

U.S. Department of Labor

Wage & Hour Division
Washington, D.C 20010



June 25, 2020

Janet Golrick
Acting Deputy Assistant Secretary for Grant Programs
Office of Community Planning and Development
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-7000

Re: Applicability of Davis-Bacon Labor Standards and Wage Determinations to Projects
Funded by HUD Community Development Block Grant Disaster Recovery Funds

Dear Ms. Golrick:

This letter is in response to a letter from you dated May 12, 2020, and a letter from Stanley Gimont dated April 26, 2019, both requesting that the Administrator of the Wage and Hour Division authorize solely prospective application of Davis-Bacon Related Act (DBRA) requirements to certain construction funded by Community Development Block Grant Disaster Recovery (CDBG-DR) funds. Through your and Mr. Gimont's letters, the U.S. Department of Housing and Urban Development (HUD) has requested that DBRA prevailing wage requirements not be applied retroactively to construction funded in whole or in part by the CDBG-DR grants listed in the letters. The listed grants provide disaster recovery funding in response to major disasters affecting numerous States and territories, including Texas and Puerto Rico, with respect to construction work financed under the grant agreements listed, including any related future CDBG-DR allocations.

Statutory and Regulatory Framework

As you know, Davis-Bacon requirements, including the requirement to pay the prevailing wage as set forth in a Davis-Bacon wage determination, are made applicable to the Community Development Block Grant program by Section 110 of the Housing and Community Development Act of 1974 (HCDA), now codified at 42 USC 5310, which provides that:

All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141-3144, 3146, and 3147 of Title 40:
Provided, That this section shall apply to the rehabilitation of residential property only if such property contains not less than 8 units. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in

Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 3145 of Title 40.

Department of Labor regulations, which govern the application of Davis-Bacon wage determinations to covered contracts, provide that:

where "Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved prior to contract award (or the beginning of construction where there is no contract award), the agency shall request a wage determination prior to approval of such funds. Such a wage determination shall be issued based upon the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937 or where there is no contract award), as appropriate, and shall be incorporated in the contract specifications retroactively to that date, *Provided*, That upon the request of the head of the agency in individual cases the Administrator may issue such a wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, *Provided Further*, That the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate."

29 CFR 1.6(g).

Application of DBRA prevailing wage standards to construction funded by the listed CDBG-DR grants

In your and Mr. Gimont's letters, HUD has advised that it believes that prospective application of Davis-Bacon requirements under 29 CFR 1.6(g) with respect to construction funded in whole or in part by the listed CDBG-DR grants is necessary and proper in the public interest to prevent injustice or undue hardship. HUD has further defined prospective application in this context to mean that for construction activities financed in whole or in part by the listed CDBG-DR grants that are subject to the Davis-Bacon requirements in section 110 of the HCDA:

- A) Davis-Bacon requirements will not apply if all construction work on a project was performed and completed prior to the date of the referenced CDBG-DR grant agreement between HUD and the recipient state(s) or territory, and CDBG-DR grant funds are used to reimburse those project costs.
- B) Davis-Bacon requirements will apply to construction work on a CDBG-DR-funded project that began after the date of the referenced CDBG-DR grant agreement between HUD and the recipient state(s) or territory.

C) Davis-Bacon requirements will apply prospectively from the date of the CDBG DR grant agreement between HUD and the recipient state(s) or territory, but not retroactively to pre-agreement construction work, if construction work on a project began prior to the CDBG-DR grant agreement but was still ongoing as of the date of that agreement.

Based on the information contained in your and Mr. Gimont's letters, the Department of Labor's Wage and Hour Division (WHD) concurs with HUD's conclusion that its requests meet the requirements established by 29 CFR 1.6(g) and grants the requested relief, as described below.¹ Specifically, WHD finds that it is in the public interest to support long-term recovery efforts in response to the disasters experienced by states and territories across the United States which triggered these CDBG-DR grants. To the extent that retroactive application of DBRA prevailing wage requirements were to delay or disrupt construction necessary to such recovery efforts, such retroactive application would cause undue hardship to the affected communities. Moreover, for construction that was ongoing or completed at the time of the respective grant agreement,² the record reflects no intent to apply for such funding prior to contract award (or the start of construction, as appropriate), as the funding was not available prior to the grant agreement.³ Therefore, it is appropriate to authorize solely prospective application of the DBRA prevailing wage standards as of the date the grant agreement was executed. For construction ongoing as of that date, the contracting agency must ensure that the contract specifications include the Davis-Bacon contract clause and the applicable wage determinations in effect as of the relevant grant agreement's execution date. DBRA requirements will also apply to construction work on a CDBG-DR-funded contract that began on or after the grant agreement execution date. DBRA requirements under section 110 of the HCDA will not apply where all construction work on a contract was performed and completed prior to the grant agreement execution date.

This prospective application of the DBRA prevailing wage requirements will apply to all contracts funded by the CDBG-DR grants listed, where construction was ongoing as of the date the grant agreement was executed, regardless of whether the construction is contracted for by the states or territories or one of the grant sub-recipients. As explained

¹ Based on the record before us, we understand that the construction at issue is not being funded by other statutes containing DBRA requirements. To the extent that such other statutes are applicable, WHD would need to receive and rule on a 29 CFR 1.6(g) waiver request from the relevant federal department or agency. In the absence of a WHD determination granting such a waiver request, DBRA labor standards under any such statute would not apply only prospectively.

² To the extent that construction is not already ongoing or completed as of the date the grant agreement between HUD and the recipient state or territory is executed, this waiver of retroactive applicability of Davis-Bacon labor standards is inapplicable.

³ In the event that an investigation or other action were to establish that there was an intent to use such funding prior to contract award or the start of construction of a particular project, or to otherwise evade the application of Davis-Bacon labor standards, this waiver of retroactive applicability would not be applicable to that project.

above, section 110 of the HCDA applies the DBRA prevailing wage requirements to construction funded in whole or in part by the CDBG-DR program. Whether the state or territory contracts directly for construction work⁴ or makes a sub-grant to a local government agency or non-profit organization which in turn contracts for the construction work, the contractor's laborers and mechanics would be performing construction work financed in whole or in part by the CDBG-DR program, and the DBRA prevailing wage requirements would therefore be applicable to that work.

This ruling is based exclusively on the facts and circumstances described in your request and is given based on the representation, express or implied, that HUD has provided a full and fair description of the facts and circumstances that would be pertinent to our consideration of HUD's request pursuant to 29 CFR 1.6(g). Existence of other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.

Sincerely,



Cheryl M. Stanton
Administrator

⁴ To the extent that a state or territory uses CDBG-DR grant monies to perform construction activities "in-house" with its own employees, DBRA prevailing wage standards would not apply to such activities. *See* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Ch. 15, § 15b06 (2010), *available at* http://www.dol.gov/whd/FOH/FOH_Ch15.pdf. Construction activities performed by state government employees are not generally subject to Davis-Bacon labor standards because governmental agencies and states or their political subdivisions are not considered contractors or subcontractors within the meaning of the Davis-Bacon Act. *Id.*