

**WITHHOLDING
AND
DISBURSEMENT
OF WITHHELD FUNDS FOR
DB/DBRA COVERED WORKERS**

WITHHOLDING OF FUNDS

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WITHHOLDING REQUEST LETTER (DB/DBRA)

VERIFICATION OF WITHHOLDING LETTER

WITHHOLDING OF FUNDS

- ◇ The labor standards clauses require the proper classification and payment of wages to:
 - ◇ Laborers and mechanics on construction projects subject to the Davis-Bacon and related Acts (DBRA),
- ◇ To protect the rights of covered workers, these Acts and related Department of Labor (DOL) regulations provide for remedies when compliance with the prevailing wage requirements is in question. An important element is the withholding of contract funds sufficient to satisfy alleged wage underpayments pending resolution of a wage dispute. The contracting agency may withhold funds on its own initiative or at the direction of DOL.
 - ◇ The relevant statutory and regulatory provisions are 40 U.S.C. 3142(c)(3), 29 § 5.5(a)(2) and 5.5(b)(3).
- ◇ The withholding of contract funds is a very effective enforcement tool in DB/DBRA/CWHSSA cases.
 - ◇ It assures the availability of monies for the payment of the back wages if a contractor refuses to make restitution when back wages are found due to covered workers.
 - ◇ When federal agencies, states and local communities have benefited from the work performed by the contractor's employees, the employees are required by law to be paid the applicable prevailing wage and overtime compensation.
 - ◇ The prime contractor is responsible for compliance on the contract, will be liable for payment of the back wages not paid by a subcontractor, and may decide to withhold payments from the subcontractor until the back wage issues are resolved.
- ◇ Assuring that the proper wages are received by covered workers on government contracts lies with representatives of the contracting agency and/or DOL.
 - ◇ A contracting officer should withhold funds when he/she believes that a back wage violation exists.
 - ◇ In addition, contracting officers shall withhold funds upon written request from DOL. Contracting officers should respond immediately confirming that the funds have been withheld.

- ◇◇ Additionally, if the request has been made by DOL, it is important for the agency to preserve the withheld funds until notified in writing by DOL regarding final disposition of the withheld funds.

◇ **Davis-Bacon and CWHSSA contract clauses**

- ◇◇ The contract clause language set forth at 29 C.F.R. § 5.5(a)(2) states:

Withholding - The federal agency or the loan or grant recipient shall upon its own action or upon written request of an authorized representative of DOL withhold or cause to be withheld from the contractor under this contract or any other federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay the full amount of wages required by the contract.

[and, further:]

In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, ... all or part of the wages required by the contract, the (Agency) may, after written notices to the contractor, sponsor, applicant or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

- ◇◇ 29 C.F.R. § 5.5(b)(3) is a similar provision concerning the withholding of contract funds in relation to overtime pay obligations and liquidated damages determined to be due because of CWHSSA violations.
- ◇◇ The comparable FAR contract clause language “Withholding of Funds” is at 48 C.F.R. § 52.222-7 and “Contract Work Hours and Safety Standards Act – Overtime Compensation” is at § 52.222-4. (The FAR guidance for applying the DBA/DBRA contract clauses is at 48 C.F.R. § 22.403-1, 22.404-12, and 22.305.)
- ◇◇◇ FAR guidance regarding the “Withholding from or suspension of contract payments” at 48 C.F.R. § 22.406-9(a) states:

(a) *Withholding from contract payments.* If the contracting officer believes a violation exists (see 22.406-8), or upon request of the Department of Labor, the contracting officer shall withhold from payments due the contractor an amount equal to the estimated wage underpayment as well as any estimated liquidated damages due the United States under the Contract Work Hours and Safety Standards Act. (See 22.302.)

◇◇◇ Continuing, the FAR guidance, at 48 C.F.R. § 22.406-9(a)(2), states:

(2) If subsequent investigation confirms violations, the contracting officer shall adjust the withholding as necessary. If the withholding was requested by the Department of Labor, the contracting officer shall not reduce or release the withholding without written approval of the Department of Labor.

◇◇◇ At 48 C.F.R. § 22.406-9(a)(3) the FAR further states that the withheld funds are to be used to satisfy validated wage underpayments (unless the contractor makes restitution) and assessed liquidated damages. (See also 48 C.F.R. § 22.406-9(c), “*Disposition of contract payments withheld or suspended*” and 48 C.F.R. § 406.10 “*Disposition of disputes concerning contract labor standards enforcement*”.)

◇◇◇ Cross-withholding provisions under the Davis-Bacon and related Acts give DOL and contracting agencies some recourse in collecting back wages in situations where the contract on which the violations occurred has been paid off by the contracting agency. Where funds remaining on the contract under which the violations occurred are insufficient to cover the back wages due, the contracting agency can withhold funds from other contracts subject to DBA/DBRA/CWHSSA or any other federal contract held by the same prime contractor. (See 29 C.F.R. § 5.5(a)(2) and 29 C.F.R. § 5.5(b)(3). For FAR guidance see 48 C.F.R. § 22.406-9(a)(1).)

DUE PROCESS

- ◇ To ensure that contractors and subcontractors receive “due process” prior to the withholding of funds at the direction of the WHD), the following steps are included in WHD enforcement procedures.
 - ◇◇ Where a contractor refuses to pay back wages under SCA or DBRA and funds are available for withholding, WHD will generally send a “due process” letter to the prime contractor. This letter will include:
 - ◇◇◇ A statement that the final conference was conducted at which time the contractor was provided an opportunity to discuss the alleged violations; or if a final conference was not held, provide the reason(s) why;
 - ◇◇◇ A brief description of the alleged violations;
 - ◇◇◇ An affirmation that the contractor received a Summary of Unpaid Wages;
 - ◇◇◇ A statement that the matter is being forwarded for a decision to a designated WHD deciding official, who will decide whether withholding action will be taken regarding the back wage findings;
 - ◇◇◇ A statement that the contractor has fifteen (15) days to provide the deciding official with written views on whether the violations occurred;
 - ◇◇◇ A statement that any determination regarding the withholding of contract funds will not result in the distribution of the funds to the underpaid workers until such time as the administrative remedies available to the contractor have been completed.
 - ◇◇ If the deciding official determines that withholding action is warranted, a copy of the WHD withholding request to the contracting agency and a letter indicating the deciding official’s decision on withholding will be sent to the prime contractor.
- ◇ In certain cases, such as missed payrolls, likely bankruptcy filings, or imminent contract close out, it may be necessary to request withholding before the measures described above can be provided. In those cases, the procedures outlined above should be followed after the withholding action; and based on the contractor’s submission, the WHD deciding official may decide to revoke an earlier withholding request.

PRIORITY OF WITHHELD FUNDS

- ◇ DOL's position is that accrued funds withheld for payment of wages may not be used or set aside for other purposes until such time as the prevailing wage issues are resolved. To give contracting agency reprocurement claims priority, for example, would essentially make the employees unfairly pay for the breach of contract between their employer and a federal agency or grant recipient.
- ◇ It is the Department's position that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. (See 29 C.F.R. § 4.187(b).) DOL believes that to hold otherwise would be inequitable and contrary to public policy since the affected employees have already performed the work subject to a contractual obligation to fulfill the labor standards requirements.
- ◇ Employees' wage claims for underpayment have priority over:
 - (1) An Internal Revenue Service levy for unpaid taxes;
 - (2) Reprocurement costs of the contracting agency after a contractor's default or termination for cause;
 - (3) Any assignee of the contractor ... including assignments made under the Assignment of Claims Act;
 - (4) Any claim by a trustee in bankruptcy.

DISPOSITION OF WITHHELD FUNDS

◇ WHD Regional Offices (RO's) are responsible for directing the processing of back wage disbursements. Following the issuance of administrative law judge decisions, including decisions approving settlement agreements, Administrative Review Board decisions, or if a contractor does not request a hearing pursuant to 29 C.F.R. § 5.11(b), the WHD RO requests the contracting agency to transfer the withheld funds.

◇ **Direct Davis-Bacon contracts**

◇◇ In the case of direct federal DBA contracts, since the DBA requires the Comptroller General to disburse back wages, the WHD RO will request the agency to transfer the withheld funds to the General Accountability Office. The GAO administers a Davis-Bacon fund account to pay claims relating to the DBA.

◇◇ The following procedure is to be used for the disposition of withheld funds.

◇◇◇ When transferring funds electronically, the Agency Location Code (ALC) is: 0 5 0 0 0 0 0 1.

◇◇◇ All checks for disbursement under the DBA should be accompanied by a completed Form 1093 and should be made payable to the U.S. General Accountability Office.

On October 1, 2007, GAO implemented a cross-servicing arrangement with the U.S. Department of Transportation (DOT) Enterprise Service Center to perform certain accounting transactions affecting cash deposits, accounts payable and accounts receivables, including the Davis-Bacon Fund. Checks should be mailed to:

Enterprise Service Center
Attn: Linda Zorhorst
FAA/MMAZ, General Accounting
6500 S. MacArthur Boulevard, Room 181
Oklahoma City, Oklahoma 73169

So that the GPO Office of the General Counsel can readily identify and/or properly establish a case file, the **name of the contractor** (the actual contractor found in violation) and the **contract number** should be shown on the bottom of the check. The contract number is the number for which the contract was written and the work was performed rather than the contract number for which funds may be withheld via a cross-withholding action.

◇◇ In situations where the contracting agency has conducted the Davis-Bacon Act investigation, FAR 48 C.F.R. § 22.406.9(c) provides guidance

regarding additional information that is to be reported to the General Accountability Office. The contracting agency should send a copy of the Standard Form 1093, along with any investigative reports required by the Department of Labor to:

U.S. General Accountability Office
Davis-Bacon Group-OGC
Attn: LaBrenda Dean
441 "G" Street, NW, Room 2L13
Washington D.C. 20548

◇ **Contracts subject to Davis-Bacon related Acts or CWHSSA**

- ◇◇ Under the Davis-Bacon “related Acts” (*i.e.*, federal assistance by grants, loans, or loan guarantees rather than a federal DBA contract), the disbursement process is handled by DOL. (This is also true under the Service Contract Act.)

When funds are forwarded to DOL for disbursement, so that the receiving DOL office can readily identify and make the appropriate disbursements to the affected employees, please include **th ame of the contractor**, and the **contract number(s) for the contract(s) on which the work was performed** (rather than the contract number from which the funds may have been withheld via a cross-withholding **e n** action) on the check or in a letter transmitting the check. All enclosed information is forwarded to the disbursing office by the bank.

- ◇◇ In the cases where federally assisted contracts subject to the provisions of Davis-Bacon related Acts have been forwarded to WHD for appropriate legal action, the RO will notify the contracting agency of the final disposition of the investigation. The withheld monies are disbursed by two methods:

- ◇◇◇ Incoming wire deposits will be processed by the Federal Reserve Bank of New York City (TREAS NYC) and must include the following information:

Bank Name: TREAS NYC
ABA Routing Number: 021030004
Agency Location Code: 16010002
Disbursement Office ID: (03, 04, 05, 06, or 09)

- ◇◇◇ Paper check deposits to:

WHD Central Processing
P.O. Box 77752
Washington, D.C. 20013

(Effective October 1, 2007, DOL lockbox deposit processing was replaced by U.S. Treasury “Paper Check Conversion Over the Counter” (PCC OTC).)

◇ **Sample letters for withholding request and verification**

- ◇◇ Below are a sample withholding request letter used by WHD and a sample verification of withholding letter that may be used by agencies to provide WHD confirmation that the funds have been withheld.

WITHHOLDING REQUEST LETTER (DBRA)

Ms. Contracting Officer
U.S. Federal Agency
Anywhere, USA 00000

Dear Ms. Contracting Officer:

Re: Name of prime contractor
Contract number and location
Our file number: 98-000-00000

Our Wage and Hour District Office has conducted an investigation of the above-referenced contractor under the Davis-Bacon and related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA).

The investigation has disclosed monetary violations resulting from failure to pay the required prevailing wage rates. DBRA back wages due have been computed in the amount of \$ ____.

The contractor has not agreed to pay the back wages found due. Therefore, in order to protect the interests of the Federal government and the affected employees, and in accordance with Department of Labor Regulations, 29 C.F.R. § 5.5(a)(2), and as provided for in the Federal Acquisition Regulations at 48 C.F.R. § 52.222-4(c) and 52.222-7, it is requested that the aforementioned sum be withheld from contract payments due the prime contractor.

<1-Optional> If there are insufficient funds to withhold on this contract, cross-withholding of funds from any current Federal contract with the same prime contractor or from any federally-assisted contract with the same prime contractor which is subject to either Davis-Bacon prevailing wage requirements or Contract Work Hours and Safety Standards Act requirements, respectively, is authorized by the FAR (48 C.F.R. § 52.222-7 and/or 52.222-4(c), respectively).

<2-Optional> We request that you advise us immediately if you have any information that the prime contractor has filed bankruptcy proceedings.

Should we succeed in securing direct payments to the employees or should there be any change in the amount noted, we will advise you immediately. Thank you for your continuing cooperation in this matter. If you have any questions, please contact the Wage and Hour Regional Wage Specialist at the above address.

**U.S. DEPARTMENT OF LABOR
DAVIS-BACON RESOURCE BOOK 2010**

*DBA/DBRA/CWHSSA
WITHHOLDING*

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Please notify us in writing of your actions on this request no later than (date) . A withholding verification form is enclosed for your convenience.

Sincerely,

Regional Administrator
Wage and Hour Division

Enclosure

cc: Name of Prime Contractor

VERIFICATION OF WITHHOLDING LETTER

Case Name:

File Number:

VERIFICATION OF WITHHOLDING

This is to verify that \$_____ has been withheld from funds due (name of contractor) to cover wage underpayments under Contract Number _____ as of (enter date) per section 5.5(a)(2) of Regulations, 29 C.F.R. § Part 5.

Contracting Officer

Agency

Telephone Number