

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210



FEB 7 2011

Terry R. Yellig
Sherman, Dunn, Cohen, Leifer & Yellig, P.C.
Suite 1000
900 Seventh Street, N.W.
Washington, D.C. 20001

Dear Mr. Yellig:

This is in response to your January 10, 2011 letter regarding the application of Davis-Bacon Act (DBA) prevailing wage and labor standards requirements to the installation of smart meters by PECO Energy Company (PECO). The installation of these meters is part of the Smart Future Greater Philadelphia (SFGP) project being performed by PECO.

This is a \$423 million project that is funded in part by U.S. Department of Energy (DOE) Smart Grid Investment Program Grant (SGIP) No. DE-OE0000207 for \$200 million. The American Recovery and Reinvestment Act of 2009 (ARRA) provides the funding for this grant. Section 1606 of ARRA Division A includes the following language with respect to the DBA:

[A]ll 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 [the Davis-Bacon Act].

Section 1606 also provides that:

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.

Project Objective and Major Elements

As outlined in the June 7, 2010 SFGP Project Execution Plan submitted to DOE by PECO (page 14), the objective of the project is:

[T]o develop and deploy a smart grid, smart metering network and support systems to deliver the benefits of smart grid technologies on an accelerated

schedule, provide consumers with dynamic rate programs and test innovative applications of the “smart grid.” The project will deploy all infrastructure necessary to support Advanced Metering Infrastructure (AMI), accelerate deployment of more reliable and secure smart grid technologies, install 600,000 smart meters within three years, and accelerate universal meter deployment by five years. The project will further promote the goals of DOE and the ARRA by deploying smart grid technology to improve electric grid reliability, security and efficiency, while creating jobs, improving energy efficiency and reducing emissions.

The meters being installed are bidirectional meters that communicate power usage data to both PECO and the consumer. Six hundred thousand meters will be installed over a three year period starting in the spring of 2011.

Davis-Bacon Applicability to the SFGP Project

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).

Construction, alteration and repair are further defined by Department of Labor regulations. They include all types of work done on a building or work at the site thereof; altering, remodeling and installation on the site of work of items fabricated off-site; and manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work. 29 CFR 5.2(j)(1)(i)(iii). The “laborers or mechanics” included in the DBA are those workers whose duties are manual or physical in nature, as distinguished from mental or managerial. This includes workers who use tools or who are performing the work of a trade. 29 CFR 5.2(m).

Section 1606 of ARRA Division A does not create an independent requirement for DBA coverage of work funded by ARRA. Instead, as explained in All Agency Memorandum No. 207 (AAM No. 207, 5/29/09), it requires the application of DBA labor standards and prevailing wage requirements to ARRA-assisted projects “[in] accordance with existing Davis-Bacon Act (DBA) requirements”

AAM No. 207 parallels Section 1606 of ARRA with respect to the authority of the Secretary of Labor and further advises that pursuant to Reorganization Plan No. 14 of 1950 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. 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. 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 covered ARRA-assisted projects must comply with the requirements in the Department's regulations at 29 CFR Parts 1, 3 and 5.

The statute and regulations make it clear that if a laborer or mechanic performs covered construction work on a project subject to DBA requirements, that person must receive the applicable prevailing wage. This reflects “a functional rather than a formalistic test to determine coverage: If someone works on a project covered by the Act and performs tasks contemplated by the Act, that person is covered by the Act, regardless of any label or lack thereof.” *Lance Love, Inc.*, WAB No. 88-32, slip op. at 2 (March 28, 1991); *Ray Wilson Company*, ARB No. 02-086, slip op. at 8 (February 27, 2004).

Davis-Bacon Applicability to Smart Meter Installation

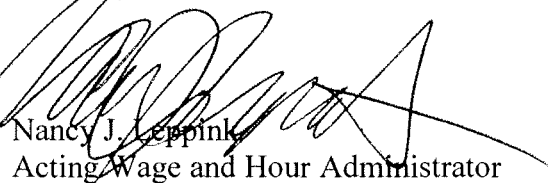
The Department of Labor has long recognized that not all work performed on a construction site covered by the DBA is subject to DBA labor standards and prevailing wage requirements. To be subject to the Act, a person must be a “laborer” or “mechanic” engaged in “construction” work. Pursuant to this principle, the Department has ruled, for example, that air balance engineers and inspectors are not subject to the DBA because they are not laborers or mechanics in the DBA context, and do not perform construction work. *DOL Field Operations Handbook* Chap. 15e06 and 15e14.

The issue with respect to routine smart meter installation is whether the workers installing the meters are performing “construction” work of a “laborer” or “mechanic.” Based on the description of this work provided by DOE in correspondence and in meetings with representatives of my office and the Solicitor of Labor, it is our understanding that meter installation will be performed by PECO subcontractors. The technicians who perform this work receive one week of training, primarily in safety procedures. Routine installation itself takes approximately two minutes and consists of breaking the tamper clip with a wire clipper, removing the ring securing the old meter with a screw driver, removing the meter, plugging in the new meter to the existing connection, reattaching the ring, and installing a new tamper clip. No wiring or connection changes or upgrades are required. There is no indication that the skills or tasks typical of an electrician, or any other type of construction trade, are necessary to perform the installation. Nor do the installers perform any type of testing or verification procedures on the new meters. The installation of smart meters in the manner described above on a pre-existing privately-owned building where there is already a functional mechanical electricity meter does not constitute Davis-Bacon construction, alteration or repair.

DOE acknowledges that any non-routine smart meter installation work involving the use of laborers or mechanics employed by contractors and subcontractors would be covered by the DBA. Specifically, where meter installation requires the performance of construction work by laborers and mechanics in the DBA context (for example, where the meter installation requires rewiring, installation of circuit breaker boxes, or similar work beyond that typically required for routine meter installation), DBA prevailing wage and labor standards will apply. However, we conclude that routine smart meter installation of the kind described above is not construction work and is not subject to DBA requirements.

This letter constitutes a final ruling under 29 CFR 5.13. A petition for review may be filed with the Department of Labor Administrative Review Board pursuant to 29 CFR 7.9.

Sincerely,



Nancy J. Leppink
Acting Wage and Hour Administrator