



WEATHERIZATION STIMULUS ALERT

Revised June 5, 2009

Weatherization Assistance Program

The American Recovery and Reinvestment Act of 2009 (“ARRA”) signed by President Obama on February 17, 2009 provided an additional \$5 billion for the Weatherization Assistance Program (“WAP”) to be obligated by September 30, 2010. As a result of this increase in funding, many Community Action Agencies (“CAAs”) are working with their states on collaborative plans to deliver the increased services. Many states will undoubtedly choose to allocate all of the additional funds to existing providers. However, if the states are considering allocating some of the funds to additional providers, then they must follow the selection guidelines and procedures discussed below.

Subgrantee Selection Procedures

All funds, including ARRA funds, used to conduct weatherization activities under WAP must be distributed by states to entities in accordance with the federal WAP statute and regulations governing selection of subgrantees.¹ Subgrantees must be CAAs or other public or nonprofit entities.² In selecting a subgrantee, preference is given to any CAA or other public or nonprofit entity which has, or is currently administering, an effective program under this part or under title II of the Economic Opportunity Act of 1964 [Community Action Program], with program effectiveness evaluated by consideration of factors including, but not necessarily limited to, the following:.

- The extent to which the past or current program achieved or is achieving weatherization goals in a timely fashion;
- The quality of work performed by the subgrantee;
- The number, qualifications, and experience of the staff members of the subgrantee; and
- The ability of the subgrantee to secure volunteers, training participants, public service employment workers, and other federal or state training programs.³

The state must hold a public hearing to select subgrantees.⁴ The state must list its choice of subgrantees in its proposed WAP state plan, which it must provide to the public at least 10 days before the public hearing.⁵ The notice for the hearing must specify that copies of the plan are available and state how the public may obtain them.⁶ The final selection of each subgrantee must be made on the basis of public comment received during the public hearing and findings regarding:

- The subgrantee’s experience and performance in weatherization or housing renovation activities;
- The subgrantee’s experience in assisting low-income persons in the area to be served; and
- The subgrantee’s capacity to undertake a timely and effective weatherization program.⁷

The final state plan is then submitted to the Department of Energy (“DOE”).⁸ Even though the DOE WAP regulations require that the “state must prepare a transcript of the hearings and accept written submission of views and data for the record,”⁹ according to DOE’s WAP guidance:

DOE no longer requires an official transcript of the public hearing. However, DOE considers an official hearing transcript as a best practice, particularly if the hearing is of a contentious nature. [States] must submit the notes or minutes taken by a [state] staff person as part of the final State Plan. Where discrepancies exist in the minutes or notes, the [state] must allow participants to provide supplemental submissions. Whenever possible, DOE would like to be informed, in advance, of major proposed program changes or issues of a contentious nature that will be addressed at the hearing.¹⁰

It is DOE’s practice to review the reports of the public hearings to determine that all local agency issues are properly addressed by the state prior to approval of the final State plan.¹¹ However, DOE will not necessarily review other forms of unsolicited communications regarding the content of the state plan. Therefore, it is essential that any concerns about the substance of the plan be presented in full at the public hearing. In addition, in a case where a state does not prepare a hearing transcript, CAAs and other interested parties could challenge the resulting state plan on the ground that it was not developed in accordance with DOE regulations.

Advance Payments

Given the large initial outlays and timing involved, the payment process is crucial. DOE regulations require that a state must pay each WAP subgrantee in advance unless the subgrantee fails to meet certain criteria.¹²

In order to be paid in advance, nonprofit subgrantees must maintain or demonstrate the willingness to maintain: (i) written procedures that minimize the time elapsing between the transfer of funds and disbursement by the subgrantee and (ii) financial management systems that meet the standards for fund control and accountability as established by the regulations.¹³ The state may convert a nonprofit subgrantee from advance payment to reimbursement whenever the subgrantee no longer meets the criteria for advance

payment.¹⁴ However, any such conversion may be accomplished only after the state has advised the subgrantee in writing of the reasons for the proposed action and has provided a period of at least 30 days within which the subgrantee may take corrective action or provide satisfactory assurances of its intention to take such action.¹⁵ These requirements are similar to those states must follow when imposing special award conditions.¹⁶

States are also required to pay local government subgrantees in advance as long as: (i) the subgrantees maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of funds and disbursement by the subgrantees and (ii) the state has not determined them to be “high risk” and therefore subject to payment on a reimbursement basis.¹⁷ However, a state may only place a local government subgrantee on “high risk” status for certain reasons.¹⁸ When the state places the subgrantee on “high risk” status, the state must notify the subgrantee as early as possible, in writing, of the (i) conditions related to the subgrantee’s “high risk” status, (ii) the corrective actions which must be taken before the subgrantee will be removed from “high risk” status, (iii) the time allowed for the subgrantee to complete the corrective actions, and (iv) the method the subgrantee should follow for requesting reconsideration of status.¹⁹

New Davis-Bacon Act Requirements

Under the stimulus act, laborers and mechanics working on stimulus funded projects, including WAP projects, must be paid at local prevailing wage rates as determined by the U.S. Department of Labor (“DOL”) under the Davis-Bacon Act.²⁰ Thus, weatherization crews (whether employees of a CAA or of a contractor or subcontractor) performing the duties of laborers or mechanics 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 Davis-Bacon Act and, thus, technicians conducting energy audits would not be subject to the Davis-Bacon requirements.²¹

As discussed in great detail below, all WAP subgrantee contracts for weatherization work on stimulus-funded projects must include language requiring: (i) CAAs and contractors to follow the Davis-Bacon Act requirements; and (ii) contractors to include language in their subcontracts passing those requirements on to their subcontractors.

The Davis-Bacon Act defines laborers and mechanics as those workers, whose duties are manual or physical in nature, including those workers who use tools or who are performing the work of a trade as distinguished from performing mental or managerial tasks.²² The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards.²³ The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual.²⁴ Working foremen who

devote more than 20% of their time during a workweek to mechanic or laborer duties, and who are not exempt under Fair Labor Standards Act (“FLSA”), are considered to be laborers and mechanics for the time so spent.²⁵ Every person performing duties of a laborer or mechanic for a contractor is considered to be employed by that contractor, regardless of whether the contractor calls them employees or “independent contractors.”²⁶

The Davis-Bacon Act requirement applies to projects paid for in whole or in part by federal stimulus funds.²⁷ Weatherization projects funded solely by non-stimulus WAP funds (such as regular or supplemental FY’09 appropriations) are not subject to the Davis-Bacon Act requirements.²⁸

Background

Since 1931, Congress has extended the Davis-Bacon prevailing wage requirements to some 60 “Related Acts” which provide federal assistance for construction through loans, grants, loan guarantees and insurance. These Related Acts include by reference the requirements for payment of the prevailing wages in accordance with the Davis-Bacon Act. Because it includes the Davis-Bacon Act requirements by reference, the stimulus act is considered one of the Related Acts.²⁹

The Davis-Bacon and Related Acts apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. The acts require these contractors and subcontractors pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits, as determined by the Secretary of Labor, for corresponding classes of laborers and mechanics employed on similar projects in the area. Covered contractors and subcontractors are also required to pay employees weekly and to submit weekly certified payroll records to the federal contracting agency.³⁰

DOE Requirements

Under Department of Energy regulations, when required by federal program legislation, all construction contracts awarded by subgrantees of more than \$2,000 shall include a provision for compliance with the Davis-Bacon Act and relevant DOL regulations (29 C.F.R. Part 5, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction”).³¹ Department of Labor regulations (29 C.F.R. § 5.5) include contract language that must be included in contracts and subcontracts for federally assisted construction work subject to Davis-Bacon requirements.³² Under DOE regulations, nonprofit subgrantees must place a copy of the current prevailing wage determination issued by the DOL in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. Nonprofit subgrantees also must report all suspected or reported violations to DOE.³³

Resource Links

- To locate federal regulations online, visit <http://ecfr.gpoaccess.gov>.
- For more information on compliance with the Davis-Bacon requirements, visit <http://www.dol.gov/compliance/guide/dbra.htm>.
- To find current Davis-Bacon wage rates in your area, visit <http://www.access.gpo.gov/davisbacon/>.
- For background information on Davis-Bacon wage determinations visit <http://www.access.gpo.gov/davisbacon/referencemat.html>.

Program Changes

Lastly, the ARRA revises the statute governing WAP in the following ways:

- The household income eligibility is raised by requiring states to set the eligibility level at the higher of 200% (increased from 150%) of federal poverty guidelines (“FPG”) or 60% of state median income. The minimum or floor is also set at 200% FPG. This means a state may not deny an applicant solely on the basis of income if they have income at or below the 200% FPG level.
- The statewide per unit average cap on WAP expenditures for labor, weatherization materials and related matters is increased from \$2,500 to \$6,500.
- The number of dwelling units that may receive additional weatherization services after having received partial weatherization assistance has been expanded by adjusting the time period covering the partially weatherized homes from September 30, 1975 through September 30, 1979 to September 30, 1975 through September 30, 1994. However, the regulations were amended in 2000 to allow re-weatherization of pre September 1993 units, so this change has the effect of adding just one more year’s ‘cohort’ of homes to list of potential re-weatherization sites.
- The cap on the amount of appropriated WAP funds the DOE may spend on training and technical assistance, including developing and implementing weatherization-related technology is increased from 10% to 20%.³⁴

All of the regulations and statutes referenced in this document may be obtained through CAPLAW’s website at <http://www.caplaw.org/resources.html#Weather>.

¹ See 42 U.S.C. §§ 6861 *et seq.*; 10 C.F.R. Part 440 and 10 CFR § 440.15(b); 10 C.F.R. Part 600.

² See 10 C.F.R. § 440.15(a)(1).

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- ³ See 42 U.S.C. §§ 6861, 6864(b)(4), 6865(b); 10 C.F.R. § 440.15(a).
- ⁴ See 10 C.F.R. §§ 440.15(a)(2); 440.14(a).
- ⁵ See 10 C.F.R. § 440.14(a), (b)(1).
- ⁶ See 10 C.F.R. § 440.14(a).
- ⁷ See 10 C.F.R. §§ 440.15(a)(2); 440.14(a).
- ⁸ See 10 C.F.R. § 440.14(a).
- ⁹ 10 C.F.R. § 440.14(a).
- ¹⁰ Department of Energy Weatherization Program Notice 09-1, *Program Year 2009 Weatherization Grant Guidance* at 11, November 17, 2008
- ¹¹ Department of Energy Weatherization Program Notice 09-1, *Program Year 2009 Weatherization Grant Guidance* at 10, November 17, 2008
- ¹² See 10 C.F.R. §§ 600.104, 600.122, 600.221.
- ¹³ See 10 C.F.R. § 600.122(c).
- ¹⁴ See 10 C.F.R. § 600.122(n).
- ¹⁵ See 10 C.F.R. § 600.122(n).
- ¹⁶ See 10 C.F.R. § 600.114.
- ¹⁷ See 10 C.F.R. § 600.221.
- ¹⁸ See 10 C.F.R. § 600.221.
- ¹⁹ See 10 C.F.R. § 600.212.
- ²⁰ See The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1606 and 29 C.F.R. § 3.2; Letter from Dept. of Labor regarding application of the Davis-Bacon Act to CAAs receiving stimulus funds, dated June 1, 2009, (“DOL Letter”) available at http://www.capl原因.org/documents/davis-bacon-application-weatherization-letter_000.pdf.
- ²¹ See DOL Letter.
- ²² See 29 CFR § 5.2(m).
- ²³ See 29 CFR § 5.2(m).
- ²⁴ See 29 CFR § 5.2(m).
- ²⁵ See 29 CFR § 5.2(m).
- ²⁶ See 29 CFR § 5.2(o).
- ²⁷ See The American Recovery and Reinvestment Act of 2009, § 1606.
- ²⁸ See Department of Energy Weatherization Program Notice 09-1, *Program Year 2009 Weatherization Grant Guidance* at 26, November 17, 2008.
- ²⁹ See U.S. Dep’t. of Labor, Employment Law Guide, Prevailing Wages in Construction Contracts, available online at <http://www.dol.gov/compliance/guide/dbra.htm> (last visited March 3, 2009), (“Prevailing Wages in Construction Contracts”).
- ³⁰ See 40 U.S.C. § 3142 and Prevailing Wages in Construction Contracts.
- ³¹ See 10 C.F.R. Part 600, Appendix A to Subpart B and 10 C.F.R. § 600.236.
- ³² See 29 C.F.R. § 5.5.
- ³³ See 10 C.F.R. Part 600, Appendix A to Subpart B.
- ³⁴ See The American Recovery and Reinvestment Act of 2009, Title IV, § 407.