

U.S. ARMY

PROCUREMENT POLICY

ALERT BULLETIN

NO. 96-013

December 6, 1996

The enclosed documents are forwarded for your information and any necessary implementation in advance of formal publication of a Federal Acquisition Circular (FAC), or Defense Acquisition Circular (DAC). There will be no Department of the Army level supplementation or implementing instructions.

ENCLOSURES:

U. S. Department of Labor Memorandum, Subject: Application of Labor Standards Provisions to Hazardous Materials (HAZMAT) Cleanup Contracts, November 18, 1996.

This bulletin is issued by the U.S. Army Contracting Support Agency. Comments or questions should be referred to the Policy and Procedures Division, SFAE-CSA-PP, 5109 Leesburg Pike, Suite 916, Falls Church, Virginia 22041.

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Bulletin 96-013 consists of 50 pages.

Release Approved by: TWC

U.S. Department of Labor

Employment Standards Administration

Wage and Hour Division

Washington, D.C. 20210

NOV 18, 1996

MEMORANDUM NO. 187

TO: All Government Contracting Agencies of the
Federal Government and the District of Columbia

FROM: MARIA ECHAVESTE //s//
Administrator

SUBJECT: Application of Labor Standards Provisions to
Hazardous Materials (HAZMAT) Cleanup Contracts

The Department of Labor has received numerous complaints regarding the misapplication of the McNamara-O'Hara Service Contract Act (SCA) and the Davis-Bacon Act (DBA) to the subject contracts. Accordingly, All Agency Memorandum No. 155, originally issued on March 25, 1991, is reissued to provide guidance with respect to proper application of DBA and SCA to HAZMAT cleanup contracts. In addition, copies of pertinent materials developed by the Environmental Protection Agency, in conjunction with the Department of Labor, are also attached to provide such guidance.

In all future situations where a contracting agency submits an SF-98 for a wage determination under SCA, the SF-98 should clearly identify that the contract is for HAZMAT cleanup and should describe as completely as possible the scope of work to be performed under the contract (see attached example). If there are any concerns as to proper labor standards coverage, the SF-98 submittal should also include a copy of the contract statement of work for coverage review by this Department.

Attachments

Working for America's Workforce

<p>STANDARD FORM 88 Rev. Feb. 1973 U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION</p>	<p align="center">NOTICE OF INTENTION TO MAKE A SERVICE CONTRACT AND RESPONSE TO NOTICE <i>(See Instructions on Reverse)</i></p>	<p>L. NOTICE NO. A 239225.</p>																		
<p>MAIL TO:</p> <p align="center">Administrator Wage and Hour Division U.S. Department of Labor Washington, D.C. 20210</p>	<p>B. Estimated completion date (see instructions)</p> <table border="1"> <tr> <td>Month</td> <td>Day</td> <td>Year</td> </tr> <tr> <td>08</td> <td>13</td> <td>96</td> </tr> </table> <p>C. Estimated date bids or proposals to be opened or negotiations begun (see instructions)</p> <table border="1"> <tr> <td>Month</td> <td>Day</td> <td>Year</td> </tr> <tr> <td>09</td> <td>13</td> <td>96</td> </tr> </table> <p>D. Date contract performance to begin (see instructions)</p> <table border="1"> <tr> <td>Month</td> <td>Day</td> <td>Year</td> </tr> <tr> <td>11</td> <td>01</td> <td>96</td> </tr> </table>		Month	Day	Year	08	13	96	Month	Day	Year	09	13	96	Month	Day	Year	11	01	96
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11	01	96																		
<p>A. PLACES OF PERFORMANCE</p> <p>Nationwide North Central United States</p>	<p>B. SERVICES TO BE PERFORMED (describe)</p> <p>Emergency response cleanup and disposal services for hazardous waste substances - radioactive/mixed waste (see attached descriptions)</p>																			
<p>7. INFORMATION ABOUT PERFORMANCE</p>																				
<p>A. <input type="checkbox"/> Services now performed by a contractor B. <input type="checkbox"/> Services now performed by Federal employees C. <input checked="" type="checkbox"/> Services not presently being performed</p>																				
<p>8. IF BOX A IN ITEM 7 IS MARKED, COMPLETE ITEM 8 AS APPLICABLE</p>																				
<p>a. Name and address of incumbent contractor</p>	<p>b. Number(s) of any wage determination(s) in incumbent's contract</p>																			
<p>c. Name(s) of union(s) if services are being performed under collective bargaining agreement(s). Important: Attach copies of current applicable collective bargaining agreements</p> <p align="center">N/A</p>																				
<p>1. OFFICIAL SUBMITTING NOTICE</p> <p>SIGNED: <i>John Q. Hazmat</i></p>		<p>RESPONSE TO NOTICE <i>(by Department of Labor)</i></p> <p>A. <input checked="" type="checkbox"/> The attached wage determination(s) listed below apply to procurement.</p>																		
<p>DATE: 6-13-96</p>	<p>B. <input type="checkbox"/> As of this date, no wage determination applicable to the specified locality and class of employees is in effect.</p>																			
<p>TYPE OR PRINT NAME: John Q. Hazmat</p>	<p>C. <input type="checkbox"/> From information supplied, the Service Contract Act does not apply. (see attached explanation).</p>																			
<p>9. TYPE OR PRINT NAME AND TITLE OF PERSON TO WHOM RESPONSE IS TO BE SENT AND NAME AND ADDRESS OF DEPARTMENT OR AGENCY, BUREAU, DIVISION, ETC.</p>																				
<p>EPA - US Service Contracts Sections Anywhere, MD 12345-0012</p>		<p>D. <input type="checkbox"/> Notice returned for additional information (see attached explanation).</p> <p align="center"><i>(Department of Labor)</i></p> <p align="center">_____ (Date)</p>																		

JUN 24 1996

U.S. Department of Labor

Employment Standards Administration

Wage and Hour Division

Washington, D.C. 20210

March 25, 1991

MEMORANDUM NO. 155

TO: ALL CONTRACTING AGENCIES OF THE
FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: JOHN R. FRASER //s//
Acting Administrator

SUBJECT: Application of the Davis-Bacon Act to
Hazardous Waste Cleanup Contracts

To promote consistency throughout the federal contracting community, I am attaching a copy of a letter concerning the application of the Davis-Bacon Act to hazardous waste cleanup contracts that require elaborate landscaping activities or substantial excavation and reclamation work.

Please review your agency's procedures to ensure that they comport with Department of Labor policy.

Attachment

U.S. Department of Labor

Employment Standards Administration

Wage and Hour Division

Washington, D.C. 20210

May 31 1990

Mr. Henry Longest II
Director, Office of Emergency and Remedial Response
United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Longest:

The Department of Labor (DOL) has been requested to rule on the applicability of the Davis-Bacon Act (DBA) to the removal of hazardous waste at the Bunker Hill Superfund Site in Kellogg, Idaho.

As we understand the facts in this case, on March 1, 1987, the Environmental Protection Agency (EPA) entered into Contract No. 68-01-7334 with Riedel Environmental Services, Inc. (Riedel) to conduct the removal of oil, petroleum, and other hazardous substance releases pursuant to section 311 of the Clean Water Act and section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), in the 24 states and territories designated as EPA Zone Four. This emergency removal contract is one year in length with a Government option to extend the effective period three (3) additional one-year periods. The McNamara-O'Hara Service Contract Act (SCA) labor standards provisions and SCA Wage Determination No. 82-69 (Revision-3), which is updated with the exercise of each option, are incorporated. Under the terms of the contract, cleanup efforts for a hazardous waste site within EPA Zone Four are undertaken only upon the issuance of a delivery order authorizing the specific removal activity. Depending on the location of the hazardous substance release and its proximity to populated areas, the contract requires Riedel to respond to a release or threatened release within two to twenty-four hours of the receipt of a written or oral delivery order unless otherwise specified by the delivery order.

In the instant case, Delivery Order No. 7334-10-014 was issued on April 26, 1989 requiring Riedel to begin the orderly removal and disposal of soils contaminated with lead and other heavy metals from selected residences within the Bunker Hill site. The contractor was obligated to be on the site by June 5, 1989, 40 days from the date of the Delivery Order, and to complete the cleanup activities by April 24, 1990, one year from the effective date of the Delivery Order. At the time this Delivery Order was issued, SCA Wage Determination No. 82-69 (Revision-5) was included in Contract No. 68-01-7334 and applied to the work performed.

We have been advised that under Delivery Order No. 7334-10-014 Riedel was required to excavate and remove contaminated soils a maximum of 12 inches in depth over an area covering some 60 residences. The excavated soils were loaded into dump trucks and transported to a temporary storage area pending identification of a permanent disposal site. Riedel was also required to replace the excavated soils with non-contaminated dirt, resod the area and replace shrubbery. We understand that approximately \$2,000,000 was obligated from the Superfund for this delivery order.

As you know, DBA applies to "every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." Section 5.2 (j) of Regulations, 29 CFR Part 5, defines the terms "construction, alteration or repair" to "mean all types of work done on a particular building or work at the site thereof. . . ." Section 5.2 (i) of Regulations, Part 5, defines "building" and "work", in pertinent part, as follows:

The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types such as bridges, dams, . . . , drilling, blasting, excavating, clearing, and landscaping (emphasis added). * * *1

The term "landscaping" as used in these regulations includes not only such activities as planting trees, shrubs or lawns when performed in conjunction with other construction work (e.g., the erection of a building or other structure), but also includes elaborate landscaping activities such as substantial earth moving and the rearrangement or reclamation of the terrain that, standing alone, are properly characterized as the construction, alteration, or repair of a public work. Substantial excavation of contaminated soils followed by restoration of the environment, such as required for the cleanup of the Bunker Hill site, constitutes "construction work" within the meaning of the DBA and the implementing Regulations, Part 5.

SCA, which was incorporated into Contract No. 68-01-7334 and applied to the work performed at Bunker Hill, is applicable to federal contracts, the principal purpose of which is to furnish services through the use of service employees. Pursuant to section 4.116 (c) (2) of Regulations, 29 CFR Part 4, the provisions of both SCA and DBA are applicable to contracts involving construction and service work where such contracts are principally for services and where:

- (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) Such construction work is physically and functionally separate from and, as a practical matter, is capable of being performed on a segregated basis from the other work required by the contract.

While Contract No. 68-01-7334 may be determined to be principally for services within the meaning of SCA, the excavation and restoration work required by Delivery Order No. 7334-10-014 constitutes a substantial and segregable amount of construction work to which the Davis-Bacon (DB) labor standards provisions and DB wage determination are applicable. We understand that the work performed under Delivery Order No. 7334-10-014 has been completed, but that an additional 70 sites in the Bunker Hill area are targeted by EPA for removal actions similar to that undertaken pursuant to Delivery Order No.

7334-10-014. In this regard, please take the necessary steps pursuant to section 1.6 (f) of Regulations, 29 CFR Part 1, to ensure that the DB stipulations and the applicable DB wage determination are incorporated into Contract No. 68-01-7334 and applied to any subsequent delivery orders where those delivery orders require substantial and segregable construction work.

The issue of the construction work performed at Bunker Hill has raised additional questions regarding application of the federal labor standards statutes to emergency removal contracts for other EPA zones, nationwide. We understand that your agency determines the applicability of SCA or DBA to a Superfund project based on whether the response activity constitutes "emergency removal" or "remedial action" as defined by CERCLA. In meetings held in 1981 and 1985 to discuss application of the labor standards statutes to Superfund projects, EPA and DOL reached an agreement that SCA, DBA, and the Contract Work Hours and Safety Standards Act (CWHSSA) were applicable to hazardous waste cleanup contracts that were "remedial" in nature because, as represented to DOL, those contracts were principally for services and involved substantial and segregable construction work. At those meetings, EPA and DOL also agreed that SCA and CWHSSA applied to "emergency removal" contracts. However, the agreement was predicated on EPA assurances that emergency removal contracts did not require construction work within the meaning of the DBA, or that any construction work performed during the cleanup was so closely related to the service work that it could not be performed separately. Contrary to this understanding, we have become aware that individual delivery orders, such as the Bunker Hill delivery order, are being issued where those delivery orders require construction activity that is clearly substantial and segregable from any service activity performed by the contractor pursuant to its contractual obligation to provide emergency removal services within hours of a hazardous substance release. As previously stated, the construction work performed under such a delivery order is subject to the DBA provisions by virtue of the language of the statute and the implementing regulations. The nature of the work is the determinative factor in deciding DBA or SCA coverage and not whether such work is accomplished pursuant to an "emergency response" contract or a contract for "remedial action."

In addition to the foregoing, a question has been raised regarding the propriety of applying a "regional" rather than "locally prevailing" SCA wage determination to a delivery order issued under an emergency removal contract where the cleanup work was planned and where the place of performance was known at the execution of the contract or option period. In view of the numerous concerns raised and the national economic and environmental impact of these Superfund contracts, we are requesting a meeting with your agency and other agencies who contract for hazardous waste cleanup under CERCLA to discuss the current procurement policies and procedures and the application of the various labor standards statutes and wage determinations to those contracts. In addition, we are requesting your agency to review the current hazardous substance removal contracts to ensure that the DB labor standards stipulations and wage determination are incorporated and applied to any substantial and segregable construction work being performed under the contracts. Please provide us with a report of your actions in this matter, including your actions in the Bunker Hill operation, as soon as possible.

If you have additional questions or require assistance in this matter, please do not hesitate to contact us.

Sincerely,

//s//

Samuel D. Walker
Acting Administrator

1* * *Substantially equivalent definitions of "construction" and "building" or "work" have been incorporated into the government-wide Federal Acquisition Regulations at 48 CFR 22.401.

SUPERFUND GUIDANCE
DAVIS-BACON ACT / SERVICE CONTRACT ACT
AND
RELATED BONDING
January 1992

January 1992

1.0 Purpose

The purpose of this document is to provide guidance to Agency personnel in the application of the Davis-Bacon and the Service Contract Acts and related bonding requirements to EPA Superfund contracts, cooperative agreements, and interagency agreements.

2.0 Applicability

This guidance is applicable to current and future EPA Superfund removal and remedial contracts, cooperative agreements, and interagency agreements and replaces the interim guidance issued jointly on July 18, 1990, by PCMD and OERR as ERB Directive No. AP 90-17. Section 12 herein addresses in

detail the applicability of the FAR and this guidance to cooperative agreements and interagency agreements. It should be noted that applicability may vary, depending upon which agency (other Federal agencies, state and local governments or Indian tribes) takes the lead in the cleanup activity. Modifications to this document required as a result of the implementation of the Agency's Long-Term Contracting Strategy or as required by changes in statutes and/or Federal and Agency regulations will be the responsibility of PCMD.

3.0 Definitions

For the purposes of this document the following terms are defined.

3.1 Construction

"Construction" means the actual construction, or repair (including dredging, excavating, and Painting) of buildings, structures or other real property. The terms "building, structures, or other real property" include but are not limited to improvements, of all types such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property.

"Construction" also means the dismantling or demolition of buildings, ground improvements and other real property structures and for the removal of such structures or portions of them if this work will result in the construction, alteration, or repair of a public building or public work at that location. If such further construction (as defined above) work is intended, even though by separate contract, which will be funded in whole or in part with Federal funds, the Davis-Bacon Act applies to the contract or subcontract for dismantling, demolition or removal.

Generally, work of a dismantling or demolition nature at Superfund sites will be associated with work classified as "construction" and therefore, subject to the Davis-Bacon and Miller Acts.

3.2 Service

A service contract is the acquisition of the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply (labor associated with the acquisition of supplies is covered under the Walsh-Healey Public Contracts Act). A service contract may be either a "personal services contract" or a "nonpersonal services contract." Personal Services contracts are characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is required by civil service laws to hire under competitive appointment unless Congress specifically authorizes the acquisition of personal services by contract. Thus, "personal services" contracts are in violation of the laws unless specifically authorized by Congress. Services referred to in this document refer entirely to contracts for services of a nonpersonal nature.

Some examples of the type of work related to Superfund sites which are properly classified as services include:

- a) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization or modification of supplies, systems, or equipment.

- b) Routine recurring maintenance of real property.
- c) Advisory and assistance services (however, special provisions not covered in this document apply.)
- d) Refuse removal.
- e) Operation of Government-owned equipment facilities and, system.
- f) Communications services.
- h) Transportation and related services.
- i) Disposal

Additionally, dismantling, demolition or removal of improvements may be classified as services if the contract is solely for dismantling, demolition or removal of improvements, unless further work which will result in the construction, alteration or repair of a public building or public work at that location is contemplated. Generally, such work at Superfund sites will be associated with work classified as "construction" and therefore, subject to the Davis-Bacon and Miller Acts.

4.0 Background

Before proceeding further, it may be helpful to understand the history behind the establishment and enactment of both the Davis-Bacon Act (DBA) and the Service Contract Act (SCA).

Clearly, hazardous waste cleanup/mitigation was not considered when laws, such as the DBA, SCA and the Miller Act, governing construction and services were enacted. Likewise, when the Armed Services Procurement Regulations, the Federal Procurement Regulations, the Defense Acquisition Regulations, the Federal Acquisition Regulations (FAR), and the Defense Federal Acquisition Regulations (DFAR) evolved, types of contracts and related labor provisions did not consider the unique requirements of hazardous waste cleanup/mitigation. Consequently, environmental work was either considered services or construction and Superfund contracts did not initially include the commingling of labor provisions.

4.1 Davis-Bacon Act (DBA)

The DBA, as amended, is a prevailing wage law for the benefit of construction workers. It was enacted in 1931 for the purpose of protecting communities and workers from economic disruption caused by outside contractors underbidding local wage levels to obtain federal construction contracts.

The Act requires the Secretary of Labor to predetermine the prevailing wage rates to be paid before award of contracts in excess of \$2,000 for construction of all types of public works and requires that these rates be included in the advertised contract requirements. Additionally, the Act includes certain remedies for the Government, including termination and debarment, for contractor violations.

The Act was subsequently amended to include the definition of "prevailing wages", the basic hourly rate of pay and any contributions for bona fide benefits. In addition, the requirements of the Act have been extended to some 60 "related" statutes -- of which CERCLA is one -- to ensure labor standards

coverage on construction projects assisted with federal funds through instruments such as grants and loans.

Any construction contract exceeding \$2,000 for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, financed in whole or in part from Federal funds, requires the incorporation of DBA wage determinations.

4.2 Service Contract Act (SCA)

Congress adopted the McNamara-O'Hara Service Contract Act of 1965 for the purpose of preventing the exploitation of the "poorest" and "most marginal" workers in America, required workers employed by Government contractors be paid a minimum wage, and provided certain minimum benefits determined by the Secretary of Labor. Since its inception, the Act's scope has been extended to include protection of not just "marginal" workers but some university researchers and specialists in high technology industries as well.

5.0 Superfund Program

CERCLA, as amended by SARA, commonly known as "Superfund", sets forth the Agency's mission and responsibility for managing cleanup and enforcement activities of hazardous waste sites that threaten human health or the environment. The "Superfund" Act covers emergency removal and remedial action activities and assistance to state and local governments through cooperative agreements. EPA also accomplishes some Superfund cleanup activities through Interagency agreements. Removal Actions are currently accomplished under the Removal Program by the issuance of delivery orders (DO) under Emergency Response Cleanup Services Contracts (ERCS) and site-specific contracts. ERCS contracts are defined as being more critical in nature, the cleanup effort is limited to \$2.0M, and must be completed within one year (unless certain waivers are obtained). Remedial actions are currently accomplished under the Remedial Program's Alternative Remedial Contract Strategy (ARCS) contracts. The ARCS contracts are not as time critical and are actions consistent with a permanent remedy taken instead of, or in addition to, a Removal Action. Remedial Actions generally are also much longer in duration than the Removal Actions.

6.0 Procurement History of Removal and Remedial Contracts

Since their inception, the removal action contracts, more recently, ERCS contracts, have been considered strictly service type contracts and contain provisions for utilization of SCA wage determination rates. Unlike ERCS contracts, ARCS contracts are Architect and Engineering (A&E) contracts, incorporating A&E provisions. Hazardous waste cleanup is accomplished by subcontracts awarded by the prime A&E contractor. ARCS contracts include activities such as: remedial investigations (RI) of the nature and extent of the contamination, feasibility studies (FS) of alternative remedies, remedial design (RD) of the selected remedial alternatives, award of remedial action (RA) subcontracts for purposes of executing the selected remedial action, and other related activities such as community relations.

Since inception of the ARCS contracts, the DBA labor provisions have not been applied to the prime A&E contract and have been incorporated only as flow-down provisions. It was envisioned that the special subcontracting pool would primarily be utilized for construction activities in the remediation of a site and handled through a subcontract issued by the prime contractor. Most ARCS contracts contain a special clause requiring that all subcontracts awarded under the special subcontracting pool contain all

clauses that would be required if the Government had awarded the subcontracts as prime contracts. Although this contract language is somewhat unclear as to which clauses are intended to apply and may be subject to interpretation, under this provision, the Davis-Bacon Act and Service Contract Act are intended to flow down to the subcontract as applicable depending upon the nature of the work being performed under the subcontract. Since ARCS contracts are A&E service contracts, the DBA does not apply to the prime contractor unless the prime performs the construction work itself. FAR 22.403-1 states that any contract in excess of \$2,000 to which the United States is a party for construction, alteration or repair of public works or public buildings within the U. S. shall contain a clause that no laborer or mechanic employed directly upon the site of the work shall be paid less than the prevailing wage rates as determined by the Secretary of Labor. This guidance is intended clarifies (sic) the applicability of the DBA to construction work under remedial actions under the ARCS contracts.

The A&E contracts under the Remedial Program have not typically utilized SCA labor standards. The Agency determined, in accordance with 29 CFR, Section 4.111, that "if the principal purpose is to provide something other than services of the character contemplated by the Service Contract Act and any such services which may be performed are only incidental to performance of a contract for another purpose, the Service Contract Act does not apply." The SCA labor provisions were not initially incorporated into the prime contract because the services envisioned to be acquired through the special subcontracting pool were considered incidental to the professional services being acquired from the ARCS contractors, and consequently not covered by SCA.

29 CFR, Section 4.111 further states relative to the "principal purpose" as criterion for SCA determinations: "Whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case. Even where tangible items of substantial value are important elements of the subject matter of the contract, the facts may show that they are of secondary import to the furnishing of services in the particular case." Consequently, well drilling and lab services, if not the principal purpose of the work assignment under an RI/FS, or an RD could be considered incidental and the SCA labor provisions would not apply.

For example, if it is envisioned that the prime contractor, in the performance of an RI/FS or an RD work assignment, needed to acquire well drilling services in order to collect data, the subcontract would be considered incidental to the professional activity which is the principal purpose of the work assignment, and therefore, the SCA labor provisions would be determined not applicable.

However, as the Remedial Program has evolved and as work has progressed under the ARCS contracts, we have seen that it is possible to require services through the special subcontracting pool which are not considered incidental to the professional services being acquired from the ARCS contractor under RA work assignments. In that case, SCA labor provisions would apply.

For example, if a subcontract for transportation and disposal (T&D) services is found to be required at the site and is necessary to continue remediation at the site, these T&D services would be acquired through the special subcontracting pool, and probably the SCA labor provisions would apply. .

The nature of the work being accomplished in both the Removal and Remedial Programs has evolved over the life of the ERCS and ARCS contracts and the Agency must now reconsider the applicable and appropriate labor standards. As such, this document will provide the necessary guidance with which to make an appropriate determinations relative to the DBA and SCA under Superfund contracts, and cooperative agreements.

7.0 Determinations of DBA and/or SCA Applicability

For assistance in determining whether to apply DBA and/or SCA labor provisions into Superfund contracts, a decision-making flowchart has been provided as Attachment A-1 to this guidance. Also included in Attachment A-1 are definitions and examples to assist Agency personnel in determining which wage rate determinations are applicable to a given activity.

7.1 Determinations Applicable to the Davis-Bacon Act

The DBA applies to contracts for construction that exceed \$2000 and are for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work and to which the United States or the District of Columbia is a party" (Attachment B-1). The Federal Acquisition Regulations (FAR) implement the DBA statutes in Part 22.4, Labor Standards for Contracts Involving Construction.

FAR Part 22.402, Applicability, paragraph (b) Nonconstruction contracts involving some construction work (Attachment B-2), provides that the provisions of the DBA apply to construction work performed as part of a nonconstruction contract if:

- 1) The construction work is to be performed on a public building or public work;
- 2) The contract contains specific requirements for a substantial amount of construction work. (The word "substantial" relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract); and
- 3) The construction work is physically or functionally separate from, and is capable of being performed on a segregable basis from, the other work required by the contract. [48 CFR 22.402 (b)]

In these instances, instead of awarding separate contracts or delivery orders (in the case of the ERCS contracts) for construction work subject to the DBA and for services of a different type to be performed by service employees subject to the SCA, the contracting officer (CO) may include separate wage rate determinations for both types of work under a single contract or delivery order. Although the ERCS contracts are service contracts, the Agency has determined that individual delivery orders may contain elements of construction activity that can be segregable and substantial enough to justify the application of DBA wage determinations. DBA wage determinations are applicable to those labor categories engaged in any portion of the construction activity and SCA wage determinations applicable to the service-related work.

The ARCS contracts, through the prime A&E contractor, have historically applied DBA wage determinations to their remedial action subcontracts. The application of DBA under the Remedial Program ARCS contracts and subcontracts) does not change substantially under this guidance; however this guidance sets forth procedures for incorporating, as applicable, SCA into ARCS subcontracts and also provides guidance on DBA compliance.

7.2 Determinations Applicable to the Service Contract Act

The Service Contract Act applies to Federal Government contracts or any subcontract performed in the United States in excess of \$2,500 which has as its principal purpose the furnishing of services through the use of service employees. A service employee is any person engaged in the performance of a covered service (other than any person engaged in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR 541). Additional information on this exclusion (including definitions) and implementation of the statutes can be found in 29 CFR Part 4, Attachment B-3.

The DOL has developed the "SCA Directory of Occupations" which contains standard job titles and descriptions for many commonly utilized service employee occupations. Because this Directory contains standardized language, it provides a means for more effective communication between contractors and contracting agencies. Due to the length of this directory, only a portion of this document has been reproduced to provide you with the type of information contained in the directory along with ordering information (Attachment B-4). A complete version is held at EPA Headquarters. Refer to Attachment A-11 for the person to contact.

8.0 Davis-Bacon Act (DBA) Requirements

8.1 Acquisition Planning for DBA Wage Determinations

The Government, and any prime contractors or team subcontractors, in the process of developing solicitations, shall identify, to the extent possible, the appropriate DBA wage determination applicable thereto prior to issuance of a solicitation and/or bid opening. This advanced planning is critical to allow time not only for a technical review of the DBA labor classifications by the CO and the OSC/RPM and/or Project Officer (PO) but for requests, as necessary, for special (project) or additional DBA wage determinations in the absence of a published wage determination applicable to the work being performed.

8.2 Procedures for Requesting DBA Prevailing Wage Determinations

A DBA prevailing wage determination is the listing of wage rates and fringe benefit rates for each classification of laborers and mechanics that DOL has determined to be prevailing in a given area for a particular type of construction effort. The DBA requires that the minimum wage determined by DOL be paid to various classes of laborers and mechanics employed under contracts applicable to the DBA.

There are two types of DBA wage determinations, general wage determinations (also known as area wage determinations) and project determinations. Refer to Attachment B-6 for further explanation of DBA general and project wage determinations.

General wage determinations are published in the DOL publication entitled "General Wage Determination Issued Under the Davis-Bacon and Related Acts," with a notice in the Federal Register. These published general wage determinations reflect those rates determined by DOL's Wage and Hour Division to be prevailing in a specific geographic area for any contemplated type of construction. General wage determinations are usually issued whenever the wage patterns for a given location, for a particular type of construction, are well settled and it appears there will be a recurring need for predetermined rates. If a contracting agency has a proposed construction project to which a general wage determination exists and is applicable, the published determination may be used without consulting the DOL.

The other type of wage determination is referred to as a project wage determination and is usually requested for "one time", short duration projects where a general wage determination does not exist. Project wage determinations are issued at the specific request of a contracting agency and are applicable

to the "named" project only. The "named" project being the specific construction project under which the application for a project wage determination is made. A project wage determination is valid for 180 calendar days from the date of issuance. If the contract is not awarded during the 180 calendar days, the wage determination may not be used unless authorization is obtained from the DOL. Otherwise, a new project wage determination must be requested. Project wage determinations are requested by the CO for the Federal agency administering the contract on a DOL SF 308 entitled "Request for Determination and Response to Request." (A sample SF 308 is contained in Attachment B-6.)

Additional DBA wage classifications must be requested if any laborer or mechanic is to be employed in a classification that is not listed in the DBA wage determination applicable to the contract. The CO, pursuant to FAR 52.222-6, Davis-Bacon Act, shall require that the contractor submit to the CO, Standard Form 1444, Request for Authorization of Additional Classification and Rate (FAR 22.406-3). Accompanying this form should be the proposed additional labor classification and the contractor's proposed minimum wage rate including applicable fringe benefits.

The CO shall approve a request for an additional classification and corresponding wage rate and fringe benefits only when all the criteria outlined in FAR 52.222-6 (b) (1) is met. All requests must be submitted to DOL which has final approval authority. If there is a dispute on classifications between the contractor and the contracting officer, the issue must be referred to DOL for final determination.

Refer to Attachment B-6 for more detailed information on general and project wage determinations.

8.3 Procedures for Incorporating the DBA into Remedial and Removal Program Contracts.

As a reference guide for interpreting a DBA general wage determination schedule, refer to Attachment B-5.

8.3.1 Determining the Proper Schedule(s) of DBA Rates

In both the Remedial and Removal Program contracts, a determination must be made as to which of the DBA schedules, or combination of schedules, is the most appropriate for the work being performed. In the Remedial Program, the determination is made at the subcontract level and in the Removal Program the determination is made at the prime contract level. All schedules are incorporated into the prime ERCS contracts by attachment. For site-specific removal program contracts, a determination of which schedules apply is made on a case-by-case basis and the applicable wage determination incorporated into the contract by attachment.

In using the DBA wage rate determinations, a determination must be made as to the proper schedule of wage rates appropriate for the work being performed (FAR 22.404-2). The DBA wage determinations contain four (4) wage rate schedules as follows:

- (1) Building
- (2) Residential
- (3) Highway
- (4) Heavy [Includes construction projects not properly classified in any of the above three schedules and is of a catch-all nature (such as water and sewer lines, dams, flood control,

dredging, etc.)]

When the nature of a project is not clear, it is necessary to look at additional factors, with primary consideration given to locally established area practices. If there is any doubt as to the proper application of wage rate schedules to the types of construction involved, the CO may contact the DOL point of contact from the Wage and Hour Division provided in Attachment A-5 to this guidance.

A special clause pertaining to the selection of the appropriate DBA wage rate schedule has been developed for all ERCS prime contracts entitled, "Schedule for Davis-Bacon Act Wage Determinations" (See Attachment A-3).

Since circumstances may arise that do not allow for a clear or literal interpretation of a particular wage rate schedule, DOL has published Memoranda 130 and 131 to be used as additional guidance in selecting the proper wage rate schedule (Attachment B-7).

8.3.2 Procedures for Incorporating DBA Labor Provision Clauses Into the Prime Contracts

DBA and other associated labor FAR clauses as delineated in Attachment A-2 for the Remedial Program and Attachment A-3 for the Removal Program should be incorporated into the prime contract.

Because the nature and type of contracts issued under the Remedial (A&E professional services) and Removal (service contracts with elements of construction) Programs are different, you will see in Attachments A-2 and A-3 that the incorporation of the DBA clauses in full text or by reference differs depending on the prime contract. The requirement for certain of the DBA clauses to be incorporated in full text can be found in Attachment B-1, CFR Title 29, Part 5.5, paragraph (a), "Contract provisions and related matters."

Because the ARCS prime contractor does not perform any of the cleanup work itself, the required DBA clauses and associated labor provision FAR are incorporated by reference with specific flow-down provisions to construction subcontracts. The ERCS prime contractor does perform some or all of the cleanup work itself (or may subcontract it), the required DBA clauses and other associated labor provision FAR clauses are either incorporated in full text or by reference as specified in the FAR. Here too, Attachment A-3 contains specific (in full text or by reference) flow-down provisions to subcontracts that are determined to have substantial and segregable elements of construction activity.

8.3.3 Procedures for Incorporating DBA Wage Determinations into Remedial Program Contracts

Since the ARCS contracts are A&E contracts, the actual DBA wage determinations are not incorporated into the prime contract but rather into any construction subcontracts issued by the prime in performance of a particular work assignment (WA). Refer to Section 3.0 herein for a definition of "construction" and "services". If a WA is issued which requires the prime contractor to issue a subcontract primarily for construction, then the applicable DBA wage determinations must be incorporated into the construction subcontract in full text regardless of the dollar value of the subcontract. While DBA is applicable at the prime contract level only to contracts exceeding \$2,000, the DBA applies to all subcontracts where the principle purpose of the contract is for construction.

A special clause has been developed and should be incorporated into all ARCS prime contracts (Attachment A-2) instructing the prime contractor as to its responsibilities under the DBA when issuing a

construction subcontract. When developing solicitations for construction subcontracts, the prime contractor should identify the applicable DBA Wage Determination from the "General Wage Determinations issued under Davis-Bacon and Related Acts." The prime contractor should notify the EPA CO of the wage determinations it intends to use in the subcontract prior to issuance of the solicitation and/or prior to bid/proposal receipt. If the prime contractor does not have access to the "General Wage Determinations", the prime contractor should request that the EPA CO provide the applicable Wage Determination. If the DBA wage determinations are not available to the subcontractor, then the subcontractor must initiate a request to the prime contractor and the prime would forward the request to the CO. Refer to the clause entitled "Davis-Bacon Act Wage Determinations for ARCS subcontracts", Attachment A-2.

In instances where a published DBA wage determination does not contain the labor classification that is applicable to the work being performed and/or for the location at which the work is being performed, a wage determination will have to be requested from the Department of Labor for that specific project. The prime contractor should provide the EPA CO with sufficient notice for him/her to request a project wage determination from the Department of Labor. The prime contractor should forward to the CO SF303, "Request for Determination and Response to Request", with the classifications of labor for which wage determinations are required. The EPA CO should verify that the information contained on the SF303 is complete, that there is not an existing published wage determination covering the requested labor classification, and verify the labor classifications requested with the Project Officer and RPM prior to forwarding the SF303 to the Department of Labor.

The DBA wage determinations incorporated into the subcontract are fixed for the life of that subcontract unless the period of performance of the subcontract is extended or there are period of performance options in the subcontract which are exercised. Should the period of performance of the subcontract be extended or an option exercised, DBA wage determinations will need to be adjusted to reflect the current wage determination. Exercise of an option or extension of the period of performance of the subcontract is viewed as a new contract for purposes of the application of DBA provisions, and therefore, the DBA wage determination must be updated accordingly to remain in compliance with the DBA requirements.

8.3.4 Procedures for Incorporating DBA Wage Determinations into Removal Program Contracts

All ERCS zone and regional prime contracts, including site specific contracts (if there is substantial and segregable construction work), should include as an attachment the DBA wage rate determinations applicable by state (specific areas are broken down by counties) for all localities to be covered under the contract. The statute requires that these schedules be copied and directly incorporated into the contract document and not simply incorporated by reference. As of the date this guidance was issued, each of the ten EPA Regional offices had a copy of the current DBA Wage Determination Schedule. Each EPA region is encouraged to maintain a subscription to the DBA Wage Determination Schedules so that revisions are received as published. Refer to Attachment A-4 for the list of Headquarters and Regional points of contact for DBA Wage Determinations. This list contains the names and locations of those people currently holding and maintaining a copy of the DBA Wage Determinations.

The DBA wage determination incorporated into the prime contract is fixed for the life of the contract except when the period of performance of the contract is extended (by exercise of an option or otherwise). In this case, the DBA wage determination will need to be adjusted to reflect the current wage determination schedule. Should a delivery order period of performance extend beyond the contract period, the current, applicable DBA wage determination must be updated accordingly to remain in

compliance with the DBA requirements. ERCS contracts generally contain a provision allowing a period of 90 days after the expiration of the contract to complete the work under existing DOs. During this period, the wage determination would need to be updated if a revision has been issued since the inception of the contract or the last exercised option period.

(a) Use of the "Multiplier"

In accordance with the requirements of the DBA, a contractor may not pay any DBA classes of laborers less than the prevailing wages contained in a particular wage determination. Unlike SCA wage determinations, prevailing DBA wage determinations are published to a level as small as a particular county, city, town, village or civil subdivision of the State in which the work is to be performed. As such, contract negotiations for each and every DBA labor category proposed would not be practicable. Additionally, the geographic area each contract covers is usually too extensive to make it practical to negotiate a fully loaded (including all indirects, fringe benefits, and profit) fixed or provisional labor rate for every possible direct labor category. A practical approach to this problem is the negotiation of a fixed or provisional multiplier. A multiplier is a percentage which is applied to the DBA wage determination rate which includes the contractor's indirect costs, fringe benefits, and profit. Thus, the rate becomes, "fully loaded." Negotiation of a multiplier is recommended regardless of whether or not it applies to "fixed" or "provisional" DBA labor rates. The use of a multiplier will eliminate the need to negotiate DBA wage rates by DO. Further, the use of a multiplier provides consistency across all DOs thereby facilitating the process of DO definitization upon DO completion and contract closeout. Whenever possible, it is recommended that the multiplier be fixed or a ceiling negotiated. By doing this, the site costs can more accurately be estimated and the DO order definitization process is simplified.

In order to negotiate a multiplier, the contractor will be required to supply a cost element breakdown (fringe benefits, payroll taxes, overhead, general and administrative expenses, and profit) to support the proposed multiplier. The importance of obtaining and maintaining this breakdown of labor rates cannot be overemphasized since it will be required in the event of an applicable DBA increase. The multiplier will be used to compute total direct labor costs by applying the negotiated multiplier to the DBA base wage rate. In cases where the contractor's fringe contained in the multiplier is less than the DBA required fringe, the contractor is required to pay the employee the difference in cash equivalency. Refer to Attachment A-3 for the Section B prime contract clause entitled "DBA Fixed Labor Rates and Use of a Negotiated 'Multiplier'".

(c) The Removal Cost Management System (RCMS)

This section addresses the use of the RCMS in cost tracking and estimating DBA labor rates. The RCMS is only used with the Removal Program (generally, only ERCS and cost-type site specific) contracts.

Prior to issuance of a solicitation, all possible DBA labor categories should be listed in Section B of the solicitation. In order to utilize the Removal Cost Management System (RCMS) for DBA labor categories, specific contract line item numbers (CLINs) have been assigned to those labor categories within the RCMS. Accordingly, the RCMS is capable of segregating costs associated with DBA labor categories as separate and distinct from those costs associated with SCA labor categories.

The RCMS is currently under revision and includes a five digit CLIN number for each corresponding

labor category. The revision to the RCMS accommodates DBA as well as SCA wage determinations and is configured in such a way as to allow differentiation between DBA and SCA CLINs. The revised CLIN listing is included herein as Attachment A-6. Revised listings will be distributed by PCMD as new items are added.

It is important to use only the contract line items from the master CLIN list, not only for national consistency, but to enable the data from the National Data Base of ERCS costs which is maintained by ERT, Edison to be utilized. This cost data will be invaluable in the delivery order definitization process and may be useful in conducting price analyses under new requirements.

(c) Incorporating DBA Provisions into ERCS Delivery Orders

For all procurements involving the issuance of delivery orders (DO), input into the RCMS of the actual DBA wage rate schedules, if DBA is applicable to the DO, will not occur until a DO is issued. A special clause has been developed (Attachment A-3) entitled "Contractor Submission of DBA Wage Rate and Fringe Benefit Disk". The contractor will be required to supply the On-Scene Coordinator (OSC) with the applicable DBA rates on a computer disk using spreadsheet (preferably LOTUS) software to be input into the RCMS for cost tracking and estimating purposes.

At the outset of each DO, there may be a period of assessment (see following section) during which time the OSC, CO, DPO or PO, and the contractor evaluate the planned site work and determine, to the extent possible, whether there is a potential for DBA construction activity. The DBA construction activity will be segregated from the other DO tasks for purposes of DBA wage rate determinations. The CO has the responsibility for making the final determination of the activity under a given DO that is applicable to the DBA. Refer to Attachment A-1 for assistance in determining the applicability of the DBA to the DO.

Written documentation relative to DBA/SCA determinations is crucial for supporting the decisions made. A copy of this documentation, if prepared by the OSC, should be forwarded to the CO. This documentation is important for audits, compliance reviews, Congressional reviews, etc., and may be included in the DO itself, the DO statement of work, or as a separate document in the file. Determinations will not always be clearly one way or the other. The CO has the responsibility for making the final determination based upon the facts, the interpretation of those facts, and the circumstances under which the determination was made.

If after the assessment period, it is determined that there will in fact be construction activity that is segregable and substantial enough to require the application of the DBA provisions, the OSC should notify the contractor of such activity. The contractor will be required to submit a DBA rate disk before work at the site is performed which would include labor applicable to DBA rates. For verification and compliance purposes, the daily cost reports should be reviewed by the OSC for proper rate charges. It is the ultimate responsibility of the CO to assure that the proper wage determination is being used.

(d) Determining Applicable Rates During an Emergency

Due to the nature of the Removal Program, it is necessary to make a distinction between emergency removal actions which must be responded to within a matter of hours and days and other actions that are not as time critical.

If the OSC determines that the initial site work requires an emergency response within hours or days

due to an unexpected event such as a train derailment, plant explosions, etc., then that work may be accommodated under Service Contract Act (SCA) provisions until the situation is initially stabilized. The statement of work for the DO should include a statement to that effect and also should state that the SCA provisions apply to that specific portion of the work. In the event that the above type of emergency situation occurs during the course of a DO, the SCA provisions would also apply until the situation is stabilized.

In both situations, the OSC is required to prepare documentation supporting the determination of the type of emergency response and applicability of SCA provisions. This documentation may be contained in the initial delivery order, as an attachment to the delivery order, or as a separate document. It is recognized that in an emergency situation, this documentation may not be prepared until the situation is stabilized.

Once the emergency situation has been stabilized, a decision on the applicability of the Service Contract Act or Davis-Bacon Act (DBA), based on the nature of the work, must be made for the remainder of the effort. That is, if there is substantial and segregable construction activity, that portion of the work is subject to the Davis-Bacon Act. In that event, the statement of work should be further modified by the CO to incorporate DBA provisions once the initial stabilization is complete. Once the DO is issued, only the CO may modify the DO.

(e) Accommodating DBA/SCA During an Assessment Period

For DOs where an emergency response (within hours or days) is not required at the outset, there may be a period of assessment and planning relative to making DBA and/or SCA determinations. The assessment period should, to the extent possible, result in an understanding between the Contractor and the Government as to the framework under which the Contractor will operate during the course of the DO. The work performed during the assessment period may be handled under SCA provisions unless it is clear from the outset that DBA applies. The duration of the assessment period will vary depending on the nature and complexity of the work but should be as short as possible under the circumstances. The CO and OSC will determine the amount of time reasonably necessary to make the required assessment and DBA and/or SCA determinations.

8.4 DBA Compliance

Whether the DBA labor provisions are incorporated into the prime contract (ERCS) or into the subcontract (ARCS), it is the Agency's responsibility to ensure compliance with DOL's standards and regulations as set forth in Attachment B-1, 29 CFR, Part 5, Labor Standards Provisions Applicable to Contracts Covering Federally financed and Assisted Construction. Early and complete labor compliance inspections are essential to the development of a sound compliance program on all projects.

Compliance involves the review of weekly payroll records from both the prime and the subcontractor, conducting onsite inspections and employee interviews as necessary and, where required, taking corrective action which might include suspending payments, terminating contracts and calculating liquidated damages, and beginning debarment proceedings.

Each CO is responsible for determining the frequency of the compliance checks. Considerations in determining the frequency might include the period of performance and the contractor's history. Attachment A-7 includes a chart delineating the various roles and responsibilities relative to compliance with DBA labor provisions. The chart segregates the roles and responsibilities by program (Remedial and

Removal) so it is clear which person(s) are responsible for various segments of the labor standards compliance.

Detailed information on compliance is available in Attachment B-8 which includes specific responsibilities for DBA compliance under the Removal and Remedial Programs.

8.4.1 Voluntary Compliance

Before any circumstance is treated as a violation, every reasonable effort should be made to obtain the contractor's voluntary compliance. In situations where the violation is not willful, voluntary restitution by the contractor or subcontractor may remedy the situation of noncompliance. Such situations may be due to a misinterpretation of the labor standards, a valid dispute as to their meaning or application, or simple human error in the calculation of wage payments which cannot be considered willful negligence.

8.4.2 Compliance Inspection

The CO is responsible for determining the frequency with which inspections should be made to ensure compliance with the DBA labor standards and for conducting the compliance inspection itself. Under certain circumstances it might be appropriate to request the assistance of the RPM/OSC in conducting the inspection. Such instances might include assuring that posters are in place at the site, contractor employee and/or interviews. Attachment A-8 is recommended for notifying the contractor that the RMP/OSC may be delegated some of this responsibility.

The CO should assure that the contractor understands the purpose of the compliance reviews, what records will be required, and when specific reviews will be conducted. A written notification [in addition to the letter(s) in Attachment A-8] should be sent to the contractor sufficiently in advance to assure that the records and contractor personnel are available.

There is a distinction that needs to be highlighted between investigations (conducted by DOL or the Agency), which are concerned with a specific allegation(s) of wrongdoing, and compliance inspection (the responsibility of the CO), which are conducted routinely as a matter of good contract management to assure that applicable procedures are being followed relative to labor matters without any allegations of improper actions. Because of this difference, investigations are necessarily much more thorough in that they are designed either to dispel the allegations made, or to assemble concrete evidence upon which administrative action, or even criminal action, could be taken.

Specifically, the compliance checks include:

- 1) Appropriateness of labor classifications, rates of pay and fringe benefit rates;
- 2) Verification of the types and classifications of work performed;
- 3) Verification of the requirement to post DBA posters at the site;
- 4) Ensuring that payroll records are being submitted on time from both the prime and the subcontractor;
- 5) Ensuring that payroll records are complete and correct and comparing these records with the daily time sheets and logs; and,

6) Conducting interviews with contractor employees and then comparing the information received with what was actually recorded on the employee's time card. The Interview forms can be found in FAR Part 53, Labor Standards Interview, SF 1445, and Labor Standards Investigation Summary Sheet, SF 1446.

DOL does not conduct compliance reviews on a routine basis. DOL has undertaken this task only when requested to do so by the Agency on a special-case basis.

8.4.3 Payroll Records Review

The contractor must submit to the CO weekly, for each week in which any contract work is performed which is applicable to the DBA, a copy of all certified payrolls. Each payroll submitted must be accompanied by a "Statement of Compliance" signed by the contractor [29 CFR, Part 5, 5.5 (a) (ii) (B)].

There is no mandatory prescribed format for payroll record submissions; however, the DOL Form WH347 is available for this purpose. At the very least, the following information must be provided in these weekly payroll submissions:

- 1) The employee's full name, address, and social security number;
- 2) The employee's classification;
- 3) Hourly wage rate and overtime hourly rate;
- 4) The daily and weekly hours worked in each classification, including actual overtime hours worked;
- 5) The itemized deductions made and the purpose of those deductions; and,
- 6) The net wages paid.

Certain employees, at various times, may perform work during a single payroll period in different work classifications which may require different wage rates. In such circumstances, the employee must receive wages of not less than the rate specified in the wage rate determination for the classification which describes each type of work performed. Contractors must keep accurate records of such periods of work, and ensure that the employee is paid at the correct rate for periods of work performed in each classification.

The objective of specifying the purpose of a deduction and the amount withheld is to assure compliance with the Copeland "Anti-Kickback" Act and DOL regulations, 29 CFR Part 3. Therefore, the combining of payroll deductions on the payroll form without proper identification is not permitted unless supplemental data specifying the purpose and amount of each deduction is attached to the payroll when submitted.

It is the responsibility of the CO to conduct periodic DBA compliance reviews of both the prime and subcontractor payroll records. This DBA requirement not only places an additional burden on those involved with the placement and management of Superfund contracts, but also presents a storage problem

in terms of retaining payroll records.

8.4.4 Reporting Requirements to DOL

In addition to the above, the Secretary of Labor requires "Enforcement Reports" and "Semi-annual Enforcement Reports". Refer to Attachment A-11 for the name of the Headquarters person responsible for complying with these DOL reporting requirements. All matters concerning investigations, corrective action not taken on noncompliance issues, etc., should be reported to this individual.

(d) Corrective Action

The CO should notify the contractor and/or subcontractor, in writing, of any discrepancies found during compliance reviews and make recommendations for corrective action. The contractor is required to promptly submit an amended or supplemental payroll record showing the corrective action taken. If necessary, payments may be withheld until discrepancies have been corrected. In that event, the CO should notify, in writing, the person responsible for approving invoices for payment to approve the invoice with the amount specified by the CO as being withheld. The contract file should be documented accordingly. The responsibility and ultimate authority for withholding rests with the CO.

(f) Subcontract Consent

One of the most opportune times for providing guidance to prime contractors relative to DBA/SCA provisions is at the time the contractor requests consent to subcontract. Once the CO grants consent to subcontract, the CO should forward a letter to the contractor notifying the contractor of its responsibilities for ensuring full and impartial enforcement of labor standards in the administration of the subcontract. Refer to FAR 44.2 for subcontract consent provisions.

Two sample notification letters, with attachments, have been developed notifying the prime contractor of its and its subcontractor's DBA compliance responsibilities. Attachment A-8 includes separate sample letters for the Removal and Remedial Program contracts.

(g) Role of OSC/RPM/PO in Compliance

The ultimate responsibility for compliance rests with the CO even though the prime contractor may review subcontractor payroll records and has some oversight responsibilities.

Under the ARCS contracts, a separate meeting may be scheduled by the EPA CO prior to the prime conducting its preconstruction conference to review the prime's compliance program. The EPA Project Officer (PO) and the Remedial Project Manager (RPM) should attend this meeting.

Under the Removal Actions, the EPA CO should notify the prime contractor of its responsibilities under the Davis-Bacon Labor Act at the post award conference.

Under both Remedial Actions and Removal Actions, at the time of subcontract consent (if required), the EPA CO should notify the prime contractor, in writing, of its and its subcontractor's obligations under the Davis-Bacon Act. (Refer to Attachment A-8).

The prime's compliance program must include the following responsibilities:

1) Receipt and review of payrolls weekly from the subcontractor to assure compliance with Davis-Bacon labor requirements; and,

2) Performance of on-site compliance checks to ensure that the subcontractor and any lower-tier subcontractor(s) are complying with labor standard practices, as follows:

- Ensuring that the subcontractor has prominently posted at the job site the DBA schedule of wage determinations and any amendments to it;

- Interviewing workers periodically for proper classifications and appropriate wages;

- Observing, recording and notifying the CO of any apparent or perceived disproportionate ratio of laborers, helpers, and apprentices to journeymen; and,

d) Notifying the CO of any apparent or suspected violations of the labor standards provisions.

The prime contractor is required to forward to the EPA CO on a weekly basis, for both its employees and that of its subcontractors, originals of payroll records, employee interviews and, daily records documenting labor mixes. The CO may need the help of the PO, RPM and/or OSC in conducting compliance reviews due to the technical nature of the work being performed and the requirement to distinguish between the various tasks as to the applicable labor wage determinations to assure that contractor employees are being paid the proper wages. Therefore, under certain circumstances, it may be in the best interest of the Government for the EPA CO to delegate to the OSC, PO or RPM the responsibility for monitoring some of the on-site compliance activities delineated below. This should be accomplished by mutual agreement between the CO and the person to whom the responsibility is delegated and each case will need to be considered on its own merits. Factors to be considered in delegating this responsibility could include staffing and workload, travel time and travel budget, and the frequency with which that person is on site. Examples of compliance activities which might be delegated are:

- 1) Verifying that wage rates and posters are prominently displayed at the site;

- 2) Witnessing interviews of workers by the prime contractor;

- 3) Reviewing documentation of labor mix at the site;

- 4) Notifying the EPA contracting officer of any concerns.

8.5 Interagency Coordination for DBA Labor Standards

In cooperation with the DOL, a list of EPA regional COs has been developed and forwarded to DOL to assist in their investigations of Superfund contractors. Likewise, a list of DOL regional wage specialists designated for each of EPA's ten Regions (DOL Regions correspond to EPA Regions) has been provided to assist Agency personnel in the incorporation of applicable wage determinations. Both lists are provided as Attachment A-5 to this guidance.

Additionally, DOL has provided a list of "Typical Questions and Answers on the Use of Davis-Bacon Wage Determinations" that are included as Attachment B-9 and will provide additional guidance in making DBA versus SCA determinations.

9.0 Service Contract Act (SCA) Requirements in the Remedial and Removal Programs

This section addresses the incorporation of the SCA labor provisions into the Remedial and the Removal Actions. The majority of the SCA compliance and enforcement responsibility rests with the DOL and not directly with the contracting agency as with the DBA provisions.

The Service Contract Act (SCA), 29 CFR, Part 4, Section 2 (a) (Attachment B-3), defines the payment of minimum compensation based on wages and fringe benefits prevailing in the locality, for application to a class or classes of service employees in the performance of any contract in excess of \$2500 which is subject to the provisions of the SCA. Section 4 (c) of the Act provides that a successor contractor or subcontractor shall pay not less than the wages and fringe benefits provided for in a collective bargaining agreement under the predecessor contract.

The Act requires that the minimum wages and fringe benefits (as specified in the applicable DOL SCA wage determination) for service employees under service contracts be included in solicitations and contracts by attachment. SCA wage determinations establish minimum rates of pay for the various classes, and minimum fringe benefits prevailing in the locality where the work is to be performed.

Utilizing the flowchart in Attachment A-1 will assist the CO in determining whether SCA is applicable to a particular work assignment under a removal or remedial contract. To have benefit of another perspective, refer to the memorandum in Attachment A-9, "Applicability of the Service Contract Act".

Also, refer to Attachment B-10 for the SCA wage determination request procedures. The Service Contract Act Directory of Occupations (Attachment B-4) contains the standard job titles and definitions (descriptions) for many commonly utilized service employee occupations and should be consulted to the maximum extent possible in listing service employee classes on the SF98/98a.

The CO prepares and submits to DOL a SF98/98a with all anticipated labor categories for the areas in which the work is expected to be done. The SF98a must be submitted not less than sixty (60) and not more than one hundred and twenty (120) days prior to issuance of an RFP/IFB (FAR 22.1008-7). It is important to consider this time in acquisition planning since, historically, DOL has not responded favorably to requests to expedite SCA wage determinations. The SCA wage determinations must be updated when exercising an option or contract extension or for each biennial anniversary date of a multi-year contract not subject to annual fiscal appropriations of the Congress. By incorporating the SCA wage determination into the prime contract, there is no need for the prime contractor to submit a SF/98/98a prior to the issuance of an Invitation For Bid (IFB) or Request For Proposal (RFP) for a subcontract thereby eliminating a timely step in the award process.

If the CO is aware that contract performance involves a class of service employee not included in the wage determination, the CO must require the contractor to classify the unlisted labor class so that a reasonable relationship can be made (i.e., appropriate level of skill comparison) between the unlisted labor class and those labor classes contained in the wage determination. This is referred to as "conforming procedure" and must be initiated prior to any work being performed by the unlisted class (es) of labor. The contractor must submit SF 1444, Request for Authorization of Additional Classification and Rate to the CO for review who then forwards the SF 1444 to the DOL's Wage and Hour Division. Refer to Attachment B-2, FAR Part 22.1019, for a more detailed explanation of the SF 1444 procedures.

When granting subcontract consent, the CO by separate transmittal, should notify the prime contractor as to their subcontractors responsibilities relative to payment of the rates specified in the applicable SCA wage determination. Additionally, the CO must obtain a preaward clearance in accordance with FAR 22.805, for subcontracts of \$1M or more (excluding construction) prior to granting consent to subcontract. This preaward clearance is relative to affirmative action requirements. Additional information found in FAR 22.805 (a) (6). Attachment A-12 is a list of the regional representatives for the Office of Federal Contract Compliance Programs.

The prime contractor must notify the CO when the subcontract award was made and the CO shall then prepare and forward to DOL's Wage and Hour Division a SF99, "Notice of Award" in accordance with FAR 22.1017. The CO should also forward a letter to the contractor notifying the contractor of its responsibilities for ensuring full and impartial enforcement of labor standards in the administration of the subcontract. A sample of the letter to the contractor and the attached subcontractor letter is found at Attachment A-8 to this guidance.

9.1 Procedures for Incorporating SCA Provisions into the Removal Program Contracts

Since the Removal Program contracts are considered service contracts, they have historically incorporated the SCA labor provisions into the prime contracts with the appropriate flow-down clauses to subcontractors.

Incorporation of the SCA labor provision clauses and the SCA wage determinations is essentially the same process as that described above. The Removal Program has developed a master CLIN list for all SCA labor categories used in their contracts. Refer to Attachment A-10 for the SCA master CLIN list.

9.2 Procedures for Incorporating SCA Labor Provisions into Remedial Program Contracts

The Remedial Program contracts, being professional service A&E contracts, have not typically incorporated the SCA labor provisions. Due to the evolution of the work under the Remedial Program and the potential for awarding a remedial action subcontract for which the primary work is appropriately classified as services, SCA provisions should now be incorporated into all prime A&E contracts with the appropriate flow-down provisions for subcontractors for which the primary purpose is services.

Incorporating the SCA labor provisions involves the incorporation of both the applicable

FAR SCA clause as well as the appropriate SCA wage determination specific to a particular contract. The prime contract should contain the SCA clause, FAR 52.222-41, and the Contract Work Hours and Safety Standards Act - Overtime Hours Worked clause, FAR 52.222-4, by reference, with flow-down provisions to subcontracts for services.

It is recommended that the SCA labor provisions, its affiliated clauses, and the SCA wage determination, if applicable, be incorporated into all prime remedial contracts by means of a bilateral agreement. In the event that a bilateral agreement cannot be reached, the CO should unilaterally incorporate all the SCA labor provisions, affiliated clauses and wage determinations citing statutory requirements.

Attachment A-2, "Remedial Program Contract Clauses for both SCA and DBA Labor Provisions" contains the appropriate SCA clause with flow-down provisions as well as some special provision "H" clauses specifically addressing subcontracts issued applicable to the SCA subcontracts.

The Remedial Program contracting Officers may find it helpful to consult the most current SCA wage determination in the ERCS contracts since many of the categories used may be the same.

9.3 Remedial Program Subcontracts Applicable to SCA Requirements

This section applies to instances where the SCA wage determination has not been incorporated into the prime contract.

When the prime contractor determines that a subcontract under a Remedial Action is for a service subject to the requirements of the SCA, the prime contractor is required to forward a SF98/98a, "Notice of Intention to Make a Service Contract and Response to Notice", to the CO. The CO should review the SF98/98a and ensure that the classifications requested are consistent with the work to be performed and then forward the SF98/98a to the DOL's Wage and Hour Division. The applicable wage determination issued by DOL should be incorporated into the RFP/IFB for which it was intended and should be incorporated into the subsequent contract documents. The contracting officer may need to discuss with the OSC/RPM and/or PO whether, from a technical standpoint, the proposed labor is reasonable for the type of services required.

Again, because of the time required to obtain an SCA wage determinations, acquisition planning is important. Upon receipt of the SCA wage determination, the CO must forward a copy to the contractor.

If, however, the prime A&E contractor issues a service contract with elements of construction, then the question and final determination of the DBA and Miller Act applicability would be the same as outlined in the Removal Program above. The test of substantial and segregable construction activity must be made to determine whether the DBA applies.

9.4 SCA Compliance Responsibility under the Remedial and Removal Programs

As previously mentioned, since the enforcement responsibility for SCA labor provisions

rests primarily with the DOL, the compliance responsibilities of the contracting agency are much less than under the DBA regulations. There are no requirements for the contractor/subcontractor to submit weekly payroll records as was the case under the DBA. The CO is responsible for the following:

- 1) assuring that application has been made for the SCA wage determination and that it is included in the contract along with the applicable contract clauses
- 2) the DOL poster, Publication WH 1313, provided at the time the SCA wage determination is issued, is prominently posted at the contractor's worksite
- 3) ensuring that the wage determination is available for their review at the job site.
- 4) ensuring that the wage determination is applicable to the statement of work and that the contractor's service employees are classified in accordance with those classifications contained in the wage determination
- 5) ensuring that the contractor is complying with the overtime payments.
- 6) taking such action as may be necessary in accordance with FAR 22.1407 in the event of noncompliance by the contractor.

The CO is not precluded from requesting a review of the contractor's payroll records if it is necessary to ensure compliance with the wage determination and overtime payments.

ATTACHMENT A-1

DECISION TREE

FOR MAKING DBA/SCA APPLICABILITY DETERMINATIONS

This attachment contains a systemized and logical approach, by means of a decision tree, to making DBA and SCA determinations of applicability. Decision Tree I is specifically designed to accommodate DBA and SCA determinations within the Removal program while Decision Tree II is specifically designed for Remedial program determinations. Examples of typical Superfund work (construction and service type) are also provided to assist those persons involved in this DBA and SCA decision making process.

Attachment A-1

Decision Tree for SCA/DBA Applicability

and

Examples of Superfund Services/Construction

The purpose of this document is to provide those persons in a position of making DBA and/or SCA determinations with a systemized and logical approach to those decisions. The decision trees and examples of typical Superfund work which might be appropriately classified as services or construction may be helpful in making such determinations. In making these types of determinations, the following information should be used together with the information provided in the Agency guidance document under Sections 7, 10 and 11.

I. Decision Tree For Use In Applying DBA and/or SCA Labor Standards To Superfund Remedial and Removal Contracts

Decision Tree I contains information applicable to the Removal Program. Decision Tree II contains information that is applicable to the Remedial Program. These decision trees illustrate the steps in the decision-making process under contracts for construction, services, or service contracts with elements of construction.

II. Examples of Superfund Services/Construction Work

Some definitions of the terms "substantial" and "segregable" are provided as a guide to assist in determining whether a service contract contains elements of construction activity that are substantial and segregable enough to require the application of the DBA labor provisions. Additionally, some examples of typical construction, service, and service with elements of construction type of activities are included below.

Typical construction activities at Superfund sites may include:

- Construction of permanent water treatment system
- Excavating, consolidating, capping of contaminated soil, backfilling, regrading, and reseeded of excavated area.
- Construction of a water distribution system
- Installation of a security fence/warning signs (when this is the only action to be performed at the site.)

A service activity can be performed by either professional or non-professional personnel. Typical service activities at Superfund sites may include:

- Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- Routine recurring maintenance of real property
- Construction or repair of personal property
- Consulting services
- Engineering and technical services
- Operation of government-owned equipment, facilities and systems
- Transportation and related services
- Research and development
- Chemical testing and analysis
- Data collection, procession, and analysis

- Exploratory drilling (other than as part of construction) i.e. installation of monitoring wells
- Geological field surveys and testing
- Laboratory analysis
- Landscaping (other than as part of construction)
- Surveying and mapping services (not directly related to construction)
- Transportation of property or personnel
- Solid waste removal
- Tree planting, thinning, and clearing of timber or brush
- Dismantling, demolition or removal of improvements (As stated in 29 CFR 4.115, "dismantling, demolition, or removal" are exempted from SCA and fall under DBA when it appears such activity at the site is contemplated, the Davis-Bacon Act is considered inapplicable.")
- Installation of transportable treatment units (i.e. incinerator units, pugmill systems, water treatment plants).

In order to make a determination of DBA applicability under a service contract that contains elements of construction activity, an understanding of the terms "Substantial" and "Segregable" is necessary.

Substantial: 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.

Segregable: Such construction work is physically and functionally separate from and, as a practical matter, is capable of being performed on a segregated basis from the other work required by the contract.

Three examples will illustrate substantial and segregable:

1. In an action that calls for the removal and disposal of drums of hazardous waste, the contract/delivery order is principally for service (removal and disposal). However, site set-up requires some incidental construction activities such as electrical hook-up, construction of stairs for the command post, clearing and construction of access road, etc. These activities are not substantial to the overall scope of action.
2. In an action that calls for excavation and off-site disposal of contaminated soil, the principal purpose of the contract/delivery order is service (removal of

soil through transportation and disposal). The excavation and staging of the soil is an activity which is substantial, and can be functionally separated from the transportation and disposal.

3. In an action that calls for excavation and on-site incineration of the contaminated soil, the principal purpose of the contract/delivery order is still service (treatment of contaminated soil). In this case, excavation is substantial, but as a practical matter may not be segregable from the incineration of the soil if the activity is continuous and is to be performed by the same contractor employees. However, if the two activities are phased, or if the excavated material is to be temporarily contained, the incineration is then capable of being segregated from the excavation and should be treated accordingly.

Under Remedial Program contracts, the role of the A/E firm is expected to be one of oversight of the chosen remediation where the end product can be either construction, service, or a combination of both.

Some typical types of remedial contract activities could be:

1. Construction -- Example: Soil excavation and backfill
2. Services -- Example: Leachate collection and off-site transportation and disposal.
3. Construction with elements of services -- Example: Construction of a groundwater treatment plant with a follow-up option for operation and maintenance services.
4. Services with elements of construction -- Example: Transportation and Disposal of contaminated soil where the excavation and loading of the waste would be considered construction.

Copies of forms and attachments not included with this document may be obtained by contacting the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Washington, DC 20210.