

DOE GDO March 6 BABA DBA Training for Tribes Transcript

WHITNEY BELL: Hello, and welcome to the Build America, Buy America Act and Davis Bacon Act training for tribes. I'm Whitney Bell with ICF, and I'll be your host today.

First, we have a few housekeeping items to kick off today's webinar. We will record the informational portion of this presentation to post on the Grid Resilience State and Tribal Formula Grant Program web page as a resource. If you do not wish to have your voice recorded, please do not speak during the time of the recording. If you do not wish to have your image recorded, please turn off your camera or participate by phone.

If you speak during the recorded portion or use a video connection you are presumed consent to recording and use of your voice or image. Fortunately for you all, all participants are in listen only mode. If you need to view the live captioning during today's webinar, please refer to the link that will appear in the chat now.

We will have time for Q&A after today's presentation. You may submit questions at any time using the chat function. Additionally, if you have any technical issues or questions, you may type them in the chat box and select Send to Host.

All right, so let's get started. To kick off today's meeting, we have Dave Parsons, a Program Manager of the State and Tribal Assistance Programs with the Grid Deployment Office, joining us for some opening remarks. So Dave, I'll go ahead and turn this over to you.

DAVE PARSONS: Well thank you very much, and thank you to our ICF colleagues for their assistance with the webinar today. Good afternoon, everyone, and welcome to this training webinar for tribes on Build America, Buy America and the Davis Bacon Act requirements.

My name is Dave Parsons. I'm the program manager for the State and Tribal Grid Resilience Program at the Department of Energy Grid Deployment Office. And we're holding this webinar today to provide guidance to tribes regarding these important laws and the requirements that are applicable to your Grid Resilience Formula Grant.

We know many tribes have had challenges navigating these requirements, and so we're providing several opportunities. This is the first of what we hope will be several ways for tribes to get support and assistance with navigating these laws and how they apply to your grant.

So we have several members of our team at the Grid Deployment Office and our partners at the National Energy Technology Laboratory here today, and we're grateful, we're very grateful, to also have several staff from the Department of Energy's Office of the Undersecretary for Infrastructure and the Office of General Counsel here to lead us through a presentation and a question and answer session on these laws.

So I just want to thank everyone again for their participation today, and I look forward to the presentation and the questions. And with that, I'll close, and I'll turn it back over to you, Whitney. Thank you.

WHITNEY BELL: We thank you so much, Dave. So next, we'll hear from Geary Pyles, the Senior Advisor for the Office of the Under Secretary for Infrastructure at the U.S. Department of Energy. He'll provide an overview on the Build America, Buy America Act and the Davis Bacon Act. So Geary, welcome.

GEARY PYLES: Thank you so much. Good afternoon, everyone. I'm very happy to be here. I'm our Build America, Buy America, or BABA as we call it, coordinator. I'm also support on the Davis Bacon Act compliance for our S3 Office, the Undersecretary for Infrastructure.

We have two topics today, BABA and DBA. We're kicking off with BABA, which is, in my opinion, the most complex for a variety of reasons. One, it's the newest, and two, we are still, because of that newness, dealing with guidance and actual implementation.

I want to pause here for a moment to again welcome feedback through the chat and through questions and answers towards the end. This feedback is important for us, and we also have a direct communications with offices that support both of these important laws.

On the BABA side, we coordinate weekly with the Made in America Office, which provides guidance and also reviews our waivers. And on the DBA side, Davis Bacon Act, we do have direct communication with the Department of Labor. For example, for some of the questions we received, we were able, our colleagues in D.C., to reach out to DOL related to the topic of Alaska Native Village Corporations, which we may not have answers today. But just to illustrate the point that if we can't answer it, we will do our best to track down what the appropriate answer can be to your specific question.

With that, we'll start off with BABA. We'll talk about the requirements, applicability, and then specific areas of interest for tribes. And also as it relates to waivers and what we are doing and plan to do in the future. Then moving on to Davis Bacon Act, which again is a lot more mature compared to BABA. We'll talk about DBA and tribes. And then when it is applicable, getting down to administrative of two processes. One a non-electronic or paper process, and then finally, the software process through a third party provider called LCPtracker.

All right, starting with BABA. Again, BABA requires for financial assistance programs for infrastructure, funds for iron and steel, manufacturer products, and construction materials are to be produced in the United States. As you can imagine, if you cannot for various reasons get iron steel manufactured construction materials, there needs to be a waiver process. So that though you can't comply with BABA for these reasons, it's captured and it is waived.

Fundamentally, there's the public interest waiver, the nonavailability waiver, the unreasonable cost waiver, and there's also a catch all for emergency situations. We will provide a link to our BABA website and our DBA website later.

However, just for planning purposes at this time, it's probably best to budget and schedule space 90 days for a waiver. And you can probably get it done in less time, but again, we'd rather not be unreasonable with that expectation. So 90 days for planning purposes at this juncture.

BABA is very specific as to what qualifies in regards to iron and steel. It's all the processes from the initial melting stage, through coating must take place in the U.S. One of the most complex ones is manufactured products must be manufactured in the U.S. However, the cost of the components that are mined, produced, or manufactured has to be greater than 55% of the total cost of components.

And finally, for construction materials, all the manufacturing process has to be occurred in the United States. So tribes and any recipients for BABA, if you look at our terms and conditions, we require a certification from the manufacturer about the applicability of items. And we understand and we know that this is a challenge to seek and actually receive a certification from a manufacturer, and we'll talk about that shortly in a few slides.

Some key points from BABA. It applies to articles and materials that are consumed and incorporated in or affixed to an infrastructure project. They don't include the tools, equipment, or supplies. They don't apply to items that are integrated, that are not permanently fixed, such as movable chairs, computers.

We want to point out that BABA applies to all federal financial assistance, not just bill. And there is no sunset date. BABA is a new requirement, and it's going to be around for a long time, and we are learning with you going forward.

When does BABA apply? This chart captures the fundamental process, starting with who's the recipient of the federal financial assistance. Then it's the type of work-- construction, alteration, or repair of infrastructure. If that's no, then BABA does not apply.

If the infrastructure in question, is it publicly owned or is it primarily used for public purpose? If no, then BABA does not apply. If yes, then it does apply.

And what exactly is an infrastructure project? The M-24-02, some of the guidance that Made in America Office has provided us, does define an illustrative list of what an infrastructure project may be. It's not all inclusive. But as you can see, it includes many of the items that you would think of as infrastructure, but also includes buildings and EV charging stations.

Again, for applicability, we have to look at what's this project about? Does it serve a public function? Is it publicly owned and operated? Or perhaps it's privately operated on behalf of the public.

We want to point out in some cases it could be a privately owned infrastructure that's used for a public purpose, such as a hydroelectric dam. But we do want to point out that projects considered solely of the purchase, construction, or improvement of a private home for personal use would not constitute public infrastructure.

So those are the foundations of the BABA requirements. As I mentioned earlier, if you cannot secure these items for those three primary reasons, you can seek a waiver. But in addition to a tribe seeking a waiver, we, as DOE, can seek waivers on behalf of all our recipients, and we have done so.

We currently have a Tribal Consultation waiver that ends later this year. We want to point out that it only applies to activities during the consultation period. It's not like a grandfather or grandmother type of activity. I can share that we have been in discussion with our Office of Energy to pose the question, do we want to seek an additional tribal consultation period. And if that does happen, then there will be an opportunity for tribes to comment if we do seek an extension of the tribal consultation period.

We do have a General Applicability waiver that's good through 2028 for five years. It includes small grants less than \$250k, which is, not coincidentally, the simplified acquisition threshold. I do want to point out that it does not apply to subrecipients, and we'll talk about that shortly in a slide here. Also, it is for the total amount of the project. So if the project is combined with other financial assistance and exceeds the \$250k, then that would not be applicable.

There's also, again, under this General Applicability waiver, two other aspects of it. There's the de minimis. And that is if the entire project cost is less than 5% of it up to \$1 million is not BABA compliant, that's allowable. And then if you have a particular iron or steel item that's being incorporated into your infrastructure project, if less than 5% of that is not BABA compliant, that is covered by this waiver. That would be like nuts and bolts associated with large iron or steel products.

And then finally, just FYI for another example of a waiver we've done on behalf of recipients, we do have a Pacific Island Territories waiver.

What can and will we continue to do to support tribes and all our recipients? Right now we are actively pursuing a waiver for solar modules, also known as solar panels. That would be on behalf of all recipients. That is currently at Made in America Office for their review.

Once we receive their comments, we would put it out for public comment for 30 days, receive and adjudicate those comments, assuming it didn't change our mind. Then we would put out a waiver that would allow for solar modules manufactured in the United States through June of 2025, but it would not have that percentage component requirement in there.

Also, as I mentioned earlier, the \$250k. We originally had sought to have that also apply to subrecipients. However, the Made in America Office asked that we remove that and pursue that separately, and we are doing that. We have raised that topic on several occasions, and we're going to have a leadership meeting next week to again, try to explain the benefit of having the ability of applying that to our subrecipients as well.

We are also looking at sharing market research to indicate when items may not be available and how we source that information. We continue to post our waivers on our Made in America DOE website. And we're also exploring a process in which we can identify BABA-compliant certified items.

This is new for us. We are trying to identify all the legal restrictions and develop a fair process that we may be piloting. But we understand and fully recognize the hunger and eagerness to have a list of BABA-compliant items out there. And new for us, but just wanted to share that we do recognize the benefit of that.

I believe that is the end of the BABA section. I guess the question would be for our colleagues here. I haven't been monitoring the chat. Do we want to stop and address BABA topics now or do we want to proceed on to Davis Bacon Related Act?

WHITNEY BELL: Let's go ahead and proceed on.

GEARY PYLES: All right, thank you so much. All right. The Davis Bacon Act is fundamentally for federal construction. Davis Bacon Related Acts are what we have here in this case of BIL, which is DBA does apply to all laborers and mechanics performing construction, alteration, or repair. And the requirement is that they be paid wages at rates no less than that of the prevailing for similar projects.

DBA and Tribes is different than other recipients. DBA does not apply when Self-Governance Tribes are performing work with their own employees. However, DBA does apply to tribal contractors and subcontractors. The requirement expectation is that the DBA clause in your prime award would be flowed down to your contractors and subcontractors.

The U.S. government, through the Department of Labor, establishes wage determinations, which are then incorporated into the contract. Which again, are then flown down to those that will be performing DBA-type work. And again, a requirement by the law, which we have no ability to change, is that these laborers, mechanics, apprentices are paid on a weekly basis.

There is a process for complying with the weekly certified payroll. That is the paper process. If tribes are unable or have limited internet access, there is a waiver process that is described in the [INAUDIBLE] template that, once approved, would allow for the paper submission of forms to be mailed to DOE, or you receive them and mail them to DOE, and that is the Department of Labor WH-347 Form.

If the situation arises that reliable internet or access does become available, then the expectation would be going forward using the electronic process. However, once the work week is done, to comply with Davis Bacon, it has to be certified then.

We can't retroactively put them in a compliance system and have them re-certified. But going forward, it would be. But nevertheless, there's a process for uploading and saving those records going forth. Any physical ones that aren't done in this manner still need to be physically stored for three years after the end of the construction project.

The software process I mentioned earlier is we have secured a compliance service. We went through our DOE approval process and have received rapid authorization to operate. This is a very onerous process. If we're going to direct you to use a system, we need to ensure that it meets our own standards, which it has.

And that system is one of six maybe or seven commercial systems out there. The one that we are using is LCPtracker. It's being provided to you and your recipients at no cost.

The benefits of electronic system as opposed to the paper one that one would receive, it hasn't been validated, the paper system. The electronic system actually marries the individual labor rates with the minimum base pay and fringes associated with a wage determination on a particular project. And that's one of over 70 validations that need to be run and then corrected before the payroll can be certified. As an electronic system, it's available 24/7. No more paper. You can store it. And again, it provides a centralized location for an addition to the compliance. There's also jobs, locations, and other metrics that can be gleaned from that electronic system.

Just some other elements related to DBA and Tribes. Just reminder, while the project may be performed on tribal land, the way the Department of Labor sets it up is that wage determinations are based on counties. And then as I mentioned before, that even though the tribe is prime and may be performing work with its own employees, if you do have subrecipients, subcontractors that are performing DBA, then you will be in the LCPtracker system. And while you don't have to submit your own certified payroll, you can certainly review and monitor the certified payrolls of your subrecipients coming in.

And with that, we can pause for Q&A. I can share that in the background slides. There's more details in BABA related to the waiver process. And then in the DBRA, the Davis Bacon Related Act, there is a flowchart that describes applicability.

WHITNEY BELL: Great. Thank you so much, Geary. That was very informative.