



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-7000

OFFICE OF FIELD POLICY
AND MANAGEMENT

LABOR RELATIONS LETTERS

Date: January 15, 2021

Letter No. LR-21-01

Subject: Application of Department of Labor guidance concerning "projects of a similar character"

Consistent with the Davis-Bacon Labor Standards Act (DBA), the various related acts that extend the application of Davis-Bacon wage rates to Federal and Federally-assisted programs (DBRAs), and U.S. Department of Labor (DOL) requirements, the U.S. Department of Housing and Urban Development (HUD) is primarily responsible for the selection of applicable Davis-Bacon wage rates for many of HUD's programs, subject to review by DOL in accordance with Reorganization Plan No. 14 of 1950.

DOL All Agency Memoranda (AAMs) 130, 131, and 236 provide generally applicable guidance for the selection of wage determinations for DBA and DBRA covered construction projects. AAM 130 defines the four general categories of construction (building, residential, heavy, highway) and provides instruction for selecting the primary category of construction for a covered project. AAMs 131 and 236 provide additional general guidance for the selection of wage decisions, including when a single project includes construction items that, if constructed separately, would be classified in a different category under AAM 130. The purpose of this Letter is to provide guidance to HUD staff and program participants concerning the applicability of the DOL AAMs to HUD projects covered by the DBA or a DBRA, particularly in the context of HUD's mission and housing development.

In compliance with AAMs 130, 131, and 236, this Letter clarifies that HUD will select a single general wage determination for DBA and DBRA covered projects when functionally incidental construction items in any second category are less than \$2.5M and 20% of the project's total cost, and when also consistent with local area practice.

This Letter is issued in consultation and with the advice of DOL.

Applicable Wage Selection Policies (DOL All Agency Memoranda)

To comply with the purpose of the DBA and DBRAs, ensuring that workers on covered projects are paid no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area, DOL has promulgated various guidance documents.

AAM 130 provides definitions for four (4) broad categories of construction: residential, building, heavy, and highway. AAM 130 states that a project is classified as belonging in one of the 4 categories and that, generally, the primary classification would apply to all construction necessary to complete the project. In a footnote, AAM 130 states that multiple classifications may be appropriate if there are substantial portions of the project's construction that would fall into different categories if constructed separately (e.g., building and heavy).

AAM 131 provides further general guidance for agencies to determine when multiple wage determinations should be selected for a project. AAM 131 explains that a single wage determination is appropriate “if construction items in a second category of construction are ‘incidental’ in function to the over-all character of a project . . . and if there is not a substantial amount of construction in the second category.” *Id.* (emphasis in the original).

To determine whether there is substantial construction in a second category, based on cost, AAM 131 instructs the administering agency to generally select multiple wage determinations if the items in the second category are “more than approximately 20%” of the total project cost. AAM 131 also states, “when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost.”

Beginning in 1987, WHD used \$1 million as an indicator for whether the cost of construction items in a different category is substantial despite not exceeding 20% of total project costs. AAM 236 updates this threshold to account for inflation and rising costs, and specifies that items of work of a different character are sufficiently substantial in cost to warrant a separate wage determination if the construction in the second category exceeds either 20% of the total project costs or \$2.5M USD (the later amount to be periodically reviewed for inflation adjustment).

Consistent with the purpose of the DBA, DOL’s guidance in AAMs 130, 131, and 236 remains general guidance. AAM 236 states that DOL will consider on a case-by-case basis exceptional situations, where the cost of construction items in a different category is not significantly greater than \$2.5 million or 20% of the total project cost, and the agency can demonstrate that applying multiple wage determinations would not reflect local area practice or would otherwise be inappropriate.

HUD’s Selection of Applicable Wage Rates

HUD approaches its responsibility for selecting the appropriate wage rates for a covered project within the context of HUD’s mission: to create strong, sustainable inclusive communities and quality affordable housing. As required by AAM 130, HUD initially selects the category of construction applicable to the covered contract by identifying the category most consistent with the primary purpose of the project. For example, in HUD’s multifamily housing programs, the primary component of the project is residential housing units, and as such, HUD would select either Residential (4 stories or less) or Building (5 stories or more) as the primary category of construction, and select the corresponding Residential or Building general wage determination for inclusion in the project’s construction contract.

After HUD selects the primary category of construction, HUD then evaluates whether to select an additional wage decision for construction items of a separate category, as required by AAMs 130, 131, and 236. Many covered contracts in HUD’s programs do not include construction in a second category that meets or exceeds the percent or monetary thresholds described in AAM 236 (currently 20% or \$2.5M, the latter as may be adjusted for inflation). Thus, in those instances, HUD will select a single general wage decision for the project, including all functionally incidental construction items.

For example, in HUD’s multifamily housing program, a typical 4 story residential project would be covered by a Residential wage decision. Further, absent a finding of substantial

cost pursuant to AAM 236, the primary Residential wage decision will apply to all functionally incidental construction items including, e.g., site work, parking areas, utilities, streets, sidewalks, housing complex swimming pools, mail kiosks, carports, landscaping, retaining walls, signage, storm water and sanitary sewers, open spaces, playgrounds, and any other items included in the project to support its primary purpose, residential apartments.

Additionally, consistent with DOL guidance, HUD will apply the selected primary wage decision (e.g., Residential) to all functionally related construction of the project that would not be in itself considered a different category of construction under the principles of AAM 130 and 131. For example, DOL has stated that site preparation work does not itself fall within any particular category of construction; construction projects in each category can require site preparation work.

In instances where functionally incidental construction items would (a) be in a second category of construction, as those categories are defined in AAM 130, if constructed alone¹, and (b) meet or exceed the AAM 236 thresholds for substantial cost, HUD will generally apply the wage determination for the different category in addition to the wage determination for the overall project. However, where the cost of construction items in a different category is not significantly greater than \$2.5 million or 20% of the total project cost, HUD will undertake additional analysis and consult with DOL to determine whether HUD's selection of a separate wage decision is appropriate and consistent with local area practice.

In the context of multifamily residential housing, local area practice may support the application of the primary wage decision to separately categorized construction items, where the cost of construction items in a different category is not significantly greater than \$2.5 million or 20% of the total project cost, particularly when the construction involves similar materials and techniques, and will be completed by the same workers constructing the housing units. However, as noted in AAM 236 and as discussed above, such instances must be determined on a case-by-case basis and after consultation with DOL.

If HUD, after further consultation with DOL concerning local area practice, determines that more than one general wage determination is applicable to a covered contract, HUD will require compliance with these standards:

- The project/contract specifications must clearly identify which construction items are subject to each selected wage decision;
- The developer/prime contractor must post all selected wage decisions at the job-site with an explanation as to which construction items are covered by which applicable wage determination.
- The developer/prime contractor must establish adequate controls to ensure that all covered workers are paid under the wage decision applicable to their respective construction work.
- All employers (contractor, subcontractors, lower-tier subcontractors) must prepare, submit and maintain accurate employee time and payroll records that evidence the selected separate wage decisions were properly applied to the relevant construction work.

¹ In addition to defining the four categories, AAM 130 provides lists of examples of each category. These lists, while not exhaustive, may be helpful in determining how to categorize certain work.

Any questions concerning this Letter may be directed to HUD's Office of Davis Bacon and Labor Standards, at (202) 708-0370 or, if related to a specific covered contract, to the HUD Davis-Bacon and Labor Standards field staff with jurisdiction over the project's locality.



Benjamin DeMarzo
Assistant Deputy Secretary for Field Policy and Management

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C. 20210

JAN 19 2021

The Honorable Benjamin S. Carson
Secretary
U.S. Department of Housing and Urban Development
451 7th St., S.W.
Washington, DC 20410

Dear Secretary Carson,

I reviewed the correspondence between our agencies concerning HUD's application of Department of Labor (DOL) guidance concerning wage determinations for construction projects. The DOL affirms the recently-issued guidance titled "Application of Department of Labor guidance concerning 'projects of a similar character,'" which reflects DOL's recently-issued All-Agency Memorandum (AAM) 236. The guidance reflects thoughtful work between our two agencies. HUD should rely on this guidance for the selection of applicable Davis-Bacon general wage determinations in HUD's FHA Multifamily housing programs.

These actions to update guidance that, as it aged, increased costs and sub-regulatory burdens on federal housing programs will remove barriers to the construction of affordable housing. Importantly, DOL committed in AAM 236 to re-evaluate annually whether further updates to this guidance are warranted by inflation and rising costs.

As always, when a complainant or other interested party provides timely evidence to HUD or DOL demonstrating that a covered worker was paid an incorrect wage rate, that evidence must be evaluated pursuant to established HUD and DOL policy for enforcement and correction of incorrect wage payments.

Thank you for your cooperation.

Sincerely,



PATRICK PIZZELLA

cc: The Honorable Brian D. Montgomery, Deputy Secretary