

Chapter Ind 90

MUNICIPAL CONTRACTS FOR CONSTRUCTION OF PUBLIC WORKS

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Note: See explanatory footnotes at the end of this chapter.

Ind 90.01 Definitions. The following definitions shall apply in wage rate determinations made by the department pursuant to section 66.293, Wis. Stats.:

(1) **EMPLOYER**, as used in these rules and in subsection 66.293 (3) (f) Wis. Stats., includes any contractor, subcontractor, agent or other person, doing or contracting to do all or a part of the work.

(2) **AREA** means the county or other locality from which labor for any project would normally be secured.

(3) **LOCALITY** means the geographical area from which the persons in the trades or occupations to be used in the performance and execution of the project will normally be secured for employment on such public works or other similar projects.

(4) **TRADE OR OCCUPATION** means one of the job classifications that identifies the specific work regularly done by laborers, workmen and mechanics in the erection, construction, remodeling or repairing of any building or any other works projects, on a contract basis on projects that are similar to the contract work in the area. The duties, kinds of work, and other component elements envisioned by the department for job classifications of trades and occupations are those which prevail and are historically recognized in the construction industry for work on projects of a character similar to the contract work.

(5) **EMPLOYEES WORKING ON THE PROJECT** means laborers, workmen and mechanics employed directly upon the site of the work.

(6) **LABORERS, WORKMEN AND MECHANICS** include properly registered and indentured apprentices but exclude clerical, supervisory, and other personnel not performing manual labor.

(7) THE PREVAILING WAGE RATE included in a wage determination for any given trade or occupation is the hourly basic rate plus the hourly contributions for the types of economic or fringe benefits for that trade or occupation.

(8) PREVAILING HOURLY BASIC PAY RATES are the hourly wage rates on which overtime payments are computed, and represent regular straight-time hourly wage rates before deductions or withholdings.

(9) HOURLY CONTRIBUTIONS are the hourly contributions, or equivalent, for economic or fringe benefits in addition to the hourly basic rates. Payments for food, lodging, mileage, riding time, waiting time, call-in pay, overtime and other similar items are excluded. The rate of contribution or cost which is ordinarily an hourly rate, and the number of hours of work on which it is payable, will be reflected in the wage determination as such. If the contributions or costs for certain economic or fringe benefits are expressed in a formula or method of payment other than an hourly rate, the department may, at its discretion, express in the wage determination the rate of contribution or cost used in the formula or method of payment. The equivalent converted per hour value of the contribution or cost expressed in a formula or method of payment other than an hourly rate will be included in the prevailing hourly wage rate.

(a) *Contribution irrevocably made by an employer to a trustee or to a third person.* Contributions for economic or fringe benefits made to a trustee or to a third person irrevocably will be considered in ascertaining hourly contributions. The "third person" must be one who is not affiliated with the employer. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund, except those used for apprenticeship training, must be set up in such a way that in no event will the employer be able to recapture any of the required contributions paid in or in any way to divert the funds.

(b) *Fund, plan or program.* The contributions for economic and fringe benefits must be made pursuant to a bona fide fund, plan or program.

(c) *Unfunded plans.* 1. The reasonable anticipated costs to an employer pursuant to an enforceable written commitment to carry out a financially responsible plan or program, will be considered economic and fringe benefits.

2. No type of economic or fringe benefit is eligible for consideration as a so-called unfunded plan unless:

- a. A copy has been supplied to the department;
- b. It could be reasonably anticipated to provide benefits described in section 103.49, Wis. Stats., and Wis. Adm. Code section Ind 90.01 (9);

c. It is a bona fide commitment; and

d. The plan or program providing the benefits has been communicated in writing to the laborers, workmen and mechanics affected.

the person who will be responsible for keeping them; and that these payroll records will not be removed from there without prior notification to the municipality and that they will be retained and made available for a period of at least 3 years following the completion of the entire project of public works."

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 90.15 Adjusting minimum project cost of completion. Minimum threshold estimated project cost of completion figures for section 66.293(3) (c), Wis. Stats., for projects of public works where a single trade is involved and projects of public works where more than one trade is involved shall be adjusted as soon as possible after January 1, 1976 and every 2 years thereafter on the basis of changes in the United States department of commerce's composite cost index, or other similar index."

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 90.16 Cost of inspection. The request of any person for an inspection under section 66.293(3) (m), Wis. Stats., shall be made in writing to the department. The letter or written statement should identify the project and, if possible, employers and trades or occupations involved, and should give as much evidence of underpayment and noncompliance as possible, and state that the person is willing to pay for the complete cost of the inspection. The department shall maintain records on the cost(s) it incurs in making the inspection(s) and will charge this amount to the person who made the request.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 90.17 Date of notification. The date of notification by mail shall be the date entered on the document unless established otherwise by proof.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

EXPLANATORY FOOTNOTES FOR CHAPTER IND 90

' Specific economic and fringe benefits. (Interpretation)

(a) The term "other economic benefit" as used in section 103.49, Wis. Stats., is the so-called "open end" provision. This was included so that new fringe benefits may be recognized by the department as they become prevailing. A particular fringe benefit need not be recognized beyond a particular area in order for the department to find that it is prevailing in that area.

(b) To insure against considering and giving credit to any and all economic and fringe benefits some of which might be illusory or not genuine, the qualification required by the department is that such economic and fringe benefits must be bona fide. No difficulty is anticipated in determining whether a particular economic or fringe benefit is bona fide in the ordinary case where benefits are those common in the construction industry and which are established under a usual fund, plan or program. The following are typical conventional economic and fringe benefits: medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, vacation and holiday pay, defrayment of costs of apprenticeship or other similar programs, or other bona fide economic and fringe benefits, but only where the employer is not required by other federal, state, or local law to provide any of such benefits. Employers may take credit for contributions made under such conventional plans without requesting the approval of the department.

(c) Economic and fringe benefits which an employer is obligated to provide, under other federal, state, or local law are excluded. No credit may be taken under section 66.293, Wis. Stats., for the payments made for such benefits. For example, payments for workmen's compensation insurance under either a compulsory or elective state statute are not payments for economic or fringe benefits under section 66.293/ Wis. Stats. The omission in section 103.49, Wis. Stats., of any expressed reference to these payments, which are common in the construction industry, suggests that these payments should not normally be regarded as bona fide economic and fringe benefits under section 103.49/ Wis. Stats.

² Although contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employes in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employe contributions, will be borne by the employer. In such case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contribution made pursuant to the plan.

³ The phrase "fund, plan or program" is intended merely to recognize the various types of arrangements commonly used to provide economic and fringe benefits through employer contributions. In interpreting this phrase, the department will be guided by the experience of the United States department of labor and United States treasury department in administering the employe retirement income security act of 1974, of the United States department of labor in administering other related programs, and of the Wisconsin state insurance commissioner in administering employe welfare funds under Chapter 211, Wis. Stats.

⁴ These provisions are intended to permit the consideration of economic and fringe benefits meeting the requirements and which are provided from the general assets of an employer.

⁵ As in the case of other economic and fringe benefits payable under section 66.293, Wis. Stats., an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with section 66.293, Wis. Stats.

⁶ (a) Types of wage determinations:

1. When economic and fringe benefits are prevailing for various classes of laborers, workmen and mechanics in the area, such benefits are includable in any department determination. Illustrations contained in footnote 10, Ind 90.04 set forth some of the different types of wage determinations which may be made in such cases.

2. When economic and fringe benefits for various classes of laborers, workmen and mechanics do not prevail in the area, the wage determination will contain only the hourly basic rates of pay, that is, only the cash wages which are prevailing for the various classes of laborers, workmen and mechanics. An illustration of this situation is contained in footnote 10, Ind 90.04. ✓

(b) Subsequent certifications:

1. Subsequent certifications by the department modifying, superseding, correcting or otherwise changing the provisions of the original decision or certification for a given wage determination request, must be made within 30 days after the department receives the request for the wage determination.

2. If bids are not solicited or contract is not awarded by direct negotiation or if the project is rebid or renegotiated after 120 days after the date of the original certification, then the municipality must request a new determination prior to soliciting bids or prior to entering into a contract through direct negotiation.

3. Requests for prevailing wage rates for trades or occupations which are required in the work contemplated, but which are not included in the original certification, should be requested before bids are solicited.

⁷ The State of Wisconsin secretary of transportation must apply for a determination under section 66.293 (3), Wis. Stats., if he is an agent for a municipal sponsor of a project of public works and stands in the place of the municipality.