

Davis Bacon Frequently Asked Questions

Prevailing Wage Terms and Conditions

1. Municipal employees are going to be doing some landscaping work (Force Account) on a storm water project. This is work that could be included with the contracted work, but the municipality wants to have municipal workers do it. Does the municipality have to comply with Davis-Bacon and pay prevailing wages or just the regular wages of the employee?

Davis-Bacon does not apply to Force Account work by municipal or other governmental employees. Please be advised that the environmentally preferable purchasing requirements specified in RCRA 6002 apply to landscaping products. You can review the list of products at 40 CFR 247.15. On June 1, 2009, DOL issued an opinion indicating that DB applies to Force Account work by employees of non governmental organizations.

2. What is the primary difference between Part I, Requirements under Section 1606 of the ARRA for Sub recipients that are Governmental Entities, and Part II, Requirements under Section 1606 of the ARRA for Sub recipients that are not Governmental Entities?

The primary difference is which entity is responsible for obtaining the Davis-Bacon Wage Determination. Under Part I, the sub recipient obtains the Wage Determination from [http://www.wdol.gov/dba.aspx#\(\)](http://www.wdol.gov/dba.aspx#()). Under Part II, the State must assist the sub recipient with obtaining the Davis-Bacon Wage Determination from [http://www.wdol.gov/dba.aspx#\(\)](http://www.wdol.gov/dba.aspx#()).

Contract Provisions

1. With respect to communities who have already bid projects or entered into agreements with contractors, does U.S. EPA expect that these loan agreements and construction contracts will have to be amended?

Yes. The Agency, however, will not require that states or borrowers apply the DBA terms and conditions retroactively. In situations where construction contractors and subcontractors are subject to state prevailing wage laws requiring them to pay laborers and mechanics wages that equal or exceed the DBA prevailing wage rates, EPA has determined that states need not take additional actions except in response to allegations by workers that they were underpaid. The Agency expects states that do not have such prevailing wage laws to take appropriate steps to ensure that laborers and mechanics receive wages that are equal to or exceed the federal prevailing wage, even if that includes providing back wages. Nonetheless, the Agency does not intend to require states to apply retroactively the interview, certified payroll submission and review, and similar provisions of EPA's DBA terms and conditions.

2. If loan agreements and construction contracts that were bid before February 17, 2009 must be amended to include Davis Bacon, when is the effective date for the contractors to begin paying wages under the Davis Bacon and for the loan recipients to begin collecting the required weekly payrolls and certifications?

The effective date is the date the borrower amends the contract. As noted above, EPA will not require retroactive compliance with the procedural elements of the DBA terms and conditions. States, however, must ensure that workers received wages that were equal to or exceeded the federal prevailing wage prior to the amendment of the contract or subcontract. If the workers have not been paid at a rate at least equal to the federal prevailing wage, they must be paid back wages at a rate at least equal to the prevailing wage rate that was in effect at the time the contract or subcontract was awarded.

ARRA

1. To comply with Davis-Bacon relating to ARRA funds, what documents/information has to be included in the bidding documents besides 29 CFR 5.5?

29 CFR 5.5, the U.S. Department of Labor regulations that govern Davis-Bacon contract provisions and related matters, require the inclusion of the Davis-Bacon wage determination for the type of construction work being performed. Davis-Bacon Wage Determinations are available at: [http://www.wdol.gov/dba.aspx#\(\)](http://www.wdol.gov/dba.aspx#()).

2. If it is not in ARRA, do Davis Bacon and its implementing regulations apply independently outside of ARRA?

No. The Davis Bacon Act and the implementing DOL regulations apply because of Section 1606 of the ARRA. Under 40 CFR § 31.56(i)(5), EPA applies the Davis Bacon Act to EPA financial assistance programs only when required by the terms of the Federal grant program legislation. In DOL, this guidance is sometimes referred to as a Davis-Bacon Related Act.

ARRA Section 1606

1. With respect to ARRA Section 1606, is this provision being interpreted by U.S. EPA [hereinafter EPA] or the Department of Labor as meaning that Davis Bacon applies as a matter of law in its entirety or is it simply the wage rates of Davis Bacon?

We presume that by asking whether the “...Davis Bacon [Act] applies as a matter of law in its entirety...”, The state recipient is questioning whether EPA’s terms and conditions, which require recipients to comply with certain provisions (e.g. obtaining certified payrolls and interviewing workers) of the U.S. Department of Labor’s (DOL) Davis Bacon Act (DBA) regulations are authorized. Yes, recipients must comply with both the prevailing wage provisions of the DBA and the DOL regulations at 29 CFR 5.1, 3, and 5. Please note that the substance of the regulations have been incorporated into the terms and conditions (T and Cs) of EPA’s grants documents. There are some slight wording changes to these T and Cs to reflect the operation of EPA’s grant programs. The changes have been approved by DOL.

2. If it is the former, can you explain where this springs from in the ARRA?

The requirement that recipients comply with DOL DBA regulations stems from Section 1606 of the ARRA. It provides in pertinent part:

All laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or 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. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in the Reorganization Plan Number 14 of 1950 (64 Stat. 1267; 5 U.S.C. App.) and Section 3145 of Title 40, United States Code (emphasis added).

The underlined provision incorporates DOL’s authority to oversee compliance with the DBA and to issue regulations to implement the Act. EPA’s terms and conditions requiring that recipients comply with DOL DBA regulations as well as pay prevailing wages are directed by Office of Management and Budget’s (OMB) interpretation of Section 1606, which was provided at 2 C.F.R. § 176.190. The OMB regulation states:

Pursuant to Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. § 3145, the Department of Labor has issued regulations at 29 CFR Parts 1, 3, and 5 to implement the Davis Bacon and Related Acts. Regulations at 29 C.F.R. § 5.5 instruct agencies concerning application of the standard Davis-Bacon contract clauses set forth in that section. Federal agencies providing grants, cooperative agreements, and loans under the Recovery Act shall ensure that the standard Davis-Bacon contract clauses found in 29 CFR § 5.5(a) are incorporated in any resultant covered contracts that are in excess of \$2,000 for construction, alteration or repair (including painting and decorating) (emphasis added).

DOL’s May 29, 2009 Memorandum Number 207 addressed the application of DOL regulations to projects receiving federal assistance with Recovery Act funds. It advises federal agencies that federally assisted projects are subject to both the prevailing wage

requirements and DOL's DBA regulations at 29 CFR Parts 1, 3, and 5. The regulations at 29 CFR § 5.5 expressly provide that federal agencies are to require that recipients ensure that DBA clauses set forth in DOL regulations are included in contracts and subcontracts funded with financial assistance subject to the DBA. The DOL regulations also authorize federal agencies to require that recipients of ARRA funding obtain certified payroll records and conduct interviews of workers entitled to prevailing wages. We have reproduced the text of the DOL regulations below.

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by § 5.5 have been inserted in the contracts subject to the labor standards provisions of the Acts contained in § 5.1. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require the recipient of the Federal assistance to insert in its contracts the provision of § 5.5. No payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency unless the agency insures that the clauses required by § 5.5 and the appropriate wage determination of the Secretary of Labor are contained in such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that the contractor and its subcontractors have complied with the provision of § 5.5 or unless there is on file with the agency a certification by the contractor that there is a substantial dispute with respect to the required provisions.

(3) The Federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes listed in § 5.1. Investigations shall be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees, which shall be taken in confidence, and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans. In making such examinations, particular care shall be taken to determine the correctness of the classifications and to determine whether there is a disproportionate employment of laborers and of apprentices or trainees registered in approved programs. Such investigations shall also include evidence of fringe benefit plans and payments there under. Complaints of alleged violations shall be given priority. (29 CFR § 5.5(a)(1) and (a)(3)) (emphasis added).

3. What is the primary difference between Part I, Requirements under Section 1606 of the ARRA for Sub recipients that are Governmental Entities, and Part II, Requirements under Section 1606 of the ARRA for Sub recipients that are not Governmental Entities?

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ARRA Section 1554

1. Does ARRA Section 1554 apply to any of the following scenarios regarding EPA's Terms and conditions for Recovery Act grants?
 - a. When state law requires all construction contracts for sub-recipients (i.e., SRF borrowers that are governmental units) to be awarded to a lowest responsible and responsive bidder, would there ever be an ARRA Section 1554 requirement to post in such a state?
 - b. Confirm that when state and federal law have not previously required bidding for engineering services that ARRA Section 1554 requirements are not now requiring a posting of that service?
 - c. Confirm that a construction contract that has a fixed unit price (i.e., where the number of units depends on what occurs during construction like soil removal) it does not require Section 1554 posting?

ARRA Section 1554, “Special Contracting Provisions,” applies only to direct federal procurement. EPA’s Terms and Conditions for Recovery Act grants do not mention Section 1554.

Compliance Verification

1. Under the Compliance Verification section of the Wage Requirement Terms and Conditions, the sub-recipient is required, at a minimum, to interview a representative group of employees and spot check payroll data for contractors and subcontractors within 2 weeks of the contractor and subcontractor’s submission of weekly payroll data and 2 weeks prior to estimated completion date for contractor and subcontractor. 29 CFR 5.6(a) (3) requires interviews of employees and examination of payroll data to “be made of all contracts with such frequency as may be necessary to ensure compliance [with the labor standards clauses required by section 5.5]”. Are the frequency and scope of the interviews and examinations of payroll data outlined in the Compliance Verification section of the Wage Requirement Terms and Conditions mandatory or is this section intended to provide guidance as to the frequency and scope of these investigatory tools for complying with 29 CFR 5.6(a)(3)?

The sub recipient is required to conduct spot checks and interviews within 2 weeks of each contractor’s and subcontractor’s submission of the initial payroll data and within 2 weeks of the end of the project. However, the sub recipient must also establish and

follow an interview schedule based on its assessment of the risks of noncompliance with Davis-Bacon posed by contractors and subcontractors and the duration of the contract or subcontract. The sub recipient exercises its judgment in establishing a schedule once EPA's minimum requirements are met.

2. Previous EPA Guidance suggested subcontractors were not required to maintain payroll records. The most recent EPA Guidance suggests that subcontractors are required to maintain payroll records. Please clarify.

Subcontractors are required to maintain payroll records. The prime contractor is responsible for obtaining certified payroll records from their subcontractor(s) and submitting them to the sub recipient, along with their own certified payroll records.

3. The Davis-Bacon attachment to the Assistance Agreement, Section 5 "Compliance Verification" indicates that the Recipient (bolded) shall perform interviews and other compliance verification activities. The recipient is seeking clarification if this requirement must be performed by recipient's employees, or if recipient can request its contractors to perform this on-site compliance verification?

(It is highly likely that the recipient will assign (via an ordering instrument) one of its existing competitively procured contractors) to assist them with each project funded by the LUST award. Our contractors are not themselves subject to Davis Bacon wage rates, but they will procure sub-contractors for certain site activities that will from time to time fall under the Davis Bacon requirements of the award. Since the recipient's contractors provide the on-site project management and construction management on behalf of the recipient, it makes sense that they should conduct the compliance verification. For example, if the recipient's Project Manager is located in the home office, and the project is located 150 miles away, it makes sense to have their on-site contractor perform the verification rather than have the recipient's Project Manager travel for most of a day to interview the subcontractor employees subject to Davis-Bacon wage rates. Of course, if the recipient's contractors perform these compliance verifications, they will be required to provide their findings to the recipient)

EPA does not object to the recipient tasking its contractors to perform compliance verification on its behalf however, the recipient remains responsible for the Davis Bacon Terms and Conditions the recipient must maintain records of the compliance verification measures taken by its contractors. If the recipient's contractors do not adequately verify compliance with the DB wage requirements, EPA and DOL will hold the recipient rather than the contractors accountable.

Jobs Creation

1. How does the US EPA distinguish between new jobs created and retained?

(In the State's opinion, because a job would not have happened but for ARRA, all jobs associated with a project are new jobs.)

The Agency's guidance on job reporting, titled the Supplemental EPA Guidance on Measuring and Reporting Jobs, is available at: <http://www.epa.gov/recovery/supplement.html>.

The link to the Office of Management and Budget Guidance that details the government wide reporting requirements, including Section 1512 reporting requirements of ARRA, is available at: http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21.pdf.

According to the Supplemental EPA Guidance on Measuring and Reporting Jobs:

Prime recipients are required to report a single estimate of jobs directly created and retained by project and activity or contract. A job created is a new position created and filled or an existing unfilled position that is filled as a result of the Recovery Act; a job retained is an existing position that would not have continued to be filled were it not for Recovery Act funding. A specific example calculation is provided in Section 5.3 of the OMB guidance (M09.21, page 35) (PDF) (41pp, 550k, about PDF). Additionally, a job cannot be counted as both created and retained. Recipients are required to report an aggregate number for the cumulative jobs created and/or retained when reporting the aggregate number of cumulative jobs created and/or retained for the quarter. Therefore, only a single number that captures the estimates of both types of jobs (created and/or retained) is required to be reported in the designated field on the form. This guidance also suggests that recipients, sub-recipients, and vendors view the question of job impact in the following way: would the hours and FTEs reported for the employees included in the jobs measure be different in the absence of receiving Recovery Act funds?

LUST

1. The initial phase of the field work involves demolition of a 3,000 square foot building and removal of the underlying slab in order to access the petroleum contaminated soil (from a previous UST release) that needs to be removed. Adjacent to the building is an existing above ground storage tank (AST) that will be temporarily moved from its concrete slab foundation so that the slab can be removed and the underlying soils excavated. Following excavation of the soils, the excavation will be backfilled, and a new concrete slab will be constructed upon which the original AST will be re-installed. Does the Davis-Bacon Act (DBA) prevailing wage requirement apply in this case?

Yes, this project triggers DBA requirements. Based on conversations between EPA and the State, the Agency has determined that the corrective actions the State will perform at this site represents "a unique situation" for which DBA applies under the DBA term and condition for LUST Recovery Act Cooperative Agreements. (See p. 12 of Guidance To

Regions for Implementing the LUST Provision of the American Recovery and Reinvestment Act of 2009, June 2009).

This cleanup scenario is unique because there are several pre-staging and post-staging activities, such as demolition of a building and the movement and relocation of an AST, in addition to the more traditional LUST activities of soil excavation and tank pad replacement. This combination of activities is not typical to LUST cleanups. However, when the project is viewed in the aggregate it appears to constitute "construction" within the meaning of the Davis Bacon Act and will require that the State's contractor hire laborers and mechanics that are typically covered by the Davis-Bacon wage determinations. Accordingly, EPA has determined that DBA applies in this case.

Capitalization Grants

1. With respect to the terms in the amended Cap Grants, what is US EPA's expectation regarding existing loan agreements? Do you expect states to amend these agreements to pull in these additional terms?

Amending the Capitalization Grant loan agreements depends on the status of the project. If the construction activities financed by the loan agreement are not complete and contractors or subcontractors are still on the job, the recipient must amend the loan agreements to comply with EPA's Davis Bacon Act terms and conditions. States need not amend loans for projects where construction is complete. However, even if construction is complete, States must take appropriate steps to ensure that laborers and mechanics on the project have been paid wages that equal or exceed the federal prevailing wage. If the State identifies a situation in which back wages are due, please contact the EPA DBA coordinator for additional guidance.