ALL AGENCY MEMORANDUM NUMBER 244

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

FROM: Jessica Looman, Principal Deputy Administrator Jessica Looman

SUBJECT: Final Rule: Updating the Davis-Bacon and Related Acts Regulations

## Introduction

On August 8, 2023, the Department of Labor (Department) published a final rule, *Updating the Davis-Bacon and Related Acts Regulations*, to amend regulations issued under the Davis-Bacon Act (DBA or Act) and the Davis-Bacon Related Acts (collectively, the DBRA) that set forth rules for the administration and enforcement of the Davis-Bacon labor standards which apply to federal and federally assisted construction projects. The revised regulations address a number of issues that have arisen over time in the administration and enforcement of the DBRA and provide greater regulatory clarity regarding numerous Davis-Bacon requirements, thereby enhancing the regulations' usefulness in the modern economy.

The purpose of this All Agency Memorandum (AAM) is to summarize the most significant provisions of this final rule for contracting agencies and the regulated community as part of the Department's efforts to provide compliance assistance both before and after the rule becomes effective on October 23, 2023. Specifically, this AAM provides a summary of the final rule's provisions regarding the content of wage determinations, the incorporation and applicability of wage determinations to covered contracts and projects, coverage principles, recordkeeping requirements, fringe benefits requirements, and enforcement provisions. This AAM also addresses the effective date and applicability dates of the final rule and identifies resources for additional information.

This memorandum is intended as general information only. The *Federal Register* and the Code of Federal Regulations remain the official sources for regulatory information published by the Department.

## Background

The Davis-Bacon Act (DBA or Act), as enacted in 1931 and subsequently amended, requires the payment of minimum prevailing wages determined by the Department to laborers and mechanics working on federal contracts in excess of $2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings and public works. *See* 40 U.S.C. 3142.

Congress has also included the DBA prevailing wage requirements in numerous other statutes (referred to as "Related Acts") under which federal agencies assist construction projects through grants, loans, loan guarantees, insurance, and other methods. Related Acts include the National Housing Act of 1934, Pub. L. 73-479; the Federal-Aid Highway Act of 1956, Pub. L. 84-627,

and the Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58 (the Bipartisan Infrastructure Law). The Department maintains a list of Related Acts on its government contracts compliance assistance website at https://www.dol.gov/agencies/whd/government-contracts.

The Secretary of Labor has the responsibility to "prescribe reasonable regulations" for contractors and subcontractors on covered projects. *See* 40 U.S.C. § 3145. The Secretary, through Reorganization Plan No. 14 of 1950, also has the responsibility to "prescribe appropriate standards, regulations and procedures" to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts "[i]n order to assure coordination of administration and consistency of enforcement of the labor standards provisions" of the DBRA. 15 FR 3173, 3176, effective May 24, 1950, reprinted as amended in 5 U.S.C. app. 1.

On March 18, 2022, the Department issued a notice of proposed rulemaking (NPRM), proposing revisions to the DBRA's implementing regulations at 29 CFR parts 1, 3, and 5. *See* 87 FR 15698. The Department invited comments on these proposed updates and received over 40,000 timely comments. The final rule reflects a number of changes to the NPRM that were made in response to the comments received. Aside from those changes, the final rule adopts the substantive provisions of the NPRM as proposed. As discussed more fully below, the final rule makes substantive revisions to parts 1 and 5, which address the procedures for the predetermination of DBA wage rates and the labor standards provisions applicable to DBRA-covered contracts, respectively, and makes primarily conforming revisions to part 3, which implements the Copeland Act.

## Summary of Final Rule Provisions

### Content of Wage Determinations

The Department revised the regulations in 29 CFR part 1 to amend certain definitions and procedures governing the content of wage determinations. These elements of the final rule may affect basic hourly and fringe benefit rates for the classifications listed on wage determinations that are posted on SAM.gov after the rule's effective date of October 23, 2023. They do not impose new or different requirements on contracting agencies with regard to the procedures for identifying appropriate wage determinations or administering and enforcing contract requirements.

*Determining Prevailing Wage Rates*

- "Area" of Wage Determinations: The final rule maintains the use of the county as the default "area" for most wage determinations. *See* 29 CFR 1.7(a). For most projects, the contracting agency must identify the county in which the project will take place and then search on SAM.gov the wage determination that contains the prevailing wage rates for the relevant type or types of construction in that county.

  The final rule also clarifies that, for highway projects, the Wage and Hour Division (WHD) may use a State highway district or "similar State geographic subdivision" instead of a county as the "area" for general wage determinations. *See* 29 CFR 1.2 (Area). Where WHD has used this methodology, the wage determination on SAM.gov may list prevailing wage

rates by highway district, and contracting agencies and contractors may need to identify the prevailing wage for a classification by reference to the highway district in which the project takes place.

- Definition of "Prevailing Wage": The definition of "prevailing wage" in 29 CFR 1.2 contains the basic methodology that WHD uses to analyze wage survey data to determine the prevailing hourly wage and fringe benefit amounts to include for each job classification in a given area. Under the amended definition, WHD identifies as prevailing any wage rate that is paid to a majority of workers for whom usable wage data is received. If there is no majority wage rate, WHD identifies as prevailing the wage rate that is paid to the greatest number, as long as it is paid to at least 30 percent of workers (*i.e.*, between 30 and 50 percent). If no wage rate is paid to at least 30 percent of the workers, WHD will use a weighted average of the wages paid to those employed in the classification.

  The final rule permits WHD to count wage rates that are not identical as the same rate if those rates are "functionally equivalent." The functional equivalence determination must be based on collective bargaining agreements or a written policy or policies of a contractor or contractors. *See* 29 CFR 1.3(e). Using this methodology, WHD is permitted to treat functionally equivalent variable or premium rates—such as escalator-clause rates, zone rates, night premiums, or foreperson premiums—as the same for the purpose of determining the prevailing wage.

- Scope of Consideration: WHD will expand the scope of data considered in determining prevailing wage rates when there is not sufficient current wage data in a given area (*e.g.*, in a given county). *See* 29 CFR 1.7. The prior regulation contained an across-the-board exclusion that prevented WHD from considering any data from "metropolitan" counties in making wage determinations for "rural" counties, and vice versa. The final rule eliminates this across-the-board bar. *See* 29 CFR 1.7(b). However, this change only applies where there is not sufficient data in the county at issue and WHD must use data from surrounding counties or larger geographic areas to determine a prevailing wage rate for a particular classification. Where there is not sufficient current wage data in surrounding counties, the final rule progressively expands the geographic scope of wage data that may be used to groups of comparable counties and, when necessary, statewide data (still for the same classification of workers). *See id.* § 1.7(c).

  The final rule does not change the current procedure under which WHD will consider wage data from federal or federally assisted projects subject to Davis-Bacon labor standards when it is determining prevailing wage rates. Accordingly, for heavy and highway determinations, the Department will continue to use such federal or federally assisted project data when determining prevailing wage rates. For building and residential wage determinations, the Department will continue to use such data only when "it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data." *See* 29 CFR 1.3(d).

*Other Wage Determination Improvements:*

- Frequently Conformed Rates (Supplemental Rates): The final rule expressly permits the Department to list on wage determinations a new category of "supplemental" wage and fringe benefit rates for classifications for which WHD received insufficient data through its wage survey process and for which conformance requests are regularly submitted. WHD is authorized to list such classifications on a wage determination, along with wage and fringe benefit rates that bear a "reasonable relationship" to the wage and fringe benefit rates contained in the wage determination. The hourly wage and fringe benefit rates for these classifications will be determined in the same manner as such rates are currently determined by WHD pursuant to the existing conformance process. *See* 29 CFR 1.3(f). The use of supplemental rates is intended to reduce the need for contracting agencies to submit requests for conformances and promote greater certainty in the bidding process.

- Periodic Adjustments to Wage Determinations: The final rule expressly permits WHD to periodically adjust certain non-collectively bargained prevailing wage and fringe benefit rates between Davis-Bacon wage surveys so that these rates do not become out-of-date and fall behind prevailing rates in the area. Such rates may be adjusted based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication. *See* 29 CFR 1.6(c)(1).

- Use of State or Local Agency Prevailing Wage Rates: The final rule allows WHD to adopt prevailing wage rates set by state or local officials, even if the state or locality's methods or criteria for determining the prevailing wage are not precisely the same as WHD's, provided that specified criteria are met. *See* 29 CFR 1.3(g) and (h). To adopt such rates, WHD must first obtain them and any relevant supporting documentation from the state or local government, and review both the rate and the processes used to derive the rate.

**Incorporation and Applicability of Wage Determinations**

The final rule contains several provisions that instruct contracting agencies regarding the procedures for incorporating wage determinations into covered contracts and for determining which wage determination(s) should be applied to a particular project.

*Duration of Applicability of Wage Determinations to Contract or Project*

The final rule reflects that a wage determination, once incorporated into a contract, generally applies for the life of the contract, with three limited exceptions. *See* 29 CFR 1.6(a) and (c). The three exceptions are where there is new out-of-scope construction, where there is an additional time period not previously obligated, or where the contract is an indefinite-delivery-indefinite-quantity (IDIQ) or similar long-term contract:

- New out-of-scope construction: The final rule codifies the Department's longstanding position that the most recent revision of any applicable wage determination(s) must be incorporated when a contract is modified to include substantial additional construction not

within the scope of work of the original contract. *See* 29 CFR 1.6(c)(2)(iii)(A). *See also, e.g.*, *U.S. Army*, ARB No. 96-133, 1997 WL 399373, at *6 (July 17, 1997).

- Additional time period not obligated: The final rule codifies WHD's longstanding position that the most recent revision of any applicable wage determination(s) must be incorporated when a contract is changed to require the contractor to perform work for an additional time period not originally obligated, such as when an option is exercised. *See* AAM 157 (Dec. 9, 1992). The final rule clarifies that this requirement applies to both unilateral and bilateral exercises of options.

- IDIQ and similar long-term contracts: The final rule requires contracting agencies to update wage determinations annually for IDIQ and similar long-term contracts that require construction work over a period of time that is not tied to the completion of any particular project. Even where such contracts involve the exercise of options, but have extended base or option periods, wage determinations must still be incorporated on an annual basis in years in which an option is not exercised. *See* 29 CFR 1.6(c)(2)(iii)(A) and (B).

*Multiple Types of Construction*

The final rule clarifies that when a project involves work in more than one type of construction (*e.g.*, building, heavy, highway, residential), the contracting agency must incorporate the applicable wage determination for each type of construction involved that is anticipated to include a substantial amount of construction. *See* 29 CFR 1.6(b)(1).

*Project Wage Determinations*

Under the final rule, contracting agencies continue to be able to request that WHD issue a wage determination specific to a particular project if there is no general wage determination in effect for the relevant area and type(s) of construction for an upcoming project, or if all or virtually all of the work on a contract will be performed by classifications that are not listed in the general wage determination that would otherwise apply. *See* 29 CFR 1.5(b)(i).

- Multi-County Projects: The final rule authorizes contracting agencies to request a project wage determination where the project involves work in more than one county and will employ workers who may work in more than one county. In appropriate circumstances, a multi-county project wage determination may identify a single prevailing wage rate that will apply to a classification of workers for all counties in the project area. *See* 29 CFR 1.5(b)(i). If a contracting agency has not requested a multi-county project wage determination, it must incorporate into the contract the general wage determinations for each of the counties in which the project takes place.

**Coverage Principles**

In general, the DBRA covers federal and federally-funded contracts and subcontracts by contractors and subcontractors for construction, alteration, or repair on the site of the work.[1] The final rule amends several of the regulatory terms that define the scope of covered entities, projects, and activities. Many of these amendments clarify longstanding policies and practices, but some represent substantive changes.

*Covered Contracting Agencies*

- The final rule revises the definition of *agency* to clearly encompass state and local agencies that enter into contracts for projects that are subject to Davis-Bacon labor standards and that allocate federal assistance under a Related Act to sub-recipients.

- *Federal agency* is added as a sub-definition of *agency* to distinguish those situations where the regulations refer specifically to an obligation or authority that is limited solely to a federal agency that enters into DBA-covered contracts or allocates federal assistance under a Related Act.

- The District of Columbia is expressly included in the definition of *federal agency*. This change does not reflect a general characterization of the District of Columbia as a Federal Government entity, but rather is intended simply to clarify that covered contracts entered into by the District of Columbia are subject to the DBA labor standards requirements and the regulations implemented by the Department.

*Types of Covered Entities*

- The final rule adds *contractor*, *prime contractor*, and *subcontractor* as defined terms and amends the definition of the term *contract*.

    - The definition of *contractor* clarifies that, where used in the regulations, it applies to both prime contractors and subcontractors. This revised definition also provides notice that sureties may be considered *contractors* under the regulations in appropriate circumstances. As further discussed below, the term *contractor* excludes entities that are material suppliers outside the scope of the DBRA.

    - The definition of *prime contractor* includes any person or entity that enters into a contract with an agency (regardless of whether they consider themselves to be a developer/owner or a general contractor). The definition also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, and any contractor that has been delegated responsibility for overseeing

[1] Under the DBA, the construction, alteration, or repair must be of a public building or public work. A few Related Acts that apply to all laborers and mechanics involved in the "development" of a project have a different coverage standard that is not limited to "contractors," "subcontractors," or the "site of the work."

all or substantially all of the construction anticipated by the prime contract. All of these entities may be held liable under the regulatory provision at 29 CFR 5.5(a)(6), which states that prime contractors are responsible for the compliance of all subcontractors on the contract.

- The definition of *subcontractor* includes any contractor that agrees to perform or be responsible for the performance of any part of a contract subject to the DBRA. It includes subcontractors of any tier.

- The final rule also codifies the long-understood principle that the DBA and the vast majority of Related Acts entirely exclude from coverage bona fide "material suppliers." The final rule does so by defining the term *material supplier* and amending the regulatory definitions of *contract* and *contractor* to exclude material suppliers from their scope. Unless a particular Related Act provides for broader coverage, employees of true material suppliers are not covered at all, including for time spent on the site of the work.

  - An entity is considered a material supplier if:

    1. Its *only* obligations on the contract or project are the delivery of materials and activities that are incidental to material supply, such as loading, unloading, and pickup, *and*

    2. Any facility that manufactures the supplies:

       - is not located on the primary or secondary worksite, and

       - was either established before the beginning of the project or is not dedicated exclusively or nearly exclusively to the project.

  - The final rule further explains that if an entity engages in any construction, prosecution, completion, or repair work that is not incidental to material supply at the site of the work, it is a contractor or subcontractor, not a material supplier. Therefore, workers' time at the site of the work would be covered, subject to the *de minimis* exception discussed below. This eliminates a 20 percent threshold for material suppliers that had been set out previously in subregulatory guidance, including WHD's Field Operations Handbook.

  - While a material supplier can pick up materials in addition to delivering them, an entity that only picks up (but does not deliver) materials is not considered a material supplier, but rather is a contractor or subcontractor.

*Types of Covered Activities*

- *Modern examples of covered construction:* The regulations' definition of *building or work* includes a list of examples of covered construction activities. The final rule revises this list to explicitly include solar panels, wind turbines, broadband installation, and installation of electric car chargers in this non-exclusive list. The inclusion of these

additional examples does not expand DBRA coverage, but rather clarifies that such projects are among the types of buildings or works that may be covered by the DBRA when all other coverage criteria are met.

- *Projects Involving a Portion of a Building or Work.* The final rule adds language to the definitions of *building* (or *work*) and *public building* (or *public work*) to clarify that these definitions can apply even when the construction activity involves only a portion of an overall building, consistent with longstanding policy.

- *Installation Work.* The final rule also adds language to the definitions of *building (or work*) and *public building (or public work*) to expressly reflect that installation (where appropriate) of equipment or components into a building or work is covered by the DBRA, consistent with longstanding policy.

- *Members of Survey Crews.* The final rule clarifies and reaffirms that members of survey crews who perform primarily physical and/or manual work while employed by contractors or subcontractors on a DBRA-covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards.

- *Demolition and/or removal work*. The final rule addresses DBRA coverage of demolition in a manner consistent with existing DBRA subregulatory guidance and SCA regulations. While standalone demolition work that does not constitute construction, alteration, or repair and with no contemplated future construction is not covered by the DBA or Related Acts, Davis-Bacon labor standards apply to demolition and/or removal work under any of three circumstances:

    1. where the demolition and/or removal itself constitutes construction, alteration, and/or repair of an existing building or work (*e.g.*, asbestos removal from a facility that will not be demolished; land recycling that involves substantial earth moving).

    2. where the demolition is performed in contemplation of a DBRA-covered construction project, either as part of the same contract or a future contract; or

    3. where otherwise required by statute.

*Locations of Covered Activities*

- *Work at Secondary Construction Sites*:

    - The definition of *Site of the Work* is revised to define "secondary construction sites" that are covered under the DBRA. Such sites include any site away from the primary worksite where *all* of the following requirements are met:

        1. A "significant portion" of the building or work is constructed.

- *Significant portion* means an entire portion or module of a building or work, such as a completed room or structure, with only minimal construction work remaining to install or assemble the room or module at the primary site of work.

- It does *not* include materials or prefabricated component parts such as prefabricated housing components.

2. The "significant portion" is constructed for *specific use* in that building or work and is not just a product made available to the general public.

3. The site is *either* established specifically for the performance of the contract or project, *or* is dedicated exclusively, or nearly so, to the performance of the contract or project for a *specific period of time*.

    - A *specific period of time* means a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline. DBRA coverage exists only during the specific period of time in which the site is dedicated exclusively, or nearly so, to the performance of the contract or project.

- This definition reflects a modest expansion of coverage. Under the prior definition in effect since 2000, a secondary site at which "significant portions" of a public work are constructed was covered only if the site was established specifically for contract or project performance.

- *Flagger/traffic control work*. The final rule clarifies that locations adjacent, or virtually adjacent, to a primary construction site at which workers perform activities associated with directing vehicular or pedestrian traffic around or away from the primary construction site are part of the site of the work. As the Department has previously recognized that flaggers are laborers or mechanics within the meaning of the DBA (*see* AAM 141), this means that workers performing flagging activities adjacent or virtually adjacent to the primary construction site are covered by the DBRA.

- *Transportation:*

    - The final rule articulates the circumstances under which transportation (*e.g.*, of materials) by employees of contractors or subcontractors is covered, namely:

        1. Transportation entirely within the site of the work (*i.e.*, from one location on the worksite to another),

        2. Transportation of a "significant portion" of a public work between a secondary construction site and a primary construction site (*see* above),

3. Transportation between an adjacent or virtually adjacent dedicated support site (*e.g.*, project-dedicated batch plants or borrow pits located next to the worksite) and the primary or secondary worksite, and

4. Onsite activities essential or incidental to offsite transportation (*e.g.*, pickup, dropoff, loading and waiting time) where such time is not *de minimis*. The total amount of time a driver spends on the site of the work during a typical day or workweek—not just the amount of time that each individual delivery or removal takes—is relevant to a determination of whether the driver's onsite time is *de minimis*.

- Note that, as explained above, transportation is generally not covered at all if the employer meets the definition of *material supplier*.

*No Employment Relationship Required*

The final rule includes revisions throughout parts 1, 3, and 5 to reinforce the well-established principle that Davis-Bacon labor standards requirements apply even when there is no employment relationship between a contractor and worker. For example, many references to "employee" have been changed to "worker." *See* 40 U.S.C. 3142(c)(1); *see, e.g.*, 29 CFR 1.2, 3.2, 5.2.

**Fringe Benefits**

The final rule revises a number of provisions related to fringe benefits.

- The final rule codifies the principle of annualization that is used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a bona fide fringe benefit plan (or the reasonably anticipated costs of an unfunded benefit plan) when the contractor's workers also work on projects not subject to DBRA requirements (also referred to as private (non-DBRA) work). *See* 29 CFR 5.25(c).

    - Contractors, plans, and other interested parties may request an exception to the annualization requirement by submitting a request to the WHD Administrator, but such exceptions are only available if the benefit provided by the plan is not continuous in nature and does not compensate both DBRA and non-DBRA work.

    - Consistent with existing guidance, the annualization requirement will not apply to contributions to defined contribution pension plans (DCPPs) as long as the DCPP contributions meet the exception criteria and the plan provides for immediate participation and essentially immediate vesting.

- The final rule codifies the criteria for determining whether an unfunded benefit plan or program qualifies as a bona fide fringe benefit and explains the process contractors must use to obtain WHD approval of an unfunded plan or program.

- The final rule clarifies the requirements that must be met for the cost of apprenticeship programs to be credited against fringe benefit obligations. The rule codifies the standard

that credit may be taken only for amounts reasonably related to the costs of the apprenticeship benefits provided to the contractor's employees, such as instruction, books, and tools or materials. The final rule further explains that WHD will presume that amounts the employer is required to contribute by a collective bargaining agreement or by a bona fide apprenticeship plan (whether or not collectively bargained) satisfy the governing standard, but that voluntary contributions beyond those reasonably related to apprenticeship benefits will not be creditable.

- The final rule adds a provision distinguishing between creditable and noncreditable administrative expenses, explaining that costs that are directly related to the administration and delivery of bona fide fringe benefits to the contractor or subcontractor's workers are creditable, whereas a contractor's own administrative expenses incurred in connection with the provision of fringe benefits are not, even when a contractor pays a third party to perform some or all of its own administrative tasks. The provision provides examples of each category.

**Recordkeeping**

Contractors and subcontractors on DBRA-covered projects must keep records required under the DBRA, including under the Copeland Act and the Contract Work Hours and Safety Standards Act (CWHSSA), as set forth in 29 CFR parts 3 and 5.[2] The final rule clarifies and supplements existing DBRA recordkeeping requirements to better effectuate compliance and enforcement. The revisions include the following:

- The final rule adds requirements that contractors and subcontractors maintain DBRA contracts and related documents, as well as worker telephone numbers and email addresses. *See* 29 CFR 5.5(a)(3)(ii) and (iii); 5.5(c).

- The final rule clarifies that required records must be retained for at least 3 years after all the work on the prime contract is completed. *See* 29 CFR 5.5(a)(3), 5.5(c), and 5.6(a)(2)(i); *see also* 29 CFR 3.4.

- The final rule clarifies the distinction between "regular payrolls" and "other basic records" that contractors must make and maintain, and the "certified payroll" documents

[2] The Copeland Act requires that contractors working on Davis-Bacon projects submit weekly certified payrolls for work performed on the contract, *see* 40 U.S.C. 3145, and it also prohibits contractors from inducing any worker to give up any portion of the wages due to them on such projects. *See* 18 U.S.C. 874. The regulations implementing the Copeland Act as it pertains to DBRA-covered contracts are set forth in 29 CFR part 3. CWHSSA requires an overtime payment of one and one-half times the basic rate of pay for hours worked over 40 in a work week by laborers and mechanics, including watchpersons and guards, on federal contracts as well as certain federally assisted contracts. *See* 40 U.S.C. 3701 *et seq.* CWHSSA recordkeeping requirements are set forth in 29 CFR 5.5(c).

and statements of compliance that contractors must submit weekly. *See* 29 CFR 5.5(a)(3)(i) and (ii); *see also* 29 CFR 3.4.

- The final rule codifies WHD's longstanding position that certified payrolls may be requested—and federal agencies must produce, or ensure production of, such certified payrolls—regardless of whether or not WHD has initiated an investigation or other compliance action.

- The final rule also codifies longstanding Department policy that certified payrolls may be signed and submitted electronically, and clarifies that access to such electronic records must be ensured for at least 3 years after all the work on the prime contract is completed. *See* 29 CFR 5.5(a)(3); *see also* 29 CFR 3.3(b).

- The final rule provides that a contractor's failure to submit required records upon request may, in addition to providing grounds for the suspension of contract payments and debarment, preclude the contractor from introducing such records as evidence in an administrative proceeding. *See* 29 CFR 5.5(a)(3)(iv)(B).

**Enforcement**

The final rule enhances enforcement by the Department and contracting agencies of the Davis-Bacon labor standards requirements in various ways, including those discussed below. The final rule also seeks to improve compliance by the regulated community.

*Omission of Required Clauses and Wage Determinations and "Operation of Law"*

- The final rule emphasizes that the federal agency has the initial responsibility to determine whether a contract is covered by the DBRA and, if so, which wage determination(s) must be included in the prime contract. *See* 29 CFR 5.6(a)(1)(i). Any question related to the applicability of the DBRA or the appropriate wage determination must be referred to the Administrator of WHD for an appropriate ruling or interpretation.

- The final rule provides that the labor standards contract clauses and appropriate wage determinations are effective "by operation of law" and considered to be incorporated even when they have been wrongly omitted from a covered contract. The provision requires that prime contractors be compensated for any difference in labor costs resulting from the incorporation. *See* 29 CFR 5.5(e). The provision ensures that a mechanism exists to enforce Congress's mandate that workers on covered contracts receive prevailing wages—notwithstanding any mistake made by an executive branch official in an initial coverage decision.

- Notwithstanding the operation-of-law provision, contracting agencies continue to have the responsibility to ensure that when DBRA labor standards clauses and/or wage determinations have been wrongly omitted from a contract, those clauses and wage determinations are retroactively incorporated. *See* 29 CFR 1.6(f); 29 CFR 5.6(a)(ii).

*Liability of Prime Contractors and Upper-Tier Subcontractors*

- The final rule clarifies that prime contractors are strictly liable for back wages owed to employees of any subcontractor on the project (though, consistent with existing policy, WHD ordinarily will seek to recover such funds from the violating subcontractor in the first instance). The rule also clarifies that upper-tier subcontractors (in addition to prime contractors) may be responsible for violations by lower-tier subcontractors and therefore responsible for the payment of back wages resulting from such violations. *See* 29 CFR 5.5(a)(6).

- The final rule clarifies that any DBRA-related contract modifications must be flowed down to lower-tier subcontractors. This requires prime contractors and upper-tier subcontractors to flow down any contract modifications in addition to the enumerated contract clauses and applicable wage determination(s) that are included in the original prime contract. *See* 29 CFR 5.5(a)(6).

*Withholding*

Withholding is a procedure through which agencies withhold contract payments from a contractor to ensure that funds are available to compensate workers for wage underpayments. Funds typically are withheld on the contract on which the DBRA violations occurred. However, cross-withholding—a mechanism under which agencies withhold contract monies due a prime contractor from contracts other than the contract under which the alleged violations occurred—may be necessary if sufficient funds are no longer available on the contract under which the violations were found. Consistent with the DBA's directive that the Department pay withheld monies "directly to laborers and mechanics," 40 U.S.C. 3144(a)(1), the withholding contracting agency may eventually transfer the withheld funds to WHD in its capacity as the enforcement agency for distribution directly to workers to whom the contractor owes DBRA back wages. WHD in turn may only distribute cross-withheld funds to such workers after any challenge to the finding of violations has been resolved. *See* 40 U.S.C. 3142(c)(3), 3144(a)(1) (DBA withholding); 3702(d), 3703(b)(2) (CWHSSA withholding); 29 CFR 5.5(a)(2) and (b)(3), 5.9.

The final rule clarifies and strengthens the withholding remedy in several ways:

- The final rule clarifies that cross-withholding can be from any contract held by the same prime contractor, even if the contract was awarded or assisted by a different agency than the agency that awarded or assisted the contract on which violations necessitating the withholding occurred. *See* 29 CFR 5.5(a)(2)(i), 5.5(b)(3)(i), 5.9(b).

- The final rule establishes the ability to cross-withhold from entities other than the entity that directly entered into the contract with the contracting agency. Under the final rule, when a prime contractor uses a single-purpose entity, joint venture, or other similar vehicle to secure DBRA-covered contracts, the Department may pursue cross-withholding on any other contract held by one of the related entities. *See* 29 CFR 5.2 (new definition of "prime contractor"), 5.5(a)(2)(i), 5.5(b)(3)(i), 5.9(b) and (c).

- The final rule adds a provision explaining that withholding for workers' back wages has priority over various other competing claims. *See* 29 CFR 5.5(a)(2)(ii), 5.5(b)(3)(ii).

*Interest on Back Wages and Monetary Relief*

The final rule adds interest on back wages and monetary relief as a remedy for DBRA violations. *See* 5.5(a)(1)(vi), (a)(2)(i), (a)(6), (b)(3)(i), (b)(4); 5.9(a); and 5.10(a).

*Debarment*

The final rule revises the debarment provisions in part 5 to harmonize the DBA and the Related Act debarment regulations.

- First, the final rule applies the longstanding DBA debarment standard—disregard of obligations to employees or subcontractors—to the Related Acts as well as the DBA, thus, eliminating the heightened Related Act regulatory "aggravated or willful" debarment standard. *See* 29 CFR 5.12; *see also* 29 CFR 5.6(b)(4), 5.7(a).

- The final rule makes various other changes to the debarment regulations so that the Related Act debarment provisions are the same as the current provisions governing DBA debarment. Specifically, the final rule sets forth a 3-year period for all debarments, eliminates the rarely used process for early removal from the debarment list for contractors debarred under a Related Act, and clarifies that "responsible officers" and entities in which debarred entities or individuals have an "interest" may be debarred under the Related Acts as well as under the DBA. *See* 29 CFR 5.12.

*New Anti-Retaliation Protections*

- Under the final rule, it is prohibited to retaliate against workers or job applicants for engaging in protected activities such as making a complaint or cooperating in a WHD investigation under the DBRA, including CWHSSA. *See* 29 CFR 5.5(a)(11) and (b)(5).

- The final rule adds remedies to make whole workers and job applicants who have been discriminated against in any manner for engaging in, or being perceived to have engaged in, certain protected activities. *See* 29 CFR 5.18. Under the previous part 5 regulations, debarment was the only remedy for such retaliation.

- The final rule's new anti-retaliation provisions will enhance compliance and enforcement by discouraging contractors and subcontractors from engaging in business practices that may chill worker participation in WHD investigations or other compliance actions and enable Davis-Bacon labor standards violations to go undetected.

**Miscellaneous**

*Revisions to Copeland Act Regulations*

The final rule revises the regulations implementing the Copeland Act at 29 CFR part 3 to update the language and ensure that terms are used in a manner consistent with the terminology set forth

in 29 CFR parts 1 and 5, to update websites and contact information, and to make other similar changes to part 3 consistent with the changes to parts 1 and 5.

*Apprentice Rates and Ratios*

The final rule requires contractors and subcontractors to adhere to the apprentice wage rate and ratio standards of the project locality, even if the contractor's apprenticeship program is registered in a different locality. The final rule also clarifies that where there is no registered program in the locality of the project establishing applicable apprentice wage rates and ratios, the rates and ratios under the contractor's registered program apply. *See* 29 CFR 5.5(a)(4)(i)(D). The final rule also removes the outdated references to trainees and training programs from the regulations.

*Modernized Notification Methods*

The final rule updates the regulations to permit investigation findings and hearing requests to be served by additional methods of delivery, including by email and delivery by express delivery service. *See* 29 CFR 5.11(b) and (c); 5.12(b) and (c)(2)(iv).

*Agency Construction Reports*

The prior regulations and subregulatory guidance directed Federal agencies, to the extent practicable, to periodically report planned construction activities to the Department for the purpose of the Department's wage survey planning. The final rule codifies that contracting agencies are now required to report construction program data to the Department on an annual basis. *See* 29 CFR 1.4.

## Effective Date and Applicability Dates

The final rule is effective on October 23, 2023, which is 60 days after the rule published in the *Federal Register*. Certain provisions of the final rule affect the methodology by which the Department determines prevailing wage rates or otherwise prescribes the content of wage determinations. Under the final rule, these provisions may only be applied to wage surveys for which data collection is completed on or after the final rule's effective date. Wage determination revisions, as well as the amended contract clauses and enforcement provisions in the final rule, generally apply only to new contracts that are entered into after the final rule's October 23, 2023 effective date.

The final rule applies to a relatively narrow subset of existing contracts (contracts entered into prior to October 23, 2023. Specifically, to the extent practicable and consistent with applicable law, the rule requires contracting agencies to amend existing indefinite-delivery-indefinite-quantity (IDIQ) contracts (and other similar long-term contracts that are not tied to the completion of a particular project) on an annual basis so that they include the most recently updated wage determination(s). Consistent with existing subregulatory requirements, agencies are also required to incorporate new wage determination revisions (including those carried out under the new methodologies in the rule) into existing contracts where new out-of-scope covered

construction has been added to the contract or where an additional unobligated time period has been added to the project. For additional information regarding these requirements, see the discussion in section III.C (Applicability Date) of the final rule's Supplementary Information section.

**Additional Information**

For more information regarding the DBRA and WHD's Davis-Bacon Survey Program, please visit our website at: https://www.dol.gov/agencies/whd/government-contracts/construction

Questions on DBRA compliance and enforcement should be directed to the Division of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-3502, Washington, DC 20210; telephone number (202) 693-0064; email address DGCEinquiries@dol.gov.

Questions on WHD's Davis-Bacon Survey Program should be directed to the Division of Wage Determinations, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-3502, Washington, DC 20210; telephone number (202) 693-0051; email address DB-Wage-Survey-Request@dol.gov.

Questions on WHD's Construction Wage Determinations should be directed to the Division of Wage Determinations, Branch of Construction Wage Determinations, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-3502, Washington, DC 20210; telephone (202) 693-0087; email address BCWD-Office@dol.gov.

# FACILITIES GUIDANCE
## ATTACHMENT A

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## OVERVIEW

The Office of Head Start (OHS) is committed to the provision of services in good quality facilities with safe indoor and outdoor learning environments. This guidance is intended to support grantees in understanding the Head Start application and funding process for facilities activities. Head Start base grant funds in approved budgets may be used for the payment of rent under operating leases[i] and for repairs[ii] and minor renovations[iii] to facilities. Other facilities activities, including purchase, construction, and major renovations, as defined in 45CFR§ 1305.2, require separate application for funding, as described in 45CFR§1303.44 and 45CFR§ 1303.45.

In this guidance, the term "Head Start" is used inclusively for Head Start, Early Head Start, and the Early Head Start-Child Care Partnerships. Regulations applicable to facilities activities funded by OHS are found primarily at SubpartE,Facilities,45CFR§1303 of the Head Start Performance Standards (HSPPS); RealProperty,45CFR§75.318 of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Health and Human Services (HHS) Awards (the Uniform Guidance); and the HHS Grants Policy Statement (GPS), including subsequent revisions or amendments. Additional guidance is available on the Head Start Early Childhood Learning and Knowledge Center (ECLKC) website: https://eclkc.ohs.acf.hhs.gov/hslc.

## AVAILABILITY OF FUNDS

Grantees are encouraged to submit applications for needed facilities activities so that real property needs can be fully understood by OHS. However, OHS has limited funds available for one-time funding applications and typically cannot fund all requests for facilities activities. Requests for facilities funding will be subject to funding priorities established by OHS and reflected in funding opportunity announcements.

## PLANNING

A design guide and other materials to support planning for real property activities are available on ECLKC. Grantees are encouraged to engage in careful planning to assure that proposed real property activities address identified health and safety issues, reflect the results of community assessment and are eligible for funding under 45CFR§1303.42.

Grantees may submit a written request for funding under 45CFR§1303.43 to determine preliminary eligibility of a planned real property activity in advance of submitting a full facilities application under 45CFR§1303.44 and 45CFR§1303.45. Preliminary activities might include feasibility studies, cost estimates and initial indoor and outdoor environmental testing to assure suitability of the facility project being considered. Grantees are encouraged to discuss facilities

projects with their Regional Program Specialist and Fiscal Operations Specialist well in advance of submitting a full application under 45CFR§1303.44 and 45CFR§1303.45.

## APPLICATIONS

Grantees may submit an application to use Head Start funds to purchase[iv] or construct[v] facilities, and for major renovation[vi] of facilities owned by the grantee or leased from a third party. Applications for facilities funding require the use of real property Form SF-429 (Cover Page) accompanied by Attachment SF-429-B (Request to Acquire, Improve or Furnish). Additional information needed to meet the requirements of 45CFR§1303.44 and 45CFR§1303.45 must accompany the Form SF-429 and Attachment SF-429B. Note that a separate application is not required for repairs or for minor renovations, as defined in 45CFR§1305.2, but such activities may require prior written ACF approval if they meet the conditions of 45CFR§75.308. An example is a kitchen repair that includes the purchase of equipment for which prior written approval is required by 45CFR§75.308(c)(1)(xi).

## FEDERAL INTERESTS

A federal interest[vii] in real property is created when a grantee uses Head Start or other federal funds to purchase or construct real property[viii] or conduct major renovations on leased or owned property. Protection of the federal interest is required by the HSPPS, 45CFR§75.323 and GPS, page II-67. The federal interest includes total project costs paid with federal funds, those amounts awarded directly from the OHS and amounts claimed by the grantee as cost sharing or matching for the project. 45CFR§1305.2, definition, *Federal interest.*

Grantees are required to file a notice of federal interest in the official real property records for the jurisdiction in which the real property is or will be located, except modular units. 45CFR §1303.46(b)(1)-(3). Notices of federal interest for modular units must be posted on modular units. 45CFR§1303.46(b)(4)[ix]. Detailed requirements for timing, content, where to file or post notices of federal interest and instructions for submitting copies of filed or posted notices are included in the HSPPS at 45CFR§1303.46 through 45CFR§1303.49. A federal interest cannot be defeated by a grantee's failure to file a required notice of federal interest. 45CFR §1303.46(a).

## REPAIRS, MINOR RENOVATIONS AND MAJOR RENOVATIONS

Grantees should familiarize themselves with the definitions of these terms in 45CFR§1305.2. Repairs and minor renovations, as defined, do not result in a federal interest, and do not require the filing of a notice of federal interest. Major renovations require full compliance with 45CFR §1303 (Subpart E). While not common, it is anticipated that a grantee may engage in repairs, the

aggregate value of which exceeds $250,000. In the event that a grantee proposes to spend more than $250,000 for repairs, the grantee must submit to ACF, in advance of commencing the proposed repairs, a certification from a licensed, independent architect or engineer indicating that the expenditures identified as repairs do not add significant value to the real property to be repaired or extend its useful life. If the required certification is not provided, the activity will be classified as a major renovation and compliance with 45CFR§1303 (Subpart E) is required.

Sec.644(g)(3) of the Head Start Act applies the Davis-Bacon and Related Acts (40USC276aet seq) to contractors and subcontractors engaged in covered construction and renovation activities in excess of $2,000 on facilities used to carry out Head Start activities. Covered Davis-Bacon Act activities are construction, alteration, or repair (including painting or decorating). If Head Start funds in excess of $2,000 are used toward the cost of covered activities, the Davis-Bacon Act applies. Grantees engaging in facilities activities of any type should familiarize themselves with the requirements of the Davis-Bacon Act to assure compliance. Compliance resources are available from the US Department of Labor: https://www.dol.gov/whd/govcontracts/dbra.htm.

## FINANCING, REFINANCING AND PLEDGES OF COLLATERAL

Prior ACF approval is required in all circumstances in which real property subject to a federal interest is pledged as collateral. 45CFR§1303.48(a). Such circumstances include mortgages, refinancing of existing facilities debt and general or "blanket" pledges of collateral. Grantees requesting prior approval to use property subject to a federal interest as collateral must submit real property Form SF-429 (Real Property Status Report, Cover Page) and SF-429-C (Disposition or Encumbrance Request).

The HSPPS require that loan agreements with third party lenders for property subject to a federal interest contain language providing ACF with certain rights as described in 45CFR §1303.49(a)(1)-(7). These include notice of any borrower default in payment or performance, an opportunity to cure the default and the right to direct assignment of the loan to another grantee. In addition, grantees are also required to immediately notify ACF of any default in a loan agreement secured by property subject to a federal interest. 45CFR§1303.49(b). Grantees successfully competing for a new service area may be required by OHS to accept assignment of loans associated with facilities continuing in Head Start use.

Grantees should be aware that loans with short-term maturity dates of less than 15 years (interest-only and balloon loans) will not generally be approved by ACF. A capital lease resulting in acquisition of title to real property[x] requires prior ACF approval and will only be considered in those rare instances in which the grantee acquires title to the property and the cost of acquisition of title under the capital lease does not exceed the fair market value of the property at the time the capital lease is or was entered into. As noted below, absent prior ACF approval of a capital lease, rental costs under leases which are required to be treated as capital leases under Generally Accepted Accounting Principles (GAAP) are allowable only up to the amount that

would be allowed had the non-federal entity purchased the property on the date the lease agreement was executed. 45CFR§75.465(c)(5).

## SUBORDINATION AGREEMENTS

A subordination agreement is a legal contract between ACF and a lender that allows the lender to establish first lien status on property already subject to a federal interest. Only ACF can agree to a subordination of the federal interest to the rights of a lender. Common situations where subordination agreements are requested include use of Head Start funds as a down payment with an accompanying mortgage for the balance of the purchase price and when property subject to an existing mortgage is refinanced after acquisition.

Grantees requesting a subordination agreement from ACF must submit real property Form SF-429 (Real Property Status Report, Cover Page) and SF-429-C (Disposition or Encumbrance Request). In addition, when the amount of federal funds already contributed to the facility prior to the subordination requires exceeds the amount to be provided by the lender seeking subordination, 45CFR§1303.51 requires the grantee to show that funding is not available without subordination of the federal interest. This could be shown, for example, by a letter from the proposed lender stating that it will not fund the proposed loan without subordination of the federal interest.

Grantees are encouraged to consult their Regional Grants Specialist prior to submitting a subordination request to assure that the proposed subordination agreement includes all required terms and conditions, and that all supporting materials, including an independent appraisal of the current fair market value of property at issue and proposed loan documents, are completed and available to accompany the subordination request.

## LEASES

Leases for facilities are classified for accounting purposes as either operating leases or capital leases. To determine allowable costs, property subject to a capital lease is treated as though it were owned by the grantee, 45CFR§75.465(c)(5) while the reasonable costs of operating leases are ongoing operating expenses[xi]. Capital leases resulting in the acquisition of title by the lessee (grantee) are sometimes referred to as lease-purchase agreements.

Sale and leaseback agreements are treated similarly to capital leases. 45CFR§75.465(c). In addition, if the a grantee is party to a less-than-arms-length lease as described in 45CFR §75.465(c)(1)-(4) charges against the Head Start award are also limited in accordance with 45 CFR§75.436.

Rental costs under capital leases (except where previously approved in writing by ACF as a purchase) sale and leaseback agreements and less-than-arms-length lease arrangements are allowable only up to the amount that would be allowed had the grantee owned the leased property. This amount includes expenses such as depreciation, maintenance, taxes (if the grantee is not exempt) and insurance. 45CFR§75.436.

## DEPRECIATION

Grantees may charge their Head Start award for allocable and allowable depreciation of facilities used for Head Start program purposes. 45CFR§75.436. Allowable annual depreciation is generally the acquisition cost of a facility (excluding land) divided by the useful life of the facility as established in the grantee's financial statements. Depreciation must be adjusted (allocated) to reflect the extent of Head Start usage of the facility and cannot include any portion of the cost of the facility (acquisition or major renovation) borne through the use of Head Start funds or claimed as non-federal match for Head Start funds. 45CFR§75.436(b)-(d).

For example, if the acquisition cost of a grantee-owned facility, excluding land, is $800,000 and its useful life is 40 years, allowable annual depreciation is $20,000 per year if the facility is used 100 percent for Head Start purposes and no federal funds or non-federal match have contributed to the acquisition cost of the facility.

> ***Scenario 1:*** If only 60 percent of the facility is used for Head Start services, the amount of annual allowable depreciation noted above must be reduced to 60 percent of the otherwise allowable amount, resulting in depreciation of $12,000.
>
> ***Scenario 2:*** If 30 percent of the cost of the facility was paid with Head Start funds, 30 percent of the amount of annual allowable depreciation noted above must be deducted, leaving 70 percent of the otherwise allowable amount or $14,000.
>
> ***Scenarios 1 and 2 Combined:*** If only 60 percent of the facility is used for Head Start proposes *and* 30 percent the cost of the facility was paid with Head Start funds, the amount of annual allowable depreciation noted above must be adjusted for both extent of Head Start use and federal share. Step 1: Adjustment for Head Start usage at 60 percent = $12,000. Step 2: A further 30 percent reduction of the amount arrived at in Step 1 (70 percent x $12,000) produces final allowable depreciation in the amount of $8,400.

Charges for depreciation must be supported by adequate depreciation and property records, and physical inventories must be taken at least once every two years. 45CFR§75.436(e). Allowable amounts of annual depreciation may be charged against the grantee's Head Start award or



claimed as non-federal match if the grantee foregoes the charging of otherwise allowable depreciation.

## REPORTING AND RECORDKEEPING

All grantees are required to complete and submit real property status information annually using forms SF-429 (Real Property Status Report, Cover Page) and SF-429-A (Attachment A, General Reporting. Additional information must be reported for each piece of property in which a federal interest exists as that term is defined in 45CFR§1305.2, even if the grantee has not filed or posted the required notice of federal interest. 45CFR§1303.46(a).

Grantees must retain records pertinent to the lease, purchase, construction or renovation of a facility funded in whole or in part with Head Start funds for as long as the grantee owns or occupies the facility, plus three years. 45CFR§1303.54. In the circumstances identified in 45 CFR§75.361(a)-(f) record retention may be required for periods in excess of three years.

If a grantee is charging depreciation to its Head Start award, those charges must be supported by adequate property records supporting acquisition cost and useful life, and physical inventories must be taken at least once every two years. 45CFR§75.436(e).

## VALUATION AND MATCHING

Whenever current fair market value of real property is established, the determination of value must be made by an independent real property appraiser certified or licensed in the state in which the property is located. 45CFR§75.306(i)(1), GPS page II-67. The appraiser must be licensed for the type of property appraised, generally commercial real estate. An appraisal more than three years old cannot be used to establish current fair market value of real property.

Fair market rental value is the amount that a grantee would have to pay to rent comparable space in the community. The claimed value of donated space must not exceed the fair market rental value of comparable space as established by an independent appraisal of comparable space in a privately-owned building in the same locality. 45CFR§75.306(i)(3). For purposes of establishing fair market rental value of donated space from an unrelated party, the required fair market rental value may be established by an appraiser as described above, or by a licensed and independent real estate broker or real estate agent familiar with the rental market in the local community. An appraisal more than three years old cannot be used to establish current fair market rental value of donated space.

If space is donated by a related party the amount of matching the grantee may claim is limited to the amount that could have been claimed had the grantee been the titleholder of the property, generally those amounts described in 45CFR§75.436.



## DISPOSITION

When real property subject to a federal interest is no longer needed for program purposes (45 CFR§318(b)) grantees must request that ACF provide disposition instructions for the property. 45CFR§318(c). Disposition requests are made using Form SF-429 (Real Property Status Report, Cover Page) and SF-429-C (Attachment C, Disposition or Encumbrance Request). ACF may also instruct a grantee to dispose of real property if the grantee is no longer funded to provide services in the area in which the real property is located, such as when a grantee relinquishes its Head Start award, is de-funded by OHS or does not retain the service area as a result of designation renewal competition.

A grantee may request that real property subject to a federal interest be used in another federally sponsored program offered by the grantee with a purpose similar to Head Start. 45CFR §75.318(b)(2). If use in another program is not possible or not approved, ACF may direct the grantee to undertake one of three disposition options: The grantee may be instructed to retain title to property subject to a federal interest and compensate ACF for the value of the federal interest in the property. 45CFR§75.318(c)(1); ACF may direct the grantee to sell the property with the proceeds to be allocated between ACF and the grantee based on their relative interests in the property. 45CFR§75.318(c)(2); or the grantee may be directed to transfer title to a third party with compensation for the value of the grantee's share of the property. 45CFR §75.318(c)(3).

With prior ACF approval, 45CFR§75.318(c)(1) allows the grantee to use the net proceeds of the sale of property subject to a federal interest to offset the cost of replacement property acquired under the same federal award. Since the option of using proceeds of sale to offset the cost of replacement property did not exist uniformly exist under regulations applicable prior to December 26, 2014, grantees proposing to use proceeds of sale to acquire replacement property must formally adopt 45CFRPart75 for all of their existing facilities awards, as reflected in fiscal policies and procedures and approved by the Governing Body and Policy Council.

Grantees may indicate their use or disposition preference on the disposition request; however, ACF has the discretion to instruct a grantee to engage in another method of disposition which may better suit program needs. In the event that a disposition instruction requires compensation by ACF of a grantee's share in real property, the grantee must provide documentation of the source, amount and any restrictions or condition associated with funding for any claimed grantee share. Costs of purchase, construction or major renovations to the property previously claimed by the grantee as cost sharing or match to the Head Start award are part of the federal interest. 45 CFR1305.2, definition, *Federal interest*. Failure to comply with disposition instructions issued by ACF may result in denial of close-out funding or adverse action against the grantee.

To determine the current value of the federal interest and grantee share in connection with disposition of real property, current fair market value must be established by an independent real



property appraiser certified or licensed in the state in which the property is located. GPS page II-67. Once current fair market value is established, the value of the federal interest and grantee equity, and, if applicable, other third-party interest or equity, are determined by calculating the respective federal, and grantee, and, if applicable, third party contributions to the property, and applying the resulting percentages to the current fair market value.

All claims of amounts to be included in the calculation of grantee contribution must be adequately documented and cannot include funds or property subject to a third-party use restriction, reversionary interest, encumbrance or similar condition. In the event of disposition requiring ACF compensation of grantee share, it is the responsibility of the grantee to produce adequate documentation to establish grantee equity upon receipt of disposition instructions.

If it is necessary to establish federal interest and grantee equity in connection with a disposition, grantees are encouraged to work closely with their Regional Program Specialist and Grants Specialist throughout the disposition process.

## CONCLUSION

Use of Head Start funds for purchase, construction and major renovation of real property provides an important opportunity for grantees to assure that services to children and families are provided in good quality facilities that support school readiness and enhance the delivery of comprehensive services. Real property activities funded by OHS represent significant investments in real property intended to benefit children and families in the local community over extended periods of time.

Although grantees are permitted to hold title to real property acquired or improved with OHS funds, the property is held in trust by the grantee as trustee for the beneficiaries of the project or program under which the property was acquired or improved. 45CFR§75.323. Compliance with the requirements of 45CFRPart1303 (Subpart E) and 45CFRPart75 is mandatory to assure ongoing availability of real property for program use, and protects the grantee from future risk of audit issues, monitoring findings and potential disallowance of previously awarded funds. Grantees considering real property activities covered by the HSPPS, Uniform Guidance and Grants Policy Statement are encouraged to consult their Program Specialist and Grants Specialist early in the project development process to assure compliance with all of the requirements that apply to real property activities funded by OHS.

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[i] The use of grant funds to make payments under a capital lease, as noted in 45CFR§75.465(c)(5) and defined by Generally Accepted Accounting Principles (GAAP) must either be limited to the amount that would be allowed had the non-federal entity purchased the property on the date the lease agreement was executed or, if the grantee will acquire title under capital lease, approved in accordance with 45CFR§1303.44 and 45CFR§1303.45.

[ii] Repair means maintenance that is necessary to keep a Head Start facility in working condition. Repairs do not add significant value to the property or extend its useful life. 45CFR§1305.2.



[iii] Minor renovation means improvements to facilities, which do not meet the definition of major renovation. 45CFR §1305.2.
[iv] The term purchase means to buy an existing facility, including outright purchase, down payment or through payments made in satisfaction of a mortgage or other loan agreement, whether principal, interest or an allocated portion of principal and/or interest. The use of grant funds to make a payment under a capital lease agreement, as defined in the cost principles, is a purchase subject to these provisions. Purchase also refers to an approved use of Head Start funds to continue paying the cost of purchasing facilities or refinance an existing loan or mortgage beginning in 1987. 45CFR§1305.2.
[v] Construction means new buildings, and excludes renovations, alterations, additions or work of any kind to existing buildings. 45CFR§1305.2.
[vi] Major renovation means any individual of collection [sic] renovation that has a cost equal to or exceeding $250,000. It excludes minor renovations and repairs, except when they are included in a purchase application. 45 CFR§1305.2.
[vii] Federal interest is a property right which secures the right of the federal awarding agency to recover the current fair market value of its percentage of participation in the cost of the facility in the event the facility is no longer used for Head Start purposes by the grantee or upon the disposition of the property. When a grantee uses Head Start funds to purchase, construct or renovate a facility, or make mortgage payments, it creates a federal interest. The federal interest includes any portion of the cost of purchase, construction or [major] renovation contributed by or for the entity, or a related donor organization, to satisfy a matching requirement. 45CFR§1305.2.
[viii] Real property means land, including land improvements, buildings, structures and all appurtenances thereto, excluding movable machinery and equipment. 45CFR§1305.2.
[ix] See also 45CFR§75.323.
[x] As defined in Financial Accounting Standards (FAS) No. 13 when the lease results in a transfer or ownership at the end of the lease or contains a bargain-purchase option. Other criteria for a capital lease include where the lease term is at least 75% of the estimated economic life of the property and when the present value of payments under the lease exceeds 90% of the fair market value of the property at its inception.
[xi] For a full discussion of capital leases, operating leases and other lease arrangements, see FAS No. 13: http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220124481&acceptedDisclaimer=true.