CHAPTER I:
LABOR COMPLIANCE

I.1 GLOSSARY

APPRENTICES

Apprentices may be paid less than the pre-determined rate for the particular job classification that they are employed under if: 1) those apprentices are individually registered in an apprenticeship program that is registered with the U. S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or 2) if a person is employed in their first 90 days of probationary employment as an apprentice who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency. The allowable ratio of apprentices to journeymen in any classification shall not be greater than the ratio permitted to the contractor for the entire work force under the registered program. (Usually this is a 3:1 apprentice to journeyman ratio.) The ratio can depend on the contract and is determined on a daily basis (not weekly). Documentation must be provided to support the apprentice status such as documentation from the registered apprenticeship program. This documentation must be on file at the time of monitoring by TNECD. *See, 29 C.F.R. § 5.5(a)(4)(i) for additional guidance).*

BID CONTRACT DOCUMENT

TNECD will only accept the Bid Document contained in our training manual for submission with Plans and Specifications to our office. When other agencies' funds are included, the other agency forms must be completed and submitted along with TNECD's. Wage rates must be included in the document upon submission. Only a complete set of Plans and Specifications will be accepted for review; this includes the Status of Land Acquisition form and, where applicable, the Certification of Compliance with Minimum Standards for Accessibility by the Physically Handicapped forms.

CONFORMANCE

This is the procedure for establishing a Davis-Bacon enforceable wage and benefit rate for missing job classifications. (Contractors are responsible for determining the appropriate crafts necessary to perform the contract work. If a classification considered necessary for performance of the work is missing from the WD, the contractor must initiate a request for approval for a proposed wage and benefit rate. See, *29 C.F.R. § 5.5(a)(1)(ii)* sets the criteria that must be met to obtain a rate for an unlisted classification.)

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSS)

All laborers and mechanics that work over forty hours per week are to be paid one and one-half times their basic rate of pay. Contractors in violation of this act will be liable to the United States for a penalty of $27.00 per day per employee as well as to any affected employee for unpaid wages. *See, 24 C.F.R. § 5.8.*

COPELAND ANTI-KICKBACK ACT

The Copeland Act (Anti-Kickback Act) provides that no deduction or rebate on any account will be taken from an employee's pay, except deductions permitted by law, unless this deduction is authorized in writing by the employee. *See, 18 U.S.C. § 874.*

DAVIS-BACON ACT

Any contract over $2,000 that uses CDBG dollars for construction, alteration and/or repair of public buildings or public works must pay the wage rates, fringe benefits and payments without deductions or rebates as determined by the Davis-Bacon Act to all laborers and mechanics working on the project. Davis-Bacon applies to all subcontracts or lower-tier contracts under a prime contract that exceeds $2,000 regardless of the amount of the subcontract or lower-tier contract. *See, 40 U.S.C. § 3142.*

NOTE*: This Act does not apply to the construction or rehabilitation of residential projects of fewer than 8 units or to force account work.*

DAVIS-BACON WAGE CATEGORY

Davis-Bacon wage rates are divided into five categories: Building, Heavy, Residential, Construction and Highway. According to the Department of Labor, the Building category applies to the construction of sheltered enclosures, the installation of utilities and the installation of equipment associated with that building. The Highway category applies to the construction or alteration of roads, highways, etc. not incidental to building or heavy construction. The Heavy Construction category covers projects that are not properly classified as one of the other categories. Residential Construction applies to the construction, alteration, or repair of single- family homes, townhomes, or apartment buildings of no more than four stories in height and only if the property contains no less than 8 units (*See* https://www.hudexchange.info/resources/documents/Davis-BaconandHOME_TrainingManual.pdf for additional guidance and reference).

EMPLOYEE INTERVIEWS

Employee interviews are to be conducted with sufficient frequency to establish the degree of accuracy of the records. Additional information on employee interview processes is included herein.

FORCE ACCOUNT WORK

Force Account work is the construction, rehabilitation, repair or demolition that is performed by municipal employees.

FRINGE BENEFITS

Fringe benefits are the rate of costs to the contractor or subcontractor for the provision of benefits to laborers and mechanics for:

1. Medical or hospital care;
2. Pensions on retirement or death;
3. Life insurance, disability and sickness insurance, or accident insurance;
4. Vacation and holiday pay;
5. Defraying costs of apprenticeship or other similar programs; and
6. Other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State or local law to provide any such benefits.

Fringe benefits can be paid into a bona fide fringe benefits plan or paid as cash to the employees. *See, 29 C.F.R. § 5.29.*

HELPERS

This class of workers who can no longer be used on any CDBG funded project. They may be employed if the duties are clearly defined and distinct from other classifications on the wage determination and are part of an established prevailing practice in the area but are not employed in an informal training program. Additionally, only if the above conditions are met and no wage determinations class performs the work (such as a recorder or secretary), may they be employed.

LABORERS AND MECHANICS

Any employees working on a CDBG funded project.

OVERTIME VIOLATIONS AND LIQUIDATED DAMAGES

The prime contractor shall be liable to all employees for any unpaid wages. The prime contractor shall also be liable to the United States government for liquidated damages at the rate of $25.00 per day for every employee that did not receive time and one-half as necessary under the Contract Work Hours and Safety Standards Act (CWHSSA). Liquidated damages may also be assessed a contractor whose construction time goes past the stated time limit for construction of the project, as stated in the project specifications form (*See, Information for Bidders, Item 9.)*

PAYROLL

Both prime contractors and subcontractors are required to submit payrolls to the grant recipient on a weekly basis. Grant recipients are to promptly review these payrolls against the Wage Rate Determination issued for the project. The grantee should check for proper payment of each classification, overtime payment (if applicable), fringe benefit payment, etc. Any discrepancies or questionable items should be recorded for follow-up. If there are no discrepancies, write "none" in the space provided for remarks. If payrolls are not certified by the owner or an officer of the firm, a letter authorizing the designated person to supervise payment must be submitted with the first payroll. Checking the first payrolls as soon as they are submitted and catching any mistakes can help the contractor avoid continuing to make mistakes throughout the project and having to pay significant amounts in restitution to employees. This also makes for less work for the administrator and TNECD.

PRIME CONTRACTOR

This is the entity to whom the project was awarded as a result of bidding and/or other means by the grant recipient. The prime contractor is responsible for all acts and omissions of his subcontractors and lower-tier contractors. In addition, the prime contractor is responsible for ensuring that the Federal Labor Standards Provisions and the applicable wage decision are included in all subcontracts. Subcontractors are responsible for ensuring that Federal Labor Standards Provisions and the applicable wage decision are inserted in all lower tier contracts.

SITE OF WORK

The site of work includes the physical location of construction called for in the contract, any other site where a significant portion of the building or work is constructed (provided that such a site is established specifically for the contract), and job headquarters, tool yards, batch plants, borrow pits etc. provided they are located adjacent or virtually adjacent to the “site of work” and are dedicated exclusively or nearly so to the performance of the contract or project, unless otherwise excepted.

SUBCONTRACTOR

Subcontractors are contractors hired by and work directly for the prime contractor. The prime contractor is responsible for all subcontractors adhering to CDBG regulations.

TRAINEES

Trainees may be paid less than the pre-determined rate for the particular job classification they are employed under, if the trainee is individually registered in a program which has received prior approval. Such approval would be evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not exceed the percentage allowed by the Employment and Training Administration. *See, 29 C.F.R. § 5.2 for definition*.

WAGE RATE DETERMINATION

Wage decisions are published for specific characters of work by geographic location, usually a county or group of counties. General wage rate determinations are available on-line at https://beta.sam.gov/.

WORKING FOREMAN
A working foreman is one who devotes more than twenty (20) percent of their time during a work week to mechanic or laborer duties, and who must be paid no less than the applicable wage rate for those hours beyond twenty (20) percent worked. The payroll should contain the normally required information of the person, the trade they are performing, the hours worked, hourly rate of pay, etc. *See, 29 C.F.R. § 5.2*.

I.2 LABOR STANDARDS PREFACE

Upon receipt of the Final Notice of Release of Contract Conditions (FNORCC), (release of funds has occurred), the grant recipient may proceed with the steps necessary for compliance with Davis-Bacon labor standards regulations.

This chapter is broken down into five sections which outline the activities that must be undertaken in order to comply with these regulations. The sections are set up to be utilized as checklists enabling the grant administrator to easily ascertain which activities have been completed and which are left to complete.

Two files must be kept. Specifically, a labor standards compliance file and a construction contract compliance file. Checklists of items necessary to complete these files are found in the exhibit section.

Any need for additional wage rate classifications will only occur after the grant award.

I.3 PRE-CONSTRUCTION DAVIS BACON ACTIVITIES

I.3.a Pre-Construction Davis Bacon Considerations

Once the contract has been awarded, there are several activities to be performed before construction can begin. (*See also Chapter G: Bidding and Procurement and Chapter H: Pre-Construction and Construction Activities*).

A pre-construction conference should be conducted with the prime contractor, all available subcontractors, and lower-tier contractors in attendance. In addition, the individual responsible for preparing the payrolls should be encouraged to attend. Close attention should be paid to issues and questions involving labor and payrolls. Keep an accurate record of all items discussed at the meeting.

Cover all labor and payroll issues as shown:

1. A project wage rate sheet (Exhibit I-1) should be completed for all contractors, prime and sub, summarizing the wages for each contractor's employee working on the project. This sheet should be updated periodically as new employees work on the project.

2. Authorization to Make Other Deductions should be completed as signed by the employee acknowledging permissible deductions from wages (Exhibit I-2).

3. Indicate that a copy of the wage rate decision and appropriate labor and equal opportunity posters (Exhibit I-4) must be posted on the job site. All must be accessible and visible to the workers.

4. Identify classifications that may be needed an are not included in the wage decision. If an additional classification is needed, the grantee shall complete Report of Additional Classification and Rate (HUD-4230A) (Exhibit I-5) and submit to TNECD with justification for the requested rate.

5. Explain that apprentice or trainee rates cannot be paid unless the apprentice or training program is certified by DOL's Bureau of Apprenticeship and Training. The telephone number for the Bureau's Nashville Office is (615) 781-5318. If apprentices or trainees are to be used, the contractor must provide the grantee with a copy of the DOL certification of their program. Helpers are not permitted to be used on any CDBG funded project.

NOTE*: Overtime does not require the employer to pay time and a half on the fringe benefit portion of the wage. See, 40 U.S.C. § 3701 et. Seq. and is only applicable to contracts larger than $100,000. See, 40 U.S.C. §329 (c).*

A waiver of the penalty (liquidated damages) in amounts less than $500 may be granted by the Regional Labor Relations Officer. Waivers of the penalty in amounts of $500 or more may be granted by the Headquarters Office of Labor Relations or the U.S. Department of Labor. Waivers can be recommended only if the violations were inadvertent, notwithstanding the exercise of due care. The prime contractor must also demonstrate the exercise of due care in preventing violations by subcontractors.

1. Payroll deductions cannot be made if they are not specifically provided for by law, unless authorization is obtained from the worker. (*For example, an unidentified payroll deduction is a method used by unethical contractors to get their workers to "kick back" a portion of their pay. This is a particularly common problem in times of high unemployment and in areas of minority concentrations. Unspecified payroll deductions should be treated as a serious discrepancy and should be resolved prior to contractor payments*.)

2. Explain debarment proceedings relative to Labor Standards and Equal Opportunity violations and requirements.

3. Correct any deficiencies involving incomplete Equal Opportunity forms, subcontractor certifications, eligibility verification, so that everything is in order, before construction begins.

4. Explain compliance review requirements such as grantee's weekly review of the payrolls and employee interviews as well as the potential for TNECD to audit payrolls, timesheets, and check stubs.

I.4 DAVIS BACON CONSIDERATIONS DURING CONSTRUCTION

After construction has been initiated, several important tasks must be undertaken in order to comply with Davis Bacon labor standards regulations. These activities include: payrolls, employee interviews, and reports. In addition to Davis-Bacon applying to all construction contracts greater than $2,000, Davis- Bacon also applies only to laborers and mechanics employed "directly at the site of the work."

I.3.a Davis Bacon Exemptions

Bona Fide Business Owners (Exempt Executive): Pursuant to 29 C.F.R. § 541.101, a bona fide business owner who owns at least a bona fide 20-percent equity interest in the enterprise in which he or she is employed, regardless of type of entity, and who is actively engaged in its management as their primary duty, is exempt from the wage requirements of Davis Bacon. The business owner must also direct the work of two or more other employees in the business. In order to establish this exemption, the business owner must:

1. Submit weekly certified payrolls with the hours worked but may omit their own wage rate only.
2. The owner must provide the grantee (which is subject to monitoring by TNECD) with documentation which satisfies the above requirements. Documentation may include, but is not limited to: business incorporation documents, partnership agreements, tax statements, business licenses, notarized statements of interest, human resources statements attesting to management roles, any other documentation which conclusively establishes the employment relationship and economic realities.

NOTE: *If the business owner engages in activities which meet the definition of laborer or mechanic however, this exemption no longer applies (See 29 C.F.R. § 5.2).*

Sole Proprietors: If the business owner is a sole proprietor, the grant recipient must determine if that person is a true bona fide sole proprietor prior to contracting by obtaining the Federal Tax ID number and copy of the business license. A bona fide sole proprietor is exempt from Davis-Bacon entirely and is not required to submit a certified payroll for weeks in which he/she does not employ others in the performance of work on the contract/project. Any other employees brought on by the sole proprietor to perform labor or mechanic work will be subject to Davis-Bacon.

Independent Contractors: All laborers and mechanics classified as independent contractors or "1099 workers" are generally covered by Davis-Bacon and must be paid Davis-Bacon wages and listed on the contractor's certified payroll record.

Other Commonly Exempt Professions: Lawyers**;** Teachers; Accountants**;** Pharmacists**;** Engineers**;** Actuaries**;** Chefs**;** Certified Athletic Trainers**;** License funeral directors or embalmers.

I.3.b Payrolls for Non-Exempt Employees (Davis-Bacon Applies)

The proper procedures for submitting and checking payrolls must be closely followed. The failure of contractors to pay wages properly will result in adjustments to an employee's salary and may also result in financial penalties. Therefore, it is important that any discrepancies in payrolls be detected and corrected early. The following should be adhered to closely, with any questions directed to TNECD prior to continuing the project.

- Payrolls and written Statements of Compliance must be submitted weekly to the grant recipient by all contractors. The written statements of compliance must be signed by the owner, and officer, or a designated employee of the firm. If a designated employee is to certify the payrolls, authorization for this individual to supervise payment must be submitted with the first payroll.

- **Check the payrolls for accuracy** as soon as they are submitted (especially with the first few payrolls) on each job classification against the Davis-Bacon wage rates. The prime contractor shall be liable to all employees for any unpaid wages. The individual reviewing the payrolls shall ensure the following:
  1. The dates and days of the week have been entered on the payroll.
  2. Payrolls are sequentially numbered.
  3. Payroll number one (1) carries the contractor's IRS Employer.
  4. Identification Number in the upper left corner of the front page.
  5. Each employee's name, complete address, and last four digits of Social Security number are shown on the first payroll on which that employee appears.

6. Worker's classifications are listed on the prevailing wage determination. No substitutions are allowed. Wage classifications must be shown on every payroll. Since workers may perform more than on classification, the contractor must clarify what wages are being paid for each classification.
7. Wage rates paid to workers are equal to or exceed those rates listed on the wage decision for the appropriate classification.
8. For any apprentices or trainees listed, evidence of proper registration must accompany the first payroll upon which they appear.
9. The disposition of all required fringe benefits has been satisfactorily explained on the reverse of the payroll form.
10. Deductions taken are those permitted by law or are authorized in writing by the employee. One blanket statement is sufficient for deductions made on a regular basis.

A sample payroll can be found here: https://www.dol.gov/whd/forms/wh347.pdf .

SCENARIO I:

1. TNECD drafts a letter to the contractor to assess liquidated damages (Notice of Assessment). Any appeals will be sent to HUD-Labor Relations through TNECD. The contractor has 60 days to file a request for waiver or reduction.
2. A copy of the Notice of Assessment will be sent with a cover letter to HUD-Labor Relations containing this basic information:
   a. Name and address(es) of involved contractor (*and subcontractor, if applicable*);
   b. Company representative(s) present at the pre-construction conference;
   c. Whether Labor Standards, including overtime provisions included in the contract/subcontract;
   d. Whether an attempt was made by the contractor/subcontractor to conceal hours or otherwise circumvent law, and contractor's willingness to make restitution (along with promptness).

SCENARIO II:

1. Refer to No. 1 in Scenario I above
2. Refer to No. 2 in Scenario II above.
3. The contractor appeals and requests a waiver through TNECD;
4. TNECD transfers the appeal to HUD-Labor Relations. Deposit agreements will no longer be used for liquidated damage unless TNECD chooses to close the project prior to resolution of the appeal by HUD-Labor Relations.

I.3.c Equipment Installation and Davis Bacon

Installation costs exceeding thirteen (13) percent of the total equipment cost, makes the project subject to Davis-Bacon. If the cost does not exceed thirteen (13) percent and does not require demolition or alterations to the property, then it is not subject to Davis-Bacon.

I.3.d Employee Interviews

The person performing the employee interviews must be knowledgeable of construction trade practices and should understand that labor standards enforcement is an important contract requirement. Interviews should be conducted by the grantee or administrator regularly. No one from the employee's company should be present for the interview. A translator can be present if needed; the employee interview forms are also available in Spanish. As has been previously mentioned, the failure of contractors to comply with labor regulations may result in adjustments to an employee's salary and may also result in financial penalties; therefore, in order to ensure that the employee interviews are conducted properly, it is imperative that the following conditions are met:

1. Check the construction site for the appropriate job safety, equal opportunity and wage rate posters.

2. Conduct employee interviews with sufficient frequency to establish the degree of accuracy of records. These interviews should be representative of all classifications of workers on the project. TNECD generally recommends monthly interviews. However, interviews should be completed more frequently if issues arise.

3. The interview should take place on the job site. In the event that an interview cannot be conducted properly and privately on the job site, the interview can be undertaken at the employee's home, the agency's office, by mail or telephone.

4. Observe the duties of the worker before the interview is initiated to make certain that the employee's job duties correspond to their job classification.

5. Begin the interview by identifying yourself, clearly stating the purpose of the interview (to ensure the worker is being paid fairly), advising the worker that the information given is confidential, and their identity will be disclosed to the employer only with the employee's written permission.

6. Utilize the "Record of Employee Interview" (Exhibit I-3) in recording the employee interview. The interviewer should record what the employee says and pay particular attention to the employee's name, phone number, and permanent mailing address.
   a. Verify the identification of the employee. One way to do this is to check the employee's driver's license (Note: It is not required for the employee to produce a driver's license or other identification, but it may be requested). The last date and the number of hours the individual worked on that particular project.

   b. Be clear to the employee that these questions relate to work performed on this project only.

   c. This information will be used to check against the certified weekly payrolls.

7. Record all wage classifications that the employee worked under on that day. The hourly rate of pay and pay stub. The interviewer should ensure the worker is quoting their gross hourly rate, not the "net" hourly rate. If the worker has a pay stub on hand, request to view it.

8. The worker must be paid at least the minimum required by the Davis-Bacon wage decision. If it appears that the worker is underpaid, the interview should question the worker and ask to see any records of payment. A follow-up interview should be scheduled to re-interview the employee.

9. Record all rates of pay if the employee is working under more than one wage classification.

10. It is important that the worker's description of their classification(s) be entered on the form.

11. Duties and tools used.

The above are some of the most important items on the interview form. The worker must be observed before the interview takes place and the actual tools being used for the work should be recorded on the interview form. Observed data is compared with the worker's statements and with payroll records to see if discrepancies exist. If there are discrepancies, further investigation and explanation are necessary.

Ensure the following are included on the interview form:

- Employee signature (to have the employee confirm their responses).
- Any comments by the reviewer should be recorded in the "Remarks" section. This section is also where the desktop review comments should be added. The person completing the desk to preview will examine payrolls from the last day the employee worked and compare job classifications, hours and pay reported in the interview, as compared to the payrolls. If there are no problems or discrepancies with the payroll review, write "review complete" in the "Remarks" section.
- Notate any discrepancies or restitution owed, as well as any remedial actions taken and report those to TNECD.
- The interview form should reflect the exact date on which the employee interview occurred. This will ensure accuracy when comparing the date of the interview against the relevant payroll.

I.3.e Common Errors to Avoid with Davis Bacon:

- Assuming all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is "suffered or permitted" to work
- Limiting the number of hours employees are allowed to record
- Failing to include all pay in calculating regular rate for overtime
- Failing to add all hours worked in separate establishments for the same employee when calculating overtime due
- Making improper deductions from wages that cut into the required minimum wage or overtime
- (i.e. shortages, drive-offs, damage, tools, uniforms)
- Treating an employee as an independent contractor
- Failing to account for different wage classifications even for fractions of hours on the payrolls
- Confusing Federal and State law

I.4 DAVIS BACON CONSTRUCTION COMPLETION REQUIREMENTS

Inspection and acceptance of the work closeout of construction and making the final payment involve the completion of the following tasks:

- A certification of completion of work and a request for final payment should be submitted by the contractor to the grant recipient's engineer/architect.
- Publication of Notice of Contract Completion.
- A final inspection should be arranged.
- A final inspection report should be submitted by the architect/engineer to the grant recipient.
- All labor compliance activities must be completed, including:
  - Viewing all weekly payrolls and statement s of compliance;
  - Resolving all interview discrepancies;
  - Satisfying all equal opportunity requirements;
  - Receiving all contractor/subcontractor certifications;
  - Resolving all monitoring findings;
  - Resolving all claims and disputes involving the contractor;
  - Completing all files and filing as-built plans.
  - Submit a final Wage compliance Certification to TNECD (at closeout of contract)

I.5 LABOR COMPLIANCE EXHIBIT LIST

I-1 PROJECT WAGE RATE SHEET
I-2 AUTHORIZATION TO MAKE OTHER DEDUCTIONS
I-3 RECORD OF EMPLOYEE INTERVIEW (HUD-11)
I-4 LABOR POSTERS
I-5 REPORT OF ADDITIONAL CLASSIFICATION AND RATE (HUD-4230A)