

**Follow-Up Questions from the March 2, 2010, ARRA Training
EPA Region 7, Kansas City**

REPORTING

Is there a preferred methodology for jobs reporting?

- A. No. States and systems need to be consistent and document their methodology. States may report either when the job actually occurs (payroll) or when the state reimburses the work (i.e. disbursement). If you enter (report) jobs with reimbursement of the work, then report the jobs the quarter the disbursement is made.

What if the Quarter ends in the middle of the week; how are job hours to be counted?

- A. In terms of quarter ending and reporting on jobs, it doesn't matter when/how the system ends the quarter. Importance is on consistency in how job (hours) data is collected. Systems can end the reporting at the 15th of the month (i.e. March 15th) or the last Friday in the quarter as long as they are consistent each quarter. EPA wants to ensure no jobs (hours) get lost.

DAVIS-BACON

If a contractor pays his employees bi-weekly, does Davis-Bacon require them to change their payroll to weekly?

- A. Yes. The EPA Terms & Conditions and Davis Bacon Act are clear that laborer/mechanics are to be paid weekly.

What will be the process be for requesting variances from the EPA Terms and Conditions for Davis-Bacon?

- A. February 4, 2010 memo from EPA Office of Grants and Debarment is attached (*See end of document*). Under EPA Terms & Conditions, a minimum of two employee interviews must be conducted for each contractor and subcontractor, even if the timeframe is limited.
- B. The system should document why the minimum interviews were not conducted if an interview is missed.
- C. In summary, the EXCEPTIONS process includes that the state must indicate why complying with a specific non-statutory requirement is impracticable and what the alternative approach will be. Then concurrence must be requested and received of the EPA Regional Davis-Bacon coordinator, the Assistant Regional Administrator, and the appropriate Regional Program Office.

If a subcontractor works on a project for a short period (i.e. less than a week), how should the potential to miss interviews be handled?

- A. Under EPA Terms & Conditions a minimum of two employee interviews must be conducted for each contractor and subcontractor, even if the timeframe is limited.

- B. The system should document why the minimum interviews were not conducted if an interview is missed.

Does the Service Contract Act impact ARRA funded SRF projects? If so, how? (Example was presented regarding snow removal services in relation to a SRF ARRA project.)

- A. The Service Contractor Act doesn't apply to state and systems receiving SRF ARRA assistance (i.e. federal grants to states). It is not part of the EPA-DOL MOU. The Service Contract Act applies Federal service contract projects and includes classes of employees who are not typically part of a construction job.

Are there more recent policies on the use of multiple wage determinations than DOL All-Agency Memos 130 and 131, which were published in 1977?

- A. The memos still apply. However, the Prevailing Wage Resource Book (2009) provides additional clarification.
<http://www.dol.gov/whd/recovery/pwrp/Tab13DBWageDetermin.pdf>

Is construction of utility services to an ARRA project (such as installing electric lines to a new well) covered by Davis-Bacon?

- A. Per Philip Metzger with EPA's Office of Water, this is allowed as an exception under the February 4, 2010 memo. More details will be forth coming.

What constitutes a "project" for Davis-Bacon considerations?

- A. See All Agency Memo No. 207 – "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."

BUY AMERICAN

Is construction of utility services to an ARRA project (such as installing electric lines to a new well) covered by Buy American requirements?

- A. Still waiting on a response.

What constitutes a "project" for Buy-American considerations?

- A. See All Agency Memo No. 207 – "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."

February 4, 2010 memo from EPA Office of Grants and Debarment

MEMORANDUM

SUBJECT: Exceptions Process for Davis-Bacon Act Terms and Conditions

FROM: Howard F. Corcoran /s/ Howard F. Corcoran
Director, Office of Grants and Debarment

TO: Assistant Regional Administrators

Following discussions with the Department of Labor (DOL), the Office of Grants and Debarment (OGD) issued in July 2009 EPA-specific terms and conditions addressing compliance with the Davis-Bacon Act (DBA) under Recovery Act assistance agreements. These terms and conditions may also apply to non-Recovery Act assistance agreements subject to the DBA. Our experience to date shows that parts of the terms and conditions may not properly address unique circumstances faced by recipients.

To provide appropriate flexibility in DBA implementation, we are establishing an exceptions process for the terms and conditions under 40 CFR 30.4 or 40 CFR 31.6 as applicable. Specifically, with the concurrence of the Regional DBA coordinator, the Assistant Regional Administrator and the affected Regional Program Office, a grant recipient may request OGD to approve an exception from a provision(s) in the terms and conditions for a particular grant project.

In their exception requests, recipients must explain why application of a provision would be impracticable and unduly impede the achievement of Recovery Act or programmatic objectives. They must also present an alternative approach to ensure DBA compliance. Please note that the Agency cannot deviate from statutory DBA requirements such as requiring that recipient contractors or subcontractors pay prevailing wages as determined by DOL. Conversely, an exception request may be appropriate for a non-statutory item in the DBA terms and conditions that is not required by DOL regulations (e.g., a request for an exception from the required frequency for employee interviews).

Exemption requests should be sent to me with a copy to Catherine Vass in OGD.

*Follow-Up Questions from the March 2, 2010, ARRA Training
EPA Region 7, Kansas City*

We will act on the requests expeditiously, in consultation with the Office of General Counsel and the affected Headquarters Program Office. If you have any questions about this memo, please contact me at (202) 564-1903.

cc: Beth Craig
Nanci Gelb
Cynthia Dougherty
Jim Hanlon
Renee Wynn
Regional Davis-Bacon Act Coordinators
Denise Benjamin-Sirmons
Catherine Vass
John M. Hall
Francis Roth
Samuel Peterson
Wendel Askew
Joanne Hogan
Lauren Willis
Samuel Peterson
Jim Drummond
Philip Metzger
Jordan Dorfman
Faye Swift
Courtney Hyde
Mark Barolo
Adam Klinger
Barbara McDonough
Becky Brooks
David R. Lloyd
Janet Kasper
Wayne Anthofer

Questions from the Hays and Wichita ARRA Training
March 17 & 18, 2010

Davis Bacon

Q1. Is there a limit to the number of hours a trainee or apprentice can work?

- A. *Cadmus has not located any specific documentation indicating that there is a limit to the number of hours that apprentices or trainees can work. To ensure all work requirements are being met and there are no work hour limits, the details of the individual's bona fide registered program should be reviewed.*

Q2. Is the all agency memo 148 from 1986 (located at www.wdol.gov/aam/AAM148.pdf) still applicable today, and what if the contractor has more trainees or apprentices than what is listed, do they have to be paid the prevailing wage?

- A. *AAM 148 is still applicable. The ratio table referenced in the memo is an example of the type of ratio requirements one might expect. Required ratios may vary across trainee or apprentice programs.*
- a. *Per the Davis-Bacon contract language (29 CFR 5.5.(a)):*
- i. *“The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program.”*
- ii. *“The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration.”*
1. *If there are trainees on site under a registered program, trainees must be counted together with the apprentices in determining compliance.*
- B. *Per 29 CFR 5.5 (a), any apprentices and trainees performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.*

Q3. If employee's on-site do not speak English, who would be responsible for providing an interpreter for the required employee interviews?

- A. *The assistance recipient or state should provide the interpreter. Though not required, having the contractor provide the interpreter should be avoided if at all possible.*

Q4. Is the contractor required to keep any other records than payroll information (i.e. Buy American, Job Hours, etc.)? If so, for how long?

- A. *There is no specific guidance or requirement regarding what other records must be kept and for how long. It is suggested that the contractor have a written records retention policy that outlines the type of records that and the length of time records are maintained.*

Buy American

Q5. When calculating the limits for *De Minimis*, is it 5% of the cost of “all Materials” or 5% of all iron, steel, and manufactured goods used in the project? In other words do you get credit for raw materials that are not covered under the Buy American requirements?

- A. *The waiver text refers to the “total cost of the materials used in and incorporated into a project.” Therefore, raw materials and other general construction materials should be included in total materials costs for the purposes of the de minimis calculation.*

Questions from the Hays and Wichita ARRA Training
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Q6. Is there a requirement for Contractors to keep records after the project is complete? If so how long?

- A. *There is no specific guidance or requirement regarding what records must be kept and for how long. It is suggested that the contractor have a written records retention policy that outlines the type of records that and the length of time records are maintained. Note: audits may occur several years (i.e. 3 to 5 years or longer) after the project is complete.*

Q7. Can a laptop computer be considered incidental and De Minimus to a SCADA project?

- A. *There is no "yes" or "no" answer to this question. Under certain circumstances it may be appropriate to consider relatively inexpensive, off-the-shelf computers as incidental components which would then be eligible to be considered by the assistance recipient for coverage under the de minimis waiver. The revised waiver provides some flexibility in which leads to one or a very few items to be incidental as long as they were of low cost individually (probably in most projects, one or a very few off-the-shelf laptops or PCs would be) and of miscellaneous character. One can consider in determining "miscellaneous character" that the product is not specified by brand or model but, if at all, only by certain features or characteristics, so it doesn't particularly matter what brand of the item you get as long as it has a few features or characteristics that are found widely in a variety of combinations.*
- B. *The assistance recipient and their consulting engineer should ensure there is justification to support their decision. The decision should also be defensible and justifiable to an independent reviewer. Be aware that the de minimis waiver should not be used for a single or very small number of large items.*

Q8. Can a laptop computer be considered substantially transformed by installing hardware and software and (required to operate the SCADA) and connecting it to a SCADA system?

- A. *No, computer hardware is not substantially transformed by any process involving software, which is not in any case itself a manufactured good (so its modification can't ST hardware), or that occurs onsite.*

Q9. Can a complete electrical system (everything an electrical subcontractor installs and connects) be evaluated under substantial transformation to determine compliance with Buy American requirements? In other words consider the entire contract as the manufactured good?

- A. *Generally, installation of a complete electrical system at the site would be considered construction activities and under ARRA the various electrical components would need to meet the Buy American provisions. It would be difficult to justify a claim of substantial transformation for a complete electrical system as it would be equivalent to claiming that manufacturing takes place on the construction site. In order to make the claim that the electrical system is being manufactured at the site, the contractor needs to show "conditions that mimic off-site manufacturing." While it may be difficult to make this claim for the entire system, there may be components (e.g., control box) that the assistance recipient could rightfully claim is being manufactured on-site (provided the proper documentation is maintained).*
- B. *The general presumption of the OMB Guidance of April 6, 2009 is that what occurs once a manufactured good is "brought to the construction site" is construction, not manufacturing. The only exceptions to this, where substantial transformation (and thus manufacturing) may be considered to occur onsite, are described in detail in the section "Can Substantial Transformation Occur Onsite" on pages 8-9 of the paper "DETERMINING WHETHER "SUBSTANTIAL TRANSFORMATION" OF COMPONENTS INTO A "MANUFACTURED GOOD" HAS OCCURRED IN THE U.S.: ANALYSIS, ROLES, AND RESPONSIBILITIES", available at*

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http://www.epa.gov/water/eparecovery/docs/10_23_09_Substantial_Transformation_memo_Final.pdf.

A more concise version of this discussion is provided in Q. A4. of the Buy American Q&As Part 2 at http://www.epa.gov/water/eparecovery/docs/2009_11_18_BA_Q-As_Part2-final.pdf.

EPA has developed a couple at slides 21-22 of our June 11 webcast at http://www.epa.gov/water/eparecovery/docs/2009_11_06_Webcast_final_webvers.pdf.