CHAPTER 4 - COMPLIANCE PROCEDURES - DAVIS-BACON AND RELATED ACTS

4-1. General. This chapter deals with the scope and application of those contract labor provisions which affect most directly the District Commander and his staff's role in the enforcement program. It includes discussion of pertinent statutory language, rulings of the Solicitor of Labor, requirements of regulations, and violations most commonly experienced. Therefore, this chapter provides guidance for enforcement purposes. Each district should maintain a continuing effective program which shall include:

a. Training appropriate contract administration, labor relations, quality assurance, and other labor standards enforcement personnel in their responsibilities.

b. Assuring that contractors and subcontractors are informed, prior to commencement of work, of their obligations under the labor standards provisions of their contracts.

c. Adequate payroll review, on site surveillance and employee interviews to determine compliance, and prompt initiation of corrective action when required.

d. Prompt investigation and disposition of complaints.

e. Prompt submission of all reports required by FAR 22.406-8.

f. Periodic review of field enforcement activities to assure compliance with applicable regulations.

4-2. Davis-Bacon Act. Of the statutes involved, the Davis-Bacon Act is perhaps the most controversial. Its application and certain rulings as to its coverage of some activities have generated much discussion in the construction industry in recent years. It is therefore not practicable to attempt to treat in this regulation the many situations which could arise because they involve coverage questions of a borderline nature which must be considered on a case by case basis. Such cases should be submitted to the District Labor Advisor as early as possible. The provisions of the Davis-Bacon Act apply to contracts in excess of $2,000, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works. The Act requires that every such contract contain certain stipulations concerning the rate of wages to be paid laborers and mechanics, and requirements to be met by contractors and subcontractors with respect to the payment of wages earned.

4-3. Basic Hourly Rates and Fringe Benefits. All wage determination decisions of the Secretary of Labor set forth the minimum basic hourly rates to be paid the various classes of

workers employed by contractors and subcontractors on the contract work. In addition to such basic rates, some decisions also specify certain types of fringe benefits which must be paid. The wage decisions in each contract must be referred to because some decisions do not specify any fringe benefits, some decisions specify fringe benefits for some but not all classes of workers and some decisions specify fringe benefits for all classes of workers. Also, there is considerable variation in the type and amount of fringe benefits in wage decisions applicable to different areas as well as different kinds of construction. Therefore, each wage decision in a contract must be studied carefully with particular attention to modifications to the wage decision which may have been incorporated by amendment.

a. Payment of Basic Hourly Rates and Fringe Benefits. The Davis-Bacon Act clause in the contract explains how the contractor may discharge his obligation to workers in any classification for which the wage decision contains only a basic hourly rate, or both a basic hourly rate and fringe benefits. The method and/or combination of methods by which a contractor discharges his obligation for payment of fringe benefits will depend upon whether or not he is obligated pursuant to approved funds, plans or programs to make payments (contributions) to funds set up and administered for purpose of the particular fringe benefits. Typical is where a contractor is signatory to labor agreements with unions and such agreements obligate the contractor to make payments to trust funds set up, for example, for pensions, health and welfare, and vacations. Some contractors (generally those who operate non-union) do not participate in plans or programs as just mentioned; however, they must still pay the fringe benefits to workers in any classification for which the wage decisions contain fringe benefits. In such cases, the fringe benefits must be paid in cash (or included in payroll check) to the workers in addition to other wages they have earned.

b. Payroll Information. For details concerning what information should be shown on contractor's weekly payrolls, and statement of compliance to be submitted with payrolls, see Paragraph 4-19.

4-4. Classification of Workers and Minimum Basic Rates. Experience has shown that the most common violation of the Davis-Bacon Act is the improper classification of workmen. It must be stressed that the workers be classified according to, and in conformance with, the work they perform. The contractor is in violation of the Act when he pays a workman at a wage rate less than that contained in the contract. If an individual workman is utilized in performing work of more than one classification, he must be paid not less than the contract minimum rate applicable to the respective classifications. In such instances the contractor's payroll and payroll records must show clearly that the workman's total wages have been computed on the basis of not less than the respective contract minimum rates. There may be instances when a workman performs work within two or more trade classifications, each of which are performed intermittently or only occasionally. In such instances the contractor

may elect to pay only one rate for all work performed. The payment of one rate is permissible only if the workman is paid not less than the contract minimum rate applicable to the classification with the highest rate in which he works. The payment of one rate under the above circumstances is considered acceptable compliance with the minimum rate requirement of the Act; however, the payroll and payroll records must reflect the classifications of work performed.

a. Working Foremen. Experience has also shown that some contractors pay some key employees on a weekly or monthly basis and such salary is paid year-round whether they work or not. Generally, those key employees are supervisory personnel in the contractor's organization who are also experienced equipment operators or mechanics. There may be occasions when a contractor, for lack of work elsewhere, will use those regular salaried employees as operators or mechanics on Government work which is subject to the Davis-Bacon Act. As a general rule, working foremen who devote more than 20% of their time during a workweek to mechanical or laborer duties, are laborers and mechanics for the time so spent. Accordingly, when they perform covered work, i.e., work of a laborer or mechanic, the payroll must show the classifications of work performed, daily and weekly number of hours worked, as well as all other required payroll data. It should be noted that a weekly salary is permissible and may be paid for nonmanual (supervisory) work. In cases where the employee performs both covered and noncovered work in the same pay period, compliance with the Davis-Bacon Act minimum wage rate requirement as well as weekly overtime compensation requirements can be determined only by showing the covered and noncovered work on separate lines on the payroll. Therefore, one line should show the daily hours worked and wages paid for supervisory work, and one line should show the daily and weekly hours worked as a laborer or mechanic with wages computed on an hourly rate basis.

b. Self-Employed Contractors. The statutory language of the Davis-Bacon Act makes it clear that Congress intended that individuals performing the work of laborers and mechanics on construction sites be guaranteed the prevailing wage rate "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics... " The requirement in All-Agency Memorandum 123 for the prime contractor to list officers/owners of a subcontractor corporation, partnership, or proprietorship, who are themselves performing the work of laborers and mechanics on the prime contractor's payroll records was withdrawn by All-Agency Memorandum 125. However, as a practical matter, the prime contractor would have to be able to demonstrate in some manner that the subcontract price equaled or exceeded the applicable prevailing wage rate for the number of hours the owner/partner worked as a laborer or mechanic on a Davis-Bacon covered contract, and that the owner/partner was, therefore, paid the proper rate.

4-5. Piece-Rate Work. The payment of employees on a piece-work basis is not, of itself, contrary to the Davis-Bacon Act. However, there have been instances where contractors have adopted the piece-work procedure for the apparent purpose of avoiding or minimizing record keeping. This is in disregard of their contractual and statutory obligation to assure that their employees are paid not less than the amounts due them computed on the basis of the hours worked at the prescribed wage rates.

a. Contractors Responsibility. Notwithstanding any piece-work agreement with an employee, contractors subject to the Davis-Bacon Act must keep adequate wage and hour records to demonstrate compliance with such act as well as all other labor standards provisions.

b. Advice to Contractors. During preconstruction conferences, contractors and subcontractors should be questioned as to whether they intend to employ any workers on a piece-rate basis. (Prime contractors will be advised at that time that it is their responsibility to inform all subcontractors who are not represented at such conferences of the above.) If the contractor and subcontractors state that no piece-work hiring arrangements will be used on the contract work, no detailed discussion is necessary; however, if they state that they plan to pay on a piece-rate basis or there is indication that they might, they must be advised that their piece-work hiring arrangements will have to be reported to the District Labor Relations Advisor for determination regarding compliance with all the contract labor standards provisions and particularly the maintenance of adequate basic time and payroll records. The contractors will be further advised that their reports on such hiring arrangements must identify all workers involved, describe the specific work to be performed and materials and tools to be utilized, list the piece rates to be paid, and describe how and in what form the basic time and payroll records will be maintained.

c. Field Enforcement Activities. All contract administration personnel and particularly those responsible for on-site surveillance and payroll checking, should watch for piece-work hiring arrangements. When such arrangements are found to exist and have not been reported by the contractor in accordance with the above, the contractor will be informed to do so immediately.

4-6. Additional Classifications and Rates. The Davis-Bacon Act clause states that the CO shall require that any class of laborers or mechanics not listed in the wage decision and which is to be employed on the contract shall be classified or reclassified to conform to the wage decision. For details concerning the administrative action to be taken by contractors and government personnel see Paragraphs 4-22 through 4-24 of this regulation.

4-7. Wage Rate Posting. The contract provision requires that a copy of the wage rates be posted at the site of the work. This is mandatory by the express language of the law, which says, "... the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work... " In this connection, frequently there are work sites where both the prime and one or more subcontractors are working. Sometimes the employees of the subcontractors work in an area on the site which is a considerable distance from the operations of other groups of employees (e.g., constructing ridges, dams, reservoirs, sodding operations) and there is no occasion for them to mix with other groups. Under such circumstances, the wage rates must be posted so as to be in a prominent and easily accessible place to them. Thus, a sufficient number of postings of wage rates on each work site will depend upon the circumstances. Appendix B is a reduced sample copy of revised poster, WH Publication 1321, entitled "Notice to Employees Working on Federal or Federally Financed Construction Projects." Display of this poster is a contract requirement. It has been distributed by the DOL for posting with Davis-Bacon Act wage rate schedules. Each poster at a job site should have printed in the space provided the name of the ACO or a member of his staff designated by him, together with the location of his office, rather than the name and address of the CO. ACO Offices should requisition and keep on hand a sufficient supply of posters to issue to all contractors.

4-8. Site of Work. The wage requirements of the Davis-Bacon Act clause apply to all mechanics and laborers employed or working directly upon the site of the work. The meaning of the words "directly upon the site of the work" has been extremely contentious requiring careful consideration of the facts in each instance.

a. The DOL's implementing regulations were revised in December of 2000 to reflect the findings in three U.S. Court of Appeals decisions relating to the DOL's regulatory definition of "site of the work." In both Building & Construction Trades Dept., AFL-CIO v. United States Department of Labor Wage Appeals Board and Midway Excavators Inc., 932 F.2d. 985 and Ball, Ball and Brosamer, Inc. v. Robert Reich et al., 24 F3d 1447, the Court of Appeals for the D.C. Circuit concluded that the DOL's long-standing "functional" test for determining the "site of work" conflicted with the Act's "geographic" standard. In L.P. Cavett Company v. U.S. Department of Labor, 932 F2d 985, the Court of Appeals for the Sixth Circuit followed the D.C. Circuit in holding that the prevailing wage protections afforded by the Davis-Bacon Act were limited to those laborers and mechanics employed directly upon the site of the work. Based on these decisions, the DOL will now limit Davis-Bacon Act coverage of off-site, dedicated support facilities to those that are either adjacent or virtually adjacent to the construction location. The DOL in their revision of the regulations at 29 CFR 5.2, however, declined to provide either a definition of "virtual adjacency" or examples illustrating covered and non-covered projects.

b. The DOL's Definition of the "site of the work". The DOL's regulations (29 CFR 5.2(l) now define "site of the work" as follows.

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc.,are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

c. Coverage questions. As a result, it is recommended that questions regarding coverage of possible off-site operations should be discussed during preconstruction conferences. Contractors should be questioned about their plans regarding work to be subcontracted and how they propose to conduct operations involving features of the work which lend themselves to an off-site type of operation. All unresolved questions regarding coverage of off-site operations must be referred to the District Labor Relations Advisor together with the facts and circumstances in each case.

4-9. Contract Work Hours and Safety Standards Act (40 USC 327-333) is the Federal law applicable to Government construction contracts requiring the payment of overtime compensation to laborers and mechanics for all hours worked in excess of forty per workweek. The contract provisions apply to all laborers and mechanics, including apprentices and trainees, and watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated by the contract. Also, for purposes of the Act, the term laborers and mechanics includes workmen performing

services in connection with dredging or rock excavation in any river or harbor of the United States, but does not include any employee employed as a seaman. As stated above, watchmen and guards are included under the coverage of the Act. Thus, for purpose of enforcement of contract labor provisions, they must be paid overtime compensation, but as previously noted, watchmen and guards are not considered as laborers and mechanics within the meaning of the Davis-Bacon Act. Consequently no such classifications or wage rates are contained in the Secretary of Labor's Wage Rate Decisions pursuant to the Davis-Bacon Act for construction contracts. This means, as to watchmen and guards, for purposes of overtime compensation, they must be paid one and one-half times their basic or "regular" rate of pay as noted below.

a. Hours of Work - A calendar day is from midnight to midnight; a standard work week is seven consecutive calendar days.

b. Basic Rate of Pay - For purposes of computing the CWHSSA premium, the basic rate of pay is the same as the "regular" rate of pay under the FLSA (see 29 CFR 5.14 (c); also Masters v. Maryland Management Company, 493 F. 2d 1329).

c. Methods of Computing Overtime Compensation.

(1) For all overtime hours worked, covered employees must receive compensation at a rate not less than one and one-half times the basic rate of pay.

(2) There are two methods used by contractors to compute compensation for overtime work. The one most commonly used is to multiply the total regular or straight time hours by the basic or straight time hourly rate, and then multiply the total overtime hours by a rate that is one and one-half times the basic rate, the sum of which is the worker's total gross earnings. The other methods is to multiply the total of all hours worked (regular and overtime hours) by the basic hourly rate, and then multiply the total overtime hours by one half the basic rate, the sum of which is the worker's total gross earnings. Thus, either method results in the same gross earnings and satisfies the contract requirements with respect to overtime compensation.

(3) It should be noted that the Department of Labor has ruled that the Davis-Bacon Act requires the payment of fringe benefits for all hours, including overtime hours (WAB Case No. 83-7, G & C Enterprises).

(4) To illustrate the above, a wage decision may specify that a particular classification requires the payment of a basic hourly rate of $8.00 and fringe benefits of $4.00 for a total hourly rate of $12.00. To compute the total wages due an employee who has worked 41

hours in a week, the contractor would first multiply the total rate (basic plus fringes) by the hours worked, i.e., $12.00 X 41 = $492.00. Note that fringe benefits have been included. To compute the overtime premium due under the CWHSSA, multiply the $8.00 basic hourly rate by one-half, i.e., $8.00 x .5 = $4.00.

d. Employment Under One or More Contracts.

(1) When an employee works for more than one employer under the same contract (e.g., the prime and subcontractors) all hours worked by the employee must be counted for purpose of computing overtime compensation even though the employers are disassociated and separate.

(2) When the employee works for the same contractor under two or more separately awarded contracts, the weekly hours worked under each contract must be combined in computing overtime compensation.

(3) Where two contracts are awarded separately to two different and completely disassociated contractors, and when an employee works not more than 40 hours per week under each contract but in excess of such weekly hours under both, overtime compensation need not be paid.

(4) As distinguished from subparagraph (3) above, if there is an arrangement between the two employers with respect to the employment, or if the contractors are under common control or direction, the combined weekly employment must be counted for the purpose of computing the required overtime compensation.

e. Detection and Reporting Violations.

(1) ACOs shall, immediately upon the detection of any violation, notify the District Labor Advisor who will make such additional investigation necessary to determine the appropriate course of action to be taken by the CO.

(2) All correspondence with contractors regarding CWHSSA violations, withholding of liquidated damages, and restitution payments resulting from violations will be initiated by the District Labor Advisor for the signature of the CO.

f. Contractor's Right of Appeal.

(1) Section 104 of the Act provides that any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages shall have the right, within 60 days

thereafter, to appeal to the head of the agency for which the contract work is done.

(2) Such section also provides that the Agency Head shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination, or if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of the Act inadvertently, notwithstanding the exercise of due care on his part or that of his agents, recommendations may be made to the Secretary of Labor that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages.

g. Notification to Contractors Regarding Violations, and Assessment of Liquidated Damages.

(1) The instructions contained in FAR 22-406-8 are applicable here. As noted above, where the CO's notification to the contractor includes an assessment of liquidated damages, the contractor shall be advised that he may request relief from such assessment. If the contractor does not appeal the proposed assessment within 60 days of such notification, the liquidated damages are assessed automatically.

(2) In those cases requiring the preparation of a CO's Report with recommendations as to the disposition of liquidated damages, the report should include the CO's notification as well as the contractor's request for relief from the proposed assessment. Figure 4-1, which follows Chapter 4, is a schematic representation of the general process of CWHSSA liquidated damages notification and assessment.

4-10. Overtime Under Collective Bargaining Agreements. Many collective bargaining agreements between employers and labor organizations provide for premium pay on certain days of the week such as Saturday and Sunday and specific holidays. In some cases the premium rate is double-time after eight hours and on certain particular days. Under no circumstances will a government representative require a contractor to pay more than the overtime rate required by the contract but at the same time will not interfere with an employer paying in excess of the rate required by the contract.

4-11. Fair Labor Standards Act (FLSA). The Fair Labor Standards Act requires payment of time and one-half for work in excess of 40 hours in any one week. It is a part of the general labor law of the U. S. and it may apply to some construction contracts and other operations and business of contractors even though it is not included in the contract. Whether or not it applies depends upon the facts of each case. Since the Corps of Engineers' function is limited to enforcement of the labor provisions in the contract, it does not include any administrative duties directly related to enforcement of the Fair Labor Standards Act.

Similarly, the Corps of Engineers has no authority to issue advice as to the application of this Act to a contract. The DOL is the designated government agency for administering the Fair Labor Standards Act, for making administrative rulings as to coverage, and for receiving employee complaints under the Act.

a. Due to the overtime compensation requirements of the Contract Work Hours Standards Act included in construction contracts, there is less apt to be inquires about the applicability of the FLSA to such contracts; however, the FLSA also deals with wages, hours and other conditions and practices of employment with respect to employees other than construction workers.

b. If inquiries are received from contractors, workmen or union representatives concerning the applicability of the Fair Labor Standards Act to a contract or if protests are received from these persons concerning matters pertaining to the Act, the inquirer should be referred to the DOL's Wage and Hour Division.

c. Written notations should be made of any inquiries received on these matters. These should be kept in the project files where they will be available for inspection if needed. The notation should contain date, name of inquirer, whether contractor, employee, or labor representative, contract number, subject of inquiry and information furnished to the inquirer. If the inquirer is an employee, his permanent address should be shown; if a labor representative, the name, number, and address of the union he represents should be listed.

4-12. Copeland (Anti-Kickback) Act. The Anti-Kickback Act, as the name implies, covers the kickback of the employee's wages in any manner to his employer. The law states that whoever by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever, induces any person employed on the contract to give up any part of the compensation to which he is entitled under his contract of employment shall be fined not more than $5,000 or imprisoned not more than five years or both. The applicable contract provision requires the contractor to comply with the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) which are made a part of the contract by reference. The Secretary's regulations made pursuant to the Copeland Act are for the purpose of aiding in the enforcement of the Anti-Kickback Act which is a criminal statute. Thus it can be seen that any restricted payment to any employee is a violation, and in certain instances an offense for which there is a criminal penalty. All contractors and subcontractors are bound by the laws and regulations, and ignorance of the law is no excuse. No contract of employment between the employer and employee can diminish the rights provided the employee by law. Except for fringe benefits paid to funds, the employee must have full and actual freedom of disposition of his wage payment, whether made in cash or by check, and any restricted payment made to an employee is considered to be a deduction.

4-13. Payroll Deductions.

a. Regulations. See the Secretary of Labor's regulations in 29 CFR, Sections 3.5 through 3.10 for detailed guidance.

b. Permissible Deductions. Only those deductions described in Section 3.5 of the Secretary's Regulations may be made without application to and approval of the Secretary.

c. Deductions Which Require Approval. Deductions not permitted under Section 3.5 of the regulations require the written approval of the Secretary. A copy of the Secretary of Labor's written approval to make payroll deductions should be submitted by the contractor and/or subcontractor along with the first payroll on which the deductions are made. Refer to Sections 3.6 through 3.8 of the regulations. Deductions for the following purposes are not permissible unless approved by the Secretary:

(1) Apprentice training funds.

(2) Industry promotion funds.

d. The amount and type of each deduction from each employee's wages must be shown on weekly payrolls. Also, all payroll deductions must be described in the appropriate space on DD Form 879 (Appendix C).

e. Discussion with contractors. During preconstruction conferences contractors and subcontractors should be reminded that the Copeland Regulations are a part of the contract and that all payroll deductions must be made in accordance therewith. They should be questioned as to the type of deductions they propose to make and if any proposed deductions are not permissible under Section 3.5 of the regulations, they should make applications to the Secretary.

4-14. Apprentices and Trainees. The Secretary of Labor's Regulations, 29 CFR, Part 5, Section 5.2 (c), defines the terms apprentices and trainees as follows:

a. "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in his first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for

probationary employment as an apprentice.

b. "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the DOL's Employment Training Administration, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that Bureau.

4-15. Employment of Apprentices and Trainees. The contract provisions noted at Section 2-10 spell out the strict conditions pertaining to the employment of apprentices and trainees. If the contractor or any subcontractors intend to use either on the job, they should be reminded of the requirements during the preconstruction conference. These requirements are established by the Bureau of Apprenticeship and Training (BAT), the Federal agency responsible for the administration of the National Apprenticeship System in the United States. BAT was established by the National Apprenticeship Act of 1937, as amended, Public Law 75-308, commonly known as the Fitzgerald Act. BAT is a program office of the Office of Apprenticeship Training and Employer and Labor Services (ATELS) located in the Employment and Training Administration of the United States Department of Labor.

4-16. Evidence of Registration.

a. The written evidence required for apprentices and trainees is described in paragraphs a and b, respectively, of the contract provision.

b. Contractors participating in such programs should have no problems in obtaining the evidence if, in fact, the programs are registered and approved by the DOL's Bureau of Apprenticeship and Training (BAT), or a state apprenticeship agency recognized by BAT. In any event, it is the responsibility of the contractor and/or subcontractor to see that the required evidence is furnished for each contract. Experience has shown that when contractors request BAT to furnish the written evidence, BAT will furnish it directly to the office administering the contract. Sometimes contractors will submit or cause to be submitted letters from unions or other sources stating that a particular person is an apprentice. Usually such letters are not acceptable because they lack proof of BAT registration and fail to furnish other required information, e.g., ratios, wage rates, and date of registration. If such letters are received, they should be forwarded to the District Labor Advisor for appropriate liaison with the local BAT office.

c. In an effort to facilitate contracting agency compliance efforts in this area, BAT has compiled a listing of apprenticeship program sponsors which are recognized and registered by BAT or a State Registration Agency (approved by BAT to serve this function). The official

name of each program sponsor, along with street address, city, and state is reflected in this listing which may be accessed at www.doleta.gov/atels/sac.htm.

4-17. Administration and Enforcement Procedure.

a. Upon receipt of the required evidence, the ACO shall accept and use such ratios and rates for the purpose of checking the contractor's and/or subcontractor's compliance with the contract labor standards provisions. The evidence will be made a part of the official contract payroll files. To the extent necessary, copies of the evidence should be furnished ACO personnel for use in checking payrolls and other on-site enforcement activities. There is no requirement to furnish the Solicitor of Labor or other offices copies of the evidence.

b. Due to turnover or training experience needs of particular apprentices, there may be instances where additional apprentices will be employed on the job after the initial submission of the evidence concerning the contractor's program. In such cases, the contractor will be required to submit the required evidence for the additional apprentices along with the payroll on which the apprentice's name first appears.

c. The required wage rate for apprentices is the appropriate percentage of the journeyman wage rate which is listed in the prevailing wage determination, and not a percentage of some other journeyman's rate set by various apprenticeship committees. (WAB 80-3, Johnson Electric. 11 Apr 83)

d. Whenever a payroll shows employees classified as apprentices or trainees and the contractor has not submitted the required evidence, he will be advised by the responsible ACO that such classification of work will not be accepted until and unless he promptly submits the evidence. If the contractor does not submit such evidence, he shall be directed to pay such employees at the contract wage rate applicable to the classification of work they actually performed.

e. Similarly, if the contractor exceeds the allowable apprentice to journeyman ratio, those apprentices employed in excess of the ratio would be entitled to restitution at the applicable journeyman's wage rate for the craft work performed. For example, if an employer is permitted to employ three apprentices under his apprentice to journeyman ratio and it is disclosed that he is employing five apprentices on the project, the first three apprentices employed shall be considered within the ratio. The last two employed shall be considered improperly employed and restitution would therefore be due these two. As a practical matter, if it is impossible to determine which apprentices were first employed on the project for purposes of restitution computations, any equitable formula will be acceptable. Thus, in the preceding situation, it would be permissible to rotate three of the

five apprentices each week as a solution to the problem of which of these employees were "first" employed on the project, and compute restitution for the remaining employees accordingly.

f. In the event of controversy between project personnel and the contractor concerning this matter, the facts and circumstances shall be reported to the District Labor Advisor for further action.

g. The Code of Federal Regulations now contains the DOL's policy that if an apprenticeship or trainee program is silent with regard to payment of fringe benefits, such employees must be paid the full amount of fringe benefits for the corresponding journeyman classifications as listed on the wage determination, unless DOL determines that a different practice prevails. This section has also been revised to allow contractors to follow the ratios and wage rates (percentages) for approved apprentice and trainee programs in their "home" area rather than requiring contractors to observe the ratios and wage rates in the area where the construction project is performed.

h. The following example illustrates the application of the ratio principle: Assume that a contractor has 100 journeymen and is allowed 10 apprentices. The ratio is thus one apprentice to 10 journeymen. Thus, for example, if he employs 11 journeymen, he will be allowed to employ two apprentices. No apprentice will be allowed unless there is at least one journeyman on the job.

4-18. Helpers.

a. Although the DOL published proposed regulations in connection with the use of semiskilled helpers in 1982, in 1987, in 1989, in 1990, and again in 1996, these regulations have been the subject of both judicial challenges and legislative prohibitions (See, for example, Building and Construction Trades Department, AFL-CIO v. Martin, 961 F.2d 269; Associated Builders & Contractors, Inc. V. Herman, 976 F. Supp. 1 (D.D.C. 1997) as well as Public Laws 102-27 and 103-112).

b. On 20 November 2000, the DOL published (65 FR 69674) a final rule that restored the DOL's policy governing the use of helpers to its pre-1982 position. As provided by the DOL's regulations at 29 CFR 5.2(n)(4), helpers will be permitted where:

(1) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

(2) The use of such helpers is an established prevailing practice in the area; and

(3) The helper is not employed as a trainee in an informal training program. A ‘‘helper’’ classification will be added to wage determinations pursuant to § 5.5(a)(1)(ii) (A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

4-19. Content of Payrolls and Basic Records.

a. Forms and Content.

(1) There is no standard form prescribed for payrolls on Corps of Engineers contracts. However, certain information is required to be shown on each payroll for all laborers and mechanics, including apprentices, trainees, watchmen, and guards [1], working at the site of the work. The payrolls must be numbered consecutively and contain the following information: Name and address[2] of each employee; his social security number; his correct classification; hourly rate of pay; daily and weekly number of hours worked; gross earnings; deductions; and actual wages paid.

(2) Some contractors use printed payroll forms and fill them in either by hand or by typewriter. Some use machine generated reports. Payrolls prepared in this manner are acceptable provided they contain the required information. Sometime a code (letter or number) is used to indicate the employee's work classification. This is also acceptable provided the contractor furnishes a complete list of the classification codes for use in checking payrolls.

(3) The payroll heading should show the name and location of the project, contract number, the name of the contractor or subcontractor and the payroll period. The last payroll should be clearly marked "Final Payroll".

b. Fringe Benefits Information to be Shown on Payrolls. (See paragraph 4 of this chapter for discussion of fringe benefits as they appear in wage rate decisions.)

(1) The Statement of Compliance, DD Form 879, Appendix C, contains blocks

[1]Watchmen and guards are reflected on payroll records for Contract Work Hours and Safety Standards Act only.

[2]Address required one time only for each employee unless there is a change of address. The addresses may be shown on a separate list and attached to the payroll.

wherein contractors are required to indicate the method they are using to pay required fringe benefits, i.e., whether they are paying to funds or to the employees, or a combination of both. See the instruction on the reverse of that form.

(2) Where the contractor indicates that all fringes are paid to funds (block (4)(a)), the fund must be identified as well as the amount contributed in order to ensure that the total (basic + f.b.) hourly wage obligation has been satisfied. If fringes are paid in cash to the workers, such payments must be shown on the payroll.

(3) Overtime premium compensation is not required to be paid on fringe benefits. For this reason, as well as making it clear on the face of the payroll what basic hourly rate is actually being paid, the rate(s) of fringe benefits paid in cash should be shown separately. If the contractor uses a lump sum rate (as per the example on reverse of DD Form 879) to compute cash in lieu of all fringes, such rate must be not less than the total of all required fringe benefits.

4-20. Statement of Compliance, DD Form 879.

a. Appendix C is DD Form 879. It is to be executed in accordance with 29 CFR, Part 3, Section 3.3(b) and submitted with each weekly payroll.

b. Some contractors use a combined payroll statement form. The statements on such payroll forms are acceptable in lieu of DD Form 879, provided the statements contain the exact language of DD Form 879, and are properly executed.

c. ACO offices should requisition the form and furnish it to all contractors and subcontractors as their needs require.

4-21. Submission of Payrolls.

a. Time of Submission. This contract provision requires that payrolls be submitted weekly to the CO and makes the prime contractor responsible for the submission of payrolls of all subcontractors. In this regard, prime contractors are to be reminded that they are more than mere conduits for the transmission of payrolls. They are obliged to ensure that all required information is furnished on such payrolls prior to their submission to the government. Submission to the ACO office within seven calendar days after the regular payment date of the payroll week covered, is considered compliance with the contract provisions. A sample payroll is attached as Appendix D.

b. Delinquent Payrolls.

(1) FAR 22.406-6(b), Withholding for Non-Submission, states that if the contractor fails to submit his or his subcontractors' payrolls promptly, the CO shall withhold approval of such amount of the progress payment estimate as he considers necessary to protect the interests of the government, or of the employees of the contractor or any subcontractor.

(2) Any action pursuant to (1) next above will be taken by the CO in accordance with contractual general provisions. If the contractor becomes delinquent and does not promptly respond to requests by the ACO to comply, the latter shall report the problem to the District Labor Relations Advisor for further action.

4-22. Request for Authorization of Additional Classification and Rate - SF Form 1444. This form (Appendix E) is to be used to accomplish the action required by paragraph (d) of the Davis-Bacon Act clause. ACO offices should requisition a supply of the form and furnish them to prime contractors as their needs arise. The additional classification process is outlined in Figure 4 -2 which follows Chapter 4. This process is explained in the sections that follow.

4-23. Instructions to Contractors.

a. The contractor should be furnished copies of the form and instructed regarding the processing of same as soon as it is determined that additional classifications will be required. In the interest of good administration this matter should be discussed during the preconstruction conference to determine which, if any, additional classifications will be required by the contractor or any of his subcontractors.

b. All requests must be made by the prime contractor, and where a subcontractor is to use the requested classifications, the name and address of the subcontractor will be shown in Item 10 and signed by the subcontractor in Item 14. Where no subcontractor is involved, show in Item 10 "Not applicable." Union representatives or other representatives of the class of labor are not required to sign the request. All copies of the request, in quadruplicate, are to be manually signed by the respective representatives in Items 15 and 16.

c. It is important to emphasize that the contractor's proposal be supplemented by information relating to how the proposed wage rate was developed. For example, it may be that the contractor is signatory to a collective bargaining agreement wherein the rate for the subject trade classification is established. The contractor may also identify similar construction projects in the vicinity of the Corps contract where such a classification and rate was used. In any event, the DOL requires that the contractor, the affected employees (if known) or their representatives, and the CO agree on the proposed classification and rate

(including the amount designated for fringe benefits where appropriate). The DOL requires that the contractor state whether the proposed rate was developed in consultation with the employees.

d. Pending a final determination by the DOL, the contractor may tentatively classify and pay affected employees in accordance with the proposal. The contractor should be advised, however, that he may eventually be required to re-classify the affected employees and/or furnish wage restitution should the proposed additional classification and rate be denied by the DOL.

4-24. Submission and Processing Requests.

a. Requests are to be forwarded to the District Labor Advisor, and every effort should be made to submit the contractor's requests for approval by the CO prior to use of the classification on the contract.

b. The DOL has indicated that it will approve, modify, or disapprove every additional classification action within 30 days of receipt or will notify the CO within the 30-day period that additional time is necessary. Experience has shown that the DOL has encountered difficulties in processing the requests within 30 days. It is essential that the District Labor Advisor monitor delays in DOL responses. All requests which are more than 90 days delinquent or any that precludes the closeout of contracts should be reported to CECC-C for coordination with the DOL.

c. Posting - Upon receipt of the DOL's determination, the ACO shall furnish the contractor with the DOL's determination. Further, the contractor will be required to post all approved classifications and rates along with the contract wage rate decision in a place accessible to all employees at the project site.

4-25. Subcontracts (Labor Standards). The contract clause set forth at FAR 52.222-11 imposes the certain requirements upon the contractor as noted below.

a. Notice of Award of Subcontracts. This contractual provision requires that within 14 days after the award of any subcontract, either by himself or a lower tier subcontractor, the contractor shall deliver to the CO a statement setting forth the name and address of the subcontractor and a summary description of the work subcontracted. At the same time, the prime contractor is required to furnish a statement signed by the subcontractor acknowledging the inclusion in his subcontract of applicable labor clauses.

b. Form of Notice, SF Form 1413. This form (Appendix F) is prescribed for use in complying with the required notification by the prime contractor and the acknowledgment required of the subcontractor. Sufficient copies of this form should be furnished to the contractor either with the preconstruction letter or during the preconstruction conference. The executed form should be forwarded so as to reach the District Labor Relations Advisor in duplicate (both copies signed). The original copy will be filed in the official contract file, and reproduced copies as necessary should be furnished the ACO or QA Representative for contract administration purposes.

4-26. Physical Inclusion of Labor Clause in Subcontracts.

a. 29 CFR 5.5a(6) requires that such clauses be "inserted" in subcontracts, and under the provision entitled "Subcontracts" the contractor agrees to do so.

b. For purpose of advising contractors, the following information should be included in preconstruction labor relations letters and discussed during preconstruction conferences. Physical inclusion of labor clauses is required for compliance with the General Provisions clause entitled "Subcontracts." Incorporation by reference does not constitute compliance. However, contractors who subcontract by means of purchase orders or other informal type contract forms will be considered in compliance provided they attach copies of the appropriate labor standards clauses to the subcontract form, and provided also that the subcontractor acknowledges receipt in writing.

c. The prime contractor is not required to furnish the CO any copies of his subcontract agreements. The only evidence required is the SF Form 1413 properly executed by both the prime and subcontractors.

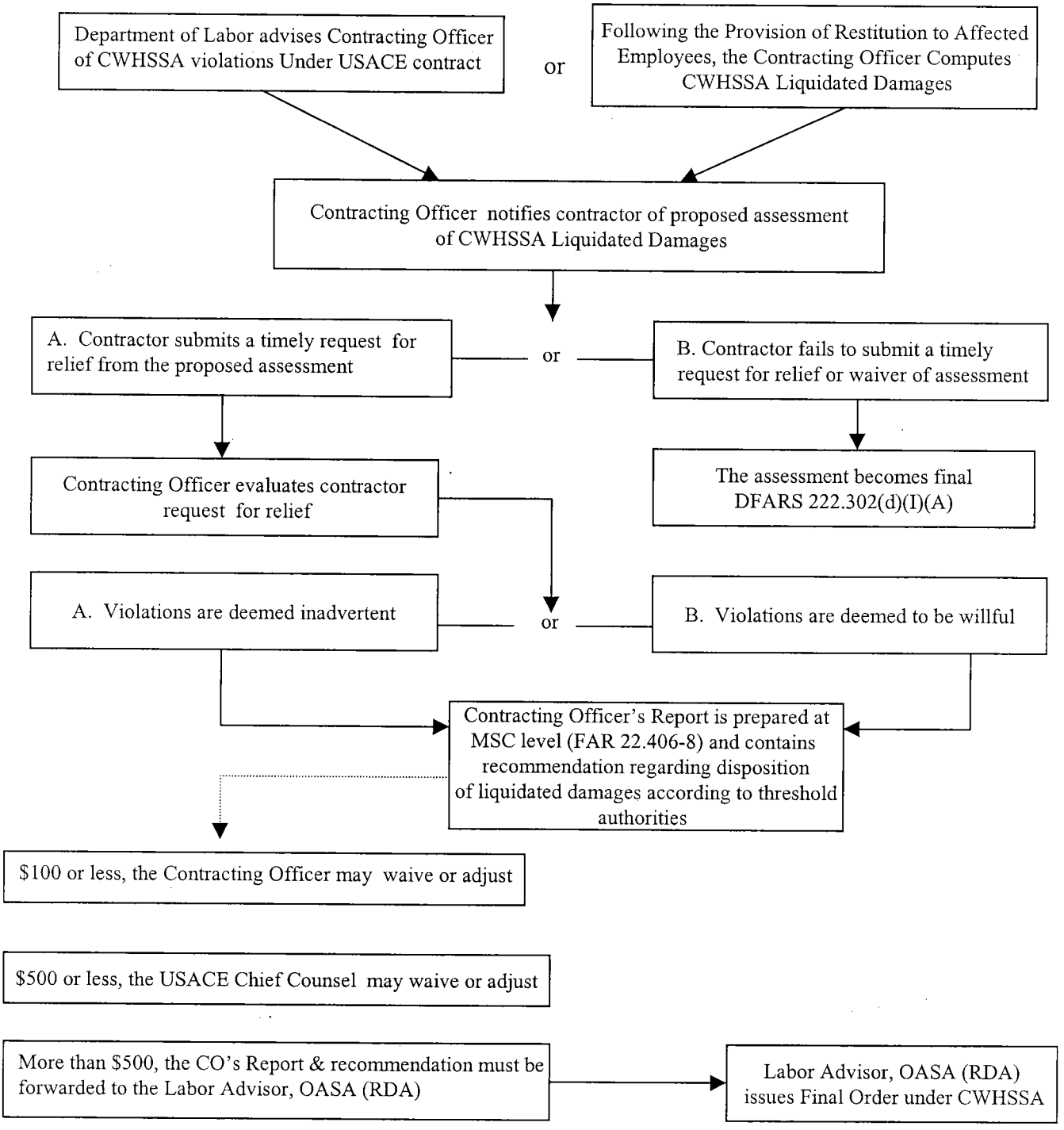

Figure 4-1. Processing of Contracting Officer Reports Relating to Contractor Violations of the Contract Work Hours and Safety Standards Act (CWHSSA) and the Assessment of Liquidated Damages

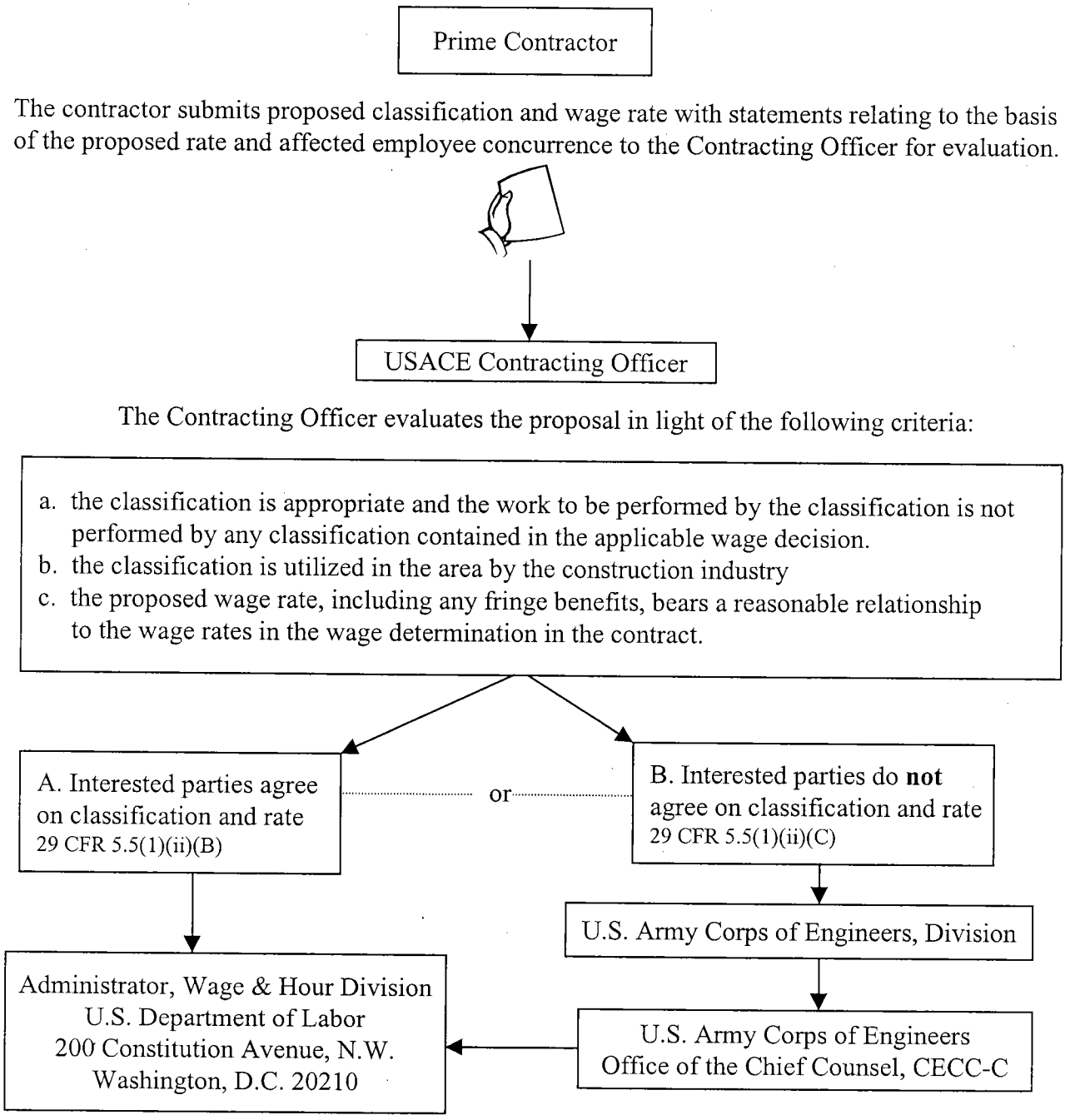

Figure 4-2. Processing of SF 1444, *Request for Authorization of Additional Classification and Rate*