



May 29, 2009

Mr. Chris Henderson  
Senior Advisor  
Office of the Secretary  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Dear Mr. Henderson:

This is in response to your inquiry concerning the applicability of Davis-Bacon Act (DBA) labor standards requirements contained in the American Recovery and Reinvestment Act of 2009 (ARRA) to Department of Interior (DOI) programs. Briefly, DOI specifically raised questions about whether the ARRA Davis-Bacon labor standards provisions affect: (1) construction projects assisted under the Indian Self-Determination and Education Assistance Act, Pub. L. No 93-638 ("638 contracts"); (2) Bureau of Reclamation projects that continue after the ARRA-funded portions of the projects are completed; and (3) DOI's youth and student labor programs.

Section 1606 of ARRA, broadly applies Davis-Bacon labor standards to ARRA-appropriated construction projects listed under Division A of the law by specifying that:

Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, all 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 subchapter IV of chapter 31 of title 40, United States Code [Davis-Bacon Act]. 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 (60 Stat. 1267; 5 U.S.C. App.) and section 3145 of title 40, United States Code. [Pub. L. No. 111-5, 123 Stat. 303.]

The wording reinforces Davis-Bacon Act coverage of construction contracts "funded directly" by Federal agencies in which they are parties to the contract. It also extends the prevailing wage requirements to projects "assisted in whole or in part by and through the Federal Government pursuant to this Act," thus encompassing any assistance provided for ARRA projects through grants, loans, guarantees, and insurance.

With respect to federally assisted projects funded by appropriations under Division A of ARRA, the introductory language of section 1606 “[n]otwithstanding any other provision of law” explicitly overrides any requirement relating to Davis-Bacon coverage that may be contained in other Davis-Bacon related Acts. Consequently, if a construction project is funded with any ARRA appropriation, then the ARRA prevailing wage requirement applies.

### **Bureau of Indian Affairs Contracts with Tribes**

The phrase “in a manner consistent with other provisions in this Act” in section 1606 instructs that other specific provisions in Division A of ARRA further define application of this Davis-Bacon wage requirement. Two ARRA provisions explicitly exempt certain tribal contracts from section 1606. One provision specifies that “section 1606 of this Act shall not apply to tribal contracts entered into by the Bureau of Indian Affairs” with the \$450 million appropriated under ARRA for repair and restoration of roads; school improvements, repairs and replacement construction; and detention center maintenance and repairs. 123 Stat. 168. A second provision specifies that “section 1606 of this Act shall not apply to tribal contracts entered into by the [Department of Health and Human Services, Indian Health] Service” with the \$415 million ARRA appropriation for Indian health facilities construction projects. 123 Stat. 171. No other tribal construction projects funded under Division A of ARRA are exempt from the labor standards provisions required by section 1606 of ARRA.

It should be noted that although ARRA does not apply Davis-Bacon labor standards to the Bureau of Indian Affairs or Indian Health Service tribal contracts for the construction noted above, if such construction is assisted under another Davis-Bacon related Act that requires application of Davis-Bacon prevailing wage requirements, then the terms of the other Davis-Bacon related Act would continue to apply. Thus, for example, construction projects assisted under the Indian Self-Determination and Education Assistance Act, Pub. L. No 93-638 (“638 contracts”), but not under ARRA, would follow the Davis-Bacon related Act requirements for 638 contracts in 25 U.S.C. 450e (tribes and tribal organizations excluded from being considered ‘contractors or subcontractors’ subject to the Davis-Bacon labor standards requirements).

### **Bureau of Reclamation Projects**

You have asked whether the ARRA Davis-Bacon labor standards continue to apply to construction projects after the ARRA-funded portions of projects are completed. It is our understanding that this issue particularly impacts the Bureau of Reclamation (BOR) because a significant number of their projects are multi-phased, multi-year projects. ARRA appropriates \$1 billion to BOR for “water and related resources” and directs that BOR use the ARRA funds “for elements of projects, programs or activities that can be completed within these funding amounts and not create budgetary obligations in future fiscal years. 123 Stat. 137.

It has been DOL's long-standing position that a project consists of all construction necessary to complete the building or work regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place. *See* All Agency Memorandum No. 130. The section 1606 language applying Davis-Bacon labor standards to "projects funded directly by or assisted in whole or in part" clearly applies Davis-Bacon coverage to projects that are only partly assisted under ARRA, whether it be up-front seed funding that is quickly used up or a steady stream of assistance during the life of the project. Section 1606's language precludes intentional splitting of ARRA projects into separate and smaller contracts to avoid Davis-Bacon coverage on some portion of a larger project, particularly where the activities are integrally and proximately related to the whole.

However, this does not mean that Davis-Bacon coverage of an ARRA project lasts in perpetuity. There are many situations in which major construction activities are clearly undertaken in segregable phases that are distinct in purpose, time, or place. While DOI, and other Federal contracting or assisting agencies, must examine every situation 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. If BOR is uncertain whether contracts awarded in the future are sufficiently related in purpose, time, and place to earlier contracts on a project covered by the ARRA Davis-Bacon requirements, the agency may contact the Wage and Hour Division for guidance.

### **Youth and Student Programs**

DOI has inquired whether the ARRA Davis-Bacon labor standards affect the agency's ability to use the Youth Conservation Corps, Student Conservation Association, and other related partnerships that serve young adults on ARRA-appropriated projects, such as maintenance of facilities and trails and other repair and rehabilitation projects for the National Park Service.

It is our understanding that many activities that these youth are engaged in for DOI do not involve construction. For instance, participants may be involved in monitoring wildlife, conducting water quality testing, and eradicating invasive species. Activities such as these are not viewed as construction work performed by laborers and mechanics within the meaning of the DBA.

As a general matter, DOL's longstanding interpretation of the Davis-Bacon and related Acts is that there are no exceptions from labor standards coverage for volunteer labor unless an exception is specifically provided for in the particular related Act under which the project funds are derived. Under DOL's regulations, every person performing the duties of a laborer or mechanic in the construction, prosecution, completion or repair of a public building or public work, or of a building or work financed in whole or in part by Federal loans, grants or guaranties, is considered employed by the project's contractor regardless of any contractual relationship to the contrary between the contractor and that person. *See* 29 CFR 5.2(o).

However, section 4 of the Davis-Bacon Act, 40 U.S.C. 3146, provides that the statute “does not supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates.” The authorizing statutes for the Youth Conservation Corps, 16 U.S.C. 1703(a)(3), and the Public Land Corps, 16 U.S.C. 1726, for example, specifically require the Secretaries of Interior and Agriculture to set the rates of pay or living allowances for the Corps’ participants. Other youth programs, such as the American Conservation and Youth Service Corps (AmeriCorps), 42 U.S.C. 12655l, and Volunteers in Service to America (VISTA), 42 U.S.C. 4955, specify in the statutory language the living allowances and other benefits that must be provided to each participant. In accordance with section 4 of the Davis-Bacon Act, we believe that these federal youth programs that establish specific compensation to be given participants would not be covered by Davis-Bacon labor standards.

Any request for further consideration of this matter should be accompanied with appropriate supporting documentation and must be sent to Mr. John L. McKeon, Deputy Administrator, Wage and Hour Division, 200 Constitution Avenue, N.W., Room S-3502, Washington, D.C. 20210.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy J. Helm". The signature is fluid and cursive, with a large initial "T" and "H".

Timothy J. Helm  
Chief, Branch of Government Contracts Enforcement  
Office of Enforcement Policy