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State of Wisconsin
Department of Workforce Development

Rule Analysis for Legislative Review

August 31, 2010
Proposed Rule in Final Draft Form

Prevailing Wage

DWD 290

CR 10-092

Basis and Purpose of the Proposed Rules

Explanation of agency authority. The state prevailing wage laws require that when a state agency or local governmental unit contracts for the erection, construction, remodeling, repairing, or demolition of a public works project, it must obtain a prevailing wage rate determination from the Department of Workforce Development and require that the contractors and subcontractors on the project pay their employees in accordance with those wage rates. Changes to the state prevailing wage law were enacted in 2009 Wisconsin Act 28, including:

- A new threshold level determines the applicability of the law. Under the current law, any project of public works with an estimated completion cost of at least \$25,000 requires a prevailing wage rate determination.
- Contractors are required to provide a monthly report of wage payments made to employees on public works projects. These reports are posted on an internet website maintained by the department. A contractor may submit a copy of its collective bargaining agreement (CBA) if the payments made under the CBA meet the prevailing wage requirements.
- Under sec. 66.0904, Stats., the prevailing wage law now also covers a private project which receives \$1,000,000 or more in direct financial assistance from a local governmental unit.

Summary of the proposed rule. The proposed rule amends the Department's existing rule on the prevailing wage program to reflect the changes made by 2009 Wisconsin Act 28 and repeals a number of obsolete provisions. In addition, the proposed rule covers the following issues:

- The proposed rule clarifies that, depending on its actions, a state agency or a local governmental unit may be an "employer" or a "contractor."
- The proposed rule provides that the Department may conduct wage surveys by electronic means.
- The proposed rule provides that no corrections or recalculations to an annual survey may be completed after March 1 of each year.
- The proposed rule provides that the estimated cost of a project does not include the cost of labor provided by volunteers and employees of the project owner.
- The proposed rule provides that, if a state agency, local governmental unit, or developer receiving more than \$1,000,000 in direct financial assistance has not requested a prevailing wage rate determination for a project covered by the law, and the Department later issues a prevailing wage rate determination for such a project, then, in addition to the payment of the increased wages which the state agency, local governmental unit or developer must make to reimburse the employer of workers who were not correctly paid, the state agency, local governmental unit or developer must also reimburse the employer for any liquidated damages that employers may have been required to pay.

Summary of related federal law. The federal prevailing wage law (known as the Davis Bacon Act) applies to a federal public works project for which the contract cost is greater than \$2,000. It does not apply to a private project which receives financial assistance from public funds unless the assistance is on such a scale that the project is determined to be a public project.

Comparison with rules in adjacent states. Minnesota has a statutory threshold of \$2,500 for a single-trade project and \$25,000 for a multi-trade project. In addition to public works projects, the Minnesota law covers the construction of a "value-added agricultural product processing facility" that is financed in whole or part with certain state loans or grants. Illinois does not have a threshold in its prevailing wage law. The law covers public works projects and defines public works projects as projects financed under various other specified laws. The Illinois law requires certified monthly payroll reports. Michigan does not have a threshold in its prevailing wage law. The law covers

projects that must be bid and relies on other agencies to determine the thresholds for what projects must be bid. Iowa does not have a prevailing wage law.

Summary of factual data and analytical methodologies. The proposed rule is primarily based on the new or amended requirements the statutes as affected by 2009 Act 28.

Effect on small business. Because the proposed rule carries forward the new or amended requirements of the statutes as affected by 2009 Act 28, the proposed rule of itself does not have an effect on small business.

Agency contact person. Julie Eckenwalder, Section Chief, Construction Wage Standards Section, (608) 266-3148, Julie.Eckenwalder@dwd.wisconsin.gov.

Public Hearing Summary

A public hearing was held in Madison on August 11, 2010. There was no testimony in favor of or opposed to the proposed rule. DWD staff responded to questions about the proposed rule. There were registrations “for information only” from:

Diane Newby, Wis. Laborers District Council
4633 Liuna Way
DeForest WI 53532

Donna Neustadter, Wis. Laborers District Council
4633 Liuna Way
DeForest WI 53532

Attorney Douglas Witte
10 East Doty, #900
Madison WI 53703

Paula Severson, ABC of Wisconsin
5330 Wall St.
Madison WI 53718

John Mielke, ABC of Wisconsin
5330 Wall St.
Madison WI 53718

Attorney Patrick Stevens, Wis. Builders Association
4868 High Crossing Blvd
Madison WI 53704

Robb Kahl, Construction Business Group
4702 South Biltmore Lane

Madison WI 53718

Mark Reihl, Wis. State Council of Carpenters
 115 W. Main St.
 Madison WI 53703

James A. Vick, Bricklayers & Allied Craftworkers
 1602 S. Park St. #202
 Madison WI 53715

Louis Pody, Plumbers Local 75
 1247 Oak St.
 Beloit WI 53511

Written comments and responses

The following written comments were received. Following the summary of each comment is the Department's response and description of the action taken in relation to the proposed rule.

(1) Associated General Contractors of Wisconsin

(a) Volunteer work by contractors - when a contractor performs work for a public works project at no cost to the public entity that is in charge of the project, the contractor should not be subject to prevailing wage rates for its employees.

Response: DWD agrees that individuals may choose to work as volunteers and thereby reduce costs for the project owner. However, when a contractor pays its employees to work on a project and chooses not to charge any cost to the project owner, the employment comes directly under the terms of the prevailing wage statutes and DWD cannot create an exemption. This change has not been made.

(b) Residential rates. The commenter is opposed to the provision in the proposed rule that would allow DWD to determine residential rates as a percentage of building or heavy construction rates rather than as a separate survey category.

Response: DWD has removed this provision from the final draft of the proposed rule.

(c) Subjourney rates. The commenter is opposed to the provision in the proposed rule that would amend the rule to state that DWD "may" (rather than "shall") make a determination of one or more subjourney person wage rates.

Response: DWD has removed this provision from the final draft of the proposed rule.

(d) Truck driver and overtime provisions. The rule should be amended to include a reference to sec. 66.0904, Stats., to clarify that the truck driver and overtime

exemptions listed in DWD 290.03(2)(a) and (b) also apply to publicly funded private construction projects.

Response: DWD has not included this reference because, due to item vetoes when these provisions were enacted as part of the budget bill, sec. 66.0904 has different language on this topic.

(e) Direct financial assistance. The rule should provide additional guidance on determining when \$1 million in direct financial assistance has been provided to a private construction project, which is the condition for the application of prevailing wage rates under sec. 66.0904, Stats.

Response: DWD has not included any new material on this topic because the new statutory provisions contain detailed language on the definition of “direct financial assistance” and DWD has had very little experience so far with the administration of the new statutory language.

(2) Construction Business Group, Operating Engineers Local 139, and the Carpenters Union (similar comments grouped together)

(a) Application of prevailing wage law to governmental entities. Local 139 proposes that the application of the prevailing wage law to governmental entities be clarified by means of explanatory notes to the definitions of “contractor” and “employer.”

Response: DWD agrees with this proposal and has included a modified version of the suggested note in the proposed rule.

(b) Volunteer labor provided by individuals. The rule should include a provision which clarifies that the estimated amount of work to be provided by volunteers should not be included in the calculation of the cost of a project.

Response: DWD agrees with this proposal and has included a provision to this effect in the proposed rule.

(c) Collective bargaining agreements providing for double time for work on Sundays and holidays. The rule should include a provision which effectively provides that, if a collective bargaining agreement (CBA) rate is found to be the prevailing rate in a county, and the CBA also includes a requirement for double time pay for work on Sundays and holidays, then the double time pay shall be required as part of the prevailing wage rates determined for that county.

Response: DWD has not included this proposed provision in the final draft of the proposed rule. This is not a topic that was included in the original notice of hearing, and

it is not clear to the department that there is any need to change the rule.

(d) Residential rates. The commenters are opposed to the provision in the proposed rule that would allow DWD to determine residential rates as a percentage of building or heavy construction rates rather than as a separate survey category.

Response: DWD has removed this provision from the final draft of the proposed rule.

(e) Correction of survey errors after March 1. The commenters oppose this provision, which would end the correction of errors in the annual survey after March 1 of each year, to the extent that it applies to errors committed by DWD.

Response: In view of the limited resources available for the administration of DWD's responsibilities under the prevailing wage law, the Department believes that this provision will be of great value in encouraging affected parties to review the annual survey determinations early in the year and file all requests for corrections and recalculations as soon as possible. The provision has been left in the proposed rule.

(f) The commenters ask for repeal of the provision which allows for an exception of up to 15% of the hours in a work week to the requirement that work is to be paid for based on the classification of the work.

Response: DWD has not included this proposed provision in the final draft of the proposed rule. This is not a topic that was included in the original notice of hearing. DWD understands the concerns of the commenters about this provision, but the views of other affected parties, such as contractors and DWD's own enforcement staff, are quite divergent and opposed to this change.

(g) Some of the references to sec. 66.0904 in the proposed rule are not correct.

Response: DWD agrees. DWD has removed some of these references, which were not necessary.

(h) The rule should clarify that a commitment of \$1 million or more of direct financial assistance, even if subject to future contingencies, makes a project subject to sec. 66.0904.

Response: DWD has not included any new material on this topic because the new statutory provisions contain detailed language on the definition of "direct financial assistance" and DWD has had very little experience so far with the administration of the new statutory language.

(3) Construction Business Group and Operating Engineers Local 139 (similar comments grouped together)

(a) The proposed rule should correct a conflict between DWD 290 and DWD 295 which affects the wages of operating engineer apprentices.

Response: DWD has not included this proposed provision in the final draft of the proposed rule. This is not a topic that was included in the original notice of hearing, and it is not clear to the department that there is any need to change the rule.

(4) State Representative Andy Jorgensen

Volunteer labor provided by individuals. The rule should include a provision which clarifies that the estimated amount of work to be provided by volunteers should not be included in the calculation of the cost of a project.

Response: DWD agrees with this proposal and has included a provision to this effect in the proposed rule.

(5) Associated Business Contractors of Wisconsin

(a) Volunteer labor provided by individuals. The rule should include a provision which clarifies that the estimated amount of work to be provided by volunteers should not be included in the calculation of the cost of a project.

Response: DWD agrees with this proposal and has included a provision to this effect in the proposed rule.

(b) Volunteer work by contractors - when a contractor performs work for a public works project at no cost to the public entity that is in charge of the project, the contractor should not be subject to prevailing wage rates for its employees.

Response: DWD agrees that individuals may choose to work as volunteers and thereby reduce costs for the project owner. However, when a contractor pays its employees to work on a project and chooses not to charge any cost to the project owner, the employment comes directly under the terms of the prevailing wage statutes and DWD cannot create an exemption. This change has not been made.

(c) Residential rates. The commenter is opposed to the provision in the proposed rule that would allow DWD to determine residential rates as a percentage of building or heavy construction rates rather than as a separate survey category.

Response: DWD has removed this provision from the final draft of the proposed rule.

(d) Subjourney rates. The commenter is opposed to the provision in the proposed rule that would amend the rule to state that DWD “may” (rather than “shall”) make a determination of one or more subjourney person wage rates.

Response: DWD has removed this provision from the final draft of the proposed rule.

(e) Truck driver and overtime provisions. The rule should be amended to include a reference to sec. 66.0904, Stats., to clarify that the truck driver and overtime exemptions listed in DWD 290.03(2)(a) and (b) also apply to publicly funded private construction projects.

Response: DWD has not included this reference because, due to item vetoes when these provisions were enacted as part of the budget bill, sec. 66.0904 has different language on this topic.

(f) Clarification. DWD 290.08 and other provisions in the rule should be clarified as to the respective roles of local governments, state agencies and owner/developers.

Response: DWD agrees. This provision and other provisions that make reference to more than one of the prevailing wage statutes have been redrafted.

(g) Direct financial assistance. The rule should provide additional guidance on determining when \$1 million in direct financial assistance has been provided to a private construction project, which is the condition for the application of prevailing wage rates under sec. 66.0904, Stats.

Response: DWD has not included any new material on this topic because the new statutory provisions contain detailed language on the definition of “direct financial assistance” and DWD has had very little experience so far with the administration of the new statutory language.

(6) Wisconsin Builders Association

(a) Volunteer labor provided by individuals. The rule should include a provision which clarifies that the estimated amount of work to be provided by volunteers should not be included in the calculation of the cost of a project.

Response: DWD agrees with this proposal and has included a provision to this effect in the proposed rule.

(b) Residential rates. The commenters are opposed to the provision in the proposed rule that would allow DWD to determine residential rates as a percentage of building or heavy construction rates rather than as a separate survey category.

Response: DWD has removed this provision from the final draft of the proposed rule.

(c) Truck driver and overtime provisions. The rule should be amended to include a reference to sec. 66.0904, Stats., to clarify that the truck driver and overtime

exemptions listed in DWD 290.03(2)(a) and (b) also apply to publicly funded private construction projects.

Response: DWD has not included this reference because, due to item vetoes when these provisions were enacted as part of the budget bill, sec. 66.0904 has different language on this topic.

(d) Clarification. DWD 290.08 and other provisions in the rule should be clarified as to the respective roles of local governments, state agencies and owner/developers.

Response: DWD agrees. This provision and other provisions that make reference to more than one of the prevailing wage statutes have been redrafted.

(e) Direct financial assistance. The rule should provide additional guidance on determining when \$1 million in direct financial assistance has been provided to a private construction project, which is the condition for the application of prevailing wage rates under sec. 66.0904, Stats.

Response: DWD has not included any new material on this topic because the new statutory provisions contain detailed language on the definition of “direct financial assistance” and DWD has had very little experience so far with the administration of the new statutory language.

(7) League of Wisconsin Municipalities

(a) Clarification. DWD 290.17 and other provisions in the rule should be clarified as to the respective roles of local governments, state agencies and owner/developers.

Response: DWD agrees. This provision and other provisions that make reference to more than one of the prevailing wage statutes have been redrafted.

(b) Direct financial assistance. The rule should provide additional guidance on determining when \$1 million in direct financial assistance has been provided to a private construction project, which is the condition for the application of prevailing wage rates under sec. 66.0904, Stats.

Response: DWD has not included any new material on this topic because the new statutory provisions contain detailed language on the definition of “direct financial assistance” and DWD has had very little experience so far with the administration of the new statutory language.

(c) Volunteer labor provided by individuals. The rule should include a provision which clarifies that the estimated amount of work to be provided by volunteers should not be included in the calculation of the cost of a project.

Response: DWD agrees with this proposal and has included a provision to this effect in the proposed rule.

(d) Volunteer work by contractors - when a contractor performs work for a public works project at no cost to the public entity that is in charge of the project, the contractor should not be subject to prevailing wage rates for its employees.

Response: DWD agrees that individuals may choose to work as volunteers and thereby reduce costs for the project owner. However, when a contractor pays its employees to work on a project and chooses not to charge any cost to the project owner, the employment comes directly under the terms of the prevailing wage statutes and DWD cannot create an exemption. This change has not been made.

Response to Legislative Council Staff Recommendations

All comments which suggested drafting changes in the rule text were accepted. The report also asks a question in section 2 concerning the definition of “facility.” The Department’s response is that we believe the broad definition, which includes “real property,” is appropriate because some projects of public work make minimal changes to land and yet are intended to be covered by the prevailing wage statutes.

Department Contacts

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