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Q: I have heard that financing (through an EECBG-supported revolving loan fund) to residential property-owners in order to install renewable energy systems and energy efficiency equipment does not require compliance with Davis-Bacon Act (DBA) because it would create an undue hardship for the participating resident. However, renewable energy and energy efficiency at commercial properties (funded through an EECBG-supported revolving loan fund) does require compliance with Davis-Bacon Act. Can you please verify these statements?

A: These statements are correct, but not because DBA would create an undue hardship for individual residents. The Office of Management and Budget (OMB) regulations regarding implementation of the American Recovery and Reinvestment Act of 2009 (Recovery Act) Section 1606 (Davis-Bacon wage requirements) make clear that the requirements of the Recovery Act - particularly the requirements applicable to recipients and subrecipients of Recovery Act funds - do not apply to individuals. Therefore, programs that are provided to individuals are not subject to the DBA, providing the individual contracts for the improvements. The OMB regulations do not exempt business and other commercial entities from the DBA requirements and as such, those entities are subject to the DBA.

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Q: Is DBA applicable to residential? Does it matter if local government is issuing vouchers or paying directly to customers?

A: The DBA may be applicable to residential, but it depends on whether an individual or a company is receiving the Recovery Act funding for the energy improvements or whether a company is receiving the Recovery Act funding. The OMB regulations regarding implementation of the American Recovery and Reinvestment Act of 2009 (Recovery Act) Section 1606 (Davis-Bacon wage rate requirements) make clear that the requirements discussed therein – particularly the requirements applicable to recipients and subrecipients of Recovery Act funds – do not apply to individuals. Therefore, given that individuals are not recipients or subrecipients of Recovery Act funds to whom Section 1606 requirements would apply, the individual owner of a small residential building, a house or houses that the individual rents to others would not be subject to the DBA requirements for energy. However, the DBA requirements are applicable to a company (i.e., LLC, S corp, C corp) receiving Recovery Act funding for energy improvements. A company is not an individual under the OMB regulations implementing Section 1606 of the Recovery Act. The OMB regulations make clear that the requirements discussed therein exempt only individuals from the requirements applicable to recipients and subrecipients of Recovery Act funds. In either case, if the local government issues a voucher to the individual or provides a check to the individual to pay a contractor, the individual is the beneficiary of the program and the DBA will not be applicable to this program. The individual must contract directly with the contractor, but payment by voucher (to prevent fraud) or check to the individual does not change the fact that the Individual is not subject to the DBA requirements.

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Q: A State or Local government agency provides SEP or EECBG ARRA-funding to a utility to run a Home Performance with ENERGY STAR (HPwES) program which trains, certifies, and markets for contractors doing home energy retrofits. The program also conducts quality assurance on the work performed by the contractors. The utility provides cash incentives to the customers to participate in the program. The customers use those incentives to pay the contractors for the work. The utility does not conduct any of the home energy retrofits. The utility only provides a program for which contractors may sign up to participate in the training, certification, and quality assurance program. Contractors sign a participation agreement with the utility indicating they will participate in the program; however, contractors do not contract with the utility. The contractors must contract with the homeowners receiving the incentive from the utility. The question is, "Do the utilities and/or contractors have to comply with DBA?"

A: DBA requirements do not apply to the utility or to the contractors under this program, because the individual homeowners are the direct beneficiaries of the program and the homeowners hire the contractors.

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Q: We understand that DBA requirements do not apply to SEP and EECBG Financing Programs that benefit individual homeowners. To avoid the potential risks involved in distributing funds directly to homeowners, and then allowing the homeowner to make payment to contractors, we are considering allowing partner lenders/utilities to process joint checks to homeowners and contractors which would require that the homeowner sign the check over to the contractor after the work is completed. (The homeowner could not cash the joint check.) The homeowner would be required to obtain bids and enter into a contract with the contractor to perform the work. In this instance would DBA requirements still not apply?

A: The DBA would not be applicable to this program because the individual homeowner is contracting with the contractor and is benefiting directly from the Financing Program.

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