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MEMORANDUM NO. 208

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

FROM: 
Nancy J. Leppink
Deputy Administrator

SUBJECT: Applicability of Davis-Bacon labor standards to construction financed with the proceeds of certain tax-favored bonds under section 1601 of Division B of the American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (ARRA) was enacted into law on February 17, 2009. In All Agency Memorandum (AAM) No. 207, the Wage and Hour Division (WHD) provided general guidance concerning the applicability of Davis-Bacon labor standards in Division A of ARRA, which included provisions appropriating substantial funding for construction, alteration and repair of Federal buildings, and for infrastructure projects such as roads, bridges, public transit, water systems, and housing. AAM No. 207 indicated that a separate Davis-Bacon provision in Division B of ARRA (section 1601, Division B, Pub. L. No. 111-5, 123 Stat. 362), which applies to projects financed with certain tax-favored bonds, would be the subject of future guidance.

The purpose of this AAM is to provide general guidance to governmental and other entities concerning the applicability of Davis-Bacon labor standards to projects financed with the proceeds of the five specific tax-favored bonds listed in section 1601 of Division B of ARRA. This memorandum also highlights the responsibilities of state and local government entities, contractors, and others for implementation of, and compliance with, the Davis-Bacon labor standards in connection with projects financed with the proceeds of the tax-favored bonds. Also included below are links to websites where additional information and guidance about Davis-Bacon Act (DBA) requirements are available.

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 1950¹ 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 on 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 Division B Davis-Bacon Requirement and Description of Relevant Tax-Favored Bonds

Section 1601 of ARRA Division B² provides that Davis-Bacon labor standards apply to projects financed with the proceeds of certain tax-favored bonds:

SEC. 1601. APPLICATION OF CERTAIN LABOR STANDARDS TO PROJECTS FINANCED WITH CERTAIN TAX-FAVORED BONDS.

Subchapter IV of chapter 31 of the title 40, United States Code, shall apply to projects financed with the proceeds of—

(1) any new clean renewable energy bond (as defined in section 54C of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(2) any qualified energy conservation bond (as defined in section 54D of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(3) any qualified zone academy bond (as defined in section 54E of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(4) any qualified school construction bond (as defined in section 54F of the Internal Revenue Code of 1986), and

¹ Available at <http://www.dol.gov/whd/regs/statutes/plan/1950.htm>.

² See Sec. 1601, Division B, Pub. L. No. 111-5, 123 Stat. 362.

(5) any recovery zone economic development bond (as defined in section 1400U-2 of the Internal Revenue Code of 1986).

This provision extends Davis-Bacon prevailing wage requirements to projects financed with the proceeds of any of the five types of tax-favored bonds listed in section 1601, to the extent such bonds were or are issued after the date of enactment of ARRA Division B.³

The Internal Revenue Code (IRC) provides national volume caps on the total value of the bonds that may be issued for each of the five types of bonds. The Internal Revenue Service (IRS) has allocated portions of those total amounts to states and particular entities (such as counties, municipalities, and large local educational agencies) and/or has requested applications and selected successful applicants to issue bonds up to the specified amounts authorized. The criteria for each of the five types of bonds are summarized below.

Section 54C(a) of the IRC provides that a bond qualifies as a New Clean Renewable Energy Bond (New CREB) if: 100 percent of the available project proceeds of the bond are to be used for capital expenditures incurred by governmental bodies, public power providers, or cooperative electric companies for one or more qualified renewable energy facilities; the bond is issued by a qualified issuer; and the issuer designates such bond for purposes of section 54C. For New CREBs, the total national allocation volume cap is \$2.4 billion,⁴ \$2.2 billion of which was allocated in 2009 through an application process with an IRS application deadline of August 4, 2009. As reflected in section 1601 of Division B, DBA labor standards apply only to those projects financed with the proceeds of New CREBs issued after the date of enactment of ARRA.⁵

Section 54D(a) of the IRC provides that a bond qualifies as a Qualified Energy Conservation Bond (QECCB) if: 100 percent of the available project proceeds of the bond are to be used for one or more qualified conservation purposes; the bond is issued by a state or local government; and the issuer designates the bond for such purpose. For QECCBs, the total national allocation volume cap is \$3.2 billion, \$2.4 billion of which was added by ARRA, and all of which was allocated in 2009 to states and some United States territories, with a portion of such amount allocated to large local governments within each

³ Qualified school construction bonds and recovery zone economic development bonds (as defined in sections 54F and 1400U-2 of the Internal Revenue Code of 1986, respectively) were created by ARRA and such bonds therefore were not issued prior to the date of enactment of ARRA, Division B.

⁴ The Energy Improvement and Extension Act of 2008 provided an allocation of \$800 million, and ARRA increased this allocation by \$1.6 billion. Sec. 107, Division B, Pub. L. No. 110-343, 122 Stat. 3765; Sec. 1111, Division B, Pub. L. No. 111-5, 123 Stat. 362.

⁵ ARRA's DBA requirements do not apply to New CREBS issued prior to the date of ARRA's enactment, nor do they apply to clean renewable energy bonds (CREBS) issued under section 54 of the Internal Revenue Code.

state. Although QECBs were established by the Emergency Economic Stabilization Act of 2008, ARRA's Davis-Bacon labor standards apply only to those QECBs issued after the date of enactment of ARRA.

Section 54E(a) of the IRC provides that a bond qualifies as a Qualified Zone Academy Bond (QZAB) if: 100 percent of the available project proceeds of the bond are to be used for a qualified purpose with respect to a qualified zone academy established by an eligible local education agency; the bond is issued by a state or local government within the jurisdiction of which the academy is located; and the issuer designates the bond for such purpose, certifies that it has written assurances that the private business contribution requirement of 26 U.S.C. 54E(b) will be met with respect to the academy, and certifies that it has the written approval of the eligible local education agency for the bond issuance. For QZABs, the national allocation volume cap, which is allocated to states and some United States territories, was \$400 million for calendar year 2008 and \$1.4 billion each for calendar years 2009 and 2010. As with QECBs, QZABs under section 54E were established by the Emergency Economic Stabilization Act of 2008; however, only those QZABs issued after the date of enactment of ARRA are subject to ARRA's DBA labor standards.

Section 54F(a) of the IRC provides that a bond qualifies as a Qualified School Construction Bond (QSCB) if: 100 percent of the available project proceeds of the bond are to be used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which the facility is to be constructed with part of the proceeds of the bond; the bond is issued by a state or local government within the jurisdiction of which the school is located; and the issuer designates the bond for such purpose. For QSCBs, a national allocation volume cap of \$11 billion each for 2009 and 2010 is allocated by the IRS to states, United States territories, and certain large local educational agencies, and a separate volume cap of \$200 million each for 2009 and 2010 is allocated by the Department of the Interior for the purpose of construction, rehabilitation and repair of schools funded by the Bureau of Indian Affairs.

Section 1400U-2(b) of the IRC provides that a bond qualifies as a Recovery Zone Economic Development Bond (RZEDB) if: the bond is a Build America Bond issued prior to January 1, 2011; the available project proceeds of the bond issue in excess of the amount required to be held in reserve for the bond issue are to be used for one or more qualified economic development purposes; and the issuer designates the bond for such purpose. For RZEBs, the national allocation volume cap is \$10 billion, all of which was allocated in 2009 to counties and large municipalities through the states and United States territories.

Once the IRS (or Department of the Interior) has allocated the volume cap, the entities receiving an allocation decide whether and when to issue the bonds and how to spend the proceeds of the bond issue, or, if applicable, whether and how to allocate their authority to issue bonds to other eligible issuers. Additional information about these five tax-favored bonds can be found on the IRS website at www.irs.gov/bonds.

Implementing the ARRA Division B DBA Requirement

Under Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. 3145, the Department of Labor has issued regulations at 29 CFR Parts 1, 3 and 5 to implement the Davis-Bacon and related Acts.⁶ 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 Davis-Bacon 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, in light of section 1601’s language that the provisions of the Davis-Bacon Act “shall apply” to projects financed with the proceeds of the five specified types of bonds, prevailing wage coverage with respect to such projects must be determined in the same manner as under the DBA, and such projects must follow applicable requirements in the Department’s regulations at 29 CFR Parts 1, 3 and 5.

Regulations in 29 CFR 5.5 provide instructions concerning application of the standard Davis-Bacon contract clauses set forth in that section. Those standard clauses for covered contracts require the applicable Davis-Bacon wage determination(s) to be attached to the covered contract and made a part thereof. The Department’s wage determinations are available to agencies and the general public online at www.wdol.gov. 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 must be followed in applying the Davis-Bacon wage determinations to bid solicitations and contract specifications.⁷ As a matter of longstanding 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.

AAM Nos. 130 and 131, dated March 17, 1978 and July 14, 1978,⁸ provide guidance on the application of Davis-Bacon wage determinations to covered construction projects. AAM No. 130 also sets forth the Department’s longstanding view that, for wage determination purposes, a project consists of all construction necessary to complete the

⁶ 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 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.

⁷ See, in particular, 29 CFR 1.6.

⁸ <http://www.dol.gov/whd/programs/dbra/docs/memo-131.pdf>.

building or work regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place. There are many situations in which major construction activities are clearly undertaken in segregable phases that are distinct in purpose, time, or place. While each situation must be examined 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.

An entity (most frequently a state or local government agency) with contracting responsibility for a new or ongoing project being financed with the proceeds of one of the above-specified tax-favored bonds (the contracting entity) must cause or require the contracting officer for the project, upon notice of ARRA assistance with respect to the project, to insert in full the Davis-Bacon contract clauses found in 29 CFR 5.5(a) (and the applicable wage determination) in bid solicitations and covered construction contracts that are in excess of \$2,000 for construction, alteration or repair (including painting and decorating).⁹ For purposes of section 1601 of Division B of ARRA, "notice of ARRA assistance" means that the contracting entity is advised or determines that a project will be financed, in whole or in part, with proceeds of one of the five tax-favored bonds (the covered bonds). This notice generally occurs as soon as the contracting entity is so advised or so determines, typically at the earliest of the date the IRS or other government entity allocates volume cap or the authority to issue covered bonds for a particular project, the date that covered bonds are issued for a particular project, the date that the issuer declares its intent to reimburse project expenditures with covered bond proceeds, the date the entity is granted approval to use covered bond proceeds for the designated project, or the date that the proceeds of the bond issue are received by the entity.

The requirement to insert the Davis-Bacon contract clauses and attach the applicable wage determination applies regardless of the amount or form of ARRA funding or assistance. Thus, coverage under section 1601 of Division B of ARRA can exist even if a project is financed only in part by proceeds of one of the bonds listed in section 1601 of ARRA Division B. If bond proceeds are pooled in a general fund or otherwise, then every project financed in whole or in part by the pooled proceeds is subject to Davis-Bacon labor standards provided that other applicable coverage criteria are satisfied.

In most cases, the applicable wage determination will be the Davis-Bacon wage determination(s) published on www.wdol.gov as of the date of contract award (or within 10 days of the bid solicitation, in the case of sealed bid competitive bidding). *See* 29

⁹ Regulatory definitions of terms used in the administration of the Davis-Bacon and related Acts are in 29 CFR 5.2. 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, Field Operations Handbook.

CFR 1.6(c). However, for an ongoing construction project that was awarded (or for which construction had started) prior to notice of ARRA assistance, a wage determination effective at the time of notice of ARRA assistance may be issued under 29 CFR 1.6(g) in appropriate circumstances. Projects that are already subject to Davis-Bacon labor standards would not require the use of a new Davis-Bacon wage determination upon notice of ARRA assistance unless such assistance is for work not contemplated under the existing contract for construction. If a project is funded from a general fund or similar pool into which the proceeds of a relevant bond issue have been or will be distributed, the applicable wage determinations should be inserted into all relevant contracts and assistance agreements.

With regard to instances where a contractor or contracting entity finds that a classification of laborer or mechanic not listed in the applicable wage determination in a contract needs to be employed in the performance of work on the contract, the contract clauses require the workers to be classified in conformance with the applicable Davis-Bacon wage determination in the contract. To request additional classifications and rates through this "conformance" process, the Standard Form (SF) 1444 "Request for Authorization of Additional Classification and Rate," available at www.wdol.gov/docs/sf1444.pdf, should be used. Facsimile submissions should be sent to (202) 693-1432. Mailed forms should be sent to the address listed in Block 1 of the SF 1444. In order to ensure proper processing of such requests, it is important for the submitting entity to fill out the form completely, and any SF 1444 submitted for a project to which the Davis-Bacon labor standards apply pursuant to ARRA Division B, section 1601, should be marked in Block 11 as being for an ARRA Division B project. Additional rules concerning the administration and enforcement of Davis-Bacon labor standards (including penalties for non-compliance) are provided in 29 CFR Part 3 and other sections of 29 CFR Part 5.¹⁰

Contractor Obligations

On projects financed with the proceeds of tax-favored bonds specified in ARRA Division B, section 1601, that are subject to Davis-Bacon labor standards, 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 entity receiving an allocation or the contracting entity. See 40 U.S.C. 3145; 29 CFR Part 3; 29 CFR 5.5. Prime contractors should also note that they are responsible for the DBA compliance of their subcontractors.

¹⁰ Failure on the part of the entity to include the relevant clauses in the contract or failure on the part of the contractor to pay workers the appropriate Davis-Bacon wages is distinct from the issues surrounding qualification of a particular bond as tax-favored under federal tax law, which is a matter for the IRS.

Contractors with questions regarding the applicability of the Davis-Bacon Act to their specific project may direct their questions to the state or local governmental entity (or other entity) with which the contractor contracted.

Additional Information

This general guidance is not intended to address every situation for which a question of Davis-Bacon applicability may arise. For the convenience of agencies, contractors and others interested in the application of Davis-Bacon prevailing wage requirements, the WHD has established a special ARRA website at www.dol.gov/whd/recovery where this memorandum, important links, and other information that may be particularly valuable to Federal and other government agencies, recipients of ARRA assistance, contracting entities, contractors, employees, and others who have an interest in the application of Davis-Bacon labor standards under ARRA are posted. The *U.S. Department of Labor Prevailing Wage Resource Book*, available at <http://www.dol.gov/whd/recovery/pwr/toc.htm>, provides information concerning these and other facets of compliance with the labor standards provisions of the Davis-Bacon and related Acts. Questions regarding the applicability of the Davis-Bacon Act to a specific project also may be directed to the Department of Labor via email to WHDARRA@dol.gov. In addition, the WHD will be conducting webinars that will focus on proper implementation of the Davis-Bacon labor standards with regard to projects financed with the tax-favored bonds pursuant to ARRA Division B, section 1601, discussed in this AAM. Information regarding the scheduling of these webinars will be posted on the WHD ARRA website noted above.