

ARRA Related Davis-Bacon Implementation Questions
Region 5
September 8, 2009

1. To comply with Davis-Bacon relating to ARRA funds, what documents/information has to be included in the bidding documents besides 29 CFR 5.5?

29 CFR 5.5, the U.S. Department of Labor regulations that govern Davis-Bacon contract provisions and related matters, require the inclusion of the Davis-Bacon Wage Determination for the type of construction work being performed. The Davis-Bacon Wage Determination includes the prevailing wage rates and related fringe benefits. Davis-Bacon Wage Determinations are available at: [http://www.wdol.gov/dba.aspx#\(\)](http://www.wdol.gov/dba.aspx#()).

2. Municipal employees are going to be doing some landscaping work (Force Account) on a storm water project. This is work that could be included with the contracted work, but the municipality wants to have municipal workers do it. Does the municipality have to comply with Davis-Bacon and pay prevailing wages or just the regular wages of the employee?

Davis-Bacon does not apply to Force Account work. Please be advised that the environmentally preferable purchasing requirements specified in RCRA 6002 apply to landscaping products. You can review the list of products at 40 CFR 247.15.

3. Under the Compliance Verification section of the Wage Requirement Terms and Conditions, the sub-recipient is required, at a minimum, to interview a representative group of employees and spot check payroll data for contractors and subcontractors within two weeks of the contractor and subcontractor's submission of weekly payroll data and two weeks prior to estimated completion date for contractor and subcontractor. 29 CFR 5.6(a)(3) requires interviews of employees and examination of payroll data to "be made of all contracts with such frequency as may be necessary to ensure compliance [with the labor standards clauses required by section 5.5]". Are the frequency and scope of the interviews and examinations of payroll data outlined in the Compliance Verification section of the Wage Requirement Terms and Conditions mandatory or is this section intended to provide guidance as to the frequency and scope of these investigatory tools for complying with 29 CFR 5.6(a)(3)?

At a minimum, the frequency and scope of interviews and examinations of payroll data (within 2 weeks of each contractor's or subcontractor's submission of the **initial** payroll data and within 2 weeks prior to the end of the work) is mandatory. However, the subrecipient must also establish and follow an interview schedule based on its assessment of the risks of noncompliance with Davis-Bacon posed by contractors and subcontractors and the duration of the contract or subcontract. The subrecipient exercises its judgment in establishing a schedule once EPA's minimum requirements are met.

4. The Compliance Verification section of Wage Requirement Terms and Conditions requires sub-recipient to “periodically review” contractors and subcontractors’ use of apprentices and trainees and verify registration of respective programs. This subsection goes on to say that these reviews shall be conducted “in accordance with the schedules for spot checks and interviews”. 29 CFR 5.6(a)(3) requires these reviews “to be made as may be necessary to assure compliance with the labor standards clauses [required by 29 CFR 5.5]”. Please clarify the frequency and scope of these reviews.

As stated in the response to question 3, the subrecipient is required to conduct spot checks and interviews within 2 weeks of each contractor’s and subcontractor’s submission of the **initial** payroll data and within 2 weeks of the end of the project. However, the subrecipient must also establish and follow an interview schedule based on its assessment of the risks of noncompliance with Davis-Bacon posed by contractors and subcontractors and the duration of the contract or subcontract. The subrecipient exercises its judgment in establishing a schedule once EPA’s minimum requirements are met.

5. The Administrative Conditions require any State agency or agency of a political subdivision of a State which is using appropriated Federal funds to comply with the requirements set forth in Section 6002 of the Resource Conservation and Recovery Act (RCRA). Please confirm that Section 6002 of the RCRA applies to the procurement of specific items, as that term is used in Section 6002 of RCRA, and does not apply to a construction contract for a public works project that may include the provision of one or more items identified under Section 6002 of the RCRA.

The State’s presumption that RCRA 6002 does not apply to construction projects is incorrect. EPA has implemented the environmentally preferable purchasing requirements of RCRA 6002 with regulations at 40 CFR Part 247, “[Comprehensive Procurement Guidelines for Products Containing Recovered Materials.](#)” Construction products are covered by 40 CFR Part 247.12. Please note that landscaping products are covered by 40 CFR 247.15.

6. When state law requires all construction contracts for sub-recipients (i.e., SRF borrowers that are governmental units) to be awarded to a lowest responsible and responsive bidder, would there ever be an ARRA Section 1554 requirement to post in such a state? Confirm that when state and federal law have not previously required bidding for engineering services that ARRA Section 1554 requirements are not now requiring a posting of that service? Confirm that a construction contract that has a fixed unit price (i.e., where the number of units depends on what occurs during construction like soil removal) it does not require Section 1554 posting?

ARRA Section 1554, “[Special Contracting Provisions,](#)” applies only to direct federal procurement. EPA’s Terms and Conditions for Recovery Act grants do not mention Section 1554.

7. The Wage Rate Requirements Terms and Conditions are divided into 2 roman numerals. Please identify whether there are any significant differences between the

requirements listed Roman Numeral I (Requirements under Section 1606 of the ARRA for Sub-recipients that are Governmental Entities) and Roman Numeral II (Requirements under Section 1606 of the ARRA for Sub-recipients that are not Governmental Entities).

The primary difference between Part I, Requirements under Section 1606 of the ARRA for Subrecipients that are Governmental Entities, and Part II, Requirements under Section 1606 of the ARRA for Subrecipients that are not Governmental Entities, is which entity is responsible for obtaining the Davis-Bacon Wage Determination. Under Part I, the subrecipient obtains the Wage Determination from [http://www.wdol.gov/dba.aspx#\(\)](http://www.wdol.gov/dba.aspx#()). Under Part II, the State must assist the subrecipient with obtaining the Davis-Bacon Wage Determination from [http://www.wdol.gov/dba.aspx#\(\)](http://www.wdol.gov/dba.aspx#()).

8. How does the US EPA distinguish between new jobs created and retained? In the State's opinion, because a job would not have happened but for ARRA, all jobs associated with a project are new jobs.

The Agency's guidance on job reporting, titled the Supplemental EPA Guidance on Measuring and Reporting Jobs, is available at: <http://www.epa.gov/recovery/supplement.html>.

The link to the Office of Management and Budget Guidance that details the government wide reporting requirements, including Section 1512 reporting requirements of ARRA, is available at: http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21.pdf.

According to the Supplemental EPA Guidance on Measuring and Reporting Jobs:

Prime recipients are required to report a single estimate of jobs directly created and retained by project and activity or contract. A job created is a new position created and filled or an existing unfilled position that is filled as a result of the Recovery Act; a job retained is an existing position that would not have continued to be filled were it not for Recovery Act funding. A specific example calculation is provided in Section 5.3 of the [OMB guidance \(M09.21, page 35\) \(PDF\) \(41pp, 550k, about PDF\)](#). Additionally, a job cannot be counted as both created and retained. Recipients are required to report an aggregate number for the cumulative jobs created and/or retained when reporting the aggregate number of cumulative jobs created and/or retained for the quarter. Therefore, only a single number that captures the estimates of both types of jobs (created and/or retained) is required to be reported in the designated field on the form. This guidance also suggests that recipients, subrecipients, and vendors view the question of job impact in the following way: would the hours and FTEs reported for the employees included in the jobs measure be different in the absence of receiving Recovery Act funds?

9. Previous EPA Guidance suggested subcontractors were not required to maintain payroll records. The most recent EPA Guidance suggests that subcontractors are required to maintain payroll records. Please clarify.

Subcontractors are required to maintain payroll records. The prime contractor is responsible for obtaining certified payroll records from their subcontractor(s) and submitting them to the subrecipient, along with their own certified payroll records.