

PRISON INMATE LABOR

Applicability of Federal Wage Rate Requirements

Date: July 10, 1992

Letter No. LR-92-01

Subject: **Applicability of Federal wage rate requirements to prison inmates engaged in HUD-assisted maintenance or construction work**

This responds to inquiries as to whether prison inmates can be utilized to perform public or Indian housing authority maintenance or construction work or other HUD-assisted construction work at less than the Federal prevailing wage rates.

There is *no prohibition* against the use of prison inmate labor on maintenance or construction work in either the legislation authorizing HUD-assisted construction or maintenance work (e.g., the U. S. Housing Act of 1937, National Housing Act, Housing Act of 1959, Housing and Community Development Act of 1974, each as amended) or in 24 CFR Part 85, Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments. At the same time, there is *no exemption* from the payment of Federal prevailing wage rates based on the use of prison inmate laborers or mechanics.

Federal prevailing wage requirements governing public and Indian housing maintenance and construction are found at *Section 12(a)* of the U. S. Housing Act (USHA) of 1937. Section 12(a) requires the payment of HUD-determined prevailing wages to "all maintenance laborers and mechanics employed in the operation, of the low-income housing project involved" and the payment of Davis-Bacon wage rates to "all laborers and mechanics employed in the development of the project involved (including a project with nine or more units assisted under section 8 of this Act...)" (emphasis added). Similar labor standards provisions requiring the payment of Davis-Bacon wage rates for other housing programs are found at *Section 212(a)* of the National Housing Act, *Section 202(j)(5)(A)* of the Housing Act of 1959, and *Section 286(a)* of the National Affordable Housing Act (NAHA) as it pertains to the HOME program. Lastly, *Section 110(a)* of the Housing and Community Development Act (HCDA) of 1974 requires that "All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this title..." shall be paid not less than the wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act.

Some exemptions from Federal prevailing wage requirements, based on factors other than the use of prison labor, may be operable in certain cases. For example, some statutory labor standards provisions contain a unit threshold under which the wage requirements *do not* apply. In those cases where the "project" fails to meet the unit threshold, the construction work including work performed by prison inmate laborers and mechanics is *exempt* from Davis-Bacon wage rate coverage. Additionally, since

Section 110(a) of the HCDA applies to laborers and mechanics employed by "contractors or subcontractors", it is possible that in certain circumstances prison inmate labor utilized directly by a *grantee* (i.e., *not* employed by a contractor or subcontractor) in the performance of CDBG-funded construction, would *not* be covered by Davis-Bacon wage requirements.

Another exemption may be operable based on the use of bona fide "volunteers." *Section 12(b)* of the USHA and *Section 110(b)* of the HCDA (as enacted by Section 955 of the NAHA) provide individuals an exemption from Federal prevailing wage requirements where the individual:

"(1) performs services for which the individual volunteered;
"(2)(A) does not receive compensation for such services; or
"(B) is paid expenses, reasonable benefits, or a nominal fee for such services; and
"(3) is not otherwise employed at any time in the construction work."

Similar exemptions were provided by the NAHA at *Section 286(b)* for the HOME program, and Section 801 which created a provision for the use of volunteers on section 202 projects at *Section 202(j)(5)(B)*. (See also 24 CFR Part 70, an interim rule published April 22, 1992, and effective May 22, 1992.)

Prison inmates *shall not* be considered "volunteers" for the purposes of these exemption provisions based solely on their status as inmates. To hold otherwise would result in an unintended and insupportable expansion of the volunteer exemption standard. The following guidance, however, discusses limited circumstances under which a prison inmate may be considered a "*volunteer*" under these exemptions. (This guidance is applicable only with respect to the four statutory exemption provisions identified above.)

The Federal Bureau of Prisons (BOP) implements a variety of *Federal* prison inmate work release programs including *Short Term Community Based Projects* (see BOP Operations Memorandum No. 225-91 (7320) dated October 9, 1991, "Community Services Projects"). Short Term Community Based Projects that are performed outside the prison institution are considered voluntary program opportunities provided through furlough provisions under Title 18 U.S.C. 3622(a)(6). Inmates *apply* for participation privileges and volunteer status. Inasmuch as another Federal agency (i.e., BOP) will have already designated these individuals as "volunteers" for its own purposes, we have determined that *such inmates may likewise be considered volunteers for the purposes of the prevailing wage exemption provisions named above.*

Prevailing wage exemptions for similar voluntary programs operated by State or local prisons or other correctional institutions shall be considered on a case-by-case basis. Where the use of non-Federal prison inmate "volunteers" is proposed under a State or local program, the proposal must include a full description of the programs and intended use and supervision of the inmates and shall be submitted through the appropriate Field and/or Regional Office Labor Relations staff to Headquarters Labor Relations for consideration and decision.

Lastly, there may be instances where persons convicted of certain offenses may be offered a *choice* of punishments during their sentencing phase. These choices may include community service at a public housing development or other sites and may involve work that is covered by Federal prevailing wage requirements. Where *such individuals indicate community service as their sentence of choice, they may also be considered volunteers under the above provisions and exempt from prevailing wage requirements.* In such cases, a request for approval shall be submitted to the appropriate Field or Regional Office Labor Relations staff. The request must include a written statement from an officer of

the Court that the individual has freely chosen a sentence of community service indicating the number of hours, location and any other stipulations on such service. Advance consultation by the Field Labor Relations Director with Regional or Headquarters Labor Relations staff in approving such requests for community service-volunteer exemption is recommended.

In all cases where prison inmate labor is utilized under the volunteer provisions named above, the responsible agency and/or contractor shall follow the guidance and recordkeeping requirements of 24 CFR Part 70 and Notice 92-01-SL

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