



November 19, 2009

Mr. Scott Harris
General Counsel
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Harris:

This is in response to your inquiry regarding whether the Davis-Bacon Act (DBA) labor standards requirements in the American Recovery and Reinvestment Act of 2009 (ARRA) apply to certain Department of Energy (DOE) programs.

DOE, through its Office of Energy Efficiency and Renewable Energy (EERE), operates a State Energy Program (SEP) that provides grants to States that may be used to fund individual States' SEP plans. These grants are funded in whole or in part by ARRA. According to the DOE, one or more States may use these grants to fund consumer rebate programs under which homeowners would apply for a rebate for funds they expend on certain energy efficiency and weatherization improvements to their homes. The rebates may reimburse homeowners for the cost of materials, the cost of labor (such as the cost of installing windows or insulation), or both. The structure and specific requirements of such consumer rebate programs, including the criteria for qualifying for a rebate and the manner in which the rebate would be provided, presumably would vary from State to State.

Section 1606 of ARRA, Pub. L. No. 111-5, 123 Stat. 303, provides:

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 [the 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 (64 Stat. 1267; 5 U.S.C. App.) and section 3145 of title 40, United States Code.

The Office of Management and Budget (OMB) issued interim final regulations (OMB Regulations) in April 2009 that provide specific guidance regarding implementation of ARRA Sections 1512 (reporting and registration requirements), 1605 (Buy American requirement), and 1606 (Davis-Bacon wage rate requirements). The OMB regulations establish “Federal Governmentwide award terms” in order to “implement the cross-cutting requirements” of ARRA, including Section 1606. 2 CFR 176.10. In issuing the OMB Regulations, OMB explained that the regulations would “foster consistent application across the Federal Government.” 74 Fed. Reg. 18449 (April 23, 2009). The OMB Regulations make clear that the requirements discussed therein – particularly the requirements applicable to “recipients” and “subrecipients” of ARRA funds – do not apply to individuals. Specifically, OMB defines “recipient” as “any entity other than an individual that receives Recovery Act funds in the form of a grant, cooperative agreement or loan directly from the Federal Government.” 2 CFR 176.30. It also defines a “subrecipient or subawardee” as “a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program.” *Id.* A similar definition of “recipient” appears in Section 1512 of ARRA, which sets forth reporting requirements for recipients of ARRA funds.

Under Reorganization Plan Number 14, the Department of Labor (DOL) has coordination and oversight responsibilities for Davis-Bacon and related Acts. ARRA Section 1606 also gives DOL authority over the labor standards provisions in ARRA, which must be carried out “in a manner consistent with other provisions” in ARRA. On May 29, 2009, the DOL Wage and Hour Division issued Memorandum No. 207, which states that “Federal agencies must ensure that recipients of assistance under ARRA require contractors and subcontractors to pay laborers and mechanics employed by contractors on ARRA-assisted construction projects at least the prevailing wages as determined under the DBA.” As noted, the OMB guidance has made clear that individuals are not considered to be recipients or subrecipients of ARRA funds.

We have not been given specific details of any State’s rebate program. However, in light of OMB’s determination that individuals cannot be considered either recipients or subrecipients of ARRA funds to whom Section 1606 requirements would apply, we believe that, as a general matter, an individual homeowner who receives a rebate for material and/or labor costs he or she has incurred in connection with qualifying energy efficiency and weatherization improvements to his or her home under a DOE SEP rebate program is not responsible for Davis-Bacon compliance. We believe that the goals of Section 1606 are best achieved by continuing to apply Davis-Bacon principles and requirements to all “recipients,” “subrecipients,” and “subawardees” of ARRA funds, as defined in the OMB Regulations. This is consistent with WHD Memorandum No. 207, which emphasized that *recipients* of ARRA funds must require that contractors and subcontractors pay at least DBA prevailing wages to the laborers and mechanics they employ on ARRA-assisted construction projects in excess of \$2,000.

This general interpretation addresses only whether Davis-Bacon labor standards apply to individual homeowners who receive a rebate, funded in whole or in part by ARRA, to reimburse them pursuant to DOE programs for certain energy efficiency and

weatherization improvements to their homes. This interpretation thus does not apply in any other context, including any rebate program that differs materially from the program described above. As stated in Memorandum No. 207, “[t]here are clearly some circumstances that are unique to a single Federal agency or to a particular Federal assistance program, and there are factual scenarios that may impact a determination of Davis-Bacon applicability. WHD is prepared to address those questions on a case-by-case basis.” The Davis-Bacon standards in Section 1606 continue to apply to any other entity that falls within the OMB definitions, including contractors and subcontractors employing laborers or mechanics on projects in excess of \$2,000 funded directly by or assisted in whole or in part by and through the Federal Government pursuant to ARRA.

Any request for further consideration of this matter should be sent to Ms. Nancy Leppink, Deputy Administrator, Wage and Hour Division, 200 Constitution Avenue, N.W., Room S-3502, Washington, D.C. 20210.

Sincerely,



Timothy J. Helm

Chief, Branch of Government Contracts Enforcement
Office of Enforcement Policy

cc: James R. O’Connor, Chief of Staff, Department of Energy
Matthew Rogers, Senior Advisor to the Secretary, Department of Energy