



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 30 2009

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Application of Davis-Bacon Act Wage Requirements to Fiscal Year 2010 Clean Water State Revolving Fund and Drinking Water State Revolving Fund Assistance Agreements

FROM: Peter S. Silva *Michael Shynis for*
Assistant Administrator

TO: Water Management Division Directors
Regions I - X

On October 30, 2009, P.L. 111-88, "Making appropriations for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2010, and for other purposes," was enacted. This law provides appropriations for both the Clean Water State Revolving Fund (CWSRF) and the Drinking Water State Revolving Fund (DWSRF) for Fiscal Year 2010, while adding new requirements to these already existing programs. One new requirement, and the focus of this memorandum, requires the application of Davis-Bacon Act requirements.

P.L. 111-88 includes the following language in Title II under the heading, "Administrative Provisions, Environmental Protection Agency,"

For fiscal year 2010 the requirements of section 513 of the Federal Water Pollution Control Act (33 U.S.C. 1372) shall apply to the construction of treatment works carried out in whole or in part with assistance made available by a State water pollution control revolving fund as authorized by title VI of that Act (33 U.S.C. 1381 et seq.), or with assistance made available under section 205(m) of that Act (33 U.S.C. 1285(m)), or both.

For fiscal year 2010 the requirements of section 1450(e) of the Safe Drinking Water Act (42 U.S.C. 300j-9(e)) shall apply to any construction project carried out in whole or in part with assistance made available by a drinking water treatment revolving loan fund as authorized by section 1452 of that Act (42 U.S.C. 300j-12).

In order to comply with this provision, States must include in all assistance agreements, whether in the form of a loan, bond purchase, grant, or any other vehicle to provide financing for a project, executed on or after October 30, 2009 (date of enactment of P.L. 111-88), and prior to

October 1, 2010, for the construction of treatment works under the CWSRF or for any construction under the DWSRF, a provision requiring the application of Davis-Bacon Act requirements for the entirety of the construction activities financed by the assistance agreement through completion of construction, no matter when construction commences.

Application of the Davis-Bacon Act requirements extend not only to assistance agreements funded with Fiscal Year 2010 appropriations, but to all assistance agreements executed on or after October 30, 2009 and prior to October 1, 2010, whether the source of the funding is prior year's appropriations, state match, bond proceeds, interest earnings, principal repayments, or any other source of funding so long as the project is financed by an SRF assistance agreement. If a project began construction prior to October 30, 2009, but is financed or refinanced through an assistance agreement executed on or after October 30, 2009 and prior to October 1, 2010, Davis-Bacon Act requirements will apply to all construction that occurs on or after October 30, 2009, through completion of construction.

Notably, there is no application of the Davis-Bacon Act requirements where such a refinancing occurs for a project that has completed construction prior to October 30, 2009. This provision does not apply to any project for which an assistance agreement was executed prior to October 30, 2009, no matter when construction occurs.

Further information may be provided in the form of "Questions and Answers" if necessary.

We fully understand the complexity of this provision and the difficulties involved in its application. If you have any question, please contact us, or have your staff contact Jordan Dorfman, Attorney-Advisor, State Revolving Fund Branch, Municipal Support Division, at (202) 564-0614, or Philip Metzger, Attorney-Advisor, Infrastructure Branch, Drinking Water Protection Division, at (202) 564-3776.

EPA's November 30, 2009 Memorandum CW/DWSRF Davis-Bacon Compliance - Guidance

- The EPA memorandum states projects with construction completed prior to October 30, 2009 do not necessitate the Davis-Bacon Act requirements, and the memorandum from EPA is dated November 30, 2009. How do you handle projects where the final contractor pay estimate was processed, contract now closed, in November and thus far in December?

A: The Davis-Bacon Act requirements will not apply to a project whose original loan agreement for a project was signed before October 30, 2009. This also includes loan increases even if they are signed on or after the October 30th date; however, they must not include any added work items to the scope of work under the original loan agreement. Further, as stated in federal guidance on this new provision, "This provision does not apply to any project for which an assistance agreement was executed prior to October 30, 2009, no matter when construction occurs."]

- Additionally, for any scheduled for final in December/January, do you need to issue a change order to the contractor, to extend time of performance, to incorporate this requirement?

A: This is the same as previously discussed; a project is affected only if the loan agreement is signed on or after October 30, 2009. However, if a loan agreement or amended agreement is signed on or after the October date that will include a new phase of work on a project, only then will a change order or amendment be necessary to be in compliance with this new provision.]

- Can you use the State certified payroll reporting form and black out the SS# for Federal reporting?

A: No – separate State and Federal report forms should be used to properly meet reporting requirements. However, if unintentionally only State forms are used, USDOL may accept the information reported on the State form if it minimally covers Federal reporting information requirements.]

- Other than publishing Federal wage rates, are there any other Federal flow down clauses that need to be incorporated into the solicitations?

A: Yes – Labor Standard Part 5 needs to be included in its entirety and not just referenced.]

- What risks/penalties are there to the ACW/ADW funding if the contractor errors in the wage rate, and you do not catch it?
 - A: If audited, labor investigators will always try to seek the source where the reporting error came from and deal with that entity on needed corrections or assessing a penalty, this is regardless of what tier a subcontractor may be on the project. If the error cannot be resolved at the lowest level, the investigator will seek each higher level of contracting on the project until a correction is made; this includes the contracting entity. As far as what risks and penalties are associated with ACW/ADW funding on the project, this would depend upon the outcome of any labor investigation. If corrections cannot not be made to satisfy applicable labor laws, affected work may be determined ineligible for payment and possibly in the worst case scenario, the entire loan amount may be subject to withdraw by ADEC.]**

- Is a utility required to submit the State/Federal certified payroll reporting forms to EPA, or is the contractor required to submit?
 - A: The State is the record keeper for State forms, and the contracting entity is the record keeper of Federal forms. No forms are submitted to EPA.]**

- For State rate, who does the payroll certification? (including site visits?)
 - A: Under Sec. 36.05.040 of State law, all contractors or subcontractors who perform work on a public construction contract for the state (or political subdivision of the State), shall every Friday of every second week, file with the DOL a sworn affidavit for the previous reporting period. Also, a contracting agency may require certified payrolls be submitted to them for monitoring, but this is an option of the contracting entity. In regards to site visits, State DOL will continue to perform audits of certified payrolls and conduct routine on-site inspections on the projects work site to ensure contractor compliance with State labor requirements.]**

- For Federal rate, who does the payroll certification? (including site visits?)
 - A: Under Federal law, whoever signs the affidavit for the certified payroll is the responsible party of that record. This could be each subcontractor on the project, or the contractor for the whole project, or even the contracting entity for the whole project. A copy of all the certified payrolls are kept with the contracting entity, but it's still whoever signs them is responsible for any incorrect reporting. Also, unlike the State, Federal reporting is required to be done weekly. In regards to site visits, the contracting entity should be making routine on-site checks to verify Federal labor law compliance; however, if a**

complaint has been filed with USDOL on a project, an investigator will most likely be sent on-site to check records.]

- How will the audits be conducted for this requirement?
A: If USDOL performs an audit, they will first contact the primary contracting entity for any record review and then move on from there to the project contractor and any subcontractors as needed. State DOL as mentioned previously will audit project payroll records on a routine basis.]

- Will it be ADEC through the loan audit or EPA independently?
A: ADEC will conduct an audit on every closed out loan project, which includes some review of certified payroll records. EPA does not usually perform independent audits of loan projects; however, if sufficient issues arise on a particular project beyond what the State audit can provide, EPA could consider doing their own independent audit.]

- If EPA is auditing ADEC files for compliance, will there be additional submittals required to ADEC by the utility? Or, will it be something noted in the ADEC audit report that ADEC verified compliance?
A: At this time, no additional reporting to ADEC is expected from this action. ADEC will make a verification of compliance at the time of the final project audit.]

- If there is a State/Federal wage rate change after solicitation, but prior to contract execution, does the solicitation need to be amended?
A: Federal – if the contract has not been awarded shortly after the solicitation and rates are updated, newer rates will apply. Any further questions on this should be directed to USDOL for guidance. State – prevailing rates are set by whatever rates are in effect 10 days prior to the final bid date of the project. If a rate change occurs during the solicitation and prior to 10 days from the end of solicitation, a bid addendum should be issued for notifying contractors of the rate change.]

- If there is a State/Federal wage rate change after contract execution, will a change order be required to reflect the new wage rate?
A: Federal – once a contract is awarded rates are good for the life of the contract. This even includes changes orders as long as they are not adding on a whole new phase of work. State – prevailing rates are set by whatever rates are in effect 10 days prior to the final bid date of the project. The rates are then set for two years, with the start

from the award date of the contract. If the project is not complete within two years, current rates at that time will become effective for another two years.]

- Is this Davis-Bacon action for all regular funded SRF projects the same as the ARRA funding reporting requirements?

A: Yes, however EPA's Office of Investigator General is expected to audit all closed out ARRA projects.]