



DEC - 2 2013

Ms. Tamika C. Carter, PHR  
Director, Construction HR  
Associated General Contractors of America  
2300 Wilson Blvd., Suite 400  
Arlington, Virginia 22201-3308

Dear Ms. Carter:

This is in response to your August 26, 2013 letter regarding Wage and Hour Division (WHD) All Agency Memorandum No. 212, dated March 22, 2013, and the applicability of Davis-Bacon Act (DBA) labor standards to members of survey crews. Thank you for expressing your concern regarding possible confusion among contractors who perform work on federal and federally assisted construction projects regarding AAM No. 212, and for suggesting that clarification of its effect is needed.

The DBA requires the Secretary of Labor to determine prevailing wage rates for inclusion in covered federal and federally assisted contracts based on the wages paid to "... corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work ..." in the area (usually a county) in which proposed contract work is to be performed. WHD has long held that members of survey crews performing primarily physical and/or manual work on a Davis-Bacon covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers and mechanics subject to the Davis-Bacon Act, and that whether individual members of survey crews are laborers or mechanics is a question of fact that must take into account the actual duties performed.

In determining whether a worker (including a member of a survey crew) is a "laborer or mechanic" as defined under the DBA at 29 CFR 5.2(m), the touchstone is whether the worker's duties "are manual or physical in nature (including those workers who use tools or who are performing the work of a trade)." As stated in the applicable regulatory definition at 29 CFR 5.2(m):

The term *laborer* or *mechanic* includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. ... The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.

After a review of WHD policies and procedures, as well as information indicating that the composition and work of survey crew members have evolved with new technology that survey crew members use in their work, WHD determined that steps should be taken to ensure that appropriate consideration will be given to survey crew members in the administration and enforcement of Davis-Bacon labor standards on covered projects.

As stated in AAM No. 212, the basis for a survey crew member to be considered a laborer or mechanic covered by the DBA requirements is that he or she:

- o performs primarily physical and/or manual duties,
- o while employed by a contractor or subcontractor,
- o in work performed immediately prior to or during actual construction,
- o in direct support of construction crew(s),
- o on the “site of the work.”

Currently, survey crew worker classifications are not listed on the DBA general wage determinations, which are available at [www.wdol.gov](http://www.wdol.gov) for incorporation into covered contracts. However, as specified in the DBA contract clause set forth at 29 CFR 5.5(a)(1)(ii), “the contracting officer shall require that any class of laborers or mechanics...which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.” As additional laborer and mechanic classifications may be added to the contract wage determination for a project if needed, AAM No. 212 advises contracting agencies to accept requests for classifications to be added to applicable Davis-Bacon wage determinations for survey crew members whose duties are primarily physical and/or manual while employed by the contractor or subcontractor(s) on Davis-Bacon covered projects immediately prior to or during construction in direct support of construction crews. WHD will review contracting agency requests for the addition of survey crew classifications and wage rates to wage determinations in covered contracts in accordance with the “conformance” process specified at 29 CFR 5.5(a)(1)(ii). Because it is necessary for WHD to consider the duties of proposed additional survey crew classifications when evaluating such conformance requests, AAM No. 212 notes that each request should include information describing the duties of the survey crew members employed on the project.

As new Davis-Bacon prevailing wage surveys are conducted across the country, relevant information concerning the wages paid and the duties performed by crew classifications in the areas surveyed can be reported and new Davis-Bacon wage determination(s) in each area surveyed can include survey crew classifications and rates if and when the

information submitted in response to the prevailing wage survey demonstrates that it is appropriate to do so. In this process as well, when the prevailing wage surveys are conducted, data submitted voluntarily by contractors and others who have classification and wage data from construction projects underway in specific areas provide the basis for determining prevailing classifications and rates for use in later contracts. While job titles used in classifying survey crew workers may vary geographically, and the duties that employers assign to different classifications may vary, the status of survey crew members as laborers or mechanics on projects to which the DBA labor standards apply depends on the actual duties they have performed. Thus, factual information will be examined to evaluate data submitted in response to DBA prevailing wage surveys conducted as a basis for determining the classifications and wage rates that will be issued (on a county-by-county basis and by type of construction) in new wage determination schedules for publication in the future. If survey crew classifications are found prevailing when they are employed by contractors and subcontractors performing primarily physical and/or manual duties in direct support of construction crews in work performed immediately prior to or during actual construction, based on data submitted when a prevailing wage survey is conducted in given areas, the classification(s) and wage rates found prevailing will be listed on the Davis-Bacon wage determination issued based on the data collected by the survey.

AAM No. 212 provides guidance on surveying work that is generally not covered by DBA requirements. That guidance clearly recognizes the following important examples:

- o Surveying work performed during the design phase in which construction projects are envisioned and engineering plans are developed by architectural and engineering firms is not subject to DBA requirements.
- o Survey crew members not employed by a construction contractor or subcontractor are not subject to the DBA requirements.
- o Individuals who meet the FLSA requirements for exemption established under 29 CFR 541 are also exempt under DBA requirements. (See 29 CFR 5.2(m), 541.101, and 541, subpart D.)

In effect, AAM No. 212 initiates of an ongoing examination, in the normal course of DBRA administration, of factual information that may substantiate a need for recognition of survey crew members as covered workers subject to the Davis-Bacon labor standards, and implementation of such applicability where appropriate.

We appreciate your correspondence regarding this matter, and we trust that the above information is helpful. WHD also appreciates and values your organization's longstanding commitment to ensuring that your members receive clear and concise compliance assistance training on all aspects of the DBA. We encourage you and your

members to provide any factual information or materials that would be relevant to ensuring appropriate WHD determinations concerning the applicability of Davis-Bacon requirements in accordance with the applicable statutory and regulatory framework. Although we do not intend to stay implementation of the AAM, we will carefully consider such information as we work to ensure appropriate application of the DBA to members of survey crews.

I have asked Mr. Timothy Helm, Chief of Government Contracts Enforcement, to contact you directly to continue the dialogue on ways that we can provide the appropriate guidance to the contracting community regarding the applicability of the DBA to survey crews.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Davidson". The signature is written in black ink and is positioned below the word "Sincerely,".

Patricia Davidson  
Deputy Administrator for Program Operations