U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 1, 2009

Mr. Matthew Rogers
Senior Advisor for Recovery Act Implementation
Office of the Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Rogers:

This is in response to your inquiry concerning application of the Davis-Bacon Act (DBA) labor standards requirements contained in the American Recovery and Reinvestment Act of 2009 (ARRA) to the Department of Energy (DOE) Weatherization Assistance Program under part A of title IV of the Energy Conservation and Production Act (42 U.S.C. 6861 *et seq.*). You specifically request guidance as to whether laborers and mechanics employed by a Community Action Agency will be subject to the Davis-Bacon labor standards requirements when performing work on a DOE weatherization assistance project funded in whole or in part with funding appropriated by ARRA.

As you know, ARRA appropriates $5 billion for the DOE Weatherization Assistance Program, which was established by the Energy Conservation and Production Act in 1976. It is our understanding that DOE awards grants under the Weatherization Assistance Program to state-level government agencies, which then contract with local agencies, usually Community Action Agencies, to deliver weatherization services to eligible residents. Individuals and families apply for assistance through their local agencies. Once they are approved for services, professionally trained weatherization assistance program technicians perform on-site home energy audits to identify cost-effective measures that can be taken. Crews then make repairs and improvements to increase energy efficiency that will bring down the energy costs for the low-income resident. It is our understanding that the technicians conducting the weatherization audits are typically employees of the governmental or community action agencies while the repair crews often work for contractors.

Section 1606 of ARRA broadly applies Davis-Bacon labor standards to ARRA-funded construction projects 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

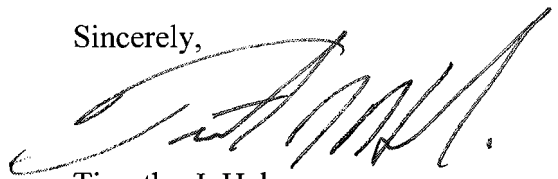
> rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code [Davis-Bacon Act]. With respect to the labor standards specified in this section, the Secretary 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.

The Department of Labor has long held that governmental agencies (such as States or their political subdivisions) are not considered "contractors" or "subcontractors" within the meaning of the Davis-Bacon Act when the construction is performed by their own employees on a "force account" basis. *See* 29 CFR 5.2(h). In essence, the governmental agency receiving the grant decides not to contract out the work but actually performs it with its own employees. It is our view that laborers and mechanics employed by a private, non-profit Community Action Agency cannot be considered as force account labor and will be covered under the Davis-Bacon labor standards requirements when performing ARRA-assisted weatherization work.

In addition, when a Community Action Agency contracts out work on a DOE weatherization project that is assisted with ARRA funding, the Community Action Agency must apply the Davis-Bacon labor standards – the contract clauses set forth at 29 CFR 5.5 and the appropriate Davis-Bacon wage determination – to the contracts for such work. Thus, repair crews performing the duties of laborers or mechanics for a Community Action Agency or its contractors must be paid at least the Davis-Bacon prevailing wages. However, certain activities such as energy audits and inspection work are not usually viewed as construction work performed by laborers and mechanics within the meaning of the DBA and, thus, technicians conducting energy audits would not be subject to the Davis-Bacon requirements.

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

Sincerely,



Timothy J. Helm
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