Department of Energy
Acquisition Regulation

No. AL-2012-02
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ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA

Subject: **Labor Standards Considerations under DOE Management and Operating Contracts**

References: Davis-Bacon Act of 1931, as amended (40 U.S.C. 3141, *et seq.*)

29 CFR Parts 1, 3, and 5, Department of Labor Implementing Regulations for Davis-Bacon Act
FAR Subpart 22.4 Labor Standards for Contracts Involving Construction

DEAR 970.2204-1-1 Administrative Controls and Criteria for Application of the Davis-Bacon Act in Operational or Maintenance Activities
DOE O 350.1 Contractor Human Resources Management Programs
DOE Acquisition Guide, Chapter 22.1, Labor Standards for Construction

When Is this Acquisition Letter (AL) Effective?

This AL is effective upon the date of issuance.

When Does this AL Expire?

This AL remains in effect until superseded or canceled.

Who Is the Point of Contact?

Contact Richard Langston, of the Contract and Assistance Policy Division, at (202) 287-1339 or at Richard.Langston@hq.doe.gov or Roberto Archuleta, of the National Nuclear Security Administration (NNSA), at (505) 845-4222 or at Roberto.Archuleta@nnsa.doe.gov. For additional information on ALs and other issues, visit our website at http://energy.gov/management/office-management/operational-anagement/procurement-and-acquisition, and for a copy of DOE ALs visit our website at http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurem-2,

What Is the Purpose of this AL?

The purpose of this AL is to provide information and guidance regarding application of labor standards at the Department of Energy (DOE) and National Nuclear Security Administration (NNSA) management and operating (M&O) contract facilities.

What Is the Background?

The Davis-Bacon Act of 1931, as amended (40 U.S.C. 3141, *et seq.*) (DBA) provides that contracts in excess of $2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works within the United States, shall contain a Federal Acquisition Regulation (FAR) clause (specifically FAR 52.222-6), *inter alia*, that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor. In some cases, Congress has extended the DBA requirements to construction financed in whole or in part by federal grants, loans, loan guarantees, and other financial assistance programs.

The DBA requires obtaining a contract specific wage determination containing job classifications and wage rates established by the Department of Labor (DOL). Wage determinations are now included in DOL's Wage Determinations On Line system at http://wdol.gov.

What Are the Responsibilities of the Heads of the Contracting Activity?

This AL encourages Heads of Contracting Activities (HCAs) to delegate to Contracting Officers (COs) the HCA's authority (pursuant to Department of Energy Acquisition Regulation (DEAR) 970.2204-1-1(b)(3)) to prescribe classes of work as to which applicability or non-applicability of the DBA is clear, and for which the HCA will require no further DOE determination on coverage in advance of the work.

Should the HCA delegate authority to a CO, to prescribe classes of work as to which applicability or non-applicability of DBA is clear, the HCA must draft a delegation memo giving a specific CO the HCA's authorization as provided in DEAR 970.2204-1-1(b)(3).

What Are the Responsibilities of the Contracting Officer?

Contracting Officers (COs) should, as a facet of their normal operational awareness and systems oversight, ensure that labor standards policies, procedures and management controls are implemented by M&O contractors, which are responsible for compliance by its subcontracts (see, e.g., FAR clause 52.222-11(c)).

HCA's are encouraged to delegate to the COs the HCA's authority, pursuant to DEAR 970.2204-1-1(b)(3), to prescribe classes of work as to which applicability or non-applicability of the DBA is clear, and for which the HCA will require no further DOE or NNSA determination on coverage or non-coverage in advance of the work.

COs will work with the M&O contractor, in consultation with local field counsel; the DOE or NNSA Contractor Human Resources/Industrial Relations Specialists; and the Office of the Assistant General Counsel for Labor and Pension Law (GC-63), for DOE, or the Office of the General Counsel for NNSA, to determine classes of work as to which applicability or non-applicability of the DBA is clear, and for which the CO will require no further DOE determination on coverage in advance of the work.

COs will perform regular audits to ensure the contractor is properly classifying the work within the classes of work.

What Are DOE's Expectations Regarding an Acceptable Labor Standards Program?

DOL regulations (29 C.F.R. Subtitle A Parts 1, 3, and 5) in conjunction with the Federal Acquisition Regulation (48 C.F.R. Part 22, Subpart 22.4), require the CO to make coverage determinations for DBA. Further, the CO must incorporate the appropriate wage determinations into solicitations and contracts and designate the work to which each determination or part applies (FAR 22.400).

Sites and facilities of the DOE and NNSA (hereinafter collectively referred to as DOE unless indicated otherwise) generally employ a two-step process for making coverage determinations for work performed by an M&O contractor. First, the contractor's Labor Standards Committee (LSC) meets to discuss the project. This contractor LSC may include participation by representatives of interested unions that may perform the work. The contractor's LSC reviews information pertaining to upcoming projects and makes suggestions as to whether the work contemplated is covered by the DBA. The two-step LSC process currently provides the contractors with the opportunity to provide input in determining applicability of DBA through participation in the first step of the LSC process.

The work package is then forwarded to the DOE LSC for review. The DOE LSC reviews the contractor information and advises the COs on the applicability of the various labor standards statutes to contracts and work packages. The CO or designee will determine coverage and notify the contractor of the decision and provide an appropriate wage determination. Many DOE sites have Project Labor Agreements (PLAs) or other Collective Bargaining Agreements (CBAs) which require that work covered by DBA be performed by contractors under the PLA or CBA and work that is routine maintenance be performed by the contractor's unionized work force. The coverage determination, therefore, is critical both on its own and because it may drive the question of which union will perform the work and whether it can or must or cannot be subcontracted.

The question has been raised whether the Department can delegate labor standards coverage determinations to the contractor; we cannot. In fact, the Department of Labor ultimately has the authority to determine labor standards coverage. 5 U.S.C. 901, *et seq.* However, the DEAR provides a mechanism by which the HCA, consistent with the DEAR, may prescribe classes of work as to which applicability or non-applicability of the DBA is clear, for which

the HCA will require no further DOE determination on coverage in advance of the work (48 C.F.R. 970.2204-1-1(b)(3)).

The HCA may delegate the use of their authority to make DBA class determinations to the CO at the site. The CO may make the class determinations as set forth in the DEAR. DOE recognizes that each facility/site has differing circumstances and that it would be more beneficial if the contractor works with the CO to determine the classes of covered work in consultation with local field counsel, the DOE Contractor Human Resources/Industrial Relations Specialists at the site/facility, and the DOE Office of the Assistant General Counsel for Labor and Pension Law (GC-63) or NNSA Office of General Counsel.

Although coverage of specific classes of work may be determined by the CO, the contractor will be required to continue submitting a request to the CO for an appropriate wage determination (WD) for the work to be performed for subcontracts. The wage determination is developed by DOL through a survey of contractors performing work in each locality and represent the wages found to be prevailing in the locality for similar projects. It is recognized that WDs are now much easier to obtain; however, FAR subpart 22.4 requires that the CO take the actions to choose the correct WD and to modify a cost-reimbursement contract to incorporate modified WDs.

Absent CO or designee approval of specific WDs, the contractor would be at risk of incurring unallowable costs. Therefore, the contractor is required to request the appropriate WD from the CO or designee for incorporation into the subcontract. The contractor may pull a WD from the DOL website www.wdol.gov and provide it to the CO or designee for approval, if the CO believes that will expedite the process.

Prior to an HCA's delegation of the authority to the CO, the M&O contractors may send a written request to the CO asking for the determination of classes of work to be covered by DBA, which will be forwarded to the HCA for action.

The HCAs should ensure that they are making the maximum appropriate use of their authority to achieve efficiency in these determinations, reducing the number of specific work packages that must be provided to the CO for individual coverage determinations, thus saving time and effort for both the contractors and DOE, while continuing to ensure compliance with applicable labor standards.

This AL does not require changes to any current process that is used by the COs and DOE Labor Standards Committee at a site/facility for determining applicability of various labor standards statutes to contracts and proposed work practices. This AL does not require the CO to make the class determinations, rather this AL provides the option for the M&O and CO. The CO & M&O may decide to proceed with the current process in place at a specific site/facility.