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 Act of 1931 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 FHA financing for new construction or substantial rehabilitation of multifamily and residential healthcare properties.

As discussed below, the most urgent Davis-Bacon issue is that HUD staff has begun assigning multiple or “split wage” rate determinations to individual projects. The Mortgage Bankers Association (MBA) seeks engagement with the US Department of Housing and Urban Development (HUD) and the US Department of Labor (DOL) to address this and other Davis-Bacon issues that affect the efficiency of FHA financing for the development 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.

RECOMMENDATIONS

Recommendations on split-wage rate decisions

Split-wage determinations for residential housing projects create significant administrative burden 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.

To prevent unwarranted split-wage rate decision, DOL should realign practices with longstanding DOL policy. Specifically, DOL should formally reinstate and communicate DOL’s past policy that only Residential wage determinations shall be applied to housing projects (four stories or less), including all incidental items, unless there is an established area practice to the contrary.

In addition, in such rare cases where it may be appropriate to apply a quantitative guideline to an FHA-assisted project to determine the significance of an item of work, the guideline should be 20 percent of the total cost of the project (not $1 million), and that guideline should be applied only to the individual item of work, not to aggregations.

Recommendations on timing of Davis-Bacon rate locks

Davis-Bacon wage determinations are modified from time to time to keep them current and, at times, wage rate increases can be significant (e.g., up 100 to 400 percent). Under current DOL regulations, Davis-Bacon wage decisions applicable to FHA-insured projects “lock-in” on the date the mortgage is initially endorsed, provided that construction commences within 90 days. As a result of how late in the process this lock-in occurs, unexpected updates in Davis-Bacon wage rates can frequently require the developer, lender and HUD to revise and repeat actions they have already completed, resulting in unwarranted costs and delays.

To prevent these avoidable costs and delays, 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.

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.