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Regional Director
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Office of Labor Relations

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U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Region VIII Labor Relations News



Trojan Horse Projects

Sometimes, You Should Look a Gift Horse in the Mouth

If It's Too Good to Be True....

Sometimes, community development agencies are asked to fund construction or rehabilitation projects that are already underway, or are dormant after initial construction began months or even years ago. More such requests may arise in areas affected by the hurricanes of 2005. Agencies should be aware of the pitfalls posed by these requests and prepare for the possible labor standards ramifications.

Section 110 of the Housing and Community Development Act (1974), requires that "construction work financed in whole or in part with grants received" under the Act are subject to prevailing wage requirements.

"Construction work" means all the work required to complete a project or facility. The "in part" term is inclusive of the varied types of funding & financing methods using CDBG dollars, even if those dollars do not go directly into a specific contract (or sometimes even a "phase" of a project). CDBG-financed work, though separately contracted, may trigger the application of Davis -Bacon wage rates on a phased project.

...It Probably Is

This can pose serious enforcement and compliance problems. For projects begun years ago, compliance with Davis -Bacon, Copeland, and Contract Work Hours and Safety

Standards Acts would be exceedingly difficult, if not impossible to achieve. The prime and all subcontractors must submit certified weekly payrolls and other necessary documentation. Some contractors may not be available or cooperative. Moreover, "real time" employee interviews and on-site inspections could not be accomplished.

A Way Out?

The local contracting agency may request a review by the Department of Labor (through HUD) to waive application of prevailing wage requirements to work performed before the award of HUD funds under the provisions of Title 29 Part 1.6 of the Code of Federal Regulations. The standards, once met, would permit application of prevailing wage requirements to a later date, usually the date when federal funds were awarded.

(1) There must be no intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate. Applications for

CDBG funds to assist the project, even if funding was not awarded, are evidence of intent, and will jeopardize any request for waiver of retroactive application of Davis -Bacon requirements to the project. If applications or other documents point to an intent to request funds, you will likely be unable to address this factor to the satisfaction of the DOL. Please exercise caution in this and ensure you have reviewed all files carefully to rule out previous applications for funding.





HUD Mission

Increase Homeownership, support community development, and increase access to affordable housing free from discrimination.

Learn more about federal labor standards requirements at the HUD Office of Labor Relations Web page:

<http://www.hud.gov/olr>

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(2) You must demonstrate that approval of a waiver is necessary and proper in the public interest to prevent injustice or undue hardship.

(3) If the DOL approves the application, the applicable wage determination shall be effective on the date of approval of Federal funds or assistance. This would be the date when your agency approved the funding application. If funding was approved from previous year grants, then the prevailing wage requirements would apply retroactive to the earliest approval.

The 100% Solution

All of the above factors must be met in order for the DOL to grant a waiver.

To be safe, put forth the best argument you can concerning the contract issues, the potential social/economic impact of the project on the community

if it is not completed, and the "but for" argument concerning the essential need for CDBG funds.

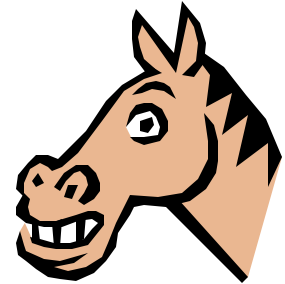
This process, even if successful, could be lengthy. Any funding of a project before obtaining a definitive answer from the U.S. Department of Labor could adversely impact the contracting agency and the contractors.

29 CFR Part 1.6

(g) If 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.

Call your OLR specialist, as yours may be a horse of a different color!



Attention:

Labor Relations Officer / Davis-Bacon Enforcement

If you don't know WHO that is in your agency....

Please call the Atlanta Office 404-331-4637 to ensure delivery