U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 29, 2009

MEMORANDUM NO. 207

TO: ALL CONTRACT AGENCIES OF THE FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: John L. McKeon
Deputy Administrator for Enforcement

SUBJECT: Applicability of Davis-Bacon labor standards to Federal and federally-assisted construction work funded in whole or in part under provisions of the American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (ARRA) was signed by President Obama on February 17, 2009. Pub. L. No. 111-5, 123 Stat. 115. Division A of ARRA appropriates substantial funding for construction, alteration and repair of Federal buildings and for infrastructure projects, such as roads, bridges, public transit, water systems, and housing. In accordance with existing Davis-Bacon Act (DBA) requirements, Federal agencies directly contracting for construction work using ARRA funds must ensure that bid solicitations and resulting covered contracts contain Davis-Bacon labor standards and wage determinations in accordance with the Federal Acquisition Regulations (FAR). *See* FAR 48 CFR Subpart 22.4. In addition, Federal agencies must ensure that recipients of assistance under ARRA require contractors and subcontractors to pay laborers and mechanics employed by contractors on ARRA-assisted construction projects at least the prevailing wages as determined under the DBA. This memorandum provides a summary of the prevailing wage labor standards applicable to construction projects funded under Division A of ARRA.[1] This memorandum also highlights the Federal agencies' responsibilities in implementing the Davis-Bacon labor standards on ARRA-funded projects and provides links to on-line websites where additional information and guidance about the DBA requirements is available.

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[1] Additional Davis-Bacon wage requirements applicable to projects financed with certain tax-favored bonds contained in section 1601 of Division B of ARRA, Pub. L. No. 111-5, 123 Stat. 362, will be the subject of future guidance.

Davis-Bacon Act—General

The DBA is codified in subchapter IV of chapter 31 of title 40 of the United States Code. The DBA requires that each contract over $2,000, "to which the Federal Government or the District of Columbia is a party, for construction, alteration or repair, including painting and decorating, of public buildings and public works . . . shall contain a provision stating the minimum wages to be paid" to "all mechanics and laborers employed directly upon the site of the work." 40 U.S.C. 3142(a), (c). The minimum wages to be paid are those that the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the locality where the work is to be performed. *Id.* at 3142(b). In addition to the DBA itself, Congress has added DBA prevailing wage provisions to numerous laws – so-called "related Acts" – under which Federal agencies assist construction projects through grants, loans, guarantees, insurance and other methods.

Under Reorganization Plan Number 14 of 1950[2] and 40 U.S.C. 3145, Federal contracting or assistance-administering agencies have the primary responsibility for the enforcement of Davis-Bacon and related Acts to ensure that laborers and mechanics are paid at least the prevailing wage rates required by covered contracts. Also, under the Reorganization Plan, in order to ensure consistent and effective enforcement of worker protections, the Secretary of Labor has coordination and oversight responsibilities, including the authority to establish regulations and investigate labor standards compliance as warranted.

ARRA Davis-Bacon Requirements

Section 1606 of ARRA[3] plainly indicates that the Davis-Bacon prevailing wage requirement broadly applies to ARRA-appropriated construction projects:

> Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267; 5 U.S.C. App.) and section 3145 of title 40, United States Code.

The wording reinforces DBA coverage of construction contracts "funded directly" by Federal agencies in which they are parties to the contract. It also extends the prevailing wage requirements to projects "assisted in whole or in part by and through the Federal Government pursuant to this Act" thus encompassing any assistance provided for ARRA

[2] Available at http://www.dol.gov/esa/whd/regs/statutes/plan1950.htm.

[3] *See* Sec. 1606, Division A, Pub. L. No. 111-5, 123 Stat. 303.

projects through grants, loans, guarantees, and insurance. The words "this Act" in section 1606 refers to all of the funding in the "appropriations provisions" in Division A of the Act.[4]

With respect to federally assisted projects funded by appropriations under Division A of ARRA, the introductory language of section 1606 "[n]otwithstanding any other provision of law" explicitly overrides any limitation to Davis-Bacon coverage that may be contained in other Davis-Bacon related Acts.[5] Consequently, if a construction project is funded under multiple statutes, including one with a pre-existing Davis-Bacon related Act provision, as well as ARRA, then the ARRA prevailing wage requirement applies if any such ARRA assistance is provided for the project.[6]

The phrase "in a manner consistent with other provisions in this Act" in section 1606 instructs that other specific provisions in Division A of ARRA may further define application of the Davis-Bacon wage requirement. Two provisions explicitly exempt certain tribal contracts from section 1606. One provision specifies that "section 1606 of this Act shall not apply to tribal contracts entered into by the Bureau of Indian Affairs" with the appropriations provided under ARRA for repair and restoration of roads; school improvements, repairs and replacement construction; and detention center maintenance and repairs.[7] A second provision specifies that "section 1606 of this Act shall not apply to tribal contracts entered into by the [HHS Indian Health] Service" with the ARRA appropriation for Indian health facilities construction projects.[8] However, although ARRA does not apply Davis-Bacon prevailing wage requirements to these tribal contracts, if such contracts receive funding or assistance under another Davis-Bacon related Act that requires application of Davis-Bacon prevailing wage requirements, then the terms of the other Davis-Bacon related Act would continue to apply.

The ARRA Department of Housing and Urban Development (HUD) appropriations provision under the heading "Assisted Housing Stability and Energy and Green Retrofit Investments" specifically defines the scope of application of the DBA prevailing wage with regard to projects funded under this heading.[9] Funding under this heading provides separately for payments to owners of projects receiving project-based rental assistance and for grants or loans for energy retrofit and green investments in certain assisted housing. The first proviso of the paragraph, however, specifies "[t]hat projects funded

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[4] Sec. 4, Pub. L. No. 111-5, 123 Stat. 116 ("Except as expressly provided otherwise, any reference to 'this Act' . . . shall be treated as referring only to the provisions of that division.").

[5] *Accord* H.R. Conf. Rep. No. 111-016, 111th Cong., 1st Sess. 512 (Feb. 12, 2009) ("Section 1606 provides for specific wage rate requirements.")

[6] *See*, Sec. 15b00(b), Chap. 15, Field Operations Handbook (FOH) ("In situations where a project is funded under a number of Federal statutes, [the Davis-Bacon related Act] applies to the project if any one of the statutes authorizing a portion of the financial assistance requires payment of D-B wages.")

[7] "Construction," Bureau of Indian Affairs, Title VII, Div. A, Pub. L. No. 111-5, 123 Stat. 168.

[8] "Indian Health Facilities," Indian Health Service, Title VII, Div. A, Pub. L. No. 111-5, 123 Stat. 171.

[9] "Assisted Housing Stability and Energy and Green Retrofit Investments," Housing Programs, Title XII, Div. A, Pub. L. No. 111-5, 123 Stat. 222.

with grants or loans provided under this heading must comply with the requirements of [the DBA.]." Accordingly, the Davis-Bacon requirements under ARRA would not apply to the rental assistance payments.[10]

Implementing ARRA Davis-Bacon Wage Requirements

Pursuant to Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. 3145, this Department has issued regulations at 29 CFR Parts 1, 3 and 5 to implement the Davis-Bacon and related Acts.[11] Reorganization Plan No. 14 authorizes the Secretary of Labor to "prescribe appropriate standards, regulations, and procedures" in order to "assure consistent and effective enforcement" of the labor standards in the DBA and related Acts. Under this authority, the Department has applied standards for prevailing wage coverage to projects subject to related Acts in the same manner as applied to projects subject to the DBA absent clear congressional intent in a particular related Act that a different coverage standard should apply. Accordingly, absent clear language to the contrary in ARRA, prevailing wage coverage under ARRA-assisted projects must be determined in the same manner as under the DBA and ARRA-assisted projects must follow the requirements in the Department's regulations at 29 CFR Part 1, 3 and 5.

Regulations in 29 CFR 5.5 instruct agencies concerning application of the standard Davis-Bacon contract clauses set forth in that section. Federal contracting/assisting agencies must include the standard Davis-Bacon contract clauses found in 29 CFR 5.5(a) in bid solicitations and resultant covered construction contracts that are in excess of $2,000 for construction, alteration or repair (including painting and decorating), regardless of the amount of ARRA funding or assistance.[12] Regulatory definitions of terms used in the administration of the Davis-Bacon and related Acts are in 29 CFR 5.2.

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[10] Other ARRA provisions reiterate the application of the DBA prevailing wage requirements. *See* Sec. 406, Title IV, Div. A, Pub. L. No. 111-5, 123 Stat. 145 (each recipient of guarantees under ARRA for construction projects involving renewable energy systems, electric power transmission systems and leading edge biofuel projects must pay laborers and mechanics employed in the performance of the projects not less than the DBA prevailing wage rates); "Supplemental Discretionary Grants for a National Surface Transportation" and "Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service," Title XII, Div. A, Pub. L. No. 111-5, 123 Stat. 204, 208 (Projects conducted using funding provided under these headings "must comply with the requirements of subchapter IV of chapter 31 of title 40, United States Code.").

[11] Regulations that govern the administration and enforcement of the Davis-Bacon and related Acts and other laws administered by the Wage and Hour Division of the Employment Standards Administration, Department of Labor are in Title 29 of the Code of Federal Regulations (CFR). The regulations in 29 CFR Parts 1, 3 and 5 apply to the numerous related Acts cross-referenced in the regulations and "such additional statutes," like ARRA, "as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon the Secretary of Labor under the Reorganization Plan No. 14 of 1950[.]"29 CFR 5.1(a). *See also* 40 U.S.C. 3145; 29 CFR 1.1(b), 3.1.

[12] The $2,000 threshold for Davis-Bacon and related Act coverage pertains to the amount of the prime construction contract, not to the amount of individual subcontracts. If the prime construction contract exceeds $2,000, all construction work on the project is covered and a standard Davis-Bacon contract clause requires that the Davis-Bacon labor standards be applied to all subcontractors. 29 CFR 5.5(a)(6), Sec. 15b00(e), Chap. 15, FOH.

The regulations in 29 CFR Part 1 include the procedures the Department follows in determining locally prevailing wage rates and fringe benefits and the rules that agencies must follow in applying the Davis-Bacon wage determinations to bid solicitations and contract specifications.[13] As a matter of long-standing policy, the Department distinguishes between four general types of construction for purposes of making prevailing wage determinations: building construction, residential construction, heavy construction, and highway construction.

All Agency Memoranda (AAM) Nos. 130 and 131, dated March 17, 1978 and July 14, 1978, provide guidance on the application of Davis-Bacon wage determinations to construction projects. AAM No. 130 also sets forth the Department's longstanding view that a project consists of all construction necessary to complete the building or work regardless of the number of contracts involved so long as *all contracts awarded are closely related in purpose, time and place.* The use of the phrase "projects funded directly by or assisted in whole or in part" in the ARRA labor standard provision precludes the intentional splitting of ARRA projects into separate and smaller contracts to avoid Davis-Bacon coverage on some portion of a larger project, particularly where the activities are integrally and proximately related to the whole. However, that does not suggest that Davis-Bacon coverage of an ARRA project lasts in perpetuity. There are many situations in which major construction activities are clearly undertaken in segregable phases that are distinct in purpose, time, or place. While the Federal agency must examine every situation independently, the general guidelines that define "project" for Davis-Bacon coverage purposes as contracts that are related in purpose, time, and place should govern in most instances.

The Davis-Bacon labor standards clauses for covered contracts require the applicable Davis-Bacon wage determination(s) to be attached thereto and made part of the covered contract. In accordance with the Federal Acquisition Regulations and 29 CFR Part 1, Federal agencies are responsible for the correct application of Davis-Bacon wage determinations to bid solicitations, contracts, and assistance agreements. For an ongoing construction project that was awarded, or for which construction had started, prior to notice of ARRA assistance, the agency should insert the applicable wage determination(s) in relevant contracts and assistance agreements effective as of the date the ARRA assistance is approved for the project. Projects that are already subject to Davis-Bacon labor standards would not require application of a new Davis-Bacon wage determination upon receipt of ARRA assistance unless such assistance is for work not contemplated under the existing contract for construction.

The Department's wage determinations are available to agencies and the general public online at www.wdol.gov.

Additional rules concerning the administration and enforcement of the Davis-Bacon labor standards are provided in 29 CFR Part 3 and other sections of 29 CFR Part 5. For the convenience of agencies, contractors and others interested in the application of Davis-

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[13] See, in particular, 29 CFR 1.6.

Bacon prevailing wage requirements, the *DOL Prevailing Wage Resource Book* provides information concerning these and other facets of compliance with the labor standards provisions of the Davis-Bacon and related Acts. *See* www.wdol.gov/docs/WRB2002.pdf.

This general guidance is not intended to address every situation for which a question of Davis-Bacon applicability may arise. There are clearly some circumstances that are unique to a single Federal agency or to a particular Federal assistance program, and there are factual scenarios that may impact a determination of Davis-Bacon applicability. WHD is prepared to address those questions on a case-by-case basis. Federal agencies should address questions relating to the application or interpretation of a wage determination or of the labor standards provisions in the ARRA to WHDARRA@dol.gov, in accordance with the procedures in 29 CFR Part 5. Such a request should be accompanied by as much information as possible on how the particular Federal assistance program works. State and local agencies or other recipients of Federal assistance should first direct their questions to the Federal agency providing the assistance. WHD may issue supplemental or revised guidance as needed.

Contractor Obligations

On contracts funded in whole or in part by ARRA appropriations, contractors and subcontractors must pay laborers and mechanics employed directly upon the site of the work no less than the locally prevailing wages (including fringe benefits) listed in the Davis-Bacon wage determination in the contract for the work performed. Contractors and subcontractors on covered projects must pay all laborers and mechanics weekly and submit weekly certified payroll records to the contracting or administering agency. 40 U.S.C. 3145; 29 CFR Part 3, 29 CFR 5.5.

It is important to note that, because day-to-day application of Davis-Bacon contract clauses and wage determinations and first-line enforcement is a responsibility of the contracting or assisting agency under Reorganization Plan No. 14, it is appropriate for contractors and employees to direct their initial inquiries concerning the application of Davis-Bacon requirements to a particular federally funded or assisted project to the Federal agency funding the project. Of course, the Secretary of Labor retains final coverage authority under Reorganization Plan No. 14.

The Wage and Hour Division has established a special ARRA website at www.dol.gov/esa/whd/recovery where this memorandum, important links, and other information that may be particularly valuable to the Federal agencies, recipients of ARRA assistance, contractors, employees, and others who have an interest in the application of Davis-Bacon labor standards under ARRA will be posted.