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The National Congress of American Indians
Resolution #ATL-14-046

TITLE: Urging Housing and Urban Development and Department of Labor to Suspend Application of Recent Davis-Bacon Wage Determinations in Indian Country until Tribal Consultation Takes Place

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Northwest Indian Housing Association (NWIHA) represents thirty-eight Indian Housing Authorities, Tribally Designated Housing Entities, and Tribal Housing Programs and Departments in Idaho, Oregon, and Washington, and Annette Island, Alaska; and

WHEREAS, the mission of NWIHA is to promote safe, sanitary, decent and affordable housing for Tribal members in the Pacific Northwest, which it accomplishes by providing training and education opportunities; providing a forum for the discussion and resolution of issues; advocating for the collective benefit of all members; effectively linking members to information and financial resources; and working collaboratively with its industry partners; and

WHEREAS, the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) was enacted to further Tribal self-governance, and streamline and simplify the process of providing housing assistance to Tribes and Tribal members; and

WHEREAS, in 2014, the Department of Labor issued a series of new prevailing wage determinations across the United States, which determinations substantially increased the applicable prevailing wage rates for various construction positions, in some instances doubling or tripling the wage rate from the previous decision; and

WHEREAS, these determinations will have substantial, direct, and adverse impacts to the operations of Indian tribal housing programs across the country, increasing the costs of development of low-income housing in Indian Country; and

WHEREAS, because there will be no increase in appropriations to cover the additional costs resulting from the new Davis-Bacon wage determinations, application of these rates to Indian Country will result in an unfunded mandate; and

WHEREAS, under Executive Order 13175 (November 6, 2000), executive departments and agencies were charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the government-to-government relationship between the United States and Indian tribes and to avoid unfunded mandates on Indian tribes; and

WHEREAS, on November 5, 2009, President Obama signed a Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, in which the President emphasized his commitment to regular and meaningful consultation and collaboration with tribal officials in Federal policy decisions that have tribal implications, and which noted that fulfillment of this commitment includes, as an initial step, complete and consistent implementation of Executive Order 13175; and

WHEREAS, the Department of Labor determined and published these wage determinations without Tribal Consultation as required by Executive Order 13175; and

WHEREAS, further, these wage determinations contravene the "Tribal Government-to-Government Consultation Policy" described in the Notice published in the Federal Register on September 28, 2001, Docket No. FR-4580-N-01; and

WHEREAS, these Davis-Bacon determinations and the related increase in development costs will degrade and diminish affordability for low-income Native Americans and will make it more difficult for Indian tribes to secure financing for new construction.

NOW THEREFORE BE IT RESOLVED, that NCAI hereby urges the Department of Housing and Urban Development's Office of Native American Programs and the Department of Labor to consult with tribes and clarify the state of Letter No. LR 2004-02; and

BE IT FURTHER RESOLVED, that NCAI hereby urges the Department of Housing and Urban Development's Office of Native American Programs and the Department of Labor to immediately suspend the application of the 2014 Davis-Bacon wage determinations to Indian Country pending full Tribal consultation pursuant to Executive Order 13175; and

BE IT FURTHER RESOLVED, that NCAI does hereby request that the National American Indian Housing Council and NCAI analyze, review and determine the national impact of this wage decision on the ability of Tribes, Tribal Housing Authorities and Tribally-Designated Housing Entities across all of Indian country; and

BE IT FURTHER RESOLVED, that NCAI does hereby respectfully request the National American Indian Housing Council, and all other regional Native American associations and organizations join NCAI in supporting this Resolution; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2014 Annual Session of the National Congress of American Indians, held at the Hyatt Regency Atlanta, October 26-31, 2014 in Atlanta, Georgia, with a quorum present.

President

ATTEST:

Recording Secretary

Office of Labor Relations

LABOR RELATIONS LETTERS

Date: September 8, 2004 **Letter No. LR 2004-02**

Subject: **Inapplicability of certain Federal labor standards provisions to Public Housing Agencies, Indian Tribes, Tribally Designated Housing Entities, Indian Housing Authorities and the Department of Hawaiian Homelands**

I. Statutory and regulatory provisions
II. Contract Work Hours and Safety Standards Act overtime provisions
III. Davis-Bacon Act weekly wage payments
IV. Copeland Act (Davis-Bacon) certified payroll reports

The Department of Housing and Urban Development (HUD) has determined that certain Federal labor standards requirements are ***not*** applicable to public housing agencies (PHAs), Indian tribes, tribally designated housing entities (TDHEs), Indian housing authorities (IHAs) and the Department of Hawaiian Homelands (DHHL) when these agencies undertake construction or maintenance work with their own employees on projects assisted under the U.S. Housing Act of 1937 or the Native American Housing Assistance and Self-Determination Act of 1996. These exclusions pertain to:

- Overtime (premium) pay for force account laborers and mechanics;
- Weekly Davis-Bacon wage payments; and
- Weekly certified payroll reports.

Note that the exclusions discussed in this Letter pertain **only** to these tribal, state and local government agencies. The exclusions do ***not*** pertain to contractors or subcontractors that are engaged by these agencies to perform work subject to Federal prevailing wage and reporting requirements.

This guidance is provided with the cooperation and advice of the HUD Offices of Public and Indian Housing, Native American Programs and General Counsel, and the Department of Labor (DOL).

SL: Distribution: W-3-1; R-1 (Regional Labor Relations Officers); R-3-1 (RC); R-6, R-6-2; R-7, R-7-2, R-9 (Labor Relations)

I. Statutory and regulatory provisions

HUD provides assistance to PHAs, TDHEs, IHAs, and the DHHL through programs authorized under the U.S. Housing Act of 1937 (USHA) and the Native American Housing Assistance and Self-determination Act of 1996 (NAHASDA), as amended. These programs are subject to labor standards provisions requiring the payment of Federal prevailing wage rates as determined by the Department of Labor (DOL) pursuant to the Davis-Bacon Act (for work defined as development), and as determined or adopted by HUD (for work defined as operations).[1] Additionally, the provisions of the Contract Work Hours and Safety Standards Act (CWHSSA) may be applicable to development or operations work, and the provisions of the Copeland Act may be applicable to development work undertaken pursuant to these programs.

The USHA and NAHASDA identify the covered classes of workers for prevailing wage purposes as "all laborers and mechanics". However, CWHSSA overtime provisions and Copeland Act reporting requirements concern wages paid to laborers and mechanics employed by ***contractors or subcontractors***.

DOL regulations implementing the Davis-Bacon and Related Acts, CWHSSA and Copeland Act requirements maintain that a state or local government is not regarded as a contractor where covered work is performed by its own employees (*aka* force account).[2] In consultation with DOL, HUD has concluded that PHAs, tribes, TDHEs/IHAs and the DHHL are agencies that are considered among the excluded units of a state or local government (including a tribal government). This exclusion means that certain labor standards provisions that are specifically applicable to laborers and mechanics employed by contractors and subcontractors are ***not*** applicable to laborers and mechanics employed by PHAs, tribes, TDHEs/IHAs and the DHHL when these agencies perform work that is subject to labor standards under the USHA or NAHASDA.[3] The specific exclusions are discussed

[1] See USHA Section 12(a); and NAHASDA Sections 104(b) and 805(b). However, under the NAHASDA Indian Housing Block Grant Program, the requirements for payment of Davis-Bacon and HUD-determined prevailing rates do not apply to any contract or agreement for assistance, sale, or lease that is covered by a tribal law or regulation requiring payment of not less than prevailing wages, as determined by the Indian tribe. See NAHASDA Section 104(b)(3) and ONAP Program Guidance No. 2003-04. This Letter applies where there is no such tribal law or regulation.

[2] See 29 CFR Part 5, Section 5.2(h).

[3] Note that the USHA and NAHASDA make no distinction between laborers and mechanics employed by contractors and subcontractors and force account employees in relation to the workers entitled to prevailing wages. Therefore, force account employees are likewise entitled to receive no less than the wages determined

in the following paragraphs.

II. Contract Work Hours and Safety Standards Act overtime provisions

The provisions of the CWHSSA are applicable to operations and development work performed under the USHA and NAHASDA. CWHSSA contains a provision requiring premium (time and one-half) pay for overtime hours worked by laborers and mechanics employed by contractors and subcontractors. Since PHAs, tribes, TDHEs/IHAs and the DHHL are not regarded as contractors, CWHSSA overtime provisions are not applicable to these agencies and their force account employees.

Accordingly, PHAs, tribes, TDHEs/IHAs and the DHHL may offer force account employees compensatory time in lieu of premium pay for overtime hours that may be performed on operations or development work. Note that force account employees may be otherwise subject to the overtime provisions of the Fair Labor Standards Act (FLSA). Compensatory time may be offered to FLSA-covered force account employees to the extent permitted under the FLSA. Such agencies should consult with the DOL concerning the extent to which force account employees may be covered by FLSA overtime provisions.

Note that CWHSSA overtime wage payment requirements remain applicable to contractors and subcontractors engaged in operations or development work (where the amount of the prime contract is in excess of $100,000).

III. Davis-Bacon Act weekly wage payments

DOL regulations implementing Davis-Bacon and Related Act (DBRA) prevailing wage requirements mandate that contractors and subcontractors pay all laborers and mechanics (employed on the DBRA-covered work) not less often than once a week.[4] The USHA and NAHASDA require the payment of Davis-Bacon wage rates to all laborers and mechanics engaged in development work. However, neither the USHA nor NAHASDA requires ***weekly*** payment of DBRA wages. Since PHAs, tribes, TDHEs/IHAs and the DHHL are not regarded as contractors for the purposes of these regulations, HUD, in consultation with DOL, has concluded that the requirement to make wage payments not less often than weekly

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to be prevailing pursuant to the Davis-Bacon Act (for development work) and the prevailing wages determined or adopted by HUD (for operations work).

[4] See 29 CFR Part 5, Section 5.5(a)(1)(i).

is **not** applicable to PHAs, tribes, TDHEs/IHAs and the DHHL. These agencies may make prevailing wage payments to force account laborers and mechanics with such frequency (e.g., bi-weekly, semi-monthly, etc.) as may be permitted under other governing Federal, tribal, state or local requirements.

Note, again, that the DBRA weekly wage payment requirement remains applicable to contractors and subcontractors engaged in development work.

IV. Copeland Act (Davis-Bacon) certified payroll reports

The Copeland Act and corresponding DOL regulations require that contractors and subcontractors engaged in construction work covered by the DBRA certify and submit weekly payroll reports regarding the payment of DBRA prevailing wages.[5] HUD, in consultation with DOL, has concluded that in relation to force account employees, PHAs, tribes, TDHEs/IHAs and the DHHL are not covered by the payroll certification and submission requirements imposed on contractors and subcontractors. However, such agencies are required to maintain, for not less than three (3) years following completion of the covered work, records demonstrating compliance with DBRA prevailing wage requirements (as well as HUD-determined wage rate requirements).

Finally, the Copeland Act and corresponding DOL regulations remain applicable to all contractors and subcontractors engaged in DBRA-covered work.

Any questions regarding this Letter should be directed to the Regional or Field HUD Labor Relations staff responsible for the jurisdiction involved. A list of Labor Relations staff and contact information is available at the Office of Labor Relations website: www.hud.gov/offices/olr

/S/
Edward L. Johnson
Director
Office of Labor Relations

[5] See 29 CFR Part 3, Section 3.3(b).