

TAB F



Department of Energy
Washington, DC 20585

WEATHERIZATION PROGRAM NOTICE 09-9
EFFECTIVE DATE: July 21, 2009

SUBJECT: GUIDANCE ON IMPLEMENTATION OF THE DAVIS-BACON ACT PREVAILING WAGE REQUIREMENTS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

PURPOSE: To issue guidance to Weatherization Assistance Program participants, on implementing Davis-Bacon Act (DBA)¹ requirements associated with the expenditure of American Recovery and Reinvestment Act of 2009 (Recovery Act) funds. The Department of Labor (DOL), Employment Standards Administration, Wage and Hour Division (WHD) has issued guidance on applicability of DBA requirements to all agencies engaged in funding projects for construction, alteration, and/or repair funded in whole or in part by funds appropriated under the Recovery Act,² and has issued guidance to the Department of Energy's (DOE) Weatherization Assistance Program in particular.³ Those DOL documents are attached hereto for your convenience. The instant memorandum is intended to provide you with the DOL guidance and to amplify that information as may be appropriate for our circumstances. It does not modify or replace the DOL guidance or any requirements or terms and conditions contained in the grant instrument.

BACKGROUND: The Davis-Bacon Act

The DBA is applicable to contracts of the United States⁴ in excess of \$2,000⁵ for the construction, alteration, and/or repair (including painting and decorating)⁶ of public buildings or public works. The DBA requires all contractors and subcontractors to pay laborers and mechanics employed on a covered contract wages and fringe benefits

¹ 40 U.S.C. section 3142.

² See DOL Memorandum No. 207, dated May 29, 2009, available at <http://www.dol.gov/esa/whd/recovery/AAM207.pdf>. (hereinafter, "AAM No. 207").

³ See DOL Advisory Letter, dated June 1, 2009, available at <http://www.dol.gov/esa/whd/recovery/AdvisoryLetterDOE.pdf> (hereinafter, "DOL Advisory Letter"). See also DOL's DBA regulations at 29 CFR Parts 1, 3, and 5; *DOL Prevailing Wage Resource Book*, available at www.wdol.gov/docs/WRB2002.pdf. Moreover, The Department of Labor has established a special Recovery Act website at www.dol.gov/esa/whd/recovery with important links, and other information that may be particularly helpful with respect to application of Davis-Bacon labor standards under the Recovery Act.

⁴ Including the District of Columbia. For applicability of the Davis-Bacon Act to government agencies, such as states, under Section 1606 of the Recovery Act, see the DOL Advisory Letter, page 2, and to tribal entities, see AAM No. 207, page 3.

⁵ The \$2,000 threshold for coverage pertains to the amount of the prime contract, not to the amount of individual subcontracts. If the prime contract exceeds \$2,000, all work on the project is covered.

⁶ These work activities are defined at 29 CFR Part 5.2(k).

determined by the Secretary of Labor to be prevailing for corresponding classes of employees engaged on similar projects in the locality. In numerous additional laws, Congress has specifically required adherence to DBA prevailing wage requirements where they might not otherwise be applicable.

DISCUSSION: The Department of Energy Weatherization Assistance Program

The Weatherization Assistance Program was established in 1976. The program has historically not been subject to the DBA prevailing wage requirements. However, on February 17, 2009, President Obama signed the Recovery Act to jumpstart the economy by saving and creating jobs, and to foster weatherization and energy efficiency efforts and achieve other goals.⁷ Section 1606 of the Recovery Act specifically requires that all laborers and mechanics employed by contractors and subcontractors on any project “funded directly by or assisted in whole or in part by” Recovery Act funds be paid prevailing wages as determined by the Secretary of Labor.⁸ Thus, Weatherization Assistance projects funded or assisted in whole or part by Recovery Act funds are now subject to DBA prevailing wage requirements.⁹

Accordingly, contractors and subcontractors must ensure that any laborers and mechanics¹⁰ employed on projects funded or assisted in whole or in part by Recovery Act funds are paid prevailing wages as determined by the Secretary of Labor for construction, alteration, and/or repair (including painting and decorating). Grantees and subgrantees with the exception of state and local governments, that use their own employees to perform this work, will also pay these employees the DBA prevailing wage rate. If the entity receiving Recovery Act assistance for such projects contracts out the weatherization work, it must ensure that the DBA requirements flow down to the entities that employ laborers and mechanics that do the work.¹¹

On projects where DBA prevailing wage requirements must be paid, the requirements set out in the DOL regulations at 29 CFR Parts 1, 3, and 5 are applicable. In accordance with 29 CFR Part 1, Federal agencies directly contracting for weatherization projects or providing assistance under the Recovery Act to other entities for such projects must include the standard DBA contract clauses found in 29 CFR 5.5(a) in their bid solicitations, assistance agreements, and the resulting contracts and grants, and must require that those requirements flow down to any contracts or subcontracts for the performance of the work. The recipient of the Recovery Act funds is responsible for the

⁷ See <http://www.recovery.gov/?q=content/our-mission>.

⁸ For the entire text of the relevant Davis-Bacon provision in Section 1606, see AAM No. 207, page 2 and DOL Advisory Letter, page 2.

⁹ See AAM No. 207, page 2-3. However, as before, Weatherization Assistance Projects not funded with Recovery Act funds are not subject to the prevailing wage requirements. See AAM No. 207, page 2-3. Nonetheless, a weatherization project which is not assisted or funded in whole or part with Recovery Act money will be subject to DBA prevailing wage and associated requirements if the project is funded by another Federal statute which itself imposes those requirements. See AAM No. 207, page 3, note 6.

¹⁰ Apprentice and trainees may be paid at less than the DBA prevailing wage rate if the standards for these positions in 29 CFR Part 5.5(a)(4) are met.

¹¹ See DOL Advisory Letter, page 2.

compliance by its subgrantees, contractors and their subcontractors with all of these contract clauses.¹²

DOE is responsible for ensuring that the applicable wage determinations are included in bid solicitations, assistance agreements, and the resulting contracts and grants. DOE is working with DOL to ensure that wage determinations for weatherization projects accurately reflect the local prevailing wage rates and fringe benefits for this work. To this end, the Wage and Hour Division (“WHD”) Administrator may issue a weatherization wage determination after a contract has been awarded or after the beginning of construction. Pursuant to 29 CFR § 1.6(f), if it is determined that an inaccurate wage determination has been incorporated into a grant or contract, the proper wage determination, as issued by the WHD Administrator, will be incorporated into that contract or grant retroactively to the beginning of ARRA assisted or funded construction. The contractor/subcontractor and grantee/subgrantee must be compensated for any increases in wages resulting from such change. In the event of such a change you may use Recovery Act funds to cover the cost of the adjustments. Until DOL issues prevailing wage determinations for weatherization workers in your area, you may use Recovery Act funds to begin weatherizing homes so long as you pay at least the wage amounts currently listed at <http://www.wdol.gov/Index.aspx> for residential construction or other specific category that you believe is most similar to the work performed by your employees or those of the contractors you utilize. Please also note that the rates posted at the DOL site are minimums.

Please note that weatherization work will be defined by DOL’s survey and may not apply to the work performed by all of your employees. For example, replacement of HVAC systems by licensed contractors most likely will not be considered weatherization work. The wage determination for this work will be listed under another labor category. The wage survey being conducted by DOL is collecting data on all HVAC work including installing the HVAC unit, installing duct work, and installing the pipe. The survey is asking for the classification(s) that perform HVAC work and for a description of the scope of the HVAC work performed on the jobs. From this, the survey results will determine the classification(s) and rates/fringe benefits that will be paid to the worker(s) who perform HVAC work and will specify on the wage determination the scope of the work performed. For instance, it may be a weatherization worker, HVAC mechanic, plumber, pipefitter, or sheetmetal worker. The survey results will determine which classification(s) do the work.

DOE and others have suggested that the classifications and wage rates/fringe benefits on the current residential wage determinations are not applicable to weatherization work. DOL is working to ensure that wage determinations for work on weatherization projects accurately reflect the local prevailing practice for this work. To this end, the WHD Administrator at DOL may issue a wage determination after contract award or after the beginning of construction. If the agencies proceed without an applicable weatherization wage determination in their projects, then they risk having a back wage liability after

¹² See also 29 CFR Part 5.5(a)(6)(making prime contractor responsible for lower-tier contractor compliance).

DOL completes its survey and issues applicable weatherization wage determinations. There is no way to determine prior to the completion of the survey and prevailing wage determination process whether the weatherization wage survey will collect sufficient information for WHD to produce a separate rate for HVAC work or whether that work is performed by a weatherization mechanic, plumber, pipefitter, sheet metal worker, etc. There are no standard national classification definitions under the Davis-Bacon program. The classification of work that performs the work in question is based on the prevailing practice in the area.

It is imperative that Davis Bacon wage stipulations be inserted into all contracts in which Davis Bacon applies and that the contractors working on these projects maintain accurate and complete weekly certified payrolls from the start of construction. Pursuant to 29 CFR § 1.6(f), if an inaccurate wage determination or no wage determination has been incorporated into the grant or the contract, the proper wage determination, as issued by the WHD Administrator, will be incorporated into the contract or grant retroactively to the beginning of construction. The certified payroll records submitted prior to the inclusion of the proper wage determination must be reviewed and any employees paid less than the determined wage rates must be compensated the difference for all hours worked on the project. In addition, the contractor must be compensated for any increases in wages resulting from such change.

For States, the costs associated with DBA compliance can be charged either as an administrative cost or as a training and technical cost. For local agencies, these costs must be charged either as an administrative cost or as part of program operations. States should contact their respective DOE Project Management Center for specific guidance on how to appropriately charge these costs.

Grantees/subgrantees and contractors/subcontractors must attach the applicable wage determinations to the bid solicitation, assistance agreement, and resulting contract or grant. A grantee or subgrantee and contractors/subcontractors contracting out work on a covered weatherization project must provide the wage determination to the contractors or subcontractors 10 calendar days prior to soliciting bids. Once a project becomes subject to DBA requirements and the accurate (as stated in the above paragraph) wage determinations are obtained and incorporated into a bid/contract, then those wages are applicable for the entire project.

If an ongoing construction project which was awarded prior to the Recovery Act or which was not assisted or funded in whole or part by Recovery Act funds does become subject to Recovery Act funding, the agency will insert the appropriate wage determination(s) in relevant contracts and federal assistance agreements effective as of the date the Recovery Act assistance is approved for use on the project. The determinations will then need to be included in any contracts or subcontracts for the covered work. Projects that are already subject to Davis-Bacon labor standards would not require application of a new Davis-Bacon wage determination upon receipt of Recovery Act assistance unless such assistance is for work not contemplated under the existing contract for construction or in

the circumstances outlined above where the WHD Administrator issues a new wage determination.¹³

In addition, grantees/subgrantees and contractors/subcontractors on weatherization projects funded or assisted in whole or part by Recovery Act funds shall maintain payrolls and basic records relating to payroll during the course of the work and preserve them for a period of three years thereafter for all laborers and mechanics working on the project, or as designated in the grant document.¹⁴ **They must also ensure that all laborers and mechanics on a project funded or assisted in whole or part with Recovery Act funds are paid on a weekly basis and must submit weekly certified payroll records to the contracting and administering agency.**¹⁵

Training

DOE has completed an initial round of national webinars training on Davis-Bacon implementation for State and local agencies. Davis-Bacon training sessions also were conducted at the DOE Weatherization Assistance Program National Conference to be held July 20-23, 2009 in Indianapolis. This training is designed to provide all attendees with a general overall knowledge on compliance with DBA. Additional training may be scheduled on an as needed basis. Also, States are encouraged to conduct their own training on DBA compliance for their local agencies and contractors.

CONCLUSION

DOE is committed to ensuring that the Recovery Act meets its dual objectives of creating thousands of new jobs and of bringing about the weatherization of more than 525,000 low-income households over the next three years. DOE will provide any additional assistance needed and will address any issues that may arise in order to ensure that those goals are met. To this end, DOL, with assistance from the DOE, is developing project wage determinations that accurately reflect the classifications used and wage rates paid on residential weatherization projects. These new wage surveys are being conducted on an expedited basis. Once completed, project wage determinations, specific to weatherization work in residential buildings will be issued to DOE for incorporation into the grant and contract documents.



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¹³ See AAM No. 207, page 5.

¹⁴ See 29 CFR Part 5.5(a)(3)(i) for the payroll and record-keeping requirements, including a list of the required contents of the records and for additional record-keeping requirements.

¹⁵ See 29 CFR Part 5.5(a)(ii)(A)-(D) for additional requirements relating to the submission of weekly certified payroll records..