CHAPTER 5 - APPLICABILITY OF CONTRACT LABOR PROVISIONS TO VARIOUS SITUATIONS, CONDITIONS, AND WORK ACTIVITIES

5-1. General. This section deals with situations, conditions, and work activities in connection with construction contracts that often involve questions with respect to determining coverage. During the past few years the enforcement activities of Federal agencies have resulted in many decisions by the Department of Labor. The Solicitor of Labor has made public many of his decisions on coverage questions involving the Davis-Bacon and related acts.[1] For purposes of this regulation it is not practicable to treat all of the Solicitor's decisions or to discuss in detail all facts and circumstances pertinent thereto. Accordingly, this part attempts only to cover situations that are most common to our construction activities. In some cases fine distinctions have been drawn; therefore, in applying the Solicitor's decisions to a particular case care must be exercised in analyzing the current case with respect to its relevant Acts and circumstances.

5-2. Survey Crews.

a. Where surveying is performed immediately prior to, after, and during actual construction, in direct support of construction crews, such surveying is considered to be construction work within the meaning of the Davis-Bacon Act. Coverage of the individuals performing this work would further depend upon their individual status as laborers or mechanics.

b. In those cases where the work of an individual functioning in a survey crew is considered professional or sub-professional in character, (duties of instrumentmen, rodmen, and chainmen are technical in nature and are a part of the engineering process), that one so employed is not a laborer or mechanic within the meaning of the Davis-Bacon Act. On the other hand, where individuals perform primarily manual work, such as clearing brush and sharpening stakes, they fall within the definition of the term "laborer." (DB-26, 2 Aug 62).

5-3. Owner-Operators of Construction Equipment. Except as stated below, owner-operators of equipment employed by construction contractors or subcontractors are not recognized as independent contractors. They must be carried on the employer's payroll and paid in accordance with all the contract labor provisions.

[1]Some of the Solicitor's decisions are referred to in this part and identified by number, e.g. (DB-28).

a. The exception mentioned above is as follows: The contract labor provisions will not be enforced as to "bona fide" owner-operators of trucks or other similar construction equipment who are "independent contractors." As to such owner- operators, the payrolls must contain their names and the notation "Owner-Operator." It is not necessary to show hours worked or rates allegedly paid. The reference to "trucks or other similar construction equipment" is applicable only to the various types of equipment used exclusively for hauling, and does not cover equipment such as bulldozers, backhoes, cranes, drilling rigs, welding machines, and such (DB-9, 13 Sep 61 and DB-12, 26 Sep 61).

b. In some cases the "owner-operator" might own trucks in addition to the one he is driving. Only he, when operating his own truck, is exempt. The drivers of his other trucks are not exempt and must be paid in accordance with the contract provisions.

5-4. Operators of Rented Construction Equipment. Except the owner-operators of trucks and similar construction equipment used exclusively for hauling discussed in 5-3a(1), all operators of any type equipment rented by the prime contractor or any subcontractor for use in performing the contract work are covered by the contract provisions.

a. Method of Computing Earnings.

(1) The method of computing the earnings, i.e., per yard, ton-mile, or otherwise, does not have any effect on the status of the operator of the equipment insofar as coverage is concerned. Neither does the fact that the equipment is rented on a fixed fee per hour fully operated basis.

(2) To satisfy the requirements of the Davis-Bacon Act, covered operators must be compensated for each hour worked at a rate per hour which is not less than the proper minimum hourly rate specified in the contract specifications.

(3) To satisfy requirements of the contract overtime compensation provisions, covered operators must be compensated at not less than one and one-half times their basic hourly rate for all hours of over-time work.

b. Payrolls.

(1) Even though an operator is providing a piece of heavy equipment as well as his labor, it is clear from the language of the Davis-Bacon Act that individuals performing the work of laborers and mechanics must be paid not less than the aggregate of the basic hourly rates and fringe benefits regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics.

Also, they must be paid overtime compensation as required by the CWHSSA. It follows that such covered operators are considered to be employees of the contractor or subcontractor, as the case may be, and they must submit payrolls for such operators.

(2) Equipment owners furnishing operators with the equipment to perform covered work are considered to be subcontractors and must comply with all the contract labor standards provisions; however, the contract with the equipment owner for the manned equipment may provide for payment of the operators by the prime contractor or subcontractor, in which event the operators will be reported on their payrolls.

(3) The required content of payrolls and basic records is the same as for any other covered workers. Also, since payrolls and Statement(s) of Compliance pertain only to compensation for wages, no amounts for equipment rental should be included. Making deductions (withholdings) from wages which may be required by Federal or other tax laws, and labor agreements is the responsibility of the employing contractor. An employer's compliance with such withholding requirements is not within the enforcement jurisdiction of contracting officers; however, to the extent deductions are made they are subject to the contracting officer's enforcement of relevant contract labor standards provisions.

5-5. Equipment Repair Activities.

a. Repairs at Job Site by Employees of Construction Contractors and Subcontractors. Laborers and mechanics employed by such contractors and working at the site of construction repairing equipment used on the covered contract must be paid in accordance with the contract requirements.

b. Subcontractor Status of Equipment Dealers Pursuant to Lease Arrangement with Construction Contractors.

(1) This applies to situations where the equipment used by construction contractors is leased or rented from equipment dealers and the lease or rental agreement provides that laborers and mechanics employed by the equipment rental dealer are required to go upon the site of construction to repair the leased equipment. This does not apply to purchased equipment and repair work thereon pursuant to manufacturer's or dealer's written warranties and/or guarantees.

(2) The Solicitor of Labor has ruled that equipment rental dealers are subcontractors under the Davis-Bacon Act where substantial and recurring repair work on the construction site is involved, "substantial" being defined as work exceeding 20 percent of a person's time in any work week. Accordingly, where laborers and mechanics employed by such a

subcontractor perform work meeting the test, they are covered workers entitled to the benefits of the Davis-Bacon Act as well as all other contract labor standards provisions (WAB Case No. 64-3, Matter of Griffith Co.).

c. Repairs at Home Shop. Where the contractor has an established shop or yard used by him as a place to work on his equipment generally, including equipment used on covered and noncovered contracts, the laborers and mechanics employed therein need not be paid in accordance with the contract requirements.

5-6. Capacity of Trucks. The Secretary of Labor's wage rate decisions contain various truck driver classifications. In some decisions the minimum hourly wage rates vary according to the capacity of the trucks. Some trucks are listed by cubic yard capacity and others are listed according to ton capacity. As a result, questions may arise with respect to the proper wage rate to be applied. The Solicitor of Labor, in addressing this issue, has indicated that the controlling factor is the load carrying capacity of the vehicle, and not the rating for registration or other purposes (Solicitor of Labor Opinion letter, 21 Feb 62).

5-7. Furnishing Materials and Hauling Operations.

a. General. Usually these situations involve questions of relationship that is whether the party is a subcontractor or a bona fide materialman in relation to the prime contractor or subcontractor. The solution to such questions is dependent upon the application of the term "subcontractor," as distinguished from the term "materialman" to the activities involved. Neither the Davis-Bacon Act nor the Secretary of Labor's Regulations, Part 5, specifically define the terms "subcontractor" and "materialman" as such.

b. Secretary of Labor's Regulations and Rulings.

(1) Regulations, Part 5, Title 29 CFR, in Section 5.2(g), say that the terms "construction," "prosecution," "completion," and "repair" mean all types of work done on a particular building or work at the site thereof, including 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. Thus, it is clear that such employees performing such work are engaged in covered activities (DB-22, 12 Mar 62).

(2) The same regulations in Section 5.2(f) state that the terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. They further state that the manufacture or furnishing of materials, articles, supplies, or equipment is not a "building" or "work" within

the meaning of the regulations unless conducted in connection with and at the site of such a building or work. The Department of Labor has traditionally considered the manufacture and delivery of supply items to the worksite, when accomplished by bona fide materialmen serving the public in general, as noncovered activities.

5-8. Drilling Services. The Solicitor of Labor has issued specific guidance relating to the applicability of the Davis-Bacon Act the various types of drilling services (DB-40, 25 Jun 63; see also WAB 80-7, 22 Jul 83).

a. The Act is not applicable to exploratory drilling performed to obtain core borings for use in engineering studies and planning for a dam, where the holes themselves will presumably be abandoned or filled in.

b. Boring for soil samples is covered by the Act where the work is directly related and incidental to the actual construction process (e.g., obtaining soil samples for purposes of setting foundations). Such boring is not covered where it constitutes preliminary work (e.g., obtaining soil samples to formulate plans and specifications, or as part of site investigation).

c. Drilling holes to be used for water wells, ventilating shafts, etc., is covered.

d. The Act does cover digging of test holes which are to be converted to water wells if the tests at a hole indicate adequate yield and a production well is desired at that location. The fact that some of the holes may not be used for wells is not significant - the expectation that some of them may be so used is sufficient.

e. Plugging of oil or gas wells and removal of above-ground equipment, in connection with construction of a reservoir, is covered whether the work is regarded as demolition or drilling.

5-9. Carpet Laying and Installation of Draperies. The Davis-Bacon Act applies to carpet laying and the installation of draperies when it is performed as an integral part of, or in conjunction with, new construction. The Service Contract Act applies to carpet laying when it is performed as part of routine maintenance, e.g., replacement of worn out carpeting in a public building or a public work where no other construction is contemplated.

5-10. Clean-up Work. Cleaning work is covered by the Davis-Bacon Act in situations where the cleaning is performed as a condition precedent to the acceptance of a building as satisfactorily completed. For example, this would include activities such as window scraping and washing, removal of excess paint, and sweeping. Where cleaning is carried

out after the construction contractor and subcontractors have finished their work, left the site, and the contracting agency has accepted the work as completed, such work would not be covered under the Davis-Bacon Act.

5-11. Demolition Work in Relation to Construction. Demolition, standing alone, is not subject to the Davis-Bacon Act. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished and further DBA-covered construction activity at the site is contemplated, the Act would apply (Solicitor of Labor Opinion, 20 Jun 61).

5-12. Landscape Contracting. Landscaping performed in conjunction with new construction or renovation work subject to the DBA is covered. In addition, elaborate landscaping activities standing alone such as substantial earth moving and rearrangement of the terrain may constitute construction within the meaning of the Act, without requiring that it be related to other construction work. Landscaping which is not covered by the Act is work for which the SCA may be applicable.

5-13. Painting and Decorating. The Davis-Bacon Act provides coverage for the "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." The coverage also includes painting or re-painting of mail collection boxes, street and traffic lines, the refinishing of floors and bowling lanes, and the installation of wall covering or hanging wallpaper. Federal contracts for painting of Government-owned, privately-occupied houses, apartments, commercial properties, etc., are also covered by the Act (DB-45, 1 Jun 65).

5-14. Public Utility Installation.

a. Whether or not the employees of a public utility, who perform construction type work in connection with Federal or federally assisted projects, are covered by Davis-Bacon will depend upon the nature of the contracts involved and the work performed.

b. Where a public utility is furnishing its own materials and is in effect extending its own utility system, such work is not covered by the DBA. The same conclusion would apply where the utility company may contract out such work for extending its utility system. However, where the utility company agrees to undertake a portion of the construction of a covered project (e.g., relocation of utility lines or installation of utility lines which are to become the property of the project sponsor), such work would be subject to the DBA provisions.

5-15. Sewer Repair Services. The internal inspection of sewer lines for leakage and damage through the use of closed circuit TV inspection and the simultaneous sealing of leaks or other damage in the lines as the machine inspects the sewer line is covered by the DBA. On the other hand, if the contract is only for inspection, the DBA would not apply. However, the SCA would apply in the latter situation if the Government was a direct party to the contract.

5-16. Steam and Sand Blast Cleaning. Steam and sand blast cleaning, as well as bird-proofing, are covered by the Act. Such cleaning operations performed on public buildings are authorized for the purpose of renewing the original appearance of these buildings and are performed for the same purpose as painting and decorating which are covered by the Act (DB-8, 17 Jul 61).

5-17. Supply and Installation Contracts.

a. Installation work performed in conjunction with supply or service (e.g., base support) contracts is covered by the DBA where it involves more than an incidental amount of construction activity (i.e., the contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work, and such work is physically or functionally separate from, and can be performed on a segregated basis from the other non-construction work called for by the contract). For example, DBA coverage has been extended to installing a security system or an intrusion detection system, installing permanent shelving which is attached to a structure, installing air-conditioning ducts, excavating outside cable trenches and laying cable, installing heavy generators, mounting radar antenna, and installing instrumentation grounding systems, where a substantial amount of construction work is involved.

b. Whether installation involves more than an incidental amount of construction activity depends upon the specific circumstances of each particular case and no fixed rules can be established which would accommodate every fact situation. Factors requiring consideration include the nature of the prime contract work, the type of work performed by the employees installing the equipment on the project site (i.e., the techniques, materials, and equipment used and the skills called for in its performance), the extent to which structural modifications to buildings are needed to accommodate the equipment (such as widening entrances, relocating walls, or installing wiring), and the cost of the installation work - either in terms of absolute amount or in relation to the cost of the equipment and the total project cost.

c. The DBA does not apply to construction work which is incidental to the furnishing of supplies or equipment, if the construction work is merged with nonconstruction work or

so fragmented in terms of the locations or time spans of its performance that the construction work is not capable of being segregated as a separate contractual requirement.

d. Coverage questions which cannot be resolved in accordance with the above principles should be directed to the Department of Labor through the appropriate channels.

5-18. Flaggers. Flaggers who direct traffic on federally funded projects but perform no manual construction work are still "laborers and mechanics" within the meaning of the Act (see All Agency Memorandum No. 141, 19 Aug 85).

5-19. Logging Operations. The cutting and removal of marketable timber by a logger or subcontractor is a part of the contract construction work and employees engaged in cutting and removal come within the purview of the DBA provisions of the construction contract. The test of coverage is: Is the work being performed by the logger or subcontractor any part of the work which the contractor is required to do to satisfy the specifications as to clearing and disposal? The fact that the contractor gives the timber to the logger in consideration of the logger's cutting and removal makes no difference with respect to coverage. When the contractor has made final disposition of the timber or debris in accordance with the contract requirements, the taking of possession and the hauling away by others is not a part of the contract work. In this connection, there may be situations where the contractor, subcontractor, or logger performs all of the felling, trimming, and sawing into log lengths or other suitable form, ready to be moved into commercial channels. All such work on the contract site is a covered activity and all workers engaged in such must be paid in accordance with the contract labor standards provisions.

5-20. Crews on Towboats and Pushboats Engaged in Transportation and Tending Services.

a. General. Some background discussion is necessary for a clear understanding of this subject. The courts have held that seamen are not laborers or mechanics; therefore, seamen are not subject to the DBA or other construction contract labor standards provisions.

b. Seamen. Pursuant to legislative history and court decisions the DOL's regulations under the FLSA state that an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters

as well as ocean-going and coastal vessels.

c. Not Seamen. (1) The question of whether or not an employee is a seaman depends on the nature of his duties rather than on the title of his occupation. (2) The regulations referred to above state that employees on "floating equipment" who are engaged in the construction of docks, levees, revetments, or other structures, and employees engaged in dredging operations or in the digging or in the processing of sand, gravel or other materials are not employed as seamen within the meaning of the Act but are engaged in performing essentially industrial or excavation work. (3) The "floating equipment" mentioned above is that on which employees are working as laborers and mechanics and used directly in the prosecution of the construction. Such floating equipment includes piledrivers, equipment and material barges, dredges, and attendant plant. The important distinction here is that such employees, although employed on floating plant, are employed in the performance of construction work and not employed aboard a vessel used as a means of transportation. Therefore, they are laborers and mechanics and not seamen.

5-21. Removal of Asbestos-Containing Materials. Asbestos abatement projects give rise to problems relating not only with respect to the appropriate trade classification but also as to the appropriate labor standards provisions (DBA v. SCA).

a. DBA v. SCA - The DOL has advised this agency that either statute may apply to such work depending upon the nature and purpose of the asbestos removal. The SCA applies to asbestos removal performed in conjunction with demolition services (see paragraph 5-11) where no future construction is contemplated. However, where such removal is performed in conjunction with the rehabilitation of a public building or work, the Davis-Bacon Act would apply.

b. Appropriate DBA Trade Classification - In recent years, questions have arisen as to the proper classification for workers involved in asbestos-removal projects. In addressing this issue, two considerations are critical:

(1) the location of the asbestos-containing material, i.e., mechanical systems (pipes, boilers, and ducts) and

(2) the disposition of the insulated system (will it remain in place or be scrapped?). In those contracts containing negotiated wage rates, the Fry Brothers (WAB Case No. 76-6, dated 14 June 1977) policy allows the Contracting Officer to follow negotiated (union) classification practices. In these situations, we may refer to the International Agreement (Appendix G) between the Laborers International Union of North America and the

International Association of Heat and Frost Insulators and Asbestos Workers. This agreement describes specific situations for asbestos removal and identifies the proper classification for workers involved in removal work. Experience has shown that although the Agreement specifically determines the classification of workers responsible for the removal of asbestos-containing material, local trade unions may not necessarily adhere to the Agreement. In these cases as well as in contracts containing open-shop (non-union) wage rates, the District Labor Advisor must perform an area practice survey to determine the proper classification. Further information relating to area practice surveys may be found in Chapter 8.

5-22. Ship-Building, Alteration, Repair and Maintenance. The building, alteration, and repair of ships under government contracts is work performed upon "public works" within the meaning of the Davis-Bacon Act. Wage determinations for ship-building under the Act are issued only if the location of contract performance is known when bids are solicited. However, a government contract which calls for the construction, alteration, furnishing, or equipping of a "naval vessel" (U.S. Navy and U.S. Coast Guard vessels) is subject to the Walsh-Healey Public Contracts Act. A contract which calls for the maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel is a service contract within the meaning of the Service Contract Act.

5-23. Air-Balance Engineers. In general, air balance engineers are not considered laborers or mechanics within the meaning of the Davis-Bacon Act. The primary function of such employees is to take measurements and to accumulate data upon which recommendations are based to advise mechanical contractors how to rectify imperfections or imbalances in heating or air conditioning systems which may become apparent after the contractor(s) have installed such systems. Generally, however, such employees do not physically make the required corrections. If, however, such employees spend a substantial amount of their time in any workweek (i.e., more than 20 percent) on the site performing manual, physical, and mechanical functions which are those of the traditional craftsmen, they would be considered laborers or mechanics for the time so spent.

5-24. Leases Involving Construction Activity. The applicability of the Davis-Bacon Act to leases involving construction has been the subject of various Wage Appeals Board proceedings (In re Military Housing, Ft. Drum, WAB 85-16, August 23, 1985 and In re Applicability of Davis-Bacon Act to Lease of Space for Outpatient Clinic, WAB 86-33, June 26, 1987) and related litigation (Building and Constr. Trades Dept. v. Turnage, 705 F. Supp. 5 (D.D.C. 1988)). As a result of the above, the applicability of the Act to any specific lease contract can be determined only by considering the facts of the particular contract. Among the factors to be considered are the length of the lease, the extent of government involvement in the construction project, the extent to which the construction will

be used for private rather than public purposes, and the extent to which the costs of construction will be fully paid for by the lease payments. Questions with respect to the applicability of the Act should therefore be referred to the District Counsel for consideration in light of these factors.

5-25. "Working Subcontractors". The statutory language of the DBA requires that all laborers and mechanics employed directly upon the site of the work be paid the predetermined wage rates "…regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and laborers and mechanics…". In 1960, the Attorney General issued a legal opinion that stated in relevant part "the gist of the Secretary of Labor's position is that the word 'employed' in the phrase "mechanics and laborers' does not necessarily import 'employee.'" (see 41 Op. Att'y Gen 488 (1960)). Owners of subcontractor firms who are themselves performing the work of laborers and mechanics are entitled to the applicable prevailing wage rate for the classification of work performed. If the subcontract price covers the applicable wage rate for the number of hours worked as a laborer or mechanic on the DBA job, the Department of Labor considers the owner/subcontractor to have been paid in compliance.

5-26. Non-Federal Work-in-Kind Performed Pursuant to Project Cooperation Agreements. In December of 2000, the Department of Labor advised the Assistant Secretary of the Army for Civil Works that certain Civil Works projects authorized by annual Energy and Water Resources Development Acts (such as the Water Resources Development Act of 2000) are subject to the Davis-Bacon Act. In particular, the Department of Labor asserted Davis-Bacon Act coverage of non-Federal work-in-kind that is undertaken by non-Federal interests for credit or reimbursement. After extensive consideration of the Project Cooperation Agreements (PCAs) under which credit or reimbursement arrangements with non-Federal interests are addressed, the Department of Labor concluded that all PCAs and similar type agreements that provide for prospective non-Federal work-in-kind, for which the work is "construction" within the meaning of the Davis-Bacon Act are covered by the Act and must include references to DBA in the PCA or agreement.