

CHAPTER 3 - PRE-SOLICITATION ADMINISTRATION AND DETERMINATIONS

3-1. General. The issues and duties discussed herein apply generally to District Labor Advisors and supporting staff such as Contractor Industrial Relations (CIR) Assistants and Clerks. However, close coordination with the operating elements such as Contracting, Engineering, Construction and/or Operations is critical to the successful performance of the tasks noted below. Many of the more contentious and protracted labor matters confronting districts may be directly attributed to a failure to communicate essential informational needs in a timely and effective manner during the pre-solicitation phase. The definitions listed below relate to key elements in the determination of applicability and coverage in the pre-solicitation phase.

a. Construction. Generally includes altering, remodeling, installation (where appropriate) on the site of the work items fabricated off-site, painting and decorating, the transporting of materials and supplies to, or from, the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work.

b. Substantial Construction. The word substantial relates to the types and quantity of construction work to be performed and not merely to the total value of the contract. A determination as to whether to include the construction labor standards and clauses is keyed to the following considerations:

(1) The contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at the contract date that a substantial amount of construction work will be necessary for the performance of the contract;

(2) The construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract; and

(3) The requirements are otherwise applicable to the contract.

c. Building Construction. Includes construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment or supplies; all construction of such structures; the installation of utilities and of equipment, both above and below grade levels; as well as incidental grading, utilities and paving. Such structures need not be "habitable" to be building construction. Also, the installation of heavy machinery and/or equipment does not generally change the project's character as a building.

d. Heavy Construction. Includes those projects that are not properly classified as either "building," "highway," or "residential." Unlike these classifications, heavy construction is not a homogenous classification. Because of this catch-all nature, projects within the heavy classification may sometimes be distinguished on the basis of their particular project characteristics, and separate schedules may be issued for dredging projects, water and sewer line projects, dams, major bridges, and flood control projects.

e. Highway Construction. Includes construction, alteration or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy, construction.

f. Residential Construction. Includes the construction, alteration or repair of single family houses, apartment buildings of no more than four stories in height. This includes all incidental items such as site work, parking areas, utilities, streets, and sidewalks.

3-2. Rates to be Included in Solicitations. Wage determinations issued by the DOL frequently contain more than one schedule of rates, i.e., such as those outlined above. When such multiple schedules are incorporated into the construction contract there is introduced an element of doubt as to the proper schedule or schedules to be used on various; phases of the work. It is necessary to eliminate any possible uncertainties with respect to the application of the wage rates prior to contract negotiations or opening of bids. Accordingly,

a. Where only one type of work such as building construction is contemplated under a given contract, include only the schedule of rates for that type (such as building) in the advertised specifications.

b. Where a proposed contract involves more than one type of work, such as both building and highway, and the applicable wage decision specifies separate schedules for these various types of construction work, the advertised specifications should identify, as specifically as possible, the schedules which will apply to the particular work items.

c. Where the proposed construction involves primarily building construction and, based on area practice, the DOL, in addition to the building schedule, also issues a schedule of rates for related incidental paving and utility work, the work to which such schedules are applicable should be clearly indicated in the advertised specifications.

d. COs should make every effort to keep informed as to area practice, not only to assure contract compliance, but also to assure fairness to all prospective bidders on contracts to be awarded. Each determination of area practice should be supported by a record of written findings and an analysis of the record leading to that determination.

e. Experience indicates that it is generally better to include an entire schedule, e.g., highway or building, rather than to select individual classifications for incorporation within the specifications.

3-3. Classes of Employees. Because of the differences in coverage of labor laws, construction employees will usually be divided into two basic groups, manual and nonmanual employees.

a. Manual Employees. The Davis-Bacon Act applies to construction laborers and trades craftsmen (mechanics), including apprentices, trainees, and working foremen (these latter workers must be listed on the payrolls in the same manner as those they supervise (hours worked, hourly rate paid, etc.)).

b. Nonmanual Employees. The Davis-Bacon Act does not apply to nonmanual employees, including supervisory, engineering, architectural, clerical, and administrative personnel. Also included in the nonmanual class and thus not subject to the Act are factory representatives, technical engineers, scientific workers and watchmen. It is noted, however, that although the Davis-Bacon Act does not apply to watchmen, the Contract Work Hours and Safety Standards Act does apply to watchmen and guards for purpose of overtime compensation.

3-4. Wage Determinations. Two basic types of prevailing-wage rates are established by the DOL: general determinations, also known as area determinations, and project determinations. Less frequently issued and reflecting elements of both area and project determinations are installation determinations. It is critical that District Labor Advisors be cognizant of the distinctions among these determinations. The differences among them extend not only to the method of obtaining the determinations but also to their use and terms of effectiveness.

a. General wage determinations reflect those rates determined by the DOL to be prevailing in a specific area for the type of construction described. The general wage decisions contain no expiration date and remain in effect until modified, superseded, or withdrawn. These determinations are usually issued whenever the wage patterns for a given location, for a particular type of construction, are well-settled and it appears that there will be a recurring need for determined rates. These determinations are available from various sources. Electronic (on-line) access to these wage determinations is available through the Corps of Engineers Automated Legal Services (CEALS) program through each MSC Counsel office. USACE offices with Internet access may obtain wage determinations through the Chief Counsel's Web Site (www.ceals.usace.army.mil). Alternatively, wage determinations can be obtained on a subscription basis from the Government Printing

Office. This publication is published annually by the Government Printing Office on behalf of the DOL. Information relating to the publication, General Wage Determinations Issued Under The Davis-Bacon and Related Acts, as well as subsequent modifications are announced within the Federal Register. Those who do not have access to the Internet or the CEALS program may arrange for a subscription to the National Technical Information Service (NTIS) electronic data base. NTIS also provides on line access to these wage determinations allowing COs to "download" the entire wage determination data base as well as weekly modifications.

b. Project wage determinations are issued at the specific request of a contracting agency; are applicable to the named project only; and expire 180 calendar days from the date of issuance unless an extension of the expiration date is requested by an agency and approved by the DOL. These determinations are requested by the agency through the use of SF 308 (see Appendix A). The DOL also issues installation type determinations which would be applicable to a particular installation where there is, or it is anticipated that there will be, substantial construction activity. Figure 3-1, which follows Chapter 3, outlines the SF 308 request process. In order to accommodate an agency's request for an installation determination, the DOL requires that the agency furnish a detailed listing of the anticipated projects for which the installation determination would be applicable.

c. It is critical that maximum effort be undertaken to anticipate the need for wage determinations and request them in a timely manner. It is thus recommended that the requesting officials coordinate closely with the Engineering Division. This is particularly important for Districts coordinating wage requests on behalf of Army elements within the Districts (DFARS 22.404-3 (b) (1)) .

d. The CO should be cognizant of the expiration date of project or installation determinations. New wage determinations should be requested if it is anticipated that a determination will expire before contract award. However, there may be unanticipated circumstances (i.e., bid protests) which preclude contract award before the expiration of the wage determination. While FAR 22.404-5 contains specific guidance in these matters, Figure 3-2, which follows Chapter 3, outlines the general procedure for extension requests.

e. If a project is contemplated in an area where problems concerning wage rates and classifications are known or may exist because they are controversial in nature (e.g., where unions claim building rates apply and contractors or contractors' associations contend heavy or highway rates apply), or where unusual circumstances prevail, a report to Headquarters, USACE, Attn: CECC-C, should be prepared giving pertinent data relating to the project, well in advance of the need for a wage determination. Such report will include all available wage data, plans, specifications, a map pinpointing the exact site location(s), and a statement as to the anticipated schedule of bid opening and award. Such report will be furnished the DOL

by CECC-C so as to minimize the probability of delay due to controversy during the advertising and bid opening period.

3-5. Modifications and Supersedeas Determinations. General and project wage determinations may be modified by the DOL in order to ensure that prevailing wage rates are maintained. A modification may specify only the items being changed, or may be in the form of a supersedeas wage determination. It is critical that those tasked with the responsibility of furnishing wage determinations ensure that these modifications be forwarded to the specifications personnel. Particular attention is drawn to 29 CFR 1.6 which relate to the Agency's responsibilities regarding the effective dates of modifications. While, CIR personnel should be totally cognizant of these requirements, the principal (and often, most troublesome) requirements are outlined below:

a. "10 Day Rule" - Section 1.6(c) - requires contracting agencies to accept modifications to wage determinations received less than 10 days before bid opening unless (in the case of competitive procurements) the agency finds that there is not sufficient time to notify bidders of the change, in which case such finding must be documented in the contract file, and submitted to the Wage-Hour Administrator upon request.

b. "90 Day Rule" - Section 1.6(c)(3)(iv) - provides that if a contract to which a general wage determination has been applied is not awarded within 90 days after bid opening, any modification published prior to contract award shall be effective unless the agency obtains an extension of the 90-day period from the Administrator.

3-6. Prospective Contractor's Compliance with VETS-100 Reporting Requirement. One of the contracting agency's pre-award obligations is to ensure that prospective contractors have complied with certain Affirmative Action reporting requirements as described below.

a. Any contractor or subcontractor with a contract of \$25,000 or more with the Federal Government must take affirmative action to hire and promote qualified Special disabled veterans, veterans of the Vietnam-era and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. Contractors and subcontractors with openings for jobs, other than executive or top management jobs, must list them with the nearest State Job Service (also known as State Employment Service) office. The requirement applies to vacancies at all locations of a business not otherwise exempt under the company's Federal contract. Qualified Vietnam-era and special disabled veterans receive priority for referral to Federal contractor job openings listed at those offices. The priority for referral is not a guarantee that referred veterans will be hired. Federal contractors are not required to hire those referred, but must have affirmative action plans. Contractors with 50 employees and a \$50,000 must have a

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written affirmative action plan. They must be able to show they have followed the plans and that they have not discriminated against veterans or other covered groups. They also must show that they have actively recruited Special disabled veterans, veterans of the Vietnam-era and any other veterans who served on active duty during a war on in a campaign or expedition for which a campaign badge has been authorized and disseminated all information internally regarding promotion activities.

b. As provided by FAR 22.1308(b), covered employers must file an annual VETS-100 report, which shows the number of target veterans in their work force by job category, hiring location, and number of new hires, including targeted veterans hired during the reporting period and the maximum number and minimum number of employees of such contractor during the period covered by the report. Instructions, information and follow-up assistance is provided to employers who do not understand the reporting and other legal requirements.

c. USACE personnel tasked with ensuring prospective contractor compliance with this obligation may access the DOL's Database of contractors having filed the required VETS-100 report at <http://vets100.cudenver.edu>.

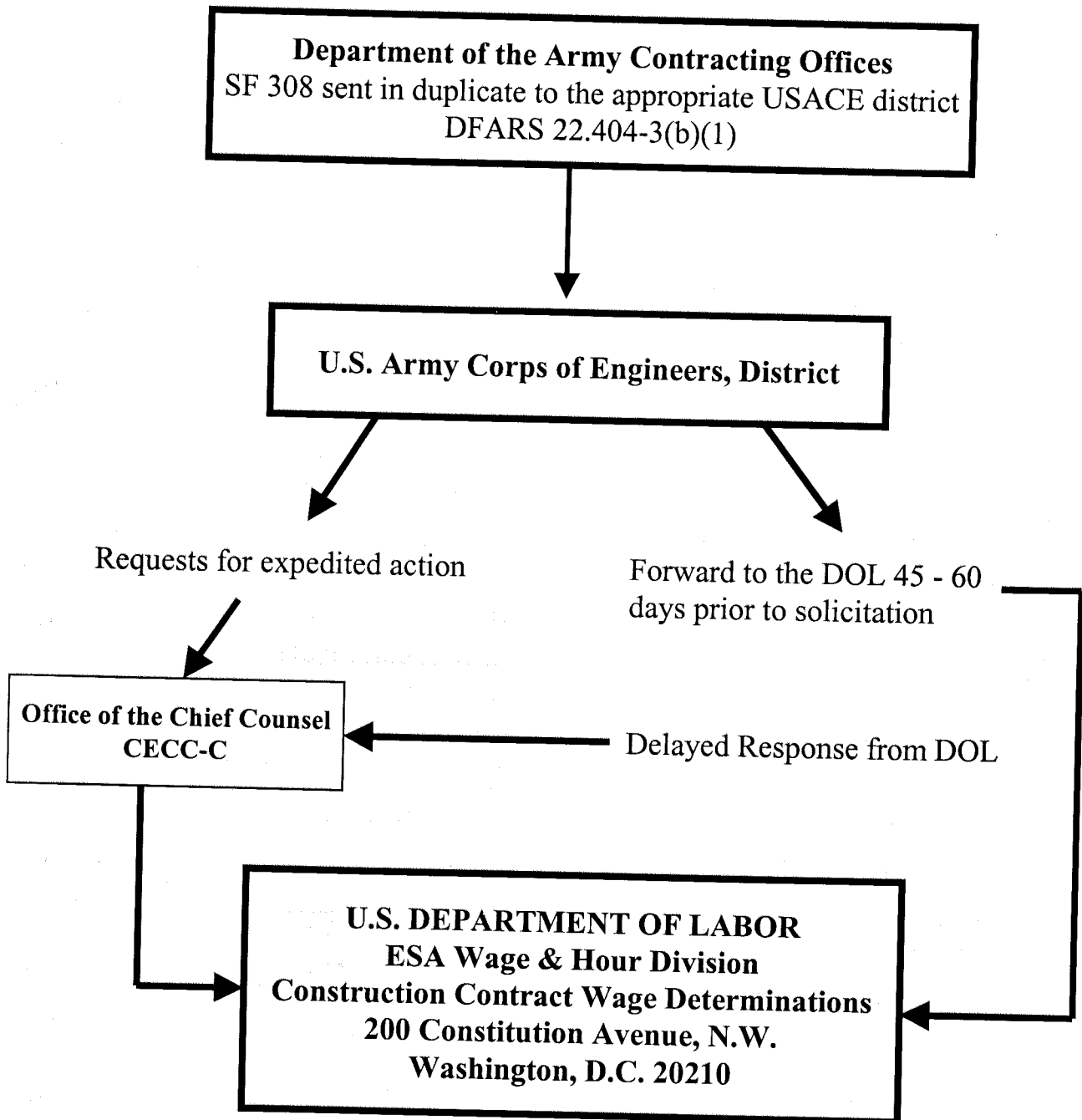
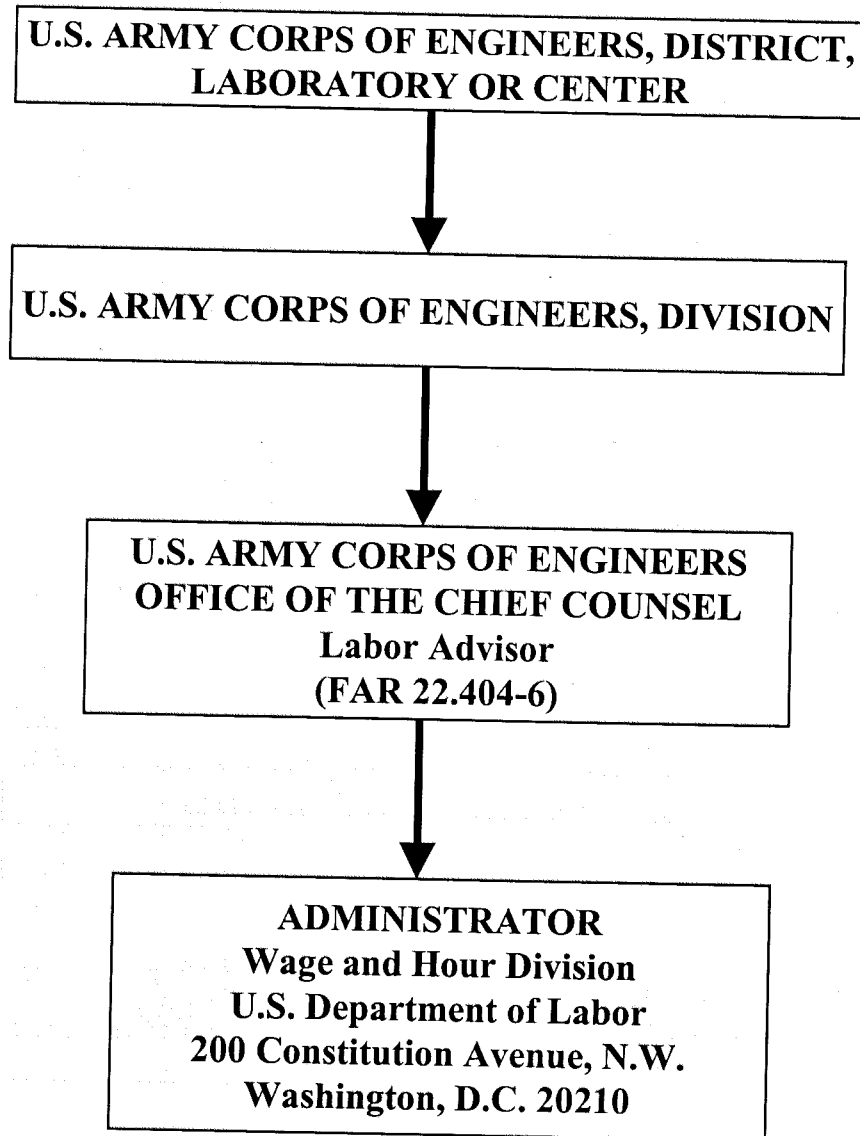


Figure 3-1. Processing of Standard Form 308, Request for Wage Determination and Response to Request



Reference: 29 CFR 1.6(A)(1)
29 CFR 1.6[c](3)(iv)
FAR 22.404-5

Figure 3-2. Processing a request for extension of wage determination that expires after bid opening but prior to contract award