



MORTGAGE BANKERS ASSOCIATION

September 18, 2019

The Honorable Cheryl M. Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Follow-up to Meeting on Davis-Bacon Issues: HUD Multifamily Programs and the Executive Order on Affordable Housing

Dear Administrator Stanton:

Thank you for meeting with the Mortgage Bankers Association in July to discuss the Davis-Bacon Act issues that affect multifamily rental housing supported by the Department of Housing and Urban Development (HUD), including Federal Housing Administration (FHA)-assisted multifamily rental construction and substantial rehabilitation projects.

As we discussed, the manner in which the Davis-Bacon Act has been applied to HUD projects has changed over the past two years or so, in ways that have created unnecessary barriers to the development of affordable rental housing. As a result, such projects are now almost always assigned multiple wage schedules ("split-wage decisions"). This is a departure from prior practice under which HUD projects had generally been assigned only Residential wage rates, and the resulting split-wage decisions are operationally burdensome and unnecessarily increase the cost of developing new affordable rental housing.

These are important issues, and we greatly appreciate the time you and Wage and Hour Division (WHD) and Department of Labor (DOL) staff spent working to understand and consider ways to address them. We want to follow up on our meeting by reviewing these Davis-Bacon-related issues through the lens of a recent Executive Order.

On June 25, 2019, President Trump issued an *Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing*.¹ In relevant part, the Executive Order:

¹ Available at: <https://www.whitehouse.gov/presidential-actions/executive-order-establishing-white-house-council-eliminating-regulatory-barriers-affordable-housing/>

- Cites “overly complex labor requirements” as a possible source of barriers to affordable housing; and
- Directs the Department of Labor and other member agencies to, among other actions, identify and assess the actions each agency can take under existing authorities to minimize Federal regulatory barriers that unnecessarily raise the costs of housing development.

The Executive Order provides a useful lens here because the current process of applying Davis-Bacon labor requirements to HUD projects could be fairly characterized as “overly complex.” That process is overly complex because it includes an analysis of every individual item of work in every HUD housing project against the thresholds in All Agency Memorandum (AAM) 131, as well as an analysis of aggregations or “buckets” of individual items of work against those thresholds.

This complexity adds time at every stage of the process and generates inconsistent conclusions across DOL and various departments within HUD (including the Office of Multifamily Housing and the Office of Davis-Bacon and Labor Standards (DBLS)), which creates barriers for market participants and renter households. For example, inconsistent conclusions lead to WHD revisions of DBLS decisions, multiple rounds of appeals, substantial delays, late-stage increases in applicable wage rates, and difficulty engaging contractors. In addition, the resulting split-wage decisions increase the costs, unpredictability, and operational burden of developing new affordable and workforce multifamily rental housing. The examples cited in our May 10, 2019 letter illustrate those impacts.

DOL and WHD may be in a position to address these barriers “under existing authorities to reduce the cost of housing development,” consistent with the directive in the Executive Order. Specifically, WHD could leverage the fact that HUD is a *housing* agency and that HUD’s housing and mortgage programs include requirements designed and administered to further HUD’s *housing* mission. As a result of those *housing*-focused program requirements, all aspects of HUD housing projects are inherently *residential* in nature, including all incidental items of work that HUD has permitted to be included in the project.²

It would be reasonable, therefore, for WHD to establish a presumption that the Residential wage schedule should apply to all aspects of any HUD housing project, including all incidental work.

² In practice, such incidental work would include “incidental items such as site work, parking areas, utilities, streets and sidewalks” referred to in AAM 130, as well as additional incidental items that have become common in HUD housing projects, such as the construction of clubhouses, parking garages, mail kiosks, leasing offices, fitness centers, swimming pools and laundry facilities. For mixed-use HUD projects, it would be reasonable to apply a single Residential wage rate to the residential portion of the project, including all incidental work that HUD has permitted to be included in the project, and to consider only the commercial portion of the project to be work “of a different character” than the overall residential project that would be subject to the analysis in AAM 131.

Guidance implementing such a presumption would formalize what had been long-standing policy and practice until the past several years.³

This simplification could reduce processing time and uncertainty; enable all parties to predict and plan for the prevailing wage rates that will be applicable to HUD housing projects; and reduce confusion, revisions, appeals, and delays, and so would reduce barriers to developing affordable rental multifamily housing.

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We appreciate the considerable time and attention you and the WHD and DOL have spent on these Davis-Bacon issues. Our hope is that the approach we suggest above can help harmonize WHD's duty under the Davis-Bacon Act with HUD efforts to increase the supply and reduce the cost of housing development.

If you or your staff have any questions about these issues or require any additional information, please contact Bruce Oliver at 202-557-2840 or boliver@mba.org.

Sincerely,



Robert D. Broeksmit, CMB
President and Chief Executive Officer
Mortgage Bankers Association

³ See HUD Handbook 1344.1 Rev 2 (Feb. 2012) ("The primary component, which determines the character of work, is the housing. Elements such as site work, parking areas, etc., are incidental items and are included within the definition of residential construction. Generally, any housing development (four stories or less) is classified as 'residential.' This classification is not altered by the cost of incidental items, even if such costs reach the threshold guides (above) for 'substantial.' Except in the most extraordinary circumstances, such as where local industry practice clearly demonstrates otherwise, only residential wage decisions shall be assigned for housing development projects of four stories or less."); see also HUD Labor Letter No. LR-96-03 (Dec. 2, 1996) ("HUD policy and practice is consistent with AAMs 130 and 131 in that HUD seeks to identify the (one) category of construction that best suits the proposed work and issues the (one) corresponding Davis-Bacon wage determination. Most HUD-assisted projects fit cleanly in a single construction category and incidental items are not 'substantial.' As a result, the issuance of multiple schedules has been rare for HUD-assisted construction projects and would represent a departure from the norm.").