



United States Department of Agriculture
Rural Development

RD AN No. 4449 (1940-C)
June 15, 2009

TO: State Directors

ATTN: Community Programs Directors, Business Programs Directors, Housing Programs Directors, State Engineers, and State Architects

FROM: Victor Vasquez (*Signed by Victor Vasquez*)
Deputy Under Secretary
Rural Development

SUBJECT: Application of Davis-Bacon Wage Rate Requirements to Projects Funded with American Recovery and Reinvestment Act Funds

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to instruct and inform Rural Development (RD) staff on the application of the Davis-Bacon and Related Acts wage rate requirements in Section 1606 of the American Recovery and Reinvestment Act of 2009 (ARRA) to RD projects. The intended outcome is to provide direction to all staff implementing these requirements and ensure compliance with ARRA and the Davis-Bacon and Related Acts.

BACKGROUND:

Section 1606 of the ARRA requires that recipients of federal assistance under the Act ensure that contractors and subcontractors performing new construction or repairs pay workers prevailing wages as required by the Department of Labor (DOL). This requirement is commonly referred to as "Davis-Bacon" requirements. RD Instruction 1940-C covers applicable requirements of the Davis-Bacon and Related Acts. ARRA funds used for contracts or subcontracts for new construction or repair in excess of \$2,000 must comply with the prevailing wage requirements of the Davis-Bacon and Related Acts.

EXPIRATION DATE:
June 30, 2010

FILING INSTRUCTIONS:
Preceding RD Instruction 1940-C

1400 Independence Ave., SW., Washington, D.C. 20250

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IMPLEMENTATION RESPONSIBILITIES:

The requirements in § 1940-C are applicable to all programs providing grants, loans, or loan guarantees under the ARRA, except for uses of funds that are not related to construction or repair. Section 1606 of the ARRA requires application of Davis-Bacon wage rates and associated labor standards to all contracts associated with a project funded directly by or assisted in whole or in part with ARRA funds, even if some of the contracts are not RD funded. The attached checklist should be used to confirm Davis-Bacon and Related Acts compliance. The Contracting Officer is responsible for assuring compliance with the Davis-Bacon and Related Acts. The Contracting Officer who may perform these duties is described below under each program.

Wage Determinations: Before bidding, the general wage determination from the Department of Labor website (www.wdol.gov) must be added to bid documents by the Contracting Officer. If no wage determination is in effect, procedures of §1940-C for requesting a project wage determination from the DOL will be followed. (See § 1940-C (1940.104(b)(2)).) If the DOL revises a Wage Determination prior to bid opening, then a bid addendum must be issued to notify bidders of the change. If a contract award is not issued within 90 days of bid opening, then any revised wage determinations will apply to the contract. Once a contract is awarded, the wage determination in effect does not change for the life of the contract. Wages from the DOL Wage Determinations are the minimums that may be paid by the contractor performing the work.

Construction Contract Provisions: All contracts covered by Davis-Bacon and Related Acts requirements must include the statement "The contractor must comply with the minimum rates for wages for laborers and mechanics as determined by the Secretary of Labor in accordance with the provisions of the Davis-Bacon and Related Acts." Labor standards provisions from 29 CFR 5.5(a) must be included in every contract. (See www.dol.gov/dol/allcfr/ESA/Title_29/Part_5/toc.htm)

Construction Phase Requirements: RD staff must ensure that contractors and subcontractors are notified of any Davis-Bacon and Related Acts requirements applicable to the contract. RD staff must also ensure that the Davis-Bacon and Related Acts poster, "Notice to All Employees Working on Federal or Federally Financed Construction Projects" (www.dol.gov/esa/whd/regs/compliance/posters/davis.htm) is posted at the construction site. RD staff must ensure that no payment advance, grant, guarantee or loan of funds is authorized for construction or repair unless there is a certification on file by the contractor that they and their subcontractors have complied with the requirements of Davis-Bacon and Related Acts.

Application to Owner-Construction/Force Account Projects: All employees and volunteers working for individuals or corporations (not-for-profit or for-profit entities) and their contractors and subcontractors are subject to the requirements of Davis-Bacon wage rates and associated labor standards. Employees and volunteers working for public body recipients of ARRA funds, including Tribes, are not subject to the Davis-Bacon wage rates and labor standards.

Application of Davis-Bacon to Entire Projects: Note that the DOL requires that if a project is funded in whole or in part using ARRA funds, Davis-Bacon requirements apply to the entire project, including contracts funded using non-ARRA funds. For example, if a public body received funds for a project for owner-construction/force account work using all employee labor, but executed a contract with a plumber using non-ARRA funds not usually subject to Davis-Bacon requirements, the contract with the plumber would be subject to Davis-Bacon requirements because the work was part of an ARRA funded project.

Review During Construction: During construction, the Contracting Officer will review all certified payrolls or timesheets submitted with pay applications for compliance with the labor standards provisions. Copies of these payrolls or timesheets will be submitted to the Agency with the pay request. For architects, engineers, or resident inspectors, this service may be considered an additional service if not included in the basic services of an agreement for professional services. Any noncompliance must be reported to the Agency. Procedures of §1940-C (1940.106(e) and (f)) will be followed.

Semiannual Reports: The field office will complete form RD 440-29, “Semi-Annual Labor Compliance Report” for each project requiring compliance and submit to the State Director. The State Director will submit such forms to the Administrator of the DOL in accordance with §1940-C (1940.107).

Recordkeeping: The Agency will preserve all payrolls and certifications for a period of 3 years from the date of final payment on the contract in accordance with §1940-C (1940.108).

Each of the program areas receiving ARRA funds are discussed below, including the designation of the person responsible for assuring compliance with the Davis-Bacon and Related Acts requirements.

Single Family Housing (Direct and Guaranteed)

For Single Family Housing Direct, the duty of “Contracting Officer” may be performed by either the applicant or the Agency field staff person. An Agency employee must document in writing the person designated to perform this duty and show that the understanding was reached by all parties. In the Single Family Housing Guaranteed Program, the approved lender will perform the functions of the Contracting Officer.

In addition to the FY09 allocation of funds for the Section 502 Direct and Guaranteed Program, the ARRA provides funds for these programs. When ARRA funds are used, prevailing wage requirements must be met. As noted above, the Davis-Bacon and Related Acts apply to each contract for construction, alteration, or repair (including painting or decorating) contract in excess of \$2,000. For a single family borrower, the Agency should determine which funding stream best serves the specific need. For example, a purchase of an existing home without repairs funded under the ARRA would have no Davis-Bacon and Related Acts requirements. A new construction loan to build a new house funded by the FY09 allocation of funds for direct or guaranteed would have no Davis-Bacon and Related Acts requirements tied to it. Any construction contract in excess of \$2,000 funded by the ARRA must include the appropriate Davis-Bacon and Related Acts requirements covered in the attached checklist.

Also, if a bank makes a construction loan that is intended to be replaced with a Rural Development guaranteed take-out loan, then the construction of the project must comply with the Davis-Bacon and Related Acts requirements.

Community Facilities and Water and Waste Disposal Programs (Grant and Direct)

For these programs, the project architect or engineer performs the Contracting Officer duties as the owner's representative. Alternatively, the resident inspector or owner could fulfill those duties.

These programs received their annual FY09 allocation of funds for grant, direct and guaranteed programs. When ARRA funds are used, prevailing wage requirements must be met. As noted above, the Davis-Bacon and Related Acts apply to each contract for construction, alteration, or repair (including painting or decorating) in excess of \$2,000. For an applicant purchasing an existing building without making repairs or doing rehabilitation, funding from the ARRA would have no Davis-Bacon and Related Acts requirements. Any construction contract in excess of \$2,000 funded under the ARRA must include the appropriate Davis-Bacon and Related Act requirements covered in the attached checklist. A new construction loan funded by the FY09 allocation of funds from grant, direct or guaranteed would have no Davis-Bacon requirements tied to it unless leveraged funds trigger the Davis-Bacon requirements.

Business Programs (Rural Business Enterprise Grants and Business and Industry Loan Guarantee)

For Business Programs, the project architect (or engineer) typically performs the Contracting Officer duties as the owner's representative. A resident inspector could fulfill those duties as well. For small grant programs with no architect, engineer, or resident inspector, the Agency may be the most appropriate Contracting Officer. Such determinations will need to be made by each State Office. In cases of guaranteed loans funded under the ARRA, the approved lender will perform the functions of the Contracting Officer.

Business Programs received its FY09 allocation of funds for its guaranteed program. Those funds do not require Davis-Bacon compliance. However, when Business and Industry loan guarantee funds and Rural Business Enterprise Grant funds under the ARRA are used, prevailing wage requirements must be met. As noted above, Davis-Bacon requirements apply to each contract for construction, alteration, or repair (including painting or decorating) in excess of \$2,000. As a reminder, Section 9003 Biorefinery Assistance includes Davis-Bacon compliance requirements in its funding as well.

If there are questions, please contact Ben Shuman, PE, Senior Environmental Engineer, at 202-720-1784 or ben.shuman@wdc.usda.gov, for Water and Waste Disposal programs, or Bill Downs, Chief, Technical Support Branch, at 202-720-1499 or william.downs@wdc.usda.gov, for Housing and Business programs.

Attachment

Project:

American Recovery and Reinvestment Act funds used for a transaction that involves a new construction or repair contract, exceeding \$2,000, must comply with the prevailing wage requirements of the Davis-Bacon and Related Acts requirements. This checklist has been created to provide an overview of the requirements established by the Davis-Bacon and Related Acts requirements as prescribed in RD Instruction 1940-C. This checklist does not substitute for the detailed provisions in RD Instruction 1940-C or the Department of Labor requirements for implementing Davis-Bacon and Related Acts requirements.

As noted in this checklist, the Contracting Officer (CO) is responsible for ensuring that Davis-Bacon and Related Acts requirements are met. The person designated to perform the duties of the CO varies by program. The Administrative Notice identifies the individual or firm responsible as CO for these requirements. The RD Official shall insert the date that each requirement is completed.

Applicable requirements are listed below.

Before awarding a construction or repair contract.

_____ (date) **Informing the Applicant and Reviewing the Contract:** When application is made to the Agency or a guaranteed lender for assistance involving construction, the Agency or approved lender must inform the applicant that wages paid for labor must not be less than the prevailing wages determined by the Secretary of Labor (RD Instruction 1940-C (1940.106(b))). The Agency must review the contract to ensure that it contains the language provided in RD Instruction 1940.105(a) and the DOL website language (see below).

_____ (date) **Wage Determination:** Before bidding, the CO shall download the applicable Department of Labor (DOL) Davis-Bacon Wage Determination for the work from the DOL website at www.wdol.gov/dba.aspx#0 Once on the selection page, the CO chooses the state, county, and Construction Type. Construction Type choices are “All Construction Types”, “Building” (public buildings), “Heavy”, “Highway”, or “Residential”. Click on “Search”. The CO then scrolls to the bottom, and clicks on “Printer Friendly Version”. The CO then clicks on “File”, “Print”, and inserts the wage determinations into the contract documents.

_____ (date) **Information for Bidders:** Information provided to any and all bidders shall include the statement "The contractor must comply with the minimum rates for wages for laborers and mechanics as determined by the Secretary of Labor in accordance with the provisions of the Davis-Bacon and Related Acts." The CO shall verify this and include a copy of the Wage Determination in the bid information.

_____ (date) **Construction Contract Provisions:** All construction and repair contracts exceeding \$2000-must include the statement "The contractor must comply with the minimum rates for wages for laborers and mechanics as determined by the Secretary of Labor in accordance with the provisions of the Davis-Bacon and Related Acts." In addition, labor standards provisions from 29 CFR 5.5(a) must be included in every contract. See www.dol.gov/dol/allcfr/ESA/Title_29/Part_5/toc.htm. (The DOL website includes updated information which meets the requirements of RD Instruction 1940.105(b)).

After awarding a construction contract and before construction starts.

_____ (date) **Pre-Construction Conference:** The CO and other project participants will have a Pre-Construction Conference to discuss the following items. (See requirements of RD Instruction 1940.106(d).)

- The CO, inspectors, or applicant may monitor contractor’s adherence to the Davis-Bacon and Related Acts requirements at any time.
- Non-compliance with the Davis-Bacon and Related Acts requirements may result in termination of the contract and debarment of the contractor.
- Enforcement of non-compliance with the Davis-Bacon and Related Acts requirements may result in penalties
- Although the Agency and owner has the right to perform employee interviews, typically information can be confirmed by reviewing progress reports and contractor’s typical payroll records.
- The contractor shall maintain posted on site a copy of the Davis-Bacon and Related Acts poster (form WH-1321) and a copy of the wage determination. The poster is available at: www.dol.gov/esa/whd/regs/compliance/posters/davis.htm, with a Spanish version available at www.dol.gov/esa/whd/regs/compliance/posters/davisspan.htm. (The wage determination should have been provided to the contractor as a part of the bid package and the contract.)

During Construction (Monitoring)

_____ (date) **Certification of Compliance:** Contractor and subcontractors must provide certification of compliance with the Davis-Bacon and Related Acts to the CO / approved lender, as well as copies of payroll records for the period during which the work was performed. (See RD Instruction 1940-C (1940.106(e)(1))).

_____ (date) **Determination of Non-compliance:** The project inspector or CO, on determining that the contractor is not in compliance, will notify the appropriate parties, including the Agency and approved lender (if applicable) who will then contact the State Director for advice and further instructions.

(Additional information on actions to be taken is available in RD Instruction 1940-C (1940.106(e)(2) and (3), and 1940.106(f).)

(date) **Semiannual Report.** RD field offices or approved lenders will submit to the State Director Form RD 440-29, "Semiannual Labor Compliance Report," for projects requiring compliance with the Davis-Bacon and Related Acts for the periods established in RD Instruction 1940-C (1940.107(a)). (October through March, and April through September)

(date) **Consolidated Report.** RD State Offices will consolidate all reports received from field offices and approved lenders, and forward copies to the Administrator no later than April 30 and October 31. (See RD Instruction 1940-C (1940.107(b)).)

After Construction

(date) **Recordkeeping.** The Agency official or approved lender responsible for the project will preserve all payrolls and certifications for a period of 3 years from the date of final payment on the contract. (See RD Instruction 1940-C (1940.108).)

Contracting Officer

date