

INVESTIGATIVE PROCEDURES

UNDER

DBA/DBRA/CWHSSA

REORGANIZATION PLAN NO. 14 OF 1950

**DAVIS-BACON LABOR STANDARDS/
CONTRACT STIPULATIONS**

**SPECIFIC STEPS IN CONDUCTING DBA/DBRA/CWHSSA
INVESTIGATIONS**

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REPORT WRITING

THE HEARING PROCESS

REORGANIZATION PLAN NO. 14 OF 1950

Purpose

- ◇ To promote responsibility for uniform and effective DBA/DBRA enforcement among federal procuring agencies under DOL coordination.

DOL Functions/Responsibilities Purpose

- ◇ Secretary of Labor – and, by delegation, the WHD – is responsible for:
 - ◇◇ Determining prevailing wages.
 - ◇◇ Issuing regulations and standards to be observed by contracting agencies.
- ◇ DOL performs an oversight function and has authority to conduct independent investigations.

Contracting Agency Functions/Responsibilities

- ◇ Federal agencies that award contracts and provide federal assistance have **day-to-day** enforcement responsibilities. The federal agency responsibilities include activities such as:
 - ◇◇ Ensuring the incorporation of Davis-Bacon contract stipulations and appropriate wage determinations in DBA/DBRA covered bid solicitations and contracts (and appropriate guidance concerning the application of multiple wage schedules) in accordance with 29 C.F.R. § 1.6(b) and 29 C.F.R. §§ 5.5-5.6.
 - ◇◇ Ensuring that the Davis-Bacon poster (WH 1321) and the applicable wage determination(s) and approved conformances are posted at the site of the work. 29 C.F.R. § 5.5 (a)(1)(i). This poster can be downloaded from the WHD website (<http://www.dol.gov/whd/>).
 - ◇◇ Reviewing certified payrolls in a timely manner. 29 C.F.R. § 5.6(a)(3).
 - ◇◇ Conducting employee interviews. 29 C.F.R. § 5.6(a)(3).

- ◇◇ Conducting investigations, as appropriate, and forwarding refusal to pay and/or debarment consideration cases to WHD for appropriate action. 29 C.F.R. § 5.6 and All Agency Memorandum No. 182.
- ◇◇ Submitting enforcement reports and semi-annual enforcement reports to the DOL. 29 C.F.R. § 5.7 and All Agency Memorandum No. 189.
- ◇ Contracting agencies cannot contract out responsibility for the enforcement of the DBA/DBRA requirements.
- ◇ Federal contracting agencies are responsible for ensuring that grant recipients who have contracting responsibilities properly apply and enforce DBA/DBRA.

DAVIS-BACON LABOR STANDARDS CONTRACT STIPULATIONS

(29 C.F.R. § 5.5(a), reiterated at 48 C.F.R. § 52.222-6 through 52.222-15) &
CWHSSA STIPULATIONS (29 C.F.R. § 5.5(b), reiterated at 48 C.F.R. § 52.222-4)

Definition 29 C.F.R. § 5.2(f).

- ◇ The term “**labor standards**” within the meaning of the DBA means the requirements of:
 - ◇◇ The Davis-Bacon Act
 - ◇◇ The Contract Work Hours and Safety Standards Act (other than those relating to safety and health)
 - ◇◇ The Copeland Act
 - ◇◇ The prevailing wage provisions of the Davis-Bacon related Acts
 - ◇◇ Regulations, 29 C.F.R. Parts 1, 3 and 5, which govern the administration and enforcement of the DBA, DBRA, and CWHSSA

Davis-Bacon contract clauses

- ◇ 29 C.F.R. Part 5 requires contracting agencies to include in any DBA/DBRA covered construction contract the specified labor standards requirements (contract clauses). Normally these requirements are found in the contract under the heading “**Davis-Bacon Act**” or “**labor standards**” or “**prevailing wage requirements**” or “**federal requirements**” and include:
 1. **Minimum wages** - All laborers and mechanics employed or working upon the **site of work** must be paid at least the applicable prevailing wage rate for the classification of work performed as listed in the applicable wage determination or a rate approved in accordance with the “conformance process” set forth at 29 C.F.R. § 5.5(a)(1)(ii). The laborers and mechanics working on the site of work must be **paid weekly**.
 2. **Withholding** - The federal agency or the loan or grant recipient shall upon its own action or upon written request of an authorized representative of the 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. (The processing of monies so withheld is discussed further in the “DBA/DBRA/CWHSSA Withholding & Disbursement” chapter of this resource book.)

- 3a. **Maintaining basic payroll records** - The contractor must maintain basic payroll records during the course of the work and preserve them for three years. Such records shall contain:
- ◇◇ Name of each worker
 - ◇◇ Address
 - ◇◇ Social security number
 - ◇◇ His or her correct classification(s)
 - ◇◇ Hourly rates of wages paid
 - ◇◇ Daily and weekly number of hours worked
 - ◇◇ Deductions made and actual wages paid
 - ◇◇ Contractors employing apprentices or trainees under approved programs must have written evidence of the registration of the apprenticeship program and certification of the trainee program, copies of the individual registration forms of the apprentices and trainees, and written evidence of the applicable ratios and wage rates.
- b. **Submission of certified payroll records** - The contractor must submit **weekly** a copy of all payrolls to the contracting agency. The payrolls submitted must set out accurately and completely all of the basic payroll information listed above, except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individual identifying number for each employee, such as the last four digits of a social security number.
- ◇◇ The payroll information may be submitted in any form desired. Optional payroll form WH-347 is available on the WHD website at:

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<http://www.dol.gov/whd/forms/wh347instr.htm>

The form available there can be used as an electronically fillable form. (The WH-347 form is also published in the Federal Acquisition Regulations at 48 C.F.R. § 53.303-WH-347).

- ◇◇ The prime contractor is responsible for the submission of the certified payrolls to the contracting agency (including for all subcontractors on the project).
 - ◇◇ Each payroll submitted must be accompanied by a “Statement of Compliance” as required by the Copeland Act and 29 C.F.R. Part 3. (A form for this purpose is available on the second page of Optional form WH-347.)
 - ◇◇ The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution. Thus, the contractor is put on notice in the contract itself that criminal prosecution could result if falsified payrolls are submitted to the government. (*See* 29 C.F.R. § 5.5(a)(3)(ii)(D); reiterated at FAR 48 C.F.R. § 52.222-8(b)(4).)
 - ◇◇ The contractor or subcontractor must make the payroll records available for inspection, copying, or transcription by authorized representatives of the contracting agency or the DOL, and must permit such representatives to interview employees during working hours on the job.
 - ◇◇ If the contractor or subcontractor fails to submit the required records or to make them available, the federal 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.
 - ◇◇ Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action.
- 4a. **Apprentices** – Apprentices are permitted to work at less than the predetermined rate for the work they perform **only** when:
- ◇◇ They are employed pursuant to and **individually registered** in a bona fide apprenticeship program registered with the U.S. DOL,

Employment and Training Administration (ETA) Office of Apprenticeship (OA), or with a state apprenticeship agency recognized by ETA/OA. (**Note - the program itself must be registered and the apprentice must be individually registered in the program**);

- ◇◇ The allowable **ratio** of apprentices to journeymen **on the job site** in any craft classification does not exceed the ratio permitted to the contractor as to the entire work force under the registered program;
 - ◇◇◇ (Note: In view of the apprenticeship regulations at 29 C.F.R. Part 29, as revised in 2008, any questions concerning portability of the wages and ratio provisions on DBA/DBRA covered projects in light of 29 C.F.R. 29.13(b)(7) may require careful consideration by WHD.)
 - ◇◇ Fringe benefits are paid to apprentices according to the provisions of their apprenticeship program, or if the program is silent with respect to fringe benefits, they receive the full fringe benefit amount stipulated on the applicable wage decision for the craft in which they are employed (unless WHD determines that a different practice prevails for them).
 - ◇◇ Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated at 29 C.F.R. § 5.5(a)(4)(i), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed.
- b. **Trainees** – Trainees are not permitted to work at less than the predetermined rate for the work performed unless:
- ◇◇ They are employed pursuant to and **individually registered** in a program which has received prior approval (evidenced by formal certification by ETA). (**Note: State agency approval of trainee programs is not recognized for DBA/DBRA purposes**); and
 - ◇◇ The **ratio** of trainees to journeymen **on the job site** does not exceed that permitted under the plan approved by ETA.
 - ◇◇ The labor standards contract clause requirements regarding payments for fringe benefits for trainees are met.

◇◇ There is no portability of a trainee program from one locality to another.

5. **Copeland requirements** - All contractors must comply with the Copeland Act regulatory requirements in 29 C.F.R. Part 3, which prohibit kick-backs and set forth rules concerning deductions from employees' wages.

6. **Subcontracts** - The labor standards provisions require the contractor to insert the labor standards clauses in any subcontract. This clause further stipulates that the prime contractor shall be responsible for compliance by any subcontractor with the labor standards requirements in the contract.

Note: A subcontractor may be any person (other than an employee) or firm who has agreed, either verbally or in writing, to perform any of the work required under the contract.

7. **Contract termination and debarment** - If a contractor violates any of the labor standards requirements, the contractor may be terminated from the contract and/or debarred for a period not to exceed three years. (Debarment means that a firm and its responsible officers, and firms in which they have an interest (or substantial interest for related Act cases) are not permitted to work on covered contracts.)

8. All **rulings and interpretations** contained in 29 C.F.R. Parts 1, 3 & 5 are incorporated by reference in the contract.

9. **Disputes** under the contract relating to the Davis-Bacon labor standards requirements must be submitted to the DOL for resolution pursuant to the Secretary of Labor's authority under Reorganization Plan No. 14 of 1950, and 29 C.F.R. Parts 5, 6 and 7.

10. **Certification of eligibility** - By entering into the contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded federal government contracts (debarred).

◇◇ This labor standards clause further stipulates that no part of the contract shall be subcontracted to any person or firm debarred.

◇◇ The penalty for making false statements about eligibility for government contract work can be criminal prosecution.

CWHSSA contract clauses

- ◇ 29 C.F.R. 5(b) requires contracting agencies to include CWHSSA contract clauses in covered contracts. The requirements at 29 C.F.R. § 5.5(b) include:
 1. **Overtime requirements** – The contractor or subcontractor contracting for any part of the contract work and employing any laborer(s) or mechanic(s), including watchmen or guards, over 40 hours in a workweek on such work is required to pay such laborer(s) and mechanic(s) at least one and one-half times the basic rate of pay for all hours worked in excess of 40 in the workweek.
 2. **Violation; liability for unpaid wages; liquidated damages** – The contractor and any subcontractor responsible for violation(s) of the above CWHSSA contract requirement are liable for the unpaid wages and, in addition, are liable for liquidated damages computed with respect to laborers and mechanics in violation of the CWHSSA overtime requirements.
 3. **Withholding** - The withholding requirements regarding CWHSSA parallel those in the Davis-Bacon contract clauses described above.
 4. **Subcontracts** - The CWHSSA contract clause requirements parallel those in the Davis-Bacon contract clauses described above.
- ◇ These requirements are reiterated at 48 C.F.R. § 52.222-4.

SPECIFIC STEPS IN CONDUCTING DBA/DBRA/CWHSSA INVESTIGATIONS

The following guidance is intended to list the various steps that are typically undertaken by contracting agencies and WHD in conducting a DBA/DBRA/CWHSSA investigation.

Preliminary Steps

- ◇ Obtain the following information:
 1. Copy of the labor standards clauses in the contract.
 2. Copy of the Davis-Bacon wage decision(s) included in the contract, and in the case of multiple schedules, any instructions concerning their application.
 3. Copies of the certified payrolls submitted by the contractor under investigation.
 4. Employer identification number.

Initial Employer Contact

- ◇ A responsible official of the firm must be contacted at the start of the investigation.
- ◇ When investigating a subcontractor, find out what information on labor standards and wage determinations have been provided by the prime contractor (or higher-tier subcontractor) to the subcontractor. Ask the subcontractor for a copy of the subcontract, if one exists.
- ◇ When a subcontractor is being investigated, the prime contractor should be notified at the beginning of the investigation.
 - ◇◇ The prime contractor can provide information on the subcontractor's performance and may have records relating to the number of employees the subcontractor had on the project, the hours they worked, and the period of time they were on the project. The prime contractor should be asked to provide a copy of the subcontract, if it exists.

- ◇◇ The prime contractor has responsibility for compliance on the contract and is liable for back wages not paid by the subcontractor, and may decide to withhold final payment from the subcontractor until the back wage issues are resolved.
- ◇ Inform the employer that the purpose of the investigation is to determine compliance with the pertinent statutes and regulations and outline in general terms the scope of the investigation, including the examination of pertinent records, employee interviews and physical inspection of the project.
- ◇ Obtain the exact legal name of the firm and any trade names, the full address, full names of owners or officers and their titles, number of persons employed, name and address of any subcontractors, and such similar information as may be necessary to conduct and complete the investigation.

Examination of Certified Payrolls

- ◇ The contractor's certified payrolls should be examined for accuracy, completeness, and true representation of the facts. The examination should cover the current or most recent payrolls as well as those for selected periods which reflect the practice of the contractor or subcontractor during the life of the contract.
 1. Check for completeness and accuracy of the payrolls as to the names, addresses, job classifications, hourly wage rates, daily and weekly hours worked during the payroll period, gross weekly wages earned, deductions made from wages, and net weekly wages paid the employee. Notice if there are distinctions made among the various classifications.
 2. If the Contract Work Hours and Safety Standards Act is applicable and an employee worked in excess of forty hours in any workweek, determine whether time and a half the employee's regular rate was paid.
 3. Certified payrolls should be examined for discrepancies such as a disproportionate number of laborers, apprentices or trainees on the project.
 4. The wage rates should be compared against those listed on the wage determination. If workers perform work in more than one classification, the payroll records should accurately reflect the time spent working in each. Unlisted classifications should be identified and additional classification procedures initiated, if applicable.

5. Check certified payrolls for information on contributions to fringe benefit plans and/or cash paid in lieu of fringe benefits.

Examination of Records

- ◇ Examine the current or most recent payroll as well as those for selected periods which reflect the practice of the contractor or subcontractor during the life of the contract. The examination should include a review of the basic time cards, time sheets, or other work or personnel records of a representative number of employees in each classification. These records should be checked against the certified payrolls in order to disclose any possible discrepancies, or to give reasonable assurance that none exist.
- ◇ Examine documents which indicate that the firm has made contributions (or incurred costs) to fringe benefit plans. These documents might include: portions of the pension plan; documentation from the Internal Revenue Service that indicates the plan has been approved by the IRS; and records of contributions made.

Check for Compliance with Apprenticeship/Trainee Requirements

- ◇ Apprenticeship/trainee program information should be obtained and examined to verify that the program has been approved by the appropriate authority. If the contractor's evidence is not sufficient, contact ETA/OA and/or the state apprenticeship council (where appropriate) for verification. A list of local ETA/OA offices is available at <http://www.doleta.gov/oa/stateoffices.cfm#CO>.
- ◇ Obtain copies of the individual employees' apprentice/training registration forms for the file, as well as copies of the approved apprenticeship/training program itself.
- ◇ The ratio of apprentices to journeyworkers in any classification on the project should not exceed the ratio provided for in the relevant apprenticeship/training program. The ratio is determined on a daily basis, not weekly.

Determine if a Conformance is Necessary

- ◇ Determine if the wage determination contains classifications and wage rates for all the types of work performed on the contract.

1. If the applicable wage determination does not contain a classification for the work performed, the conformance procedure in 29 C.F.R. § 5.5(a)(1)(ii) must be followed. Contracting agencies cannot arbitrarily determine a rate.
2. Questions as to whether or not a conformed rate has been approved should be coordinated with WHD.

Employee Interviews

- ◇ Employee interviews are essential to the completeness of the investigation.
 - ◇◇ They should be sufficient in number to establish the degree of adequacy and accuracy of the records and the nature and extent of any violations.
 - ◇◇ They should also be representative of all classifications of employees on the project under investigation.
 - ◇◇ In some situations interviews with former employees may be appropriate.
 - ◇◇ In cases involving alleged misclassification and/or falsification of payroll records, it is important to account, through the interview process, for as many employees as possible who worked on the contract.
 - ◇◇ Employees should be questioned regarding other employees they worked with and the duties performed by those employees.
- ◇ Each employee should be informed that the information given is confidential to the fullest extent of the law, and that his/her identity will not be disclosed to the employer without the employee's written permission insofar as the law permits. (*See 29 C.F.R. § 5.6(a)(5).*)
- ◇ Place of interview
 - ◇◇ Employees currently employed may be interviewed during working hours on the job, in accordance with 29 C.F.R. § 5.5(a)(3)(ii), provided the interview can be properly and privately conducted on the premises.
 - ◇◇ In cases of falsification of records, fear of reprisals or intimidation, it may be more advisable to conduct the interview elsewhere, such as in the employee's home, at the agency's office, or other suitable place where it may be arranged.

- ◇◇ Employees should never be interviewed in the presence of the employer, another employee, or any other person.

- ◇ Telephone Interviews
 - ◇◇ Ordinarily, an interview should be made by telephone only if a personal interview is impracticable. When a telephone interview is used, it is suggested that the contracting officer send the employee the statement together with a request that the employee read the statement, make and initial any changes, sign and date it and return the statement to the contracting officer. It is suggested that the contracting officer keep a copy of the statement until the original is returned.

- ◇ Mail interviews
 - ◇◇ Ordinarily, an interview should be made by mail only if a personal or telephone interview is impracticable.

- ◇ Preparation of interview statements
 - ◇◇ When a written statement is taken, it should be recorded in the manner stated by the employee; it should be read by him/her, and contain a statement that it has been read and that it is correct. The contracting officer may restate or summarize the employee's remarks, but should do so in the first person and should phrase it in the employee's manner of speaking.

 - ◇◇ The statement should be signed by the employee and the signature, except in mail interviews, should be witnessed by the responsible agency official. In government contract cases, it is preferred that all interviews be signed. Where the statement is not signed, the contracting officer should give, either in the statement or his/her report, the employee's reason for not signing. Any changes in a signed employee statement should be initialed by the employee.

 - ◇◇ Each interview statement should contain the following information:
 1. Place and date of interview.
 2. Name of employer (firm).
 3. Name and permanent address of employee being interviewed.
 4. Employment status (whether present or former employee).

5. Period(s) of employment.
6. If an apprentice, the age, date of birth, and information concerning his status as an apprentice.
7. The statement should include specific information regarding the:
 - ◇◇◇ rate(s) of pay and wages received,
 - ◇◇◇ hour for starting/stopping work and daily/weekly hours worked,
 - ◇◇◇ manner in which time and work are recorded,
 - ◇◇◇ job classification(s) and exact work performed.

In cases alleging misclassification, the interview statement must specifically address the various types of duties performed. It is not sufficient for an employee to only state he/she was a carpenter. The interview must state the specific carpentry duties, and the tools and materials used. If an employee worked in more than one classification, the employee must be asked how much time he/she spent in each classification.

8. When possible, the interview statement should corroborate statements given by other employees. For example, the employee should be asked to identify other workers who performed the same work.
9. The interview should cover all the allegations of violations (particularly those in a complaint).
10. The interview should also cover any other details necessary to indicate accuracy of the employer's records, statements, or certifications.

◇◇ *All interview statements must be legible.*

Restrictions on Disclosure of Information to Contractors

- ◇ The contracting officer should never release interview statements to a contractor. The contracting officer should never tell any employee the amount of back wages computed.

Case Record

- ◇ Transcriptions of records and computations of back wages must be made when violations are found.

Discharging DBA/DBRA Minimum Wage and Fringe Benefit Obligations

- ◇ “Prevailing wage” is made up of two interchangeable components – basic hourly wages and fringe benefits.
 1. Both may be paid in cash;
 2. Payments can be made or costs incurred for “bona fide” fringe benefits; or
 3. Any combination thereof.
- ◇◇ Additional discussion of how the Davis-Bacon prevailing wage obligation can be met, with examples, is provided in the discussion of “Fringe Benefits” in the “DBA/DBRA Compliance Principles” chapter of this resource book.
- ◇ Monetary wages paid in excess of the Davis-Bacon minimum wage may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.
- ◇ Fringe benefits listed in the applicable Davis-Bacon wage determination must be paid for all hours worked – both straight time and overtime hours.
- ◇ Excess payments for overtime may not be offset/credited towards minimum wages due.
- ◇ Excess wages paid for work in one classification may not be offset/credited towards wage deficiencies in another classification. Under DBA/DBRA, each classification stands alone.

Resolution of Disputes Regarding Proper Classification of Workers

- ◇ To determine the proper classification for work performed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**. An “area practice survey” may be conducted by the WHD or by the contracting agency to determine proper classification of workers in accordance with local prevailing area practice. An overview of this topic is provided in the “DBA/DBRA Compliance Principles” chapter of this resource book.

Determining Compliance with CWHSSA

- ◇ See the “Overtime Pay on DBA/DBRA Contracts” chapter of this resource book for a detailed overview of determining compliance with CWHSSA overtime pay requirements. That discussion includes examples of how to assure that CWHSSA requirements are met.

CWHSSA Liquidated Damages

- ◇ Liquidated damages are computed at \$10.00 per day per employee for CWHSSA violations.

Example:

	M	T	W	T	F	S	S	<u>TOTAL</u>
REGULAR TIME	10	10	10	10	10	5	0	55

In the above example, no overtime premium was paid. The 15 weekly overtime hours were worked on two calendar days, Friday and Saturday. Thus, \$20.00 in CWHSSA liquidated damages would be computed.

- ◇ The decision on whether to assess liquidated damages is made by the federal contracting agency.
 - ◇◇ The contractor should be advised of the potential liquidated damages, and that they will be advised of the contracting agency’s determination concerning the assessment of liquidated damages.
- ◇ As a matter of administrative policy, liquidated damages are not computed for employees whose CWHSSA back wages are less than \$20.
- ◇ Liquidated damages in excess of \$500 may be waived or adjusted only with the concurrence of the appropriate WHD Regional Administrator. (At <http://www.dol.gov/whd/whdkeyp.htm>, see the listing of “WHD Regional Offices.”)
- ◇ If a federal Agency Head finds that a sum of liquidated damages administratively determined to be due under CWHSSA for a contract is \$500 or less, an appropriate adjustment may be made in such liquidated damages or the contractor or subcontractor may be relieved of liability for the liquidated damages without submitting recommendations or a report to the WHD if the Agency Head finds that:

- ◇◇ the sum of liquidated damages computed is incorrect, or
- ◇◇ the contractor or subcontractor inadvertently violated the provisions of CWHSSA notwithstanding the exercise of due care on the part of the contractor or subcontractor involved.

40 U.S.C. 3702(c); 29 C.F.R. §§ 5.8(d) and 5.15(c)(3).

Overtime Requirements under the Fair Labor Standards Act, as amended

- ◇ CWHSSA requires the payment of an overtime premium when a laborer or mechanic works in excess of 40 hours in a work week on covered contract(s). Overtime hours not subject to CWHSSA may be subject to FLSA overtime pay requirements.
- ◇ Where questions arise concerning overtime pay obligations under the FLSA, referral to the local WHD office is appropriate.

CONCLUSION OF INVESTIGATION

Final Conference Procedure

- ◇ Inform the contractor generally of the investigation findings, and indicate that these findings are based solely on the facts and information disclosed by the investigation.
- ◇ Detail specifically what must be done to eliminate the violations, if any, and provide any available informational material such as copies of 29 C.F.R. Part 3 and/or Part 5.
- ◇ Be willing to consider additional evidence from the contractor which may affect the findings, such as an unresolved conformance request, evidence of contractor contributions to a fringe benefit plan, or inspection reports.
- ◇ Request for payment of back wages:
 - ◇◇ The DBA contains no injunctive action procedures. Therefore, a demand for the payment of the back wages must always be made even if the employer refuses to comply.
 - ◇◇ Contracting officers may accept partial back wage restitution for undisputed issues.
 - ◇◇ Contracting officers may attempt to collect back wages even though the case meets the debarment criteria, unless there is evidence of possible Copeland “Anti-kickback” Act violations. However, in no event will a contractor be left with the impression that the payment of back wages will eliminate the possibility of debarment.
 - ◇◇ If the employer is a subcontractor and refuses to make full restitution, the prime contractor must then be requested to make restitution. The prime contractor is ultimately responsible for the payment of the back wages.
- ◇ Notify the subcontractor and/or prime contractor of the potential for the assessment of liquidated damages (\$10.00 per day per violation) under CWHSSA. The firm(s) should be advised that the contracting agency will make a decision on the assessment of liquidated damages at a later date.

- ◇ If there is no agreement to pay back wages, the file must be forwarded to the appropriate WHD Regional Office pursuant to 29 C.F.R. § 5.7 for review, collection of back wages, and debarment consideration. (See AAM No. 182. The updated addresses for the WHD regional offices are available at <http://www.dol.gov/whd/whdkeyp.htm> under the heading “WHD Regional Offices.”)

Withholding

- ◇ In refusal-to-pay cases under both DBA/DBRA and CWHSSA, the contracting agency shall withhold contract funds to cover the back wages due.
- ◇ If funds remaining on the contract under which the violations occurred are insufficient to cover the back wages due, the contracting agency can withhold funds from other contracts subject to DBA/DBRA/CWHSSA or any other federal contract held by the same prime contractor – “cross-withholding”.
- ◇ Contracting officers should immediately notify WHD if they become aware that the prime contractor may be filing for bankruptcy.
- ◇ In situations where WHD has instituted withholding actions, a letter to the prime contractor will describe the nature of the alleged violations and back wages found due. The prime contractor will have 15 days to provide written views on the alleged violations. Withholding procedures and the back wage disbursement process are discussed further in the “DBA/DBRA/CWHSSA Withholding and Disbursement” chapter of this resource book.

Due Process for Withholding Action

- ◇ To ensure that contractors and subcontractors receive “due process” prior to the withholding of funds at the direction of the WHD, the following steps are included in the WHD enforcement procedures.
 - ◇◇ Where a contractor refuses to pay back wages under DBA, DBRA, and/or CWHSSA and funds are available for withholding, WHD will generally send a “due process” letter to the prime contractor. This letter will include:
 - ◇◇◇ A statement that the final conference was conducted at which time the contractor was provided an opportunity to discuss alleged violations; or if a final conference was not held, provide the reason(s) why;
 - ◇◇◇ A brief description of the alleged violations;

- ◇◇◇ An affirmation that the contractor received a Summary of Unpaid Wages;
- ◇◇◇ A statement that the matter is being forwarded to a designated WHD deciding official, who will decide whether withholding action will be taken regarding the back wage findings;
- ◇◇◇ A statement that the contractor has fifteen (15) days to provide the WHD deciding official with written views on whether the violations occurred;
- ◇◇◇ A statement that any determination regarding the withholding of contract funds will not result in the distribution of the funds to the underpaid workers until such time as the administrative remedies available to the contractor have been completed. See discussion of “The Hearing Process And Appeal Rights,” below.
- ◇◇ If the deciding official determines that withholding action is warranted, a copy of the WHD withholding request to the contracting agency and a letter indicating the deciding official’s decision on withholding will be sent to the prime contractor.
- ◇ In certain cases, such as missed payrolls, likely bankruptcy filings, or imminent contract close out, it may be necessary to request withholding before the measures described above can be provided. In those cases, the procedures outlined above should be followed as quickly as reasonably possible after the withholding action; and based on the contractor’s submission, the WHD deciding official may decide to revoke an earlier withholding request.

Debarment

- ◇ Debarment occurs when a contractor or subcontractor is declared ineligible (debarred) from receiving federal or federally assisted contracts for **up to 3 years** because it was found to be “in aggravated or willful violation of the labor standards provisions” of any of the related acts, or declared ineligible **for 3 years** because violations of the DBA were a disregard of the contractor’s “obligations to employees or subcontractors.”
- ◇ At the conclusion of the investigation, the contracting officer may advise the contractor of the potential for debarment where appropriate, **but make no statement** to the contractor about any recommendation concerning debarment.

- ◇ In no event should a contractor be left with the impression that payment of back wages eliminates the possibility of debarment.

Debarment Criteria

- ◇ The facts and circumstances of a given case will dictate whether debarment is appropriate. Some of the more common instances in which the DOL finds debarment appropriate are when a contractor has:
 - ◇◇ Submitted falsified certified payroll records,
 - ◇◇ Required kickbacks of wages or back wages,
 - ◇◇ Committed repeat DBA/DBRA violations,
 - ◇◇ Misclassified covered workers in clear disregard of proper classification norms, or
 - ◇◇ As a prime contractor, failed to ensure compliance by subcontractors.
- ◇ DOL holds general contractors responsible not only for their own violations of the federal Davis-Bacon labor standards, but in appropriate circumstances also for those committed by their subcontractors. A July 26, 2012 WHD press release in a major case involving a prime contractor's enhanced compliance measures under a settlement agreement and debarment of multiple subcontractors is instructive in this regard. The July 26, 2012 press release is available at: <http://www.dol.gov/whd/media/press/whdpressVB2print.asp?pressdoc=Northeast/20120726.xml>.

Contracting agency reports to DOL

- ◇ Federal agency responsibility to conduct labor standards investigations under DBA and to submit investigation reports to DOL are described in the FAR at 48 C.F.R. § 22.406.8. Investigation reports to DOL are addressed there and at 29 C.F.R. § 5.7. Agency investigation/enforcement reports to DOL, with relevant information, are required where:
 - ◇◇ Underpayments by a contractor or subcontractor total \$1,000 or more, or
 - ◇◇ Where there is reason to believe that either the contractor has disregarded its obligations to employees and subcontractors under DBA or that the violations are aggravated or willful under one of the DBRA, or

- ◇◇ The agency investigation was made at the request of the Department of Labor, or
- ◇◇ Back wages have not been paid.
- ◇ In addition, upon DOL request, a federal agency head shall transmit to the WHD Administrator such information available to their agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the WHD Administrator may find necessary for the performance of his or her duties with respect to the labor standards provisions referred to in this part. 29 C.F.R. § 5.7(c) and FAR 48 C.F.R. § 22.406.12.
- ◇ Also, semi-annual reports on compliance with and enforcement of the construction labor standards requirements of the DBA and CWHSSA are required from each contracting agency for the reporting periods October 1 through March 31 and April 1 through September 30. 29 C.F.R. § 5.7(b) and FAR 48 C.F.R. § 22.406.13. AAM No. 189 provides further guidance and includes the required reporting format.

REPORT WRITING

This is one of the most important aspects of the investigation.

- ◇ The report is reviewed at many levels, both inside and outside the contracting agency. For example:
 - ◇◇ WHD
 - ◇◇ DOL's Office of the Solicitor
 - ◇◇ The contracting agency
 - ◇◇ The Comptroller General.
- ◇ Plan the report.
- ◇ In the report, refer to exhibits included in the case file – do not repeat interviews in the reports.
- ◇ Avoid the use of abbreviations which may not be understood by other agencies.
- ◇ Except under CWHSSA, in most jurisdictions there is no right of individual employee action in government contract statutes. The government acts on the employee's behalf to recover back wages. Refusal-to-pay cases are usually resolved administratively by a hearing before a DOL Administrative Law Judge (ALJ).

THE HEARING PROCESS AND APPEAL RIGHTS

- ◇ Refusal-to-pay cases are resolved pursuant to 29 C.F.R. § 5.11.
 - ◇◇ If factual issues are in dispute, WHD notifies the contractors (both prime and sub) in writing of the investigation finding and offers the opportunity to request a hearing before an administrative law judge.
 - ◇◇ If only issues of law are in dispute, WHD offers the contractors the opportunity to appeal a WHD ruling before the Department's ARB.
- ◇ In both agreement-to-pay and refusal-to-pay cases where the debarment criteria are met, the contractors are offered a hearing before an ALJ pursuant to 29 C.F.R. § 5.12 on the issue of debarment.
- ◇ ALJ decisions may be appealed to the ARB under 29 C.F.R. Part 7.
- ◇ The ARB hears all appeals of ALJ cases. The ARB, which acts on behalf of the Secretary of Labor, consists of members appointed by the Secretary. The ARB also acts on petitions for review of rulings issued by the WHD Administrator on coverage, interpretations, and wage determination matters.