Davis-Bacon must be applied in a reasonable way to avoid unnecessary disruption to FHA-financed new construction and rehabilitation projects.

BACKGROUND

The Davis-Bacon Acts of 1931 (DBA) is foundational to the determination of wage rates for federally assisted projects. The manner in which wage rates under the Act are applied is critical to the viability of Federal Housing Administration (FHA) financing for new construction or substantial rehabilitation of multifamily and residential healthcare properties.

The Davis-Bacon Act and applicability to FHA-financed projects

The Davis-Bacon Act requires the payment of wages that prevail in the locality on projects of a character similar to the work that will be performed on direct federal contracts. The National Housing Act (§ 212) requires Davis-Bacon compliance on multifamily projects assisted with FHA mortgage insurance under Sections 221, 232 and 241.

Administration of the Davis-Bacon Act

DOL prescribes standards and procedures for federal agencies that administer programs subject to Davis-Bacon requirements. HUD’s Office of Field Policy and Management/Davis-Bacon and Labor Standards Division (DBLS) administers and enforces Davis-Bacon requirements at HUD.

Importance of Davis-Bacon to FHA Multifamily construction lending and development

The FHA Multifamily program has been vital to supporting affordable and workforce rental housing. The historic strength of FHA mortgage insurance programs rests in the capability of borrowers to obtain a seamless construction-to-permanent loan financing – a feature unique in the multifamily finance market. Competitive pricing for the loan is possible due to the safety of a Government National Mortgage Association (Ginnie Mae) security backed by an FHA-insured mortgage loan. Significantly, these programs have maintained strong credit performance.

Key Davis-Bacon guidance

Four guiding documents, three Department of Labor (DOL) All Agency Memoranda (AAM), (AAM 130, AAM 131, and AAM 236) and Labor Letter No. LR-21-01, provide the framework for selection of wage determinations for the DBA and Davis-Bacon Related Acts (DBRA) covered construction projects. AAM 130 provides four categories of construction and provides recommendations for selecting primary construction on a project and AAM 131 and 236 provide further context for wage determination by project and selection of wage decisions.
On January 15, 2021, in consultation and with the advice of DOL, HUD issued Labor Letter No. LR 21-01, clarifying that HUD would select a single general wage determination for DBA and DBRA covered projects when functionally incidental constructions items in any secondary category were less than $2.5 million and 20% of the projects total cost, and when consistent with local area practice. This was the first time that the threshold has been increased in over 42 years.

These changes fell in line with MBA’s recommendations to prevent unwarranted split-wage rate decisions and work to ensure that only residential wage determinations shall be applied to housing projects that are four stories or less. MBA will continue to advocate for consistent wage rate determination for residential projects. Specifically, MBA continues to monitor for any evidence of the practice of “bucketing” of individual items of work before applying the $2.5 million threshold, which the MBA has long advocated against, however, this new guidance did not address.

Labor Letter No. LR 21-01 gives HUD more discretion to issue single wage decisions and adds HUD’s additional analysis for construction items of a separate category that are not “substantially greater than” the 20% or $2.5 million threshold.

HUD will now analyze such work, on a case-by-case basis, in consultation with DOL, to determine whether a separate wage decision is 1) appropriate; and 2) consistent with local area practice.

Additionally, it established compliance standards for implementing multiple wage rates:

- Project/contract specifications must identify which construction items are subject to which rates;
- Developer/prime contractor must post wage decisions and applicable construction items for each;
- Developer/prime contractor, must establish controls to ensure workers are paid appropriate wage rates; and
- All employers must prepare, submit, and maintain accurate time and payroll records.

**RECOMMENDATIONS**

**MBA recommends assigning only residential wage rates to HUD multifamily projects.**

HUD multifamily housing projects are inherently residential in nature and should generally be assign only a single, residential wage rate. Assigning multiple wage rates to a residential multifamily project (“split-wage determinations”) create significant unwarranted administrative burdens and complexity. For example, a split-wage decision may require a developer to pay workers different wages to perform identical work, depending upon where on the project they perform that work. Moreover, disparate components of work on a residential project often cannot be neatly separated from one another, and the differences between wage rates across categories can be substantial. In some cases, the resulting administrative burden and disruption can make a project infeasible after a developer has expended significant amounts of time, effort and funds.
Additional Davis-Bacon recommendations

- Currently, the construction of any HUD multifamily project of over four stories is subject to "building" rather than residential wage rates, despite advances in construction that no longer justify that four-story rule. Therefore, to reduce the adverse impact of Davis-Bacon on affordable rental housing, HUD should also work with the Department of Labor to modernize the story-limit for projects that may be assigned a residential wage schedule, by converting it to a height limit that is consistent with modern construction and building codes for apartment buildings.

- Late-stage changes to Davis-Bacon wage rates add needless disruption and costs to the development of new workforce and affordable housing. To prevent avoidable costs and delays arising from periodic update to Davis-Bacon wage rates DOL should revise its procedures to effectively lock-in Davis-Bacon wage decisions for FHA-insured projects at a time sufficiently early in the application process to avoid the need for the developer, lender, or HUD to revise and repeat previously completed process steps (e.g., 45 days prior to the date an application for firm commitment is submitted). As an interim measure, DOL should work with HUD to implement a streamlined hardship-based waiver process to address situations where the timing of the effective date of a wage decision modification on any project would be likely to cause an unreasonable need to modify and repeat previously completed process steps.

Additional information and resources can be found at:

- Department of Labor- Wage and Hour Division
- HUD- Department of Davis-Bacon Labor Standards

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