



No. 2003-04
February 5, 2003

PROGRAM GUIDANCE

PROGRAM: Indian Housing Block Grant

FOR: All Tribal Government Leaders and Tribally Designated Housing Entities (TDHE)

R.B.A.

FROM: Rodger Boyd, Deputy Assistant Secretary for Native American Programs, PN

TOPIC: Application of Tribal Laws Pertaining to the Use of Tribally Determined Wages (TDW)

Purpose: This Guidance has been prepared in cooperation with HUD's Office of Labor Relations (OLR) to provide assistance to tribes that are interested in adopting tribal laws or regulations for determining tribally determined prevailing wage rates (commonly referred to as tribally determined wages [TDW]) for application to the development and operation of affordable housing.

References: Section 104(b) of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA); 24 C.F.R. 1000.16 and 29 C.F.R. 1.2 and 1.3.

Background: Section 104(b) of NAHASDA requires that prevailing wage rates as determined by the Secretary of Labor (commonly known as Davis-Bacon wage rates) be paid to all laborers and mechanics employed in the development of affordable housing and that HUD-determined prevailing wage rates be paid to all maintenance laborers and mechanics employed in the operation of affordable housing.

On December 27, 2000, NAHASDA was amended, in part, by the Omnibus Indian Advancement Act (P.L. 106-568) by adding paragraph (3) to section 104(b), which allows for Indian tribes to determine and apply their own prevailing wage rates in their contracts or agreements for the development and operation of affordable housing in place of Federally determined prevailing wage rates. The new statutory language reads as follows:

PROGRAM GUIDANCE 2003-04 (RECIP)

- (3) APPLICATION OF TRIBAL LAWS- Paragraph (1) shall not apply to any contract or agreement for assistance, sale, or lease pursuant to this Act, if such contract or agreement is otherwise covered by one or more laws or regulations adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe.

Upon passage of the December 2000 amendments, the Department originally determined that this amendment would require an implementing regulation. HUD has modified its position and will now permit implementation of the exception from Davis-Bacon and HUD-determined wage rate coverage under NAHASDA for tribally determined prevailing wage rates without waiting for issuance of implementing regulations.

Developing and Enacting a TDW Law or Regulation: In general, NAHASDA now provides that Davis-Bacon and HUD-determined rates shall not apply to a contract or agreement if the contract/agreement is otherwise covered by a law or regulation adopted by an Indian tribe that provides for the payment of not less than prevailing wages as determined by the tribe. From this we can see that an Indian tribe that chooses to use TDWs in place of Davis-Bacon and/or HUD-determined wage rates needs, by statute, to do two things: (1) pass a tribal law or regulation, and (2) be sure that the law requires the payment of not less than those wage rates the tribe determines to be prevailing. In doing these, there are several other pieces to be considered.

In order for Davis-Bacon or HUD-determined rates to be inapplicable, the tribal law or regulation must provide for payment of a tribally determined *prevailing* wage rate -- not merely a "minimum" wage rate. To do this, an administrative mechanism should be established for determining the prevailing wage rates. The Department recommends that in establishing this mechanism, the tribe also give consideration to such issues as providing for formal adoption of the wage rates and future changes to the wage rates in order to keep them current. This mechanism may be separate from the actual tribal law or regulation.

Neither NAHASDA, nor HUD, defines "*prevailing*." In providing for TDWs, practicality requires that the tribe will have to develop (or reference) their own definitions of what "*prevailing*" rates are and their own methods for how to make their determinations of prevailing wage rates. The definition can appear in the law or regulation, or in the determining mechanism. We highly recommend that in defining it, the term "prevailing" actually be used.

The Department of Labor (DOL) defines *prevailing wages* for Davis-Bacon purposes in its regulations at 29 C.F.R. 1.2 as:

- (a)(1) The prevailing wage shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the prevailing wage shall be the average of the wages paid, weighted by the total employed in the classification.

This definition is provided here solely as an example. In developing TDWs, tribes may, or may not, wish to adapt the DOL's definition for their use as the tribe sees fit.

PROGRAM GUIDANCE 2003-04 (RECIP)

In establishing TDWs, it should be kept in mind that IHBG funded projects still must comply with the cost reasonableness provisions of OMB Circular A-87 and Total Development Costs (TDC) which limit the amount of funds that can be provided for construction.

The tribe should consider its options regarding the scope of work for which TDWs will apply and whether TDWs will apply to *all*, or only a portion of, the work involved in the development and/or operation of affordable housing. In other words, will TDWs replace both Davis-Bacon and HUD-determined rates and to what extent (all work or only certain work)? In developing TDWs, tribes may also use, or adapt, the job classifications provided under the Davis-Bacon Act, or they may develop their own classifications as applicable to their situation.

In addition, tribes are responsible for designing whatever monitoring and enforcement mechanisms they choose to ensure compliance with their tribally determined prevailing wage rates.

Application of TDWs: Under Section 104(b)(3), the substitution of TDWs for federally determined prevailing wage rates is only applicable to the Indian Housing Block Grant (IHBG) Program. Any other federally funded programs will be guided by the labor standards specified by that program.

The provisions of section 104(b)(3) regarding the application of TDWs only apply to prevailing wages and certain related requirements. The provisions for certified payroll reports and permissible payroll deductions in the Copeland “Anti-Kickback” Act and the overtime provisions of the Contract Work Hours and Safety Standards Act will not apply to contracts and agreements that are subject to TDWs, unless the agreement or contract is also assisted by other sources of federal assistance that apply Davis-Bacon wage rates. In addition, the DOL regulations pertaining to the Davis-Bacon and Related Acts (29 CFR Parts 1, 3, 5, 6, and 7) will not be applicable to TDW-covered contracts. This means, for example, that there will be no federal provision requiring the conduct of on-site interviews or governing the use of apprentices and trainees. Also, the federal statutory and regulatory provisions allowing for the exemption of volunteers from Davis-Bacon and HUD wage rate requirements will not be applicable. Other applicable federal laws and regulations pertaining to labor standards, such as the Occupational Safety and Health Act (OSHA), will still apply to IHBG funded projects cover by TDWs.

HUD Notification: It is not necessary to obtain HUD approval of a tribal law or regulation establishing TDWs. However, NAHASDA conditions for labor standards do stipulate that IHBG recipients must annually certify as to their compliance with Section 104(b)(1) of the Act. In order to help IHBG recipients avoid any monitoring confusion either with HUD or the Department of Labor (DOL), ONAP requests that IHBG recipients annually notify their Area ONAP office with their IHP whether they will be using TDWs in place of Davis-Bacon and/or HUD-determined prevailing wage rates. The notification should indicate if the TDWs are to apply to maintenance and/or development work. Area ONAP staff will provide copies of the notifications to HUD’s OLR Field Office staff in order to convey that these recipients will not require monitoring for compliance with Davis-Bacon requirements and/or HUD-determined wage requirements.

PROGRAM GUIDANCE 2003-04 (RECIP)

HUD Assistance: The HUD’s OLR has considerable experience in the determination, administration and enforcement of Federal prevailing wage rates. OLR is available to share that knowledge and experience with any tribe that wants the Department’s advice about how to implement TDWs. Tribes that would like individual advice or assistance from HUD regarding the determination or implementation of TDWs should contact their HUD Regional Labor Relations Officer (see list below) or their Area Office of Native American Programs (ONAP).

In sharing its knowledge and expertise, HUD recognizes that it is serving in an advisory capacity only. The parameters set in sec. 104(b)(3) of NAHASDA are very broad, leaving decisions to the discretion of the tribe, and tribes are free to make whatever decisions they deem appropriate within the confines of the statutory language.

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PROGRAM GUIDANCE 2003-04 (RECIP)

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