

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 1, 22, and 52**

[FAR Case 1997-613]

RIN 9000-AI47

**Federal Acquisition Regulation;
Application of the Davis-Bacon Act to
Construction Contracts With Options
To Extend the Term of the Contract**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement the requirement of Department of Labor (DoL) All Agency Memorandum No. 157 (AAM 157), as clarified in the **Federal Register** on November 20, 1998. The rule requires incorporation of the current Davis-Bacon Act wage determination at the exercise of each option period in construction contracts.

DATES: Comments should be submitted on or before February 1, 2000 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405. Address e-mail comments submitted via the Internet to: farcase.1997-613@gsa.gov. Please submit comments only and cite FAR case 1997-613 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAR case 1997-613.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule provides for incorporation of the current Davis-Bacon Act wage determination at the exercise of each option to extend the

term of a contract for construction, or a contract that includes substantial and segregable construction work. Unlike the Service Contract Act, the Davis-Bacon Act and its implementing regulations do not include any provisions to require incorporation of new or revised wage determinations at the exercise of each contract option period.

On December 9, 1992, DoL issued AAM 157, which required incorporation of a current Davis-Bacon Act wage determination at the exercise of each option period in construction contracts containing options to extend the term of the contract. Following several years of controversy regarding the authority of DoL to issue AAM 157, DoL Administrative Review Board confirmed on July 17, 1997, the authority of the DoL Administrator's ruling that a current Davis-Bacon Act wage determination must be incorporated at the exercise of an option to extend the term of the contract. The Review Board also directed DoL to clarify the language of AAM 157 and to republish the memorandum in the **Federal Register**. The Acting Administrator published the clarification in the **Federal Register** at 63 FR 64542, November 20, 1998.

This rule was not subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the rule will apply to any contractor, including a small business, that enters into a contract for construction, or a contract that includes substantial and segregable construction work, that contains option provisions to extend the term of the contract. Therefore, the Councils have prepared an Initial Regulatory Flexibility Analysis. It is summarized as follows:

The proposed rule provides four alternative methods of adjusting the contract price when exercising the option to extend the term of the contract.

1. No adjustment in contract price (because the option prices may include an amount to cover estimated increases);

2. Price adjustment based on a separately specified pricing method, such as application of a coefficient to an annually published unit pricing book incorporated at option exercise;

3. A percentage price adjustment, based on a published economic indicator; and

4. A price adjustment based on a specific calculation to reflect the actual

increase or decrease in wages and fringe benefits as a result of incorporation of the new wage determination.

The last method, applying calculations similar to the calculations of price adjustments in contracts subject to the Service Contract Act, removes the risk to the contractor, but imposes some reporting requirements, to provide the required information upon which to base the price adjustment. However, the contractor is already required to keep payroll records upon which the calculations are based, so the burden is not significant. Data for fiscal year 1998 indicates the Government awarded 229 indefinite-delivery construction contracts, of which 121 were awarded to small businesses. Nearly all construction contracts with options to extend the term are indefinite-delivery contracts and most indefinite-delivery contracts have options to extend the term. Although there is no database to determine the number of contracts for other than construction that have substantial and segregable construction requirement, we estimate 225 prime contractors and 675 subcontractors, of which approximately 50 percent are small businesses.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* FAR Case 1997-613, in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements. Accordingly, the FAR Secretariat submitted a request for approval of a new information collection requirement concerning application of the Davis-Bacon Act to construction contracts with options to extend the term of the contract to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Annual Reporting Burden

We estimate the public reporting burden for this collection of information is 90 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

We estimate the annual reporting burden is as follows: *Respondents:* 900; *Responses per respondent:* 1; *Total annual responses:* 900; *Preparation hours per response:* 90; and *Total response burden hours:* 81,000.

D. Request for Comments Regarding Paperwork Burden

Comments regarding this burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (MVR), Room 4035, Washington, DC 20405, telephone (202) 208-7312. Please cite OMB control number 9000-00XX, FAR Case 1997-613, Application of the Davis-Bacon Act to Construction Contracts with Options to Extend the Term of the Contract, in all correspondence.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: November 29, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR Parts 1, 22, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Amend section 1.106 in the table following the introductory paragraph by adding an entry to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

FAR segment					OMB Control No.
*	*	*	*	*	
52.222-32				9000-0154
*	*	*	*	*	

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

3. Amend section 22.404-1(a)(1) by revising the third sentence; and paragraph (b) by revising the fourth sentence to read as follows:

22.404-1 Types of wage determinations.

(a) *General wage determinations.* (1) * * * Once incorporated in a contract, a general wage determination normally remains effective for the life of the contract, unless the contracting officer exercises an option to extend the term of the contract (see 22.404-12). * * *

(b) * * * Once incorporated in a contract, a project wage determination normally remains effective for the life of the contract, unless the contracting officer exercises an option to extend the term of the contract (see 22.404-12).

4. Revise section 22.404-2(a) to read as follows:

22.404-2 General requirements.

(a) The contracting officer must incorporate only the appropriate wage determinations in solicitations and contracts and must designate the work to which each determination or part thereof applies. The contracting officer must not include project wage determinations in contracts or options other than those for which they are issued. When exercising an option to extend the term of a contract, the contracting officer must select the most current wage determination from the same schedule as the wage determination in effect at award, unless the type of construction in the option period is significantly different from the type of construction in the preceding contract period.

5. In section 22.404-3, revise the last sentence of paragraph (c); remove paragraph (d); and redesignate paragraph (e) as (d) to read as follows:

22.404-3 Procedures for requesting wage determinations.

(c) * * * Accordingly, agencies should submit requests to the Department of Labor at least 45 days (60 days if possible) before issuing the solicitation or exercising an option to extend the term of a contract.

6. In section 22.404-6, revise paragraph (a); and add paragraph (d) to read as follows:

22.404-6 Modifications of wage determinations.

(a) *General.* (1) The Department of Labor may modify a wage determination to make it current by specifying only the items being changed or by issuing a "supersedes decision," which is a reissuance of the entire determination with changes incorporated.

(2) All project wage determination modifications expire on the same day as the original determination.

(3) The agency must time-date stamp all modifications of wage determinations immediately upon receipt. (Note the distinction between receipt by the agency (modification is effective) and receipt by the contracting officer, which may occur later.)

(d) The following applies when modifying a contract to exercise an option to extend the term of a contract:

(1) A modified wage determination is effective if, before execution of the contract modification to exercise the option, the contracting agency receives a written action from DoL, or DoL publishes notice of modifications to general wage determinations in the **Federal Register**.

(2) If the contracting officer receives an effective wage modification either before or after execution of the contract modification to exercise the option, the contracting officer must modify the contract to incorporate the modified wage determination, and any changed wage rates, effective as of the date of option exercise.

7. Revise section 22.404-7 to read as follows:

22.404-7 Correction of wage determinations containing clerical errors.

Upon the Labor Department's own initiative or at the request of the contracting agency, the Administrator, Wage and Hour Division, may correct any wage determination found to contain clerical errors. Such corrections will be effective immediately, and will apply to any solicitation or active contract. Before contract award, the contracting officer must follow the procedures in 22.404-5(b)(1), (b)(2)(i) or (ii) in sealed bidding, and the procedures in 22.404-5(c)(3) or (4) in negotiations. After contract award, the contracting officer must follow the procedures at 22.404-6(b)(5), except that for contract modifications to exercise an option to extend the term of the contract, the contracting officer must follow the procedures at 22.404-6(d)(2).

8. In section 22.404-10, revise the first sentence to read as follows:

22.404-10 Posting wage determinations and notice.

The contractor must keep a copy of the applicable wage determination (and any approved additional classifications) posted at the site of the work in a prominent place where the workers can easily see it. * * *

9. Add section 22.404-12 to read as follows:

22.404–12 Labor standards for contracts containing construction requirements and option provisions that extend the term of the contract.

(a) Each time the contracting officer exercises an option to extend the term of a contract for construction, or a contract that includes substantial and segregable construction work, the contracting officer must modify the contract to incorporate the most current wage determination.

(b) If a contract with an option to extend the term of the contract has indefinite-delivery or indefinite-quantity construction requirements, the contracting officer must incorporate the wage determination incorporated into the contract at the exercise of the option into task orders issued during that option period. The wage determination will be effective for the complete period of performance of those task orders without further revision.

(c) The contracting officer must include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of the Government, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract:

(1) The contracting officer may provide the offerors the opportunity to bid or propose separate prices for each option period. The contracting officer must not further adjust the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

(2) The contracting officer may include in the contract a separately specified pricing method, that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. At the time of option exercise, the contracting officer must incorporate a new wage determination into the contract, and must apply the specific pricing method to calculate the contract price adjustment. An example of a contract pricing method that the contracting officer might separately specify is incorporation in the solicitation and resulting contract of the pricing data from an annually published

unit pricing book (*e.g.*, the R.S. Means Cost Estimating System, or the U.S. Army Computer-Aided Cost Estimating System), which is multiplied in the contract by a factor proposed by the contractor (*e.g.*, .95 or 1.1). At option exercise, the contracting officer incorporates the pricing data from the latest annual edition of the unit pricing book, multiplied by the factor agreed to in the basic contract. The contracting officer must not further adjust the contract price as a result of the incorporation of the new or revised wage determination.

(3) The contracting officer may provide for a contract price adjustment based solely on a percentage rate determined by the contracting officer using a published economic indicator incorporated into the solicitation and resulting contract. The contracting officer must apply the percentage rate, based on the economic indicator, to the portion of the contract price designated in the contract clause as labor costs subject to the provisions of the Davis-Bacon Act. The contracting officer must insert 50 percent as the estimated portion of the contract price that is labor unless the contracting officer determines, prior to issuance of the solicitation, that a different percentage is more appropriate for a particular contract or requirement. This percentage adjustment to the designated labor costs must be the only adjustment made to cover increases in wages and/or benefits resulting from the incorporation of a new or revised wage determination at the exercise of the option.

(4) The contracting officer may provide a computation method to adjust the contract price to reflect the contractor's actual increase or decrease in wages and fringe benefits (combined) to the extent that the increase is made to comply with, or the decrease is voluntarily made by the contractor as a result of incorporation of, a new or revised wage determination at the exercise of the option to extend the term of the contract. Generally, this method is appropriate for use only if contract requirements are predominately services subject to the Service Contract Act and the construction requirements are substantial and segregable. The methods used to adjust the contract price for the service requirements and the construction requirements would be similar.

10. In section 22.406–3, add paragraph (e) to read as follows:

22.406–3 Additional classifications.

* * * * *

(e) In each option to extend the term of the contract, if any laborer or mechanic is to be employed during the option in a classification that is not listed (or no longer listed) on the wage determination incorporated in that option, the contracting officer must require that the contractor submit a request for conformance using the procedures noted in paragraphs (a) through (d) of this section.

11. Add sections 22.407(e), (f), and (g) to read as follows:

22.407 Contract clauses.

* * * * *

(e) Insert the clause at 52.222–30, Davis-Bacon Act—Price Adjustment (None or Separately Specified Pricing Method), in solicitations and contracts if—

(1) The contract is expected to be a fixed-price contract subject to the Davis-Bacon Act that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate contract price adjustment method is the method at 22.404–12(c)(1) or (2); or

(2) The contract is expected to be a cost-reimbursable type contract subject to the Davis-Bacon Act that will contain option provisions by which the contracting officer may extend the term of the contract.

(f) Insert the clause at 52.222–31, Davis-Bacon Act—Price Adjustment (Percentage Method), in solicitations and contracts if the contract is expected to be a fixed-price contract subject to the Davis-Bacon Act that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate contract price adjustment method is the method at 22.404–12(c)(3).

(g) Insert the clause at 52.222–32, Davis-Bacon Act—Price Adjustment (Actual Method), in solicitations and contracts if the contract is expected to be a fixed-price contract subject to the Davis-Bacon Act that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate method to establish contract price is the method at 22.404–12(c)(4).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

12. Add sections 52.222–30, 52.222–31, and 52.222–32 to read as follows:

52.222–30 Davis-Bacon Act—Price Adjustment (None or Separately Specified Pricing Method).

As prescribed in 22.407(e), insert the following clause:

Davis-Bacon Act—Price Adjustment (None or Separately Specified Pricing Method) (Date)

(a) The wage determination issued under the Davis-Bacon Act by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, that is in effect at the exercise of an option to extend the term of the contract, will apply to that option period.

(b) The Contracting Officer will make no adjustment in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of—

(1) Incorporation of the Department of Labor's wage determination applicable at the exercise of the option to extend the term of the contract;

(2) Incorporation of a wage determination otherwise applied to the contract by operation of law; or

(3) An increase in wages and benefits resulting from any other requirement applicable to workers subject to the Davis-Bacon Act.

(End of clause)

52.222–31 Davis-Bacon Act—Price Adjustment (Percentage Method).

As prescribed in 22.407(f), insert the following clause:

Davis-Bacon Act—Price Adjustment (Percentage Method) (Date)

(a) The wage determination issued under the Davis-Bacon Act by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, that is in effect at the exercise of an option to extend the term of the contract, will apply to that option period.

(b) The Contracting Officer will adjust the portion of the contract price or contract unit price containing the labor costs subject to the Davis-Bacon Act to provide for an increase in wages and fringe benefits at the exercise of each option to extend the term of the contract in accordance with the following procedures:

(1) The Contracting Officer has determined that the portion of the contract price or contract unit price containing labor costs subject to the Davis-Bacon Act is _____ [Contracting Officer insert percentage rate] percent.

(2) The Contracting Officer will increase the portion of the contract price or contract unit price containing the labor costs subject to the Davis-Bacon Act by the percentage rate published in _____ [Contracting Officer insert publication].

(c) The Contracting Officer will make the price adjustment at the exercise of each option to extend the term of the contract. This adjustment is the only adjustment that the Contracting Officer will make to cover any increases in wages and benefits as a result of—

(1) Incorporation of the Department of Labor's wage determination applicable at the exercise of the option to extend the term of the contract;

(2) Incorporation of a wage determination otherwise applied to the contract by operation of law; or

(3) An increase in wages and benefits resulting from any other requirement applicable to workers subject to the Davis-Bacon Act.

(End of clause)

52.222–32 Davis-Bacon Act—Price Adjustment (Actual Method).

As prescribed in 22.407(g), insert the following clause:

Davis-Bacon Act—Price Adjustment (Actual Method) (Date)

(a) The wage determination issued under the Davis-Bacon Act by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, that is in effect at the exercise of an option to extend the term of the contract, will apply to that option period.

(b) The Contractor states that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The Contracting Officer will adjust the contract price or contract unit price labor rates to reflect the Contractor's actual increase or decrease in wages and fringe benefits to the extent that the increase is made to comply with, or the decrease is voluntarily made by the Contractor as a result of—

(1) Incorporation of the Department of Labor's Davis-Bacon Act wage determination applicable at the exercise of an option to extend the term of the contract; or

(2) Incorporation of a Davis-Bacon Act wage determination otherwise applied to the contract by operation of law.

(d) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but will not

otherwise include any amount for general and administrative costs, overhead, or profit.

(e) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a revised wage determination unless this notification period is extended in writing by the Contracting Officer. The Contractor shall promptly notify the Contracting Officer of any decrease under this clause, but nothing in this clause precludes the Government from asserting a claim within the period permitted by law. The notice shall contain a statement of the amount claimed and any relevant supporting data, including payroll records that the Contracting Officer may reasonably require. Upon agreement of the parties, the Contracting Officer will modify the contract price or contract unit price in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.

(f) Contract price adjustment computations shall be computed as follows:

(1) *Computation for contract unit price per single craft hour for schedule of indefinite-quantity work.* For each labor classification, the difference between the actual wage and benefit rates (combined) paid and the wage and benefit rates (combined) required by the new wage determination shall be added to the original contract unit price if the difference results in a combined increase. If the difference computed results in a combined decrease, the contract unit price shall be decreased by that amount if the Contractor provides notification as provided in paragraph (e) of this clause.

(2) *Computation for contract unit price containing multiple craft hours for schedule of indefinite-quantity work.* For each labor classification, the difference between the actual wage and benefit rates (combined) paid and the wage and benefit rates (combined) required by the new wage determination shall be multiplied by the actual number of hours expended for each craft involved in accomplishing the unit-priced work item. The product of this computation will then be divided by the actual number of units ordered in the preceding contract period. The total of these computations for each craft will be added to the current contract unit price to obtain the new contract unit price. The extended amount for the contract line item will be obtained by multiplying the new unit price by the estimated quantity. If actual hours are not available from the preceding contract period for computation of the adjustment for a specific contract unit of work, the Contractor, in agreement with the Contracting Officer, shall estimate the total hours per craft per contract unit of work.

Example:

ASPHALT PAVING

[Current price \$3.38 per square yard]

DBA craft	New WD	Hourly rate paid	Diff	Actual hrs.	Actual units (sq. yard)	Increase/sq. yard
Equip Opr	\$18.50	— \$18.00	= \$0.50	600	3,000	\$.10
Truck Driver	\$19.00	— \$18.25	= \$0.75	525	3,000	.13
Laborer	\$11.50	— \$11.25	= \$0.25	750	3,000	.06
Total increase per square yard						= \$.29*

* Note: Adjustment for labor rate increases or decreases may be accompanied by social security and unemployment taxes and workers' compensation insurance.

Current unit price = \$3.38 per square yard

Add DBA price adj. + .29

New unit price = \$3.67 per square yard

(End of clause)

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