



OFFICE OF FIELD POLICY
AND MANAGEMENT

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0050

Special Attention of:
Regional and Field Davis-Bacon and Labor
Standards Staff;
Public Housing Regional and Office
Directors;
Public Housing Agencies;
Office of Native American Programs
Administrators;
Tribes; Tribally Designated Housing Entities;
Indian Housing Authorities

Notice: LR-93-01

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Expires: This Notice is effective until it is amended, superseded, or rescinded.

Cross References: U.S. Housing Act of 1937, as amended; HUD Handbooks 7485.1, REV 4 (12/89) and 7485.3 (3/92); 24 CFR 968.203

SUBJECT: Determination of prevailing wage rates for construction work financed or eligible for financing under the Comprehensive Improvement Assistance Program (CIAP) or Comprehensive Grant Program (CGP)

- I. General applicability of prevailing wage rates.
- II. "Nature" of work for the determination of wage rate applicability for CIAP/CGP-eligible work.
- III. Guidance on the determination of nature of work for painting.

The following guidance concerns the proper determination of Davis-Bacon or HUD-determined prevailing wage rate applicability to construction work carried out in public or Indian housing, both prevailing wage requirements found in Section 12(a) of the U.S. Housing Act of 1937, as amended (Act) (Title 42 U.S.C. 1437j (a)).

I. GENERAL APPLICABILITY OF PREVAILING WAGE RATES

Section 12(a) of the Act requires that not less than the wages prevailing in the locality, as determined or adopted by HUD, shall be paid to all maintenance laborers and mechanics employed in the operation of low-come housing; and that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act, shall be paid to all laborers and mechanics employed in the development of the project involved.

Construction work which is financed or which is eligible for financing under the Comprehensive Improvement Assistance Program (CIAP) or Comprehensive Grant Program (CGP) is subject to either HUD-determined prevailing wage rates or Department of Labor (DOL)-determined (Davis-Bacon and Related Acts) prevailing wage rates, **depending on the nature of work that is performed**; (i.e., whether the work falls within the purview of "operation" or "development," above). It is important to recognize that the source of the funds under the Act, whether from "operating" or "development" funds, is not determinative with regard to the proper characterization of work and correct wage rate application.

The HUD Office of Labor Relations is responsible for the determination of whether work which will be undertaken at public and Indian housing developments constitutes maintenance, nonroutine maintenance or development. Consultation with HUD Public or Indian Housing Staff may be necessary from time to time to help define the "nature" of the work. Following the determination of the "nature" of the work, the Labor Relations staff determines and issues prevailing wage rates to cover work which is found to constitute maintenance or non-routine maintenance, or issues appropriate Davis-Bacon wage rates for development work. (See also HUD Handbooks 7485.1, REV 4 (12/89), and 7485.3 (3/92).)

II. "NATURE" OF WORK FOR THE DETERMINATION OF WAGE RATE APPLICABILITY FOR CIAP/CGP-FUNDED AND CIAP/CGP-ELIGIBLE WORK

For CIAP/CGP-funded or eligible work, a proper determination of which prevailing wage rate is applicable (HUD- or DOL-determined) must be based on the nature of the work (with consideration of substantiality of the work) that is/will be performed. It is important to understand that simply making a judgement that the work in question "appears" to be maintenance or construction is not an appropriate analytical approach for reaching this decision and may often lead to an improper determination and misapplication of prevailing wage requirements. An improper determination may result in local agencies or contractors having to pay wage restitution to workers.

A. Statutory and regulatory definitions.

In order to perform an evaluation of proposed work for a determination of the "nature" of the work, the substantiality (scope and context) of that work (discussed below) must be viewed in light of statutory and regulatory definitions and other policy directives and guidance:

- Operation is defined in the Act (Section 3(c)(2)) in part as any or all undertakings appropriate for management, operation, services, maintenance, security..., or financing in connection with a low-income housing project.
- Maintenance, an activity normally funded under an "operating" account, is not defined in the Act or in existing HUD regulations. For the purpose of this Letter, maintenance shall mean work that involves the regular upkeep and preservation of buildings, grounds, and facilities. Maintenance may include but is not limited to groundskeeping, janitorial work, patching and/or finishing of interior and exterior walls and other surfaces, and the preservation, inspection and general up keep of electrical, plumbing, and heating and air conditioning systems. Maintenance work is subject to HUD-determined prevailing maintenance wage rates.
- Nonroutine maintenance under CIAP/CGP (24 CFR 968.203) is defined as work items that ordinarily would be performed on a regular basis in the course of upkeep of a property but have become substantial in scope because they have been put off, and that involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Nonroutine maintenance may include replacement of equipment

and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind. Nonroutine maintenance is subject to wage rates which are determined by HUD to prevail in the locality for similar work. HUD-determined maintenance wage rates are not applicable to nonroutine maintenance.

- Development is defined in the Act (Section 3(c)(1)) as any all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-income housing project. The definition indicates that "construction" may be confined to "reconstruction, remodeling, or repair of existing buildings." Development work is subject to Davis-Bacon wage rates.
- Work that constitutes reconstruction, a substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify as nonroutine maintenance but falls within the purview of "development" (24 CFR 968.203).
- Substantiality refers to a measurement of scope and context with which the nature of work can be determined. This measurement was introduced as a means to differentiate between deferred maintenance subject to HUD-determined wage rates and development work subject to Davis-Bacon wages in a February 4, 1983, letter from the Solicitor of Labor (T. Timothy Ryan, Jr.) to HUD's General Counsel (John J. Knapp). The Solicitor expressed substantiality in the following terms: "any repair or replacement necessitated by normal wear and tear over time would be considered 'deferred maintenance,' provided that the work is not so substantial as to constitute reconstruction....since 'reconstruction, remodeling, or repair of existing buildings' is specifically included in the Act's definition of 'development,' to which the Davis-Bacon provisions apply" (emphasis added).

Note: The Solicitor further advised that "if major rewiring, plumbing or structural changes are necessary, or if it is done as part of...virtually complete remodeling..., the work would then constitute 'reconstruction' and be subject to Davis-Bacon wage rates." Also, that the conversion of equipment or premises such as the conversion from oil to gas heat or the surfacing of gravel driveways with asphalt, and replacement or alteration of the property which results in "betterment" (provided that significant construction activity is involved) would be covered by Davis-Bacon.

- Abatement of asbestos or lead-based paint or suspected lead-based paint, and repainting or encapsulation, does not constitute nonroutine maintenance and must be treated as "development" work (DOL/All Agency Memorandum #153, August 6,1990).
- The Davis-Bacon Act, which requires the payment of wage rates predetermined by the Secretary of Labor, covers work which involves Federal government contracts in excess of \$2,000 for "construction, alteration, and/or repair, including painting and decorating..." (emphasis added).

B. Substantiality: Scope and context of work.

Substantiality is a measurement with which to differentiate between CIAP or CGP work which is subject to HUD-determined wage rates and that which is subject to Davis-Bacon wage rates. All CIAP and CGP work - nonroutine maintenance and development - is characterized as "substantial." Nonroutine maintenance describes such work as "work items that ordinarily would be performed on a regular basis in the course of upkeep of a property but have become substantial in scope because they have been put off..." (emphasis added). The DOL Solicitor described development in terms of work items that, because of substantiality (i.e., because they are so substantial) could not be considered deferred maintenance but rather would constitute reconstruction (i.e., development). (See definitions of nonroutine maintenance, development and substantiality.)

The application of these definitions to actual work for project descriptions is not an exact science and can be difficult. To assist in making accurate differentiations between nonroutine maintenance (subject to HUD-determined prevailing wage rates) and development (subject to Davis-Bacon prevailing wage rates), it is useful to look at proposed work projects and substantiality in the following way.

All buildings deteriorate over time unless maintained. Building maintenance and repair, then, may be viewed as a continuum of work responses to a building(s) over a period of time, ranging from routine daily maintenance to replacement of failed components, to virtual or complete reconstruction or remodeling. This continuum, which can also be referred to as a continuum of substantiality, is a function of both scope and context.

Scope refers to the elements of the proposed work: what specific activities are involved, how many, whether replacement (with the same kind) or new installation of materials or equipment, conversions, or abatement (asbestos, lead-based paint) activities are proposed, etc.

Since CIAP/CGP work is often carried out over time, it is important to also consider the context of the specific proposal. Context refers to where or in what circumstance the activities will take place. In other words, is there other work which is being or will be carried out which is integrally related to the specific work proposal? Single work activities which are presented by themselves may appear to be moderate (and may be characterized as nonroutine maintenance) when, in fact, these activities are an integral part of an overall remodeling or reconstruction which is quite substantial and which constitutes development work.

III. GUIDANCE ON THE DETERMINATION OF NATURE OF WORK FOR PAINTING.

Painting is perhaps the most difficult trade activity to characterize for prevailing wage purposes because the trade of painting is generally the same with regard to standard work practices and procedures regardless of how the work may be characterized (maintenance, nonroutine maintenance, or development). Frequently, painting is performed in conjunction with and

incidental to other work where the painting component takes on the character (or nature) of the overall project. In such cases, it is usually not necessary to determine the character of the painting work apart from the other project components.

Painting (and related patching and finishing) may also stand alone as a work activity. For example, painting may be performed as a single activity at unit turnover, or as periodic or cyclical painting associated with planned routine maintenance and in these cases be assumed to be covered by HUD-determined wage rates. Many assume incorrectly, however, from a nature of work and prevailing wage point of view, that any repainting as opposed to new construction painting is a maintenance or nonroutine maintenance activity in all cases.

The U. S. Housing Act (a Davis-Bacon Related Act) requires the application of Davis-Bacon wage rates to "development" work. The Davis-Bacon Act, while having direct application only to contracts involving the Federal government, specifically includes "painting" in the scope of work covered by Davis-Bacon wage provisions. This explicit coverage of painting within the scope of the Davis-Bacon Act clearly must be considered in decisions involving the nature of painting work and the application of Davis-Bacon wage rates to such work under the U. S. Housing Act of 1937.

As a result of these factors, painting is not an activity that can be easily viewed along the continuum of substantiality. To assist in making accurate differentiations between painting work which is maintenance, nonroutine maintenance or development for prevailing wage determination purposes, the following guidance shall be used:

- **Maintenance:** Painting work shall be characterized as maintenance (and subject to HUD-determined maintenance wage rates) where such painting is carried out as part of normal maintenance operations. Such work activities may range from simple touch-up in common areas and dwelling units to complete repainting of dwelling units at turnover. "Cycle" painting may similarly be characterized as maintenance where such painting is undertaken in an on-going, routine scheduled activity.
- **Nonroutine maintenance:** Painting work shall be characterized as nonroutine maintenance (and subject to HUD-determined prevailing wage rates for nonroutine maintenance) where such work involves "cycle" painting which has not been carried out on an on-going basis and has become substantial in scope (see definition of nonroutine maintenance, 24 CFR 968.203) provided that entire or nearly entire exteriors and/or interiors are not involved (see development, below). Additionally, painting work which is incidental to nonroutine maintenance shall be similarly characterized.
- **Development:** Painting work shall be characterized as development (and subject to Davis-Bacon wage rates) where such work is performed in conjunction with reconstruction or virtual reconstruction, remodeling or repair (where "repair" is not a nonroutine maintenance activity), or where associated with asbestos or lead-based paint abatement activity. Painting work or contracts where entire or a substantial portion of building exteriors are involved, and/or where entire or a substantial portion of interiors

including, for example, dwelling units, common spaces, office spaces, mechanical spaces, and related areas may be involved, shall also constitute development work.

ORIGINAL SIGNED BY
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