



VA ACQUISITION MANUAL UPDATE

June 24, 2020

Number VAAM 2020-03

1. **Material Transmitted:** The attached pages revise the Department of Veterans Affairs Acquisition Manual (VAAM) part M822 to remove subpart M822.12 due to the publication of the Federal Acquisition Regulation (FAR) final rule at [85 FR 27807](#), with an effective date of June 5, 2020. The final rule removes the FAR subpart 22.12 on nondisplacement of qualified workers.

2. **Summary of Changes:** This update provides changes to VAAM part M822 as follows:

VAAM Part	Title	Change Summary
M822.12	Nondisplacement of Qualified Workers Under Service Contracts	Removed and reserved.
M822.1203-3	Waiver.	Removed.

3. **Filing Instructions:**

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Effective date: June 5, 2020.

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SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

**PART M822—APPLICATION OF LABOR LAWS
TO GOVERNMENT ACQUISITIONS**

M822.001 Definitions.

“Labor advisor,” as used in this part, means the VA Labor Advisor appointed by the Office of Acquisition and Logistics (OAL). A list of agency labor advisors is posted on Department of Labor internet site <http://www.wdol.gov/ala.aspx>.

Subpart M822.1—Basic Labor Policies

M822.101 Labor relations.

M822.101-1 General.

(a) Contracting officers shall obtain approval from the Labor Advisor before –

(1) Contacting a national office of a labor organization, a Government agency headquarters, or any other organization (e.g., local unions) on labor relations matters or disputes; or

(2) Making recommendations for injunctive action relating to potential or actual work stoppages or plant seizure.

(e) Any action containing the FAR clause [52.222-1](#), Notice to the Government of Labor Disputes, requires contractors to report actual or potential labor disputes to the contracting officer.

M822.101-3 Reporting Labor Disputes.

Contracting officers shall notify the VA Labor Advisor, of any potential or actual labor disputes that may interfere with performing any contracts or orders under its cognizance in accordance with head of the contracting activity (HCA) procedures.

M822.101-4 Removal of items from contractors' facilities affected by work stoppages.

(a) When a contractor is unable to deliver urgent and critical items because of a work stoppage at its facility, the contracting officer shall, before initiating any action and before removing any items from the facility—

(1) Contact the Labor Advisor to obtain the opinion of the national office of the Federal Mediation and Conciliation Service or other mediation agency regarding the effect movement of the items would have on labor negotiations.

(2) Upon the recommendation of the Labor Advisor, provide a written request for removal of the material to the respective contract administration office;

(3) With the assistance of the VA Labor Advisor, attempt to have both the management and the labor representatives involved agree to shipment of the material by normal means; and

(4) If agreement for removal of the needed items cannot be reached following any of the procedures in paragraphs (a)(1) through (a)(3) of this subsection, refer the matter to the Labor Advisor. If the Labor Advisor is unsuccessful in obtaining concurrence of the parties for the movement of the material and further action to obtain the material is deemed necessary, refer the matter to the HCA. Upon review and verification that the items are urgently or critically needed and cannot be moved with the consent of the parties, the HCA, on a non-delegable basis, may order removal of the items from the facility.

M822.101-70 Impact of labor disputes on Veteran Affairs programs and requirements.

(a) If the dispute involves a project (including construction), service or product required to meet schedules for urgently needed VA programs or requirements, the applicable HCA shall consider the degree of impact of the labor dispute, and shall obtain and develop data reflecting the impact of the labor dispute. Upon determining the impact, the HCA shall submit a report of findings and recommendations to the VA Labor Advisor. See <http://www.wdol.gov/ala.aspx>

(b) The report to the Labor Advisor shall be in narrative form and shall include -

(1) The location of dispute and name of contractor or subcontractor involved;

(2) A description of the impact, including how the specific items or services affect the specific programs or requirements;

(3) Identity of alternate sources for the supply or service which are able to deliver within the time required; and

(4) A description of any action taken to reduce the impact.

(c) The HCA shall submit impact reports to the Chief Acquisition Officer (CAO) through the VA Labor Advisor and Deputy Senior Procurement Executive (DSPE) when-

(1) Specifically requested; or

(2) The HCA considers the impact to warrant the attention of the CAO.

(d) The VA Labor Advisor shall recommend a course of action to the CAO and require the HCA to expand the impact report submitted under paragraph (c) of this subsection by addressing the following, as appropriate -

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(1) Description of VA program, project, or service. Identify item, project, or service that will be or is being affected by the work stoppage. Describe its normal use and current functions; and

(2) Requirements and assets. Identify the following requirements and assets in appropriate detail in terms commonly used by the VA.

(i) For programs, include requirements for each VA requiring official. Where applicable, state in detail program schedule, inventory objectives, assets against these objectives, and critical shortages.

(ii) For any projects, describe the potential adverse effects of a delay in meeting schedules, and its impact on VA capability to accomplish its daily mission.

(iii) For services, describe how a loss or interruption affects the ability to support VA operations.

(3) Possible measures to minimize strike impact. Describe—

(i) Capabilities, if any, to substitute items or to use alternate sources and indicate the number of other facilities available and the relative capabilities of such facilities in meeting total requirements;

(ii) How much time would be required to replace the loss of the facilities or service affected by a work stoppage; and

(iii) The feasibility of transferring assets from one VA facility to another VA facility to relieve deficits in some areas of urgency.

(4) Conclusion.

(i) Describe the impact on VA operations of a 15-30, 31-60, and a 61-90 day work stoppage.

(ii) Project the degree of criticality of a program, project, or service resulting from a work stoppage on a calendar basis, indicating the increased impact, if any, as the stoppage lengthens. Criticality is measured by the number of days required for the work stoppage to have an effect on operational capability. This time shall be stated in terms of calendar days.

M822.102 Federal and State labor requirements.

M822.102-1 Policy.

(a) Contracting officers shall direct all inquiries from contractors or contractor employees regarding the applicability or interpretation of Occupational Safety and Health Act (OSHA) regulations to the DOL.

(b) Contracting officers shall not initiate any application for the suspension or relaxation

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of labor requirements without prior coordination with the Labor Advisor. OSHA must approve requests for any variance or alternate means of compliance with OSHA requirements.

M822.103 Overtime. M822.103-4 Approvals.

The HCA is the designated approving official. The HCA may delegate overtime approval authority to a level no lower than the contracting officer.

Subpart M822.3—Contract Work Hours and Safety Standards Act

M822.302 Liquidated damages and overtime pay.

(c) If the HCA finds that the administratively determined liquidated damages due under paragraph (a) of [FAR 22.302](#) are incorrect, or that the contractor or subcontractor inadvertently violated the Contract Work Hours and Safety Standards Act despite the exercise of due care, the HCA may --

(1) Reduce the amount of liquidated damages assessed for liquidated damages of \$500 or less;

(2) Release the contractor or subcontractor from the liability for liquidated damages of \$500 or less; or

(3) For liquidated damages above \$500, prepare and submit a request to the Labor Advisor to endorse and forward to the SPE/DSPE a recommendation that the Secretary of Labor reduce or waive liquidated damages over \$500.

M822.302-70 Contract work hours and safety standards violations and liquidated damages.

(a) The contracting officer, upon receipt of notification of Contract Work Hours and Safety Standards violations shall -

(1) Provide instructions to the supporting finance officer whether to withhold funds from contract payments pending final administrative determination;

(2) Notify the Finance Office of any final decision to assess liquidated damages; and

(3) Advise the contractor in writing of any decision to withhold funds, including the reasons for the withholding, and the amount held to satisfy the contractor's liability for unpaid wages and liquidated damages.

(b) If the contractor protests either that the sum determined is incorrect or that the violations were inadvertent, notwithstanding the exercise of due care, the contracting officer shall advise the contractor of its right to appeal this action to the Secretary of Veterans Affairs under the provision of section 104(c) of the [Contract Work Hours and Safety Standards Act](#). The contracting officer shall also advise the contractor that the appeal shall be taken under section 104(c) and not under the Disputes clause of the contract. If the

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protest is made orally to the contracting officer, the contracting officer shall advise the contractor to submit its appeal, in writing, within 60 days after receipt of the contracting officer's decision. Should the protest be in writing, however, the contracting officer shall treat the letter of protest as an appeal. In each instance, the contracting officer shall forward the written protest or appeal through the HCA to the VA Labor Advisor. Coordinate all written communications with the contractor, including the notification of dispute resolution procedures under the DOL's regulations at [29 CFR Parts 4 through 8](#), with the support of legal counsel.

(c) The assessment shall become the final administrative determination of contractor liability for liquidated damages when -

(1) The contractor fails to appeal to the contracting agency within 60 days after the date of the withholding of funds;

(2) The SPE, following the contractor's appeals, issues a final order which affirms, reduces or waives the assessment of liquidated damages of \$500 or less; or

(3) The Secretary of Labor takes final action on the Secretary of Veterans Affairs' recommendation to waive or adjust liquidated damages in excess of \$500. Also see M822.406-9, Withholding from or suspension of contract payments.

(d) Upon final administrative determination of the contractor's liability for liquidated damages, the contracting officer shall transmit withheld or collected funds determined to be owed to the Government as liquidated damages to the servicing finance officer for crediting to the appropriate Government Treasury account. The contracting officer shall return any excess withheld funds to the contractor ([see 29 CFR 5.8](#)).

Subpart M822.4—Labor Standards for Contracts Involving Construction

M822.402 Applicability.

M822.402-70 Veterans Affairs facilities support contracts.

(a) See Department of Labor User's Guide, <http://www.wdol.gov/usrguide/index.aspx>, to obtain appropriate Service Contract Labor Standards (historical title: Service Contract Act) and/or the Construction Wage Requirements statute (historical title: Davis-Bacon Act (DBA)) wage determinations for each official solicitation, re-solicitation, option, extension or any other contract action requiring the most recent and applicable wage determination. Apply both the Service Contract Labor Standards and the Construction Wage Requirements statute (DBA) to VA support contracts if -

(1) The contract is principally for services but also requires a substantial and segregable amount of construction, alteration, renovation, painting, or repair work; and;

(2) The aggregate dollar value of such construction work exceeds or is expected to exceed \$2,000 (for DBA applicability) or \$2,500 (for Service Contract Act applicability)

(b) *Service Contract Labor Standards coverage under the contract.* VA hospital, facility

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and, medical center support requirements, such as facility operations and installation services (i.e., custodial, snow removal, grounds maintenance etc.) are subject to the Service Contract Labor Standards. Apply Service Contract Labor Standards clauses and minimum wage and fringe benefit requirements to all contract service calls or orders for such maintenance and support work.

(c) *Construction Wage Rate statute (DBA) coverage under the contract.* Contracts for construction, alteration, renovation, painting, and repair requirements (e.g., roof shingling, building structural repair, paving repairs, etc.) are subject to the Construction Wage Rate statute requirements (DBA). Apply the applicable clauses and minimum wage requirements to all contract service calls or orders for construction, alteration, renovation, painting, or repairs to buildings or other works.

(d) *Repairs versus maintenance.* Some contract work may be characterized as either Construction Wage Rate statute applicable (DBA painting/repairs) or Service Contract Labor Standards maintenance. For example, replacing broken windows, spot painting, or minor patching of a wall could be covered by either the DBA or the Service Contract Labor Standards. In those instances where a contract service call or order requires construction trade skills (e.g., carpenter, plumber, painter, etc.), but it is unclear whether the work required is Service Contract Labor Standards maintenance or DBA painting/repairs, apply the following rules:

(1) Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the DBA.

(2) Individual service calls or orders which will require less than 32 work-hours to perform shall be considered to be maintenance subject to the Service Contract Labor Standards.

(3) Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work-hours required.

(e) The determination of labor standards application shall be made at the time the solicitation is prepared in those cases where requirements can be identified. Otherwise, the determination shall be made at the time the service call or order is placed against the contract. The service call or order shall identify the labor standards law and contract wage determination which will apply to the work required.

(f) Contracting officers may not avoid application of the Construction Wage Rate.

M822.403 Statutory and regulatory requirements.

M822.403-4 Department of Labor regulations.

Direct all questions regarding Department of Labor (DOL) regulations to the [VA Labor Advisor](#).

M822.403-70 Construction Wage Rate Requirements statute application.

(a) In accordance with [FAR 22.403-1](#), the Construction Wage Rate Requirements statute (Davis-Bacon Act (DBA)) applies to contracts in excess of \$2,000 to which the United States or the District of Columbia (D.C.) is a party for construction, alteration, and/or repair, including painting and decorating, of public building or public works of the United States or the District of Columbia. The Construction Wage Rate Requirements statute requires that all laborers and mechanics employed on the site of the project be paid not less than the wages and fringe benefits determined by the DOL to be prevailing in the area.

(b) Four elements are required for DBA to apply:

(1) *Public building or public work.* Public buildings include the building structure and all utility systems and other improvements to the structure. This includes plumbing, electrical, and lighting systems, fire alarm and suppression systems, heating, ventilation and air conditioning systems, elevators, material handling systems, built-in cranes, hoists, attached antennas, etc. Public works are structures and improvements other than buildings, such as roads, runways, bike-paths, storage tanks, wells, exterior portions of utility systems, exterior pools, playgrounds, playing courts, antennas not attached to a building, etc., “Public” does not require access by the general public.

(2) *Party to contract.* The courts have ruled that the Construction Wage Rate Requirements (DBA) also applies to many “lease construction” contracts under which construction is funded by third parties such as banks. See DOL memorandum number 176 dated 22 Jun 94, <http://www.wdol.gov/aam/AAM176.pdf>. The government merely contracts to lease the completed facilities at a specified rate for a specified number of years. The statute would also apply to so-called “no cost” improvements to public buildings performed by utility companies (such as installation of energy-efficient lighting- the cost of which is deducted from future savings).

(3) *United States or D.C. The Construction Wage Rate Requirements statute (DBA) applies only within the 50 states and D.C.* It does not apply to Federal construction contracts in Guam, Puerto Rico, Virgin Islands or other territories, although other laws may invoke DBA on certain civilian projects there.

(4) *Construction, Alteration, or Repair and Painting and Decorating.* Construction, alteration, repair, painting, or decorating does not include regularly-recurring, routine maintenance of public buildings and works. Alteration involves making a relatively permanent improvement to a building or work. Repair goes beyond maintenance, and is usually performed to return something to operational use rather than to keep it operating.

Example: overhaul of an elevator is much more extensive than simple maintenance, and shall be considered repair. Renovation also goes beyond maintenance.

Example: replacing several cracked windowpanes is a maintenance task but replacing all windowpanes in a building or part of a building shall be considered renovation subject to the statute.

(c) All painting other than minor touch-up following routine maintenance is subject to the

Construction Wage Rate Requirements statute (DBA). The statute also covers decorating, which may involve wallpapering, paneling/wainscoting, installation of decorative ironwork, wood trim, etc.

M822.404 Construction Wage Rate Requirements statute wage determinations.

The Office of Construction and Facilities Management provides information on the Construction Wage Rate Requirements statute (historical title: Davis Bacon Act or DBA) Wage Rate Determination at the following link:

[Http://www.cfm.va.gov/contract/WageRate.asp](http://www.cfm.va.gov/contract/WageRate.asp). This website contains information and guidance pertaining to contract work to be performed that is not covered under any classification listed in the wage determination.

M822.404-12 Labor standards for contracts containing construction requirements and option provisions that extend the term of the contract.

For guidance pertaining to the applicability of DBA for construction contracts with options see Appendix M822-A.

M822.404-70 Annual reporting of planned VA construction projects.

(a) Not later than April 1 of each year each HCA shall submit, through the VA Labor Advisor, a consolidated list of approved construction projects (to include construction maintenance and repair projects) subject to the Construction Wage Rate Requirements statute (DBA) for which contracts are proposed to be awarded by subordinate contracting offices in the ensuing fiscal year to: U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, DC 20210. The DOL uses this information to determine where general wage determination surveys will be conducted.

(b) During the fiscal year, the HCA shall notify the VA Labor Advisor of any significant changes in their proposed construction programs as reported to DOL. The report format is contained in DOL All Agency [Memo 144, December 27, 1985, \(see 29 CFR 1.4\)](#).

(1) Indicate by individual project of \$500,000 or more -

(i) The anticipated type of construction;

(ii) The estimated dollar value; and

(iii) The location in which the work is to be performed (city, town, village, county, or other civil subdivision of the state).

(2) The report control number is 1671-DOL-AN.

M822.405 [Reserved]

M822.406 Administration and enforcement.

M822.406-1 Policy.

(a) *General.* The contracting officer shall inform the prime contractor of the necessity to include labor standard clauses in all subcontracts with a preconstruction letter or at the preconstruction conference (see 29 CFR 5.5(a)(6)). The contracting officer shall document the discussion of the requirement to include labor standard clauses in all subcontracts at a preconstruction conference. Contracting officers shall file the documentation of the discussion in the respective Electronic Contract Management System (eCMS) contract file briefcase.

(b) Preconstruction letters and conferences

(1) Promptly after award of the contract, the contracting officer shall hold a preconstruction conference with the prime contractor or provide a letter to the prime contractor that accomplishes the following, as appropriate:

(i) Indicate that the labor standards requirements contained in the contract are based on the following statutes and regulations:

(A) [Davis–Bacon Act](#). (Now known as the Construction Wage Rate Requirements statute.)

(B) [Contract Work Hours and Safety Standards statute](#). (Historical title: [Contract Work Hours and Safety Standards Act](#).)

(C) [Copeland \(Anti-Kickback\) Act](#). (Now referred to simply by the title “Kickbacks.”)

(D) Parts 3 and 5 of the Secretary of Labor’s Regulations ([Part 3](#) and [Part 5](#), Subtitle A, Title 29, CFR).

(E) [Executive Order 11246](#) (Equal Employment Opportunity).

(ii) Call attention to the labor standards requirements in the contract which relate to-

(A) Employment of foremen, laborers, mechanics, and others;

(B) Wages and fringe benefits payments, payrolls, and statements;

(C) Differentiation between subcontractors and suppliers;

(D) Additional classifications;

(E) Benefits to be realized by contractors and subcontractors in keeping complete work records;

(F) Penalties and sanctions for violations of the labor standards provisions;

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(G) The applicable provisions of [FAR 22.403](#); and

(iii) Ensure that the contractor sends a copy of the preconstruction letter or minutes of the preconstruction meeting to each subcontractor.

(2) Before construction begins, the contracting officer shall advise the prime contractor and any subcontractor designated by the prime of the labor standards obligations under the contract when:

(i) The prime contractor has not performed previous Government contracts;

(ii) The prime contractor experienced difficulty in complying with labor standards requirements on previous contracts; or

(iii) It is necessary to determine whether the contractor and its subcontractors intend to pay any required fringe benefits in the manner specified in the wage determination or to elect a different method of payment.

(3) The Payroll Form [WH-347](#), and, [Instruction for Completing Payroll Form WH-347](#), developed by the Department of Labor, may be used as the basis of the discussion.

M822.406-6 Payrolls and statements.

(c) Examination.

(1) The contracting officer or the authorized Contracting Officer's Representative (COR) shall make the examination required by [FAR 22.406-6\(c\)](#) as appropriate. The contracting officer shall assure each pay period is accounted for and that each weekly payroll contains the information required. The COR shall, with each payroll submission, certify the rates of pay comply with the contract wage determination and the labor standards provisions. In the event payrolls are not received within the time specified by the COR, the COR shall inform the contracting officer. The contracting officer shall take immediate action to secure the payroll submission. The contracting officer shall include the COR requirement to perform the examination required by [FAR 22.406-6\(c\)](#) in the COR appointment letter.

(d) *Preservation.* The contracting officer shall file and maintain completed and signed copies of payrolls and statements of compliance (Form WH 347) submitted pursuant to [FAR 22.406-6](#) in the respective eCMS briefcase, (see [29 CFR 5.6\(a\)\(3\)](#)).

M822.406-8 Investigations.

(a) The contracting officer shall authorize investigations necessary to ensure contract compliance. The contracting officer, COR, or other government official shall conduct the investigation.

(b) Before beginning an investigation, the investigator shall inform the contractor that a labor standards investigation is being performed, and that the investigation will include examining pertinent records and interviewing employees. In conducting the investigation,

follow the procedures at Appendix M822-B.

(c) *Contractor notification.* Notify the contractor by certified mail of any finding that it is liable for liquidated damages under the Contract Work Hours and Safety Standards (CWHSS) statute. The notification shall inform the contractor that -

(1) They have 60 days after receipt of the notice to appeal the assessment of liquidated damages;

(2) The appeal shall demonstrate either that the alleged violations did not occur, but occurred inadvertently notwithstanding the exercise of due care, or that the assessment was computed improperly; and

(3) If an appeal is received, the contracting officer shall process the appeal in accordance with department and/or agency regulations

(d) *Contracting officer's report.* Forward a detailed enforcement report or summary report to the Labor Advisor in accordance with HCA procedures. Include in the report, as a minimum, the information specified at Appendix M822-B paragraph (8). Use Standard Forms (SF) 1445 [Labor Standards Interview](#), and SF 1446, [Labor Standards Investigation Summary Sheet](#), to document regular investigations and employee interviews to assure contractors' compliance with labor standards in construction contracts.

M822.406-9 Withholding from or suspension of contract payments.

(a) *Withholding from contract payments.* The contracting officer shall contact the Labor Advisor for assistance when payments due to a contractor are not available to satisfy that contractor's liability for Wage Rate Requirements (IAW 48 CFR 222.406-9) statute wage underpayments or liquidated damages.

(c) *Disposition of contract payments withheld or suspended.*

(3) *Limitation on forwarding or returning funds.* When disposition of withheld funds remains the final action necessary to close out a contract, the Department of Labor has given blanket approval to forward withheld funds to the Comptroller General pending completion of an investigation or other administrative proceedings.

(4) *Liquidated damages.* See M822.302-70.

M822.406-10 Disposition of disputes concerning construction contract labor standards enforcement.

(d) The contracting officer shall provide any findings along with the contractor's statement to the Labor Advisor for submission to the Administrator, Wage and Hour Division in accordance with HCA procedures.

M822.406-11 Contract terminations.

Prior to terminating any contract or subcontract for violation of the labor standards

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clauses, the contracting officer shall, in consultation with the Labor Advisor, prepare a detailed report that documents the facts and circumstances surrounding the violation. The contracting officer shall obtain a legal review of the proposed termination from the supporting Office of General Counsel (OGC). The report and results of the legal review will be forwarded to the SPE/DSPE for further review. If the contract is to be terminated, the SPE/DSPE shall submit the report as required by [FAR 22.406-11](#) to DOL's Administrator, Wage and Hour Division, and the Comptroller General.

M822.406-13 Semiannual enforcement reports.

(a) The HCA shall forward semiannual reports to the VA Labor Advisor within 15 days following the end of the reporting period. These reports shall not include information from investigations conducted by the DOL. The Labor Advisor will consolidate these reports into an agency report, which will be submitted to the DOL not later than April 30 and October 31 of each year. A negative report is required. These reports shall contain the following information, as applicable, for construction work subject to the DBA and the CWHSS statute:

- (1) Period covered.
- (2) Number of prime contracts awarded.
- (3) Total dollar amount of prime contracts awarded.
- (4) Number of contractors/subcontractors against whom complaints were received.
- (5) Number of investigations conducted.
- (6) Number of contractors/subcontractors found in violation.
- (7) Amount of wage restitution found due under—
 - (i) Construction Wage Rate Requirements statute; and
 - (ii) CWHSS statute.
- (8) Number of employees due wage restitution under—
 - (i) Construction Wage Rate Requirements statute; and
 - (ii) CWHSS statute.
- (9) Amount of liquidated damages assessed under the CWHSS statute—
 - (i) Total amount; and
 - (ii) Number of contracts involved.
- (10) Number of employees and amount paid/withheld under—

- (i) Construction Wage Rate Requirements statute;
 - (ii) CWHSS statute; and
 - (iii) Copeland Act.
- (11) Preconstruction activities—
- (i) Number of compliance checks performed; and
 - (ii) Preconstruction letters sent.

M822.406-70 Reports of violations.

(a) *Reports of violations--regular investigations.* Each non willful violation involving the Contract Work Hours and Safety Standards Act, which has been corrected, but which requires the assessment of liquidated damages, will be reported to the SPE. Based on the facts of the case, the contracting officer shall submit a recommendation with the report as to whether the contractor should be relieved of this liability.

(b) *Reports of violations--special investigations.*

(1) Reports of investigations conducted by the DOL are submitted by their Washington office to the SPE. After review by the SPE (and except as provided in paragraph (c)(2) of this section), the report will be furnished to the contracting officer concerned for necessary action together with such advice and guidance as may be indicated.

(2) If the investigation report indicates possible violations of a criminal nature, the SPE will forward the report to the VA Inspector General for investigation and referral to the Department of Justice. In the event the case is submitted to the Department of Justice, the contracting officer and the Department of Labor will be so advised by the SPE. No collection, recovery or other settlement action will be initiated while the matter is in the hands of the Department of Justice without first obtaining the concurrence of the U.S. attorney concerned, through the Inspector General.

(3) The contracting officer shall review the report of investigation and complete the actions indicated therein. The contracting officer will submit a report of the actions taken to SPE, with recommendations regarding the assessment of liquidated damages and the imposition of sanctions. The SPE will, after reviewing this report, submit a report to the DOL of the actions taken, together with recommendations for any suggested actions to be taken by that agency.

(c) *Reports control exemption.* The reports referred to in paragraphs (a) and (b) of this section are exempt from reports control.

Subpart M822.5—Use of Project Labor Agreements for Federal Construction Projects

M822.503 Policy.

(a) VA planners shall consider whether a Project Labor Agreements (PLA) requirement shall be included for construction contract actions associated with large-scale projects and document the results based on an objective analysis. VA's contracting officers shall refer to and follow FAR Subpart 22.5, Use of Project Labor Agreements when necessary. If a PLA requirement is included in the solicitation, the contracting officer shall ensure any additional requirements under [FAR 22.504\(b\)\(6\)](#) or any prescribed terms and conditions under [FAR 22.504\(c\)](#) were coordinated with supporting OGC and are explained in the file memorandum.

(b) In cooperation with the program office or project manager, the contracting officer shall ensure that the acquisition plan properly identifies each construction contract action associated with a large-scale project if the estimated value is \$25 million or greater. The contracting officer will prepare a file memorandum reflecting rationale for the PLA decision (either for or against) and have it approved by the HCA or the HCA's designee. The appropriate PLA provision and clause shall be included in the solicitation/contract when a PLA will be required.

(c) *Factors to Consider and Documentation.* In addition to the factors at [FAR 22.503](#), the following may be used to assist VA planners in determining whether requiring a PLA is in the best interest of the government and the specific terms and conditions the offeror/contractor shall include in the PLA itself:

(1) Solicit and document PLA recommendations from industry professionals in the local community where the project will be located.

(2) Request the Architect/Engineer provide information to the project manager, during each design phase, regarding current local market/economic conditions and labor shortages, as well as information on whether PLAs were used successfully in the project area.

(3) Issue a Sources Sought announcement seeking PLA input from industry or state/local governmental entities. A pre-solicitation conference also may be used to obtain similar information.

(4) Using a market survey, determine if other state or Federal construction projects will be competing for the same labor pool.

(5) Determine how a PLA could impact project budget and schedule either positively or negatively.

(6) Use any other reliable public information available to assist in the determination whether use of a PLA is in the best interest of the government.

**Subpart M822.6—Contracts for Materials, Supplies, Articles,
and Equipment Exceeding \$15,000**

M822.604 Exemptions.

M822.604-2 Regulatory exemptions.

(b) Contracting officers shall submit any requests for regulatory exemptions to the VA Labor Advisor in accordance with HCA procedures.

Subpart M822.8—Equal Employment Opportunity

M822.803 Responsibilities.

(c) The VA Labor Advisor is responsible for ensuring that the requirements of [FAR 22.8](#) are carried out within the agency, and for cooperating with and assisting the Office of Federal Contractor Compliance Programs (OFCCP) in fulfilling its responsibilities.

(d) In the event the applicability of Executive Order 11246 and implementing regulations are questioned, the contracting officer through the HCA shall forward the matter through the VA Labor Advisor to the Deputy Assistant Secretary for resolution.

M822.804 Affirmative Action Programs.

M822.804-2 Construction.

(b) The list of geographical areas subject to affirmative action requirements can be obtained from the OFCCP, U.S. Department of Labor. Contracting officers contemplating a construction project in excess of \$10,000 within a geographic area not known to be covered by specific affirmative action goals shall request instructions on the most current information from the OFCCP regional office. See https://www.dol.gov/ofccp/taguides/TAC_FedContractors_JRF_QA_508c.pdf.

(c) Contracting officers shall give written notice to the OFCCP regional office within 10 working days of award of a construction contract subject to affirmative action requirements in accordance with HCA procedures. A list of OFCCP regional office is provided at <http://www.dol.gov/ofccp/contacts/regkeyp.htm>.

M822.805 Procedures.

(a) The contracting officer shall include the value of the basic contract plus priced options to determine whether the contract meets the threshold in [FAR 22.805\(a\)](#). A contract modification exercising a priced option is not a contract award under [FAR 22.805\(a\)\(1\)\(ii\)](#) and does not require a preaward clearance. Contracting officers shall submit preaward clearance requests directly to the appropriate OFCCP regional office. The content of preaward clearance request is prescribed by [FAR 22.805\(a\)\(5\)](#). See [FAR 22.805\(a\)\(6\) and \(7\)](#) for timelines delineated for the submission of requests for preaward clearance to OFCCP and receipt of OFCCP's response.

(b) The EEO poster required by [FAR 22.805\(b\)](#) can be found at: <http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm>.

M822.807 Exemptions.

(c) When seeking an exemption from the requirements of [Executive Order 11246](#), submit the request with a justification through the HCA to the VA Labor Advisor, who will forward the request to the SPE. If the request is submitted under [FAR 22.807\(a\) \(1\)](#), the SPE shall act on the request. If the exemption is granted, the SPE shall notify the Director, OFCCP, of such action within 30 days. If the request is submitted under [FAR 22.807\(a\) \(2\) or \(b\) \(5\)](#), the SPE will forward it to the Director, OFCCP, for action.

Subpart M822.12—[Reserved]

Subpart M822.13—Equal Opportunity for Veterans

M822.1305 Waivers.

(c) The contracting officer shall submit a request to the Labor Advisor, in accordance with HCA procedures, when seeking a waiver against the terms at FAR clause [52.222-35](#), Equal Opportunity for Veterans. If the request is justified; the Labor Advisor will endorse and forward the request, through the DSPE, for action by the Secretary of Veterans Affairs. The DSPE shall notify the Deputy Assistant Secretary of Labor of the waiver in writing within 30 days.

M822.1308 Complaint procedures.

(a) The contracting officer shall –

(1) Forward any complaints received about the administration of the Vietnam Era Veterans' Readjustment Assistance Act of 1972 ([38 U.S.C. 4211 and 4212](#)) (the Act) to the Veterans' Employment and Training Service of the Department of Labor and OFCCP regional office in accordance with HCA procedures; and

(2) Notify the complainant of the referral. The contractor in question shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or that the complaint was received.

Subpart M822.14—Employment of Workers with Disabilities

M822.1403 Waivers.

(c) The contracting officer shall submit a request for waivers under [FAR 22.1403\(a\)](#) and [FAR 22.1403\(b\)](#), to the Labor Advisor. If the request is justified, the Labor Advisor will endorse and forward the request, through the DSPE, for action by the Secretary of Veterans Affairs, and for submission for DOL concurrence.

M822.1406 Complaint procedures.

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Following agency procedures, the contracting office shall forward any complaints received about the administration of the Rehabilitation Act of 1973 (the Act) to the—

Deputy Assistant Secretary for Federal Contract Compliance
200 Constitution Avenue, NW
Washington, DC 20210,

or to any OFCCP regional or area office. The OFCCP shall institute investigation of each complaint and shall be responsible for developing a complete case record. The contracting officer shall notify the complainant of such referral. The contractor in question shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or that the complaint was received.

APPENDIX M822-A

Applicability of Construction Wage Rate Requirements Statute (Davis-Bacon Act) in Construction Contracts with Options

This information is provided as a guide only; it does not replace or change the appropriate contract clauses or any labor regulations and it is not intended to be an authoritative source of the Department of Labor enforcement position.

In accordance with [FAR 22.404-12](#) contracting officers are required to incorporate current Construction Wage Rate Requirements (the statute) (historical title: Davis- Bacon Act (DBA)) Wage Determinations at option years (and extension periods).

Requirement: Effective for contracts solicited after 21 Dec 2001, the current DBA wage determination shall be incorporated into DBA-covered contracts when options or extensions are exercised to extend the term of the contract. Existing contracts and “traditional” construction contracts with no option to extend term are not affected. Incorporation of current DBA wage determinations at options was previously only required for job order contracts (e.g., this FAR change implements DOL [AAM No. 157](#), dated 9 Dec 92, as clarified and published in the *Federal Register* on 20 Nov 98.)

Required Clause: The clause prescriptions at [FAR 22.407\(e\), \(f\), and \(g\)](#) require the contracting officer to select and include one of three possible clauses in solicitations and resultant contracts. Contract price adjustment—if any—depends upon the specific clause incorporated, but all three clauses inform bidders/offerors that a new wage determination will be incorporated for each option year. The three possible clauses are as follows:

1. FAR [22.407\(e\)](#) and FAR [clause 52.222-30](#) (Davis-Bacon Act Price Adjustment (None or Separately Specified Method)), may be used for either (1) fixed-price contracts containing DBA provisions and one or more options to extend the contract term, if the contracting officer determines this pricing method to be the most appropriate of the methods identified at [FAR 22.404-12\(c\) or \(2\)](#) all cost-reimbursement contracts subject to DBA and containing one or more options to extend the contract term. Under this clause, no adjustment is made on fixed-price contracts or one is made only if there is a separate price adjustment provision in the contract. If there will be no adjustment, the contracting officer may allow bidders/offerors to price options at differently from the base year. [FAR 22.404-12\(b\)\(1\)](#) suggests that the “no adjustment” avenue is more appropriate for fixed-price construction-only contracts (with options to extend the term) that are not expected to exceed a total of three years.

OR

2. [FAR 22.407\(f\)](#) and FAR clause [52.222-31](#) (Davis-Bacon Act Price Adjustment (Percentage Method)), may be used for fixed-price contracts containing DBA provisions and one or more options to extend contract term, if the contracting officer determines this pricing method to be the most appropriate of the methods identified at [FAR 22.404-12\(c\)](#).

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Under this clause, any adjustment is based on a published economic indicator designated in the solicitation and resultant contract. This provision requires the contracting officer to designate in this clause in the solicitation the percentage of the contract (or contract unit price) believed to represent labor costs (50%, unless the contracting officer has determined another percentage is more appropriate). The economic indicator is applied only to this “labor portion” of the contract. Example: option year price X 50% (labor portion) X 3.2% (from published economic indicator) = adjustment amount.

OR

3. [FAR 22.407\(g\)](#) and FAR clause [52.222-32](#) (Davis-Bacon Act Price Adjustment (Actual Method)), may be used for fixed-price contracts containing DBA provisions and one or more options to extend the contract term, if the contracting officer determines this pricing method to be the most appropriate identified at [FAR 22.404-12\(c\)](#). We recommend this clause only when it is clearly in the best interest of the government because the level of work and/or the wage rate escalation cannot be satisfactorily projected

NOTE: The above information is in summary form, and does not discuss all the provisions of the requirement. Contracting officers are strongly advised to review [FAR 22.404-12](#) and [FAR 22.407](#) to determine exactly how this requirement will affect a particular solicitation and contract.

The wage determination for Indefinite-Delivery/Indefinite Quantity (IDIQ) contracts for non-recurring maintenance and construction repair and maintenance requirements should be handled in accordance with [FAR 22.404-6\(b\) or \(c\)](#) depending on whether sealed bidding or negotiated procurement are used. For option and extension periods, [FAR 22.404-12](#) and [FAR 22.407](#) procedures will apply. IDIQ, construction contracts with provisions to extend the term of the contract, require incorporation of the most current DBA wage determination with the exercise of each option (or extension). The current year wage determination is then applied to each work order issued during that contract year. Once incorporated in a work order, the wage determination is good for the life of the individual work order—even after the start of a new contract year containing a more current wage determination. The contracting officer will determine price adjustment according to [FAR 22.407\(e\), \(f\), or \(g\)](#). In either case it’s imperative that the methodology be specific and stated in the solicitation by incorporation of one of the three clauses, so the ground rules will be clear to both the bidders and the Government.

Incorporating Wage Determinations in Contracts with Options:

General Wage Determinations: The most current wage determination/modification available at option exercise shall be incorporated for contracts containing one or more published General Wage Determinations (GWD) (most DBA-covered contracts). The GWDs can be obtained at [WDOL.gov](#). The wage determination incorporated shall be from the same schedule as wage determination incorporated in the contract. If the contract was subject to only the “Building” schedule for a specific area, only the most current modification of the Building wage determination or superseding Building wage determination for the same area shall be incorporated. Always confirm that the wage determination still covers both the correct geographic area and the proper schedule (Building, Residential, Heavy, Highway, etc.).

APPLICABLE LAWS AND REGULATIONS

Wage Rate Requirements (Construction) (Historical Title: [Davis-Bacon Act](#)) - Requires payment of prevailing wages to laborers and mechanics employed on federal and federally assisted construction projects. [Reorganization Plan of 1950](#) - A plan that authorizes the Secretary of Labor to prescribe appropriate standards, regulations, and procedures and to make such investigations concerning compliance with, and enforcement of, labor standards as necessary.

[29 CFR Part 1](#) - Regulations describing the procedures for predetermination of wage rates.

[29 CFR Part 3](#) - Regulations regarding contractors and subcontractors on public building or public work financed in whole or in part by loans or grants from the United States.

[29 CFR Part 5](#) - Regulations regarding labor standards provisions applicable to contracts covering federally financed and assisted construction.

[29 CFR Part 6](#) - Regulations describing the Rules of Practice for administrative proceedings enforcing labor standards in federal and federally assisted construction contracts and federal service contracts.

[29 CFR Part 7](#) - Regulations describing practice before the Administrative Review Board with regard to federal and federally assisted construction contracts.

RELATED TOPICS AND LINKS

[DOL's Office of Federal Contract Compliance Programs \(OFCCP\)](#) - OFCCP administers the laws prohibiting discrimination in hiring or employment decisions on the basis of race, color, gender, religion, or national origin by government contractors and subcontractors and federally assisted construction contracts and subcontracts. **See also Compliance Assistance by Topic - [Equal Employment Opportunity](#).**

[Contract Work Hours and Safety Standards Act](#) - This Act requires contractors and subcontractors with covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek.

[Employment Law Guide - "Kickbacks" in Federally Funded Construction \(Copeland Act\)](#) - Describes the basic provisions of the Copeland "Anti-Kickback" Act.

APPENDIX M822-B

Investigations – Procedures, Guidance and Information (M822.406-8)

This information is provided as a guide only; it does not replace or change the appropriate contract clauses or any labor regulations and it is not intended to be an authoritative source of the Department of Labor enforcement position.

(a) Under Reorganization Plan No. 14 of 1950, contracting agencies are tasked with the primary responsibility for the conduct of labor standards compliance activities for construction contracts subject to the Davis-Bacon Act. When such compliance assurance activities disclose potential violations that are substantial in amount (wage underpayments in excess of \$1,000) or when requested by the DOL, the contracting officer or a designee should take the following steps to ensure compliance with the investigative requirements of the DOL:

(1) *Beginning of the investigation.* The investigator shall—

(i) Inform the contractor of the investigation in advance;

(ii) Verify the exact legal name of the contractor, its address, and the names and titles of its principal officers;

(iii) Outline the general scope of the investigation, including the examination of pertinent records and the interview of employees;

(iv) Inform the contractor that the names of the employees to be interviewed will not be divulged to the contractor; and

(v) When requested, provide a letter from the contracting officer verifying the investigator's authority.

(2) *Conduct of the investigation.* Labor standards investigations are comprised of the following essential components:

(i) Review of the contract.

(ii) Verify that all required labor standards and clauses and wage determinations are included in the contract.

(iii) Review the following items in the contract file, if applicable:

(A) List of subcontractors.

(B) Payroll statements for the contractor and subcontractors.

(C) Approvals of additional classifications.

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- (D) Data regarding apprentices and trainees as required by [FAR 22.406-4](#).
- (E) Daily inspector's report or other inspection reports.
- (F) Employee interview statements.
- (G) [Standard Form \(SF\) 1413](#), Statement and Acknowledgement.

(3) *Interview of the complainant.* If the investigation is based upon the receipt of a complaint, the investigator should interview the complainant unless this is impractical. The interview shall cover all aspects of the complaint to ensure that all pertinent information is obtained. Whenever an investigation does not include an interview of the complainant, explain such omission in the investigator's report.

(4) *Interview of employees and former employees.*

(i) Interview a sufficient number of employees or former employees, who represent all classifications, to develop information regarding the method and amount of payments, deductions, and hours worked, and the type of work performed.

(ii) Interview employees at the job site if the interviews can be conducted privately and in such a manner so as to cause the least inconvenience to the employer and employees.

(iii) Former employees may be interviewed elsewhere.

(iv) Do not disclose to any employee any information, finding, recommendation, or conclusion relating to the investigation except to the extent necessary to obtain required information.

(v) Do not disclose any employee's statement to anyone, except a Government representative working on the case, without the employee's written permission.

(vi) Obtain information by mail when personal interviews are impractical.

(vii) Use [SF 1445](#), Labor Standards Interview, for employee interviews.

(viii) Ask employees to sign their statements and to initial any changes.

(ix) Provide an evaluation of each employee's credibility.

(5) *Interview of foremen.* Interview foremen to obtain information concerning the contractor's compliance with the labor standards provisions with respect to employees under the foreman's supervision and the correctness of the foreman's classification as a supervisory employee. All procedures established for the conduct of employee interviews, and the recording and use of information obtained, apply to foremen interviews.

(6) *Interview of the contractor.*

(i) Interview the contractor whenever the investigation indicates the possibility of a violation.

(ii) Inform the contractor that—

(A) The interview does not mean that a violation has been found or that a requirement for corrective action exists; and

(B) The purpose of the interview is to obtain only such data as the contractor may desire to present in connection with the investigation.

(iii) Do not disclose the identity of any individual who filed a complaint or was interviewed.

(7) *Review of contractor and subcontractor records.*

(i) Review contractor and subcontractor records such as basic time cards, books, cancelled payroll checks, fringe benefits, and payment records. Compare them with submitted payrolls. When discrepancies are found, include pertinent excerpts or copies of the records in the investigation report with a statement of the discrepancy and any explanation the investigator obtains. When wages include contributions or anticipated costs for fringe payments requiring approval of the Secretary of Labor, examine the contractor records to ensure such approval has been obtained and that any requirements specified in the approval have been met (see [FAR 22.406-2\(a\)\(3\)](#)).

(ii) Review contractor's and subcontractor's weekly payrolls and payroll statements for completeness and accuracy regarding the following:

(A) Identification of employees, payroll amount, the contract, contractor, subcontractor, and payroll period.

(B) Inclusion of only job classifications and wage rates specified in the contract specifications, or otherwise established for the contract or subcontract.

(C) Computation of daily and weekly hours.

(D) Computation of time-and-one half for work in excess of 40 hours per week in accordance with [FAR 22.406-2\(c\)](#).

(E) Gross weekly wages.

(F) Deductions.

(G) Computation of net weekly wages paid to each employee.

(H) Ratio of helpers, apprentices, and trainees to laborers and mechanics.

(I) Apprenticeship and trainee registration and ratios.

(J) Computation of fringe benefits payments.

(iii) Transcribe the contractor's records whenever they contain information at variance with payrolls or other submitted documents as follows:

(A) Make the transcriptions in sufficient detail to permit them to be used to check computations of restitution and to determine amounts to be withheld from the contractor.

(B) Follow the form used by the contractor.

(C) Place comments or explanations concerning the transcriptions on separate memoranda or in the narrative report.

(D) Determine whether the wage determination, any modifications of the determination, and any additional classifications are posted as required.

(8) *Submission of the report of investigation.* The investigator shall submit a report of the investigation in accordance with M822.406-8(d). Each report shall include at least—

(i) The basis for the investigation, including the name of the complainant;

(ii) Names and addresses of prime contractors and subcontractors involved, and names and titles of their principal officers;

(iii) Contract number, date, dollar value of prime contract, and date and number of wage determination included in the contract;

(iv) Description of the contract and subcontract work involved;

(v) Summary of the findings with respect to each of the items listed under paragraph (a)(2) in this Appendix; and

(vi) Concluding statement concerning—

(A) The types of violations, including the amount of kickbacks under the Copeland Act, underpayments of basic hourly rates and fringe benefits under the Wage Rate Requirements statute, or underpayments and liquidated damages under the Contract Work Hours and Safety Standards statute;

(B) Whether violations are considered to be willful or due to the negligence of the contractor or its agent;

(C) The amount of funds withheld from the contractor;

(D) Other violations found; and

(E) Exhibits indexed and appropriately tabbed, including copies of the following, when applicable:

- (1) Complaint letter.
- (2) Contract wage determination.
- (3) Preconstruction letter and memorandum of preconstruction conference.
- (4) Payrolls and statements indicating violations.
- (5) Transcripts of pertinent records of the contractor and approvals of fringe benefit payments.
- (6) Employee interview statements.
- (7) Foreman interview statements.
- (8) Statements of others interviewed, including Government personnel.
- (9) Detailed computations showing kickbacks, underpayments, and liquidated damages.
- (10) Summary of all payments due to each employee or to a fund plan or program, and liquidated damages.
- (11) Receipts and cancelled checks.

(b) The contracting officer's report shall include the following:

- (1) [SF 1446](#), Labor Standards Investigation Summary Sheet.
- (2) Contracting officer's findings.
- (3) Statement as to the disposition of any contractor rebuttal to the findings.
- (4) Statement as to whether the contractor has accepted the findings and has paid any restitution or liquidated damages.
- (5) Statement as to the disposition of funds available.
- (6) Recommendations as to disposition or further handling of the case (when appropriate, include recommendations as to the reduction, waiver, or assessment of liquidated damages, whether the contractor should be debarred, and whether the file should be referred for possible criminal prosecution).
- (7) When applicable, the following exhibits:

(i) Investigator's report.

(ii) Copy of the contractor's written rebuttal or a summary of the contractor's oral rebuttal of the contracting officer's findings.

(iii) Copies of correspondence between the contractor and contracting officer, including a statement of specific violations found, corrective action requested, and the contractor's letter of acceptance or rejection.

(iv) Evidence of the contractor's payment of restitution or liquidated damages (copies of receipts, cancelled checks, or supplemental payrolls).

(v) Letter from the contractor requesting relief from the liquidated damage provisions of the Contract Work Hours and Safety Standards statute.