



MORTGAGE BANKERS ASSOCIATION

February 1, 2019

Honorable R. Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Honorable Dr. Benjamin S. Carson, Sr.
Secretary
Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20140

Re: Davis-Bacon “split-wage” decisions and late-stage updates to wage determinations

Dear Secretaries Acosta and Carson:

The Mortgage Bankers Association (MBA) respectfully requests your assistance resolving outstanding issues around Davis-Bacon split-wage determinations and late-stage updates or modifications to applicable Davis-Bacon wage rate determinations – issues that have significant adverse impacts on rental housing. We are writing to you because these problematic issues remain despite discussions over the past several years. With your help, these problems can be solved.

Davis-Bacon Act

Davis-Bacon Act “prevailing wage” rates must apply to federally assisted projects, including FHA-financed new multifamily property construction or substantial rehabilitation projects. The Department of Labor (DOL) prescribes standards and procedures for the federal agencies like the Department of Housing and Urban Development (HUD) that administer federal programs that are 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.

The Davis-Bacon issues we describe increasingly create unwarranted obstacles and burdens on businesses working to provide much-needed new and rehabilitated rental housing. This matters because this nation is in need of affordable rental housing. FHA programs affected by these Davis-Bacon issues are aimed directly at that problem.

Split-wage rate decisions

Under the Davis-Bacon Act, construction projects are categorized as Building, Heavy, Highway or Residential. Historically, DOL and HUD favored a policy of generally applying a single, Residential wage rate to residential projects, including all incidental construction.¹

Over time, however, FHA-financed projects have increasingly received split-wage determinations (e.g., determinations that the developer must pay both Residential and Building, Heavy and/or

¹ See DOL All Agency Memoranda (AAM) Nos. 131 and 130 (1978); see also HUD Labor Relations Letter No. LR-96-03 (Dec. 2, 1996).

Highway wage rates) on what are fundamentally residential projects. This creates significant administrative burden and complexity that can make a project infeasible and, in turn, be highly disruptive to increasing the supply of affordable rental housing.

This outcome is largely the result of the recent practice of assigning a separate wage rate decision to any element of a project that is 20 percent or more of the overall cost – or is \$1 million or more. The application of the additional threshold of \$1 million is a change from the prior historical practice and, as overall project construction costs have risen, it has increasingly become problematic in that it results in separate wage determinations for elements of work that do not warrant a separate wage-rate determination. This has adverse impacts on rental housing.

This issue could be resolved by issuing guidance to eliminate the \$1 million threshold. Notably, the additional, \$1 million threshold is not required by any law or regulation.

Unwarranted split-wage decisions also arise from the practice of assigning separate wage-rate determinations to elements of a project that should properly be treated as “incidental to Residential construction. Residential construction has changed in response to broad changes in renters’ expectations, so it is now typical for apartment buildings to have detached club houses or other amenities. Construction of those amenities is therefore incidental to those Residential projects.

This issue could be resolved by issuing clarifying guidance that recognizes the broadened range of construction that is incidental to Residential projects.

Late-stage modifications to Davis-Bacon wage-rate determinations

Davis-Bacon wage determinations are modified from time to time to keep them current and, at times, the resulting wage rate increases can be significant (e.g., up 100 to 400 percent). Under current DOL regulations at 29 C.F.R. § 1.6(c)(3)(ii), Davis-Bacon wage decisions applicable to FHA-insured projects do not “lock in” until the date the mortgage is initially endorsed, which is very late in the financing process.

As a result, unexpected late-stage updates can require the developer, lender and HUD to revise and repeat actions they have already completed (e.g., repeating the required third-party review of the application and HUD’s review of the application and issuance of firm commitment). This needlessly increases costs and causes delays, impairs the supply of affordable rental housing, and serves no public policy purpose.

These avoidable costs and delays can be avoided by revising DOL procedures to effectively lock in Davis-Bacon wage decisions for FHA-insured projects earlier in the financing process. For example, they could effectively lock in Davis-Bacon wage rates on the date an application for firm commitment for financing of the project is submitted, which would minimize the likelihood of needing to repeat steps already taken.

Pending completion of that change, the impacts of late-stage modifications could be mitigated by implementing a streamlined hardship-based waiver process (leveraging DOL procedures at 29 C.F.R. § 1.8) to address disruptive late-stage changes to wage-rate determinations.

Mortgage Bankers Association
Davis-Bacon "split-wage" decisions
February 1, 2019
Page 3

We would appreciate your prompt consideration of this important matter because these issues continue to be of immediate concern to our members, and they continue to have adverse impacts on FHA multifamily projects and on the availability of rental housing. For additional information, please contact Sharon Walker, MBA Associate Vice President - Multifamily, at swalker@mba.org or 202-557-2747.

Sincerely,

A handwritten signature in black ink, appearing to read "R. D. Broeksmit". The signature is fluid and cursive, with a long horizontal stroke at the end.

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

cc: J. Paul Compton, Jr., General Counsel, HUD
Brian Montgomery, Assistant Secretary for Housing – FHA Commissioner
Lamar Seats, Deputy Assistant Secretary, HUD
Keith Sonderling, Senior Policy Advisor, DOL