USDOL New DBA/DBRA Rulemaking Seminar (9/13/2023)

$217 billion in federal contracts annually covered by DBA/DBRA, affecting 1.2 million construction workers.

USDOL recovered $229 million in Davis-Bacon back wages over the last decade.

The training covered 29 CFR Parts 1, 3, & 5

Part 1.6C – Wage determinations and wage rates can now be updated mid-project, under certain conditions (*e.g.,* if the contract is modified after the bid, if there is an option to extend the contract beyond its original duration, if it is an IDIQ [indefinite delivery, indefinite quantity] contract for maintenance, or if it is an "umbrella contract," etc.). This is a major change from the past, in which the wage rates contained in the specs at the time of the bid were locked in for the duration of the project.

The survey will now consider "functionally equivalent" rates when determining whether a particular wage rate prevails. This includes things like a night shift premium, zone pay, or escalator clauses. In other words, it means WHD won't be strictly limited to calculating wage rates that match to the penny.

The survey process will be changed to eliminate the ban on overlapping data from metro and rural counties.

Part 1.3G-J – WHD will now publish frequently conformed rates so that project owners don't have to continually seek new conformances for empty rates. Frequently conformed rates will have a special identifier on the wage determination.

Part 1.3H-I – In order to allow WHD to use the results from state surveys in lieu of federal surveys, the state survey process does not have to match the federal survey process exactly, but will have to be substantially similar under the "totality of circumstances." Labor codes will also be classified in a "recognized manner" within the construction industry. The seminar did not discuss how WHD will rationalize discrepancies in the labor codes used by a state survey versus a federal survey.

Non-CBA rates can now be updated between federal surveys, as long it has been 3+ years since they were last updated, and they cannot be updated again for another 3+ years. The updated rates will be based on BLS Employment Cost Index data.

Secondary sites of work can now be covered by Davis-Bacon even if they were not created exclusively for the project. In other words, existing commercial facilities can be considered secondary sites of work if they are dedicated nearly exclusively to serving a DBA/DBRA project for a specific time frame. There was a follow-up question about whether off-site fabrication could be considered a secondary site, and WHD responded that it may be considered a

"significant portion" of the project if the off-site facility is used almost exclusively for the project. See attached screenshots of written questions and answers about this issue.

For drivers, the method for determining whether a driver's time spent on a job site was *de minimis* and not subject to DBA/DBRA now looks at the aggregate amount of time they spent on the job site each day, rather than whether each individual instance was small. The example WHD gave is for drivers who make multiple small trips back-and-forth in a single day. The new rule will look at the total time the driver spends on site to determine whether it was *de minimis* and exempt from DBA/DBRA. Driving activities such as transporting workers to other areas of the site or moving materials from a secondary site may count towards whether a driver's time is considered *de minimis*.

For material suppliers, the new rule gets rid of the 20% threshold for construction work performed by their employees. If their employees perform *any* construction work, they are covered under DBA/DBRA.

For some projects, even a portion of the work can be considered a public building/public work. The example WHD gave is for a commercial office building in which the federal government will lease only some of the office space, the construction on that portion of the work is covered. The federal government does not have to own or occupy the entire facility for it to be covered.

Part 5.2, 5.5, 5.9 — There is a new definition of "prime contractor," which includes anyone who enters into a contract with the federal government, *as well as* their controlling shareholders. Essentially this is aimed a joint ventures. The new rule also allows cross-withholding on other prime contracts for *any* prime contractor. This is aimed at the increasing number of joint ventures and legal entities created specifically for a single project, which are then dissolved, taking any liabilities for labor violations with them. Now, WHD can withhold payment on any other contracts that the prime contractors or their shareholders have entered into with the federal government.

Demolition and removal have been added to the definition of construction, alterations, or repairs.

Green energy projects (*e.g.,* car chargers, solar panels, etc.) are now considered construction, alterations, or repairs.

Contract clauses and wage determinations will now apply "by operation of law," meaning they will apply even if the contracting agency fails to include them in bid documents or specifications. Prime contractors will also be responsible for "flowing down" wage determinations and PW clauses.

The new rule includes reciprocity of apprenticeship ratios and wage rates for the locality where the work is being performed. This makes DBA/DBRA more consistent with USDOL's Employment & Training Administration (ETA) rules.

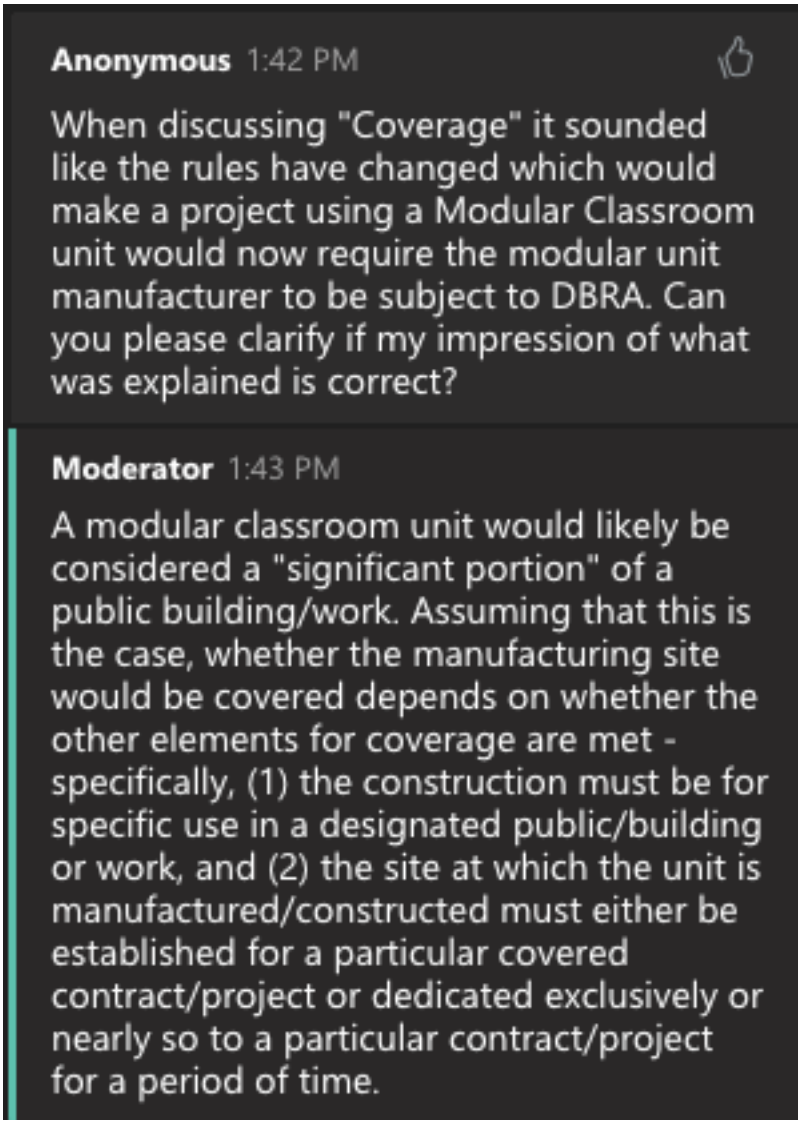
Contractors cannot take credit for its own administrative costs related to fringe benefits or taxes, nor can they pass on the cost of administration by third-party vendors.

Anti-retaliation provisions are now explicitly included.

Debarment rules are now harmonized. It will always be 3 years (previous rules allowed discretion on the duration), with no option for early release.

The Inflation Reduction Act is *not* considered a DBRA.

Contracting agencies can now request multi-county wage determinations for large projects.



Anonymous 1:27 PM

If a manufacturer is building a premanufactured concrete building that would be built and assembled off-site in a suppliers factory (includes interior trim, electrical panels and raceway, hvac units), and shipped to site ready to set on foundation by our on-site crews. The suppliers factory does this same scope of work for many contractors across the United States and is not set up solely for the project.

Moderator 1:28 PM

Under the rule, these would likely constitute "significant portions" of a public work. As a result, the manufacturing site could be considered a secondary construction site, but only if (1) the construction at issue is for specific use in a public building or work and does not simply reflect the manufacture or construction of a product made available to the general public, and (2) the manufacturing 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.