on a particular building or work at the site thereof, as defined in the regulations.

A contract is "for construction" if "more than an incidental amount of construction-type of activity is involved in the performance of the government contract."

Slide 6 - Is the “contract for construction” a contract for construction of a public building or public work of the U.S. or in the District of Columbia?

A “public building” or “public work” – includes “a building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is a Federal agency.

Slide 7 - The structure of the payments do not determine Davis Bacon coverage.

Any expenditure or transfer of funds or an asset of financial value either directly or indirectly in exchange for construction is considered public funding.

It can include grants, awards, subsidies, or the conveyance or other transfer of property or real assets.

Slide 8 - Often leases call for construction activity to be accomplished by the owner of a property to accommodate a tenant. This can range from complete construction of a new office building or complete renovation of an existing building to minor work such as repainting an area where a tenant is renting a small amount of space in a structure that has numerous tenants.

Within the meaning of the Davis Bacon the terms “public building” and “public work” are defined broadly in the applicable regulations. This slide cites the definition.

Often parties interacting with Davis-Bacon or the Related Acts imagine a narrower view. In particular note that the definition is not constrained by whether a federal agency holds title to a property.

Slide 9 - On June 22, 1994, the Wage Hour Administrator issued ALL AGENCY MEMORANDUM 176 to advise the federal contracting agencies that in view of the Crown Point case and a May 23, 1994 Department of Justice/Office of Legal Counsel memorandum, Davis-Bacon can apply to certain federal lease contracts that also call for construction of a public building or work. As stated in ALL AGENCY MEMORANDUM 176, Davis-Bacon application to any lease contract can be determined only by reviewing the specific facts of the particular contract, and accordingly, any lease calling for the construction, alteration, and/or repair, of a public building or public work must be analyzed under specified criteria to determine whether it is necessary to include Davis-Bacon requirements in the lease.

Slide 10 - ALL AGENCY MEMORANDUM 176 reiterates the Department of Justice/Office of Legal Counsel guidance by quoting from the 1994 memorandum.

Factors to be considered in determining whether a lease/construction contract calls for construction of a public building or public work may include:

- The length of the lease,
- The extent of which government involvement in the construction project [such as whether the building is being built to Government requirements and whether the Government has the right to inspect the progress of the work],

- The extent to which the building will be used for private rather than public purposes,
- The extent to which the costs of the construction will be fully paid for by the lease payments, and
- Whether the contract is written as a lease solely to avoid the application of Davis-Bacon.

Slide 11 - Now we'll discuss the Davis Bacon and Related Acts.

As mentioned before, Davis-Bacon requirements extend to numerous "related Acts" that provide federal assistance by grants, loans, loan guarantees, or insurance.

Some of the "related Acts" contain coverage criteria specific to projects funded under these statutes. A determination of whether the Davis-Bacon prevailing wage provisions apply to all or a portion of an assisted project requires reference to the actual labor standards provision in the related Act. If a statute authorizes federal assistance, but does not include either directly or by reference the DAVIS BACON labor standards clause, the statute would not be a "related" act and Davis Bacon would not apply.

Slide 12 - Here are two examples of Related Acts:

Housing and Urban Development financed construction of low-income housing projects

The Federal Highway Administration provides grants to states for reconstruction of roads and bridges on Federal-aid highways

Slide 13 - This slide provides more examples of Davis Bacon projects.

Remember, DAVIS BACON projects include construction contracts signed by an agency of the Federal government.

RELATED ACTS projects include construction contracts signed by an agency other than the Federal government.

Slide 14 - Here are some more examples of Related Acts:

Again, HUD - assisted housing construction project and

The Environmental Protection Agency - assisted water treatment plant construction project

A helpful way to think about Davis Bacon and the Davis Bacon Related Acts, is that Davis Bacon is a contract in which the federal government or D.C enters into directly with a prime contractor, while in a related act scenario, you typically see a "middle man" or middle entity, like a state, or local government, who has received federal assistance, entering into the contract with the prime contractor.

Slide 15 - Contracting agencies are required to include the labor standards requirements in any covered contract. In contracts to which Davis Bacon or a Davis Bacon Related Act requirements apply, these requirements are normally found in the contract under the heading "Davis-Bacon Act," or "labor standards," or "prevailing wage requirements," or "Federal requirements." They

explain application of the prevailing wage requirements, and by entering into the contract, the contractor makes a commitment to comply with these labor standards.

A comprehensive list of the contract clauses can be found at 29 Code of Federal Regulation Part 5.5(a)(1) – (10) or in the Federal Acquisition Regulations at 48 Code of Federal Regulations 52.222-4 through 52.222-15. The FAR contract clauses mirror the clauses in Part 5.

Slide 16 - The Davis-Bacon contract clauses must be included in covered contracts. The contractor makes a commitment to comply with these labor standards by entering into the contract. Here is a brief description of each clause.

(1) **Minimum wages** - laborers and mechanics must be paid at least the wage rate and fringe benefits contained in the contract wage determination for the classification of work performed on the job site.

(2) **Withholding** - accrued payments due the contractor on the contract or any other covered contract may be withheld to the extent necessary to safeguard the difference between the rates paid to laborers and mechanics and those required by the contract wage determination when a contractor has refused to pay.

(3) **Maintaining basic payroll records** – records must be preserved by the contractor during the course of the work and for three years thereafter.

(4) **Apprentices and Trainees** – apprentices and trainees can work at less than the predetermined rate only when all of the conditions are met. This contract clause provides very detailed compliance requirements with regard to apprentices and trainees in approved programs. Employers are to pay fringe benefits in accord with their registered program; if the program does not specify fringe benefits, employers must pay the full amount of fringe benefits listed on the wage determination for the applicable classification.

(5) **Copeland Act compliance** – requires the compliance with the requirements of 29 Code of Federal Regulation Part 3, which prohibits kick-backs, permits certain payroll deductions, addresses weekly certified payroll requirements, specifies methods of wage payments, and is binding on contractors.

Slide 17 - Contract Clause number (6) **Subcontracts** - requires the contractor and subcontractors to insert the labor standards clauses into their subcontracts. This clause further stipulates that the prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with all of the contract clauses listed here. Thus, the prime contractor can be held liable for the payment of any back wages due. Generally, a subcontractor would be any firm or person (other than a laborer or mechanic) who has agreed, either verbally or in writing, to perform any work required under the contract.

(7) **Contract termination and debarment** – a violation of the labor standards requirements in the contract may be grounds for termination of the contract or debarment. Debarment means that a firm and its responsible officers, and firms in which they have an interest (or substantial interest for “related Acts”), are prohibited from being awarded covered contracts. Debarment is for three years if Davis Bacon applies, or up to three years if a Related Act applies.

(8) **All rulings and interpretations** – of the Davis-Bacon and related Acts contained in 29 Code of Federal Regulation Parts 1, 3, and 5 are incorporated by reference into the contract.

(9) **Disputes concerning labor standards provisions** of the contract are not subject to the general disputes clause of the contract, but rather to the procedures in 29 Code of Federal Regulation Parts, 5, 6, and 7. The disputes subject to this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, DOL, or the employees (laborers and mechanics) or their representatives.

(10) **Certification of eligibility** – by entering into the contract, the contractor certifies that neither he nor she nor any person or firm who has an interest in the contractor's firm is a person that has been debarred by virtue of the Davis Bacon Act, or a related Act. Criminal prosecution and penalties can apply for making false statements about eligibility for government contract work.

Slide 18 - This brings us to the conclusion of the presentation. Thank you for joining me today.