

Chapter DWD 290

CONTRACTS FOR CONSTRUCTION OF PUBLIC WORKS

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Note: Chapter Ind 90 was renumbered chapter ILHR 290 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1996, No. 484. Chapter ILHR 290 was revised by emergency rule effective May 10, 1997. Chapter ILHR 290 was renumbered chapter DWD 290 under s. 13.93 (2m) (b) 1., Stats., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, September, 1997, No. 501.

DWD 290.001 Scope. This chapter applies to all prevailing wage rate determinations under ss. 66.0903 and 103.49, Stats., and to the certification of prevailing wage rates and the notification of minor subcontractors under s. 103.50, Stats.

History: Cr. Register, September, 1997, No. 501, eff. 10-1-97; correction made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 290.01 Definitions. The following definitions shall apply to all prevailing wage rate determinations issued by the department pursuant to this chapter:

(1) "Allowable rate" means the rate determined by the department from its review of a collective bargaining agreement by subtracting items which do not represent bona fide fringe benefits.

Note: This term is used in s. DWD 290.015 (3). Two examples of items which do not represent bona fide fringe benefits are industry or contract administration funds.

(2) "Area" has the same meaning as in ss. 66.0903 (1) (a), 103.49 (1) (a) and 103.50 (1) (a), Stats.

(4) "Contractor" means a person, including a construction manager or consultant, who has entered into a contract with a state agency or local governmental unit for a public works project.

(5) "Department" means the state of Wisconsin department of workforce development.

(6) "Employer" means any contractor, subcontractor, agent or other person, doing or contracting to do all or a part of the work.

(9) "Hourly basic rate of pay" has the meaning given in s. 103.49 (1) (b), Stats.

(10) "Hourly contributions" is the per hour cost of the economic benefits paid to a laborer, worker, mechanic or truck driver by his or her employer, in addition to the hourly basic rate of pay. Payment for food, lodging, mileage, riding time, waiting time, call-in pay, uniforms, and the use of an employer's vehicle are excluded.

Note: Specific economic benefits. (Interpretation)

(a) The term "other bona fide economic benefit" is the so-called "open end" provision. This was included so that new economic benefits may be recognized by the department as they become prevailing. A particular economic 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 or giving credit to any and all economic benefits, some of which might be illusory or not genuine, the qualification required by the department is that the economic benefits must be bona fide. No difficulty is anticipated in determining whether a particular economic 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 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, defrayal of costs of apprenticeship or other similar programs, or other bona fide eco-

nomics benefits, but only where the employer is not required by other federal, state, or local law to provide any of the benefits. Employers may take credit for contributions made under such conventional plans without requesting the approval of the department.

(c) Economic benefits which an employer is required to pay pursuant to other federal, state, or local law are excluded. No credit shall be taken for the payments made for these economic benefits. For example, payments for worker's compensation insurance under either a compulsory or elective state statute are not payments for economic benefits under s. 66.0903 or 103.49, Stats. The omission in the above-mentioned statutes of any express reference to these payments, which are common in the construction industry, suggests that these payments shall not be regarded as an economic benefit.

(a) *Contribution irrevocably made by an employer to a trustee or to a third person.* Contributions for bona fide economic benefits made to a trustee or to a third person irrevocably shall be considered in ascertaining any hourly contribution. 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 so that the employer be unable to recapture any of the required contributions paid in or to divert the funds.

Note: 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 were 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 employees 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 employee contributions, will be borne by the employer. In such case the return by the insurance company to the employer of sums paid 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.

(b) *Fund, plan or program.* The contribution for an economic benefit must be made pursuant to a bona fide fund, plan, or program.

Note: The phrase "fund, plan, or program" is intended merely to recognize the various types of arrangements commonly used to provide economic 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 Employee Retirement Income Security Act of 1974, of the U.S. department of labor in administering other related programs, and of the Wisconsin state insurance commissioner in administering employee welfare funds under ch. 641, Stats.

(c) *Unfunded plans.* 1. The reasonable anticipated cost to an employer pursuant to an enforceable written commitment to carry out a financially responsible plan or program shall be considered as an economic benefit.

Note: These provisions are intended to permit the consideration of economic benefits that meet the requirements and are provided from the general assets of an employer.

2. No type of economic benefit is eligible for consideration as a so-called unfunded plan unless all of the following criteria apply:

a. A copy has been supplied to the department.

b. It could be reasonably anticipated to provide economic benefits described in ss. 66.0903 or 103.49, Stats., and this subsection.

c. It is a bona fide commitment.

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

Note: As in the case of fringe benefit contributions made to a fund, plan, or program, an unfunded plan or program must be "bona fide" and not a mere simulation or sham to avoid compliance with s. 66.0903 or 103.49, Stats. In evaluating the per hour cost of the fringe benefit contribution for employers that "self-insure" all or a portion of their employees' health insurance, the department may use guidance from the discussion on determining the applicable premium for self-insured plans under the Consolidated Omnibus Reconciliation Act (COBRA) in the *Employer's Handbook: Mandated Health Benefits*, Thompson Publishing Group, 1725 K Street, N.W., Suite 200, Washington, D.C. 20006.

(11) "Laborers, workers, mechanics and truck drivers" includes subjourneypersons and properly registered and indentured apprentices but excludes clerical, supervisory, and other personnel not performing manual labor.

(13) "Minor subcontract" means a subcontract with an estimated cost that is less than \$2,000.00 and an estimated work duration of less than 3 days.

(15) "Prevailing hours of labor" has the same meaning as in s. 103.49 (1) (c), Stats..

(16) (a) "Prevailing wage rate" has the same meaning as in ss. 66.0903 (1) (g), 103.49 (1) (d), and 103.50 (1) (d), Stats.

(b) In determining whether there is a majority of hours worked at a particular rate of pay, the department shall consider the sum of the hourly basic rate of pay plus corresponding hourly contributions rate. If there is a majority of hours worked at the rate that is that sum and there is more than one combination of hourly basic rates plus hourly contributions rates that equal that sum, the prevailing wage rate shall be the hourly basic rate of pay and corresponding hourly contributions rate with the most hours reported that resulted in that sum.

(c) In calculating the weighted average of the "highest-paid 51% of hours worked" in a trade or occupation, the department shall include all hours worked at the sum of the hourly basic rates of pay and corresponding hourly contributions rates that include the highest-paid 51% of hours worked.

(16m) "Prevailing wage rate determination" includes the original determination and subsequent determinations modifying or otherwise changing the provisions of the original determination.

(17) "Public works project" or "project" means erection, construction, remodeling, repairing, or demolition building or work under contract with a Wisconsin state agency or local governmental unit as defined in s. 66.0903 (1) (d) or 103.49 (1) (f), Stats., including alterations, painting, and decorating and not including service and maintenance work, warranty work, and work under a supply and installation contract.

(17m) "Service and maintenance work" means work on facilities or equipment routinely performed to prevent breakdown or deterioration.

(18) (a) "Site of project" means the physical place or places where the construction called for in the contract will remain when work on it has been completed and other adjacent or nearby property used by a contractor or subcontractor in connection with the project.

(b) "Site of project" includes fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards and similar facilities, when these facilities are substantially dedicated to the performance of the contract or project and are located in proximity to the actual construction location.

(c) "Site of project" does not include:

1. A permanent home office, branch plant establishment, fabrication plant or tool yard whose location and continued operation is determined without regard to a particular contract or project.

2. A fabrication plant, batch plant, borrow pit, job headquarters, tool yard or similar facility which is established by a supplier of materials before the opening of bids, whether or not the operations of the facility may be substantially dedicated to the performance of the contract for a period of time.

(19) "Subcontractor" means any subcontractor of a contractor and subcontractor of a subcontractor, regardless of tier of subcontractor.

(20) "Subjourneyperson" means a worker who primarily works under the direction of, and directly assists, a skilled trade employee by frequently using the tools of a specific trade. "Subjourneyperson" does not include an apprentice, a laborer, a heavy equipment operator or a truck driver.

(20p) "Supply and installation contract" means a contract under which the material is installed by the supplier, the material is installed by means of simple fasteners or connectors such as screws or nuts and bolts and no other work of any kind is performed on the site of a project, and the total labor cost to install the material does not exceed 20% of the total cost of the supply and installation contract.

(21) "Trade or occupation" means one of the job classifications recognized by the department that identifies the primary purpose and typical duties regularly performed by laborers, workers, mechanics and truck drivers employed in the erection, construction, remodeling, repairing or demolition of any building or any other public works project.

Note: A "Dictionary of Occupational Classifications and Work Descriptions for Use on All Public Works Projects in the State of Wisconsin" may be obtained at no charge from the Department of Workforce Development, Equal Rights Division, P.O. Box 8928, Madison, WI 53708 or at the DWD web site at <http://www.dwd.state.wi.us/er/dictionary1.htm>

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. (intro.), (1), (4), (9) (a), (c) 1., (c) 2a, (10), (11), (12), (14), (15), r. and recr. (8) and (9) (intro.), cr. (16) to (18), Register, January, 1976, No. 241, eff. 2-1-76; am. (4) to (6), (9) (d), (10) to (13) and (15), Register, January, 1986, No. 361, eff. 2-1-86; am. (intro.), (2), cr. (1), (13), (16) (b) and (18), renum. (3) to (14) and (16) to (18) to be (12), (21), (7), (11), (16) (a), (14), (10), (22), (17), (3), (9), (8), (5), (4) and (19) and am. (11), (16) (a), and (5), r. (15); corrections made under s. 13.93 (2m) (b) 1., Register, September, 1997, No. 501, eff. 10-1-97; am. (intro.), (4), (6), (10) (a) to (c) and (18) (a) to (c) (intro.), r. (3), (7) to (9), (12) and (14), cr. (9), (17m) and (20p), r. and recr. (10) (intro.), (17) and (21), renum. (22) to be (16m) and am., Register, July, 2000, No. 535, eff. 8-1-00; corrections in (2), (10) (c) 2. b., (16) (a) and (17) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535; CR 04-081; renum. (16) (b) to be (16) (c) and am., cr. (16) (b), Register December 2006 No. 612, eff. 1-1-07.

DWD 290.015 Collecting and compiling wage rate information. **(1) ANNUAL SURVEY.** For the purpose of making prevailing wage rate determinations, the department shall conduct an annual survey of employers and compile the prevailing wage rate for each trade or occupation in each area. The survey shall consist of forms mailed by the department to employers for completion and return.

Note: The form referred to in this subsection may be obtained from the Department of Workforce Development, Equal Rights Division, P. O. Box 8928, Madison, WI 53708.

(2) SURVEY DEADLINE. The department shall include a deadline date on the forms sent to employers. A survey form shall be accepted for initial compilation if it is received at the department's offices with a postmark that is on or before the deadline date and it is properly completed.

(3) COLLECTIVE BARGAINING AGREEMENTS. If the sum of the hourly basic rate of pay and allowable hourly contributions rate in a collective bargaining agreement that has been filed with the department for the current survey period is equal to the sum of the hourly basic rate of pay and hourly contributions rate that is found to prevail in a particular area for that particular trade or occupation on that particular type of work and the majority of hours used to determine the prevailing wage rates were submitted under a collective bargaining agreement, the department shall include in its determinations any future contractual increase or decrease provided for in the collective bargaining agreement or a successor agreement that is filed before January 1 of the calendar year following the end of the survey period. The department may deter-

mine premium pay, with the exception of height pay, pay for work with particular products, shift differential, and supervisory pay.

(4) **CORRECTIONS.** The department may correct errors in compiling data from the completed surveys, based upon its own determination or its inquiry to an employer.

(5) **INSUFFICIENT DATA.** If the wage rate data which the department may consider from all sources is insufficient to determine the prevailing wage rate for a particular trade or occupation in a particular area or for a particular type of project, the department may consider wage rate data compiled for a similar trade or occupation.

(6) **INITIAL DETERMINATIONS AND RECALCULATION REQUESTS.**
 (a) The department shall issue its initial prevailing wage determinations based on the annual survey. Any person may request a recalculation of any portion of an initial determination, based upon the submission of the evidence required by s. 66.0903 (3) (bm) or 103.49 (3) (b), Stats., if the request and the accompanying evidence are received at the department's offices within 30 days after the initial determination date.

(b) The department will accept a recalculation request on the basis of evidence that the employer did not receive a survey, that the employer properly mailed a survey form which the department did not receive, or that the survey data previously submitted was erroneous. Except as provided in sub. (6m), a recalculation request will not be granted for the consideration of data that could have been submitted as a part of the annual survey but was not submitted on time.

Note: The department is required to affirm or modify the initial determination within 15 days after the date on which the department receives the request for recalculation. ss. 66.0903 (3) (bm), 103.49 (3) (b).

(6m) **RECALCULATION REQUESTS FOR THE 1996 SURVEY.** For recalculation requests which pertain to the 1996 survey, the department will accept for consideration data that could have been submitted as a part of the annual survey but was not submitted on time.

(7) **FINAL DETERMINATIONS.** the department shall issue its final annual prevailing wage determinations after it has issued decisions on all timely recalculation requests.

History: Cr. Register, January, 1986, No. 361, eff. 2-1-86; correction in (5) (e) and (7) made under s. 13.93 (2m) (b) 7., Stats., Register, June, 1987, No. 378; r. and recr. Register, September, 1997, No. 501, eff. 10-1-97; correction in (6) (a) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535; CR 04-081: am. (3) Register December 2006 No. 612, eff. 1-1-07.

DWD 290.02 Apprentices. (1) Apprentices may work at less than the prevailing wage rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program administered by the U.S. department of labor, a state agency recognized by the U.S. department of labor, or under Wisconsin's apprenticeship law, ch. 106, Stats.

(2) Any employee who is not properly registered as an apprentice under sub. (1) shall be paid not less than the prevailing wage rate applicable to the work actually performed.

(3) Apprentices shall be paid a percentage of the applicable journey person's hourly basic rate of pay and hourly fringe benefit contributions specified in the prevailing wage rate determination issued for a project.

(4) The appropriate percentage shall be obtained from each apprentice's contract or indenture.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86; am. (3) and (4), r. (5), Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.025 Subjourneypersons. (1) The department shall include a determination of one or more subjourneyperson wage rates for a particular trade or occupation in a prevailing wage determination under the criteria set forth in this section.

(2) The department shall determine whether there are at least 500 countable hours reported for a particular trade or occupation within a county, whether a collectively bargained wage rate and fringe benefit package prevails in the county for that trade or occu-

pation, whether that wage rate is identical to an allowable rate in a collective bargaining agreement for that trade or occupation which has been filed with the department during the current survey period, and whether the collective bargaining agreement includes a wage rate for a classification equivalent to a subjourneyperson. If these conditions are present, the department shall determine subjourneyperson wage rates for the particular trade or occupation, based on the wage rates in the collective bargaining agreement applicable to that county. The department shall not consider data from contiguous counties when making a determination under this subsection.

(3) As an alternative to sub. (2), the department shall determine whether there are at least 500 countable hours reported for a particular trade or occupation within a county and whether the majority of the total hours reported for the trade or occupation were worked under collective bargaining agreements. If these conditions are present, the department shall determine subjourneyperson wage rates for the particular trade or occupation in accordance with the collective bargaining agreement that covers the greatest number of employees in the particular trade or occupation and is applicable to that county. The department shall not consider data from contiguous counties when making a determination under this subsection.

(4) If neither the conditions in sub. (2) nor the conditions in sub. (3) are met, and there are at least 500 countable hours reported for a particular trade or occupation within a county, then the department shall determine subjourneyperson wage rates under this subsection.

(a) The entry-level subjourneyperson hourly basic rate of pay shall be equal to 35% of the journey person's hourly basic rate of pay for the trade or occupation plus 35% of the journey person's fringe benefit package.

(b) The regular subjourneyperson hourly basic rate of pay shall be equal to 65% of the journey person's hourly basic rate of pay for the trade or occupation plus 65% of the journey person's fringe benefit package.

(c) The hourly basic rate of pay under par. (a) or (b) shall not be less than the minimum wage.

(d) An employee shall not be employed at the entry-level subjourneyperson wage rate after one year of cumulative service in the trade or occupation. After one year of cumulative service, the employee shall be advanced to the regular subjourneyperson wage rate or be enrolled in an apprenticeship program or the employer shall not employ that employee on any project subject to a prevailing wage rate determination.

(e) The department shall determine wage rates for subjourneypersons in accordance with the following required job site ratios:

Number of journeypersons in the trade or occupation employed on the job site	Maximum allowable number of subjourneypersons (either entry-level or regular) employed on the job site
1	1
5	2
9	3
13	4
more than 13	1 for every 4 journeypersons

(f) Subject to the job site ratios in par. (e), an employer may employ one person as an entry-level subjourneyperson for each current apprentice employed in the same trade or occupation.

(g) As an alternative to par. (f) and subject to the job site ratios in par. (e), an employer may employ one person as an entry-level subjourneyperson if the employer has no current apprentice in the same trade or occupation but did employ an apprentice in the same

trade or occupation within the last 5 years who completed his or her apprenticeship during that time.

(h) The department shall not consider data from contiguous counties when making a determination under this subsection.

Note: "Request to Employ Subjourneyperson," form ERD-10880, may be obtained at no charge from the Department of Workforce Development, Equal Rights Division, P.O. Box 8928, Madison, WI 53708 or the DWD web site at <http://www.dwd.state.wi.us/er/pdf/forms.htm>.

History: Cr. Register, September, 1997, No. 501, eff. 10-1-97.

DWD 290.03 Classification of laborers, workers, mechanics and truck drivers. (1) Wages paid for work done in any given trade or occupation shall be computed at a wage rate not less than the prevailing wage rate specified in the prevailing wage rate determination issued for a project. The type of work done for the most similar trade or occupation, and not a previously assigned occupational title, shall determine the required minimum prevailing wage rate payable.

(2) A laborer, worker, mechanic or truck driver who is regularly employed to process, manufacture, pick up or deliver materials or products from a commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products is not entitled to receive the prevailing wage rate or to receive at least 1.5 times his or her hourly basic rate of pay for all hours worked in excess of the prevailing hours of labor unless any of the following applies:

(a) The laborer, worker, mechanic or truck driver is employed to deliver mineral aggregate such as sand, gravel or stone that is immediately incorporated into the work, and not stockpiled or further transported by truck, to or from the site of a project that is subject to this chapter by depositing the material substantially in place, directly or through spreaders from the transporting vehicle.

(b) The laborer, worker, mechanic or truck driver is employed to transport excavated material or spoil from and return to the site of a project that is subject to this chapter.

(3) A laborer, worker, mechanic or truck driver that performs work in more than one occupational classification during a given work week shall be cross-classified and compensated for all work performed in each classification, unless work other than the primary classification is performed for 15% or less of the time spent working on a particular public works project during a given work week.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86; renum. to be (1), cr. (2), Register, September, 1997, No. 501, eff. 10-1-97; am. (1), cr. (3), Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.035 Classification of projects. (1) BUILDING OR HEAVY CONSTRUCTION. A building or heavy construction project includes sheltered enclosures with walk-in access for the purpose of housing persons, employees, machinery, equipment, or supplies and nonsheltered work such as canals, dams, dikes, reservoirs, and storage tanks. A sheltered enclosure need not be habitable in order to be considered a building. The installation of machinery or equipment, both above and below grade level, does not change a project's character as a building. Building or heavy construction includes on-site grading, utility work, and landscaping.

Note: Examples of building or heavy construction projects include, but are not limited to, antenna towers; apartment buildings of 5 or more stories; enclosed arenas; athletic fields, excluding all paving work; auditoriums; automobile parking garages or ramps; banks or financial buildings; barracks; bathhouses; indoor or outdoor bleachers; breakwaters; caissons; canals; channels; channel cut-offs; chemical complexes or facilities; churches; city halls; civic centers; cofferdams; coke ovens; commercial or retail buildings; courthouses; dams; demolition; detention facilities or jails; dikes; docks; dormitories; dredging; factories; fire stations; flood control; fueling facilities; gas and oil pipelines; golf courses; grandstands; hospitals; hotels; industrial buildings; industrial incinerators; institutional buildings; irrigation; jetties; kennels; kilns; land drainage; land leveling; land reclamation; landfills; landscaping; laterals; levees; libraries; lift stations, excluding drop-in type; locks; manufacturing plants; marine work; mausoleums; motels; museums; nursing and convalescent facilities; office buildings; oil refineries; out-patient clinics; outdoor electrification; passenger or freight terminals; police stations; ponds; post offices; power plants; prefab-

ricated buildings; pumping stations; railroad construction; reservoirs; rest areas; restaurants; revetments; schools; service stations; shopping centers; shoreline rehabilitation; ski tows; storage tanks, including above ground, below grade, or removal; stores; swimming pools, excluding projects subject to sub. (5); subways; theaters; tip-ple; unsheltered piers or wharves; viaducts other than state highway or local street; warehouses; water or sewage treatment plants; water towers; waterways; water wells, excluding projects under sub. (5).

(2) **SEWER, WATER, OR TUNNEL CONSTRUCTION.** A sewer, water, or tunnel construction project includes those projects that primarily involve public sewer or water distribution, transmission, or collection systems and related tunnel work, excluding buildings. Sewer, water, or tunnel construction performed within the lot line of a building or heavy construction project are subject to sub. (1).

Note: Examples of sewer, water, or tunnel construction projects include, but are not limited to, aqueducts; catch basins; cofferdams; compressed air tunnels; culverts; forcemains; free air tunnels; drop-in lift stations; manholes; marine work; open cut trenches; sanitary sewers; sewage collection or disposal lines; shafts; storm sewers; tunnels, except for subways; water mains; and water supply or distribution lines.

(3) **AIRPORT PAVEMENT OR STATE HIGHWAY CONSTRUCTION.** An airport pavement or state highway construction project includes all airport projects and all projects awarded by the Wisconsin department of transportation that do not include buildings.

Note: Examples of airport pavement or state highway construction projects include, but are not limited to, airport aprons, runways, or taxiways; base courses; bituminous pavement; brick paving; bridges; concrete pavement; curbs; excavation or embankment for road construction; fencing; grade crossing elimination or separation, such as overpasses or underpasses; guard rails; gutters; landscaping; lighting or traffic control; marine work; medians; parkways; public sidewalks; resurfacing; shoulders; signs; stabilizing courses; and storm sewers, sanitary sewers, or water supply lines incidental to airport pavement or state highway construction.

(4) **LOCAL STREET OR MISCELLANEOUS PAVING CONSTRUCTION.** A local street or miscellaneous paving construction project includes roads, streets, alleys, trails, bridges, paths, parking lots and driveways that are not subject to sub. (5), public sidewalks, and racetracks. Projects awarded by the Wisconsin department of transportation are excluded.

Note: Examples of local street or miscellaneous paving construction projects include, but are not limited to, alleys; athletic field paving work; base courses; bike or bridle paths; bituminous pavement; brick paving; bridges; concrete pavement; curbs; driveways; excavation or embankment for road construction; fencing; grade crossing elimination or separation, such as overpasses or underpasses; guard rails; gutters; landscaping; lighting or traffic control; marine work; medians; parking lots; parkways; public sidewalks; racetracks; recreational trails; resurfacing; roadways; shoulders; signs; and stabilizing courses.

(5) **RESIDENTIAL OR AGRICULTURAL CONSTRUCTION.** A residential or agricultural construction project includes single family houses or apartment buildings of no more than 4 stories in height and all buildings, structures, or facilities that are primarily used for agricultural or farming purposes, excluding commercial buildings. For classification purposes, the primary consideration is the exterior height of a residential building in stories. Residential or agricultural construction includes all incidental items such as site work, driveways, parking lots, private sidewalks, swimming pools, and private septic systems or sewer and water laterals connected to a public system.

Note: Examples of residential or agricultural construction projects include, but are not limited to, apartment buildings of 4 stories or less, barns, breeding facilities, condominiums of 4 stories or less, convents, cribs, fencing, garages, grain bins, greenhouses that are not incidental to retail, irrigation wells, land clearing, manure pits, nurseries, sheds, silos, single-family houses, stables, storage or outbuildings, student housing of 4 stories or less, swimming pools, town or row houses, training, riding or exhibition facilities, and water wells that are not subject to sub. (1).

History: Cr. Register, September, 1997, No. 501, eff. 10-1-97; r. and recr. Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.04 Straight time wages. (1) An employer may discharge its obligation for payment for work done less than or equal to the prevailing hours of labor as defined in s. 103.49 (1) (c), Stats., by paying the total prevailing wage rate in cash or by paying in cash and incurring costs for bona fide economic benefits if the total of the cash payment and the total hourly contribution for the bona fide economic benefits equal or exceed the total prevailing wage rate.

(2) Before an employer can be given credit for any unfunded economic benefit plan or program, the employer shall supply a

copy of the plan or program to the department and comply with all other provisions of s. DWD 290.01 (10) (c).

(3) Unconventional plans shall be approved by the department before any credit will be given to an employer.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; am. (1), Register, September, 1990, No. 418, eff. 10-1-90; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; r. and recr. Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.05 Overtime wages. All hours worked by a laborer, worker, mechanic or truck driver in excess of the prevailing hours of labor per day or per week must be paid at a rate at least 1.5 times the hourly basic rate of pay. Sums paid by an employer for bona fide economic benefits shall be excluded in the computation of the overtime premium. In no event can the rate upon which the overtime premium is calculated be less than the amount determined by the department as the hourly basic rate of pay. Nor can the rate upon which the overtime premium is calculated be less than the straight time cash payment made to the laborer, worker, mechanic or truck driver or be less than the employee's normal hourly basic rate of pay, if it is higher. Contributions by employees are not excluded from the rate upon which the overtime premium is computed; that is, an employee's overtime premium rate is computed on the taxable earnings before any deductions are made for the employee's contributions to bona fide economic benefits. The employer's contributions, costs or cash payments for bona fide economic benefits may be excluded in computing the overtime premium rate so long as the exclusions do not reduce the overtime premium rate below the hourly basic rate contained in the prevailing wage rate determination issued for a project.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86; am. Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.08 Prevailing wage rate determinations for individual projects. (1) Every state agency or local governmental unit shall request the department to determine the prevailing wage rates for all trades or occupations required to complete any public works project which meets or exceeds the dollar thresholds provided in s. DWD 290.155.

(2) The request shall be made on the form numbered ERD-5719, which shall be provided at no charge by the department.

(3) The department may be notified about ensuing projects as far in advance as possible. However, the official request to the department to determine the prevailing wage rates for all trades and occupations required to complete the work contemplated shall be made between 50 to 60 days before making a contract by direct negotiation or soliciting bids.

(4) A prevailing wage rate determination that is issued on or before June 30 in a particular year shall remain in effect for the remainder of the calendar year. A prevailing wage rate determination that is issued after June 30 shall remain in effect for 180 days.

Note: "Application for a Prevailing Wage Determination Issued by the Department of Workforce Development," form ERD-5719, may be obtained at no charge from the Department of Workforce Development Equal Rights Division, P.O. Box 8928, Madison WI 53708 or the DWD web site at <http://www.dwd.state.wi.us/er/pdf-forms.htm>.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; cr. (4), Register, September, 1997, No. 501, eff. 10-1-97; am. (1) and (3), Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.09 Procedure for requesting exemption from applying for individual project prevailing wage rate determinations. (1) The petition of any local governmental unit for exemption from applying to the department to determine the prevailing wage rates for any individual public works projects pursuant to s. 66.0903 (6), Stats., shall be sent to the department and shall include:

(a) A certified copy of the ordinance or other enactment setting forth the standards, policy, procedure and practice followed in

determining the prevailing wage rates for all trades or occupations required in the work contemplated.

(b) A current schedule of prevailing wage rates for all trades or occupations required for any public works project, setting forth all of the following:

1. The trades or occupations required.

2. The current and future hourly basic rates of pay, the hourly contribution for bona fide economic benefits and any premium pay, if applicable, for these trades or occupations.

3. The types of public works projects, by kind and size, that are subject to the ordinance or other enactment.

4. The effective date of the hourly basic rates of pay and hourly contribution for bona fide economic benefits.

(c) Frequency of, method of, and responsibility for updating the schedule of prevailing wage rates, hours of labor and hourly basic pay rates.

(d) Name, title, address and phone number of person to whom the exemption order is to be mailed.

(2) Upon request of the department, the local governmental unit shall also supplement its petition with information pertinent to determining the granting of an exemption.

(3) An exemption will be granted for a period no longer than 18 months. A new petition shall be filed with the department each time continuation of the exemption is desired beyond the termination date granting such exemption.

(4) Each exemption is subject to revocation for cause at any time, and also subject to observance of the applicable provisions of Wisconsin laws, rules and regulations of the department, and of the agreements included in the petition and application. The provisions of ch. DWD 290 and s. 66.0903 (1), (3), (4), (5), (8), (9) (b) and (c), (10), (11) and (12), Stats., remain in effect and are not included within an exemption.

(5) No exemption shall be granted unless the local governmental unit has enacted a methodology to enforce the payment of the prevailing wage rates determined pursuant to its ordinance or enactment and that methodology has been approved by the department.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; am. (4), Register, September, 1990, No. 418, eff. 10-1-90; correction in (4) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; am. (1) (intro.), (a), (2) and (4), r. and recr. (1) (b), cr. (5), Register, July, 2000, No. 535, eff. 8-1-00; corrections in (1) (intro.) and (4) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 290.10 Procedure for an administrative review. (1) This section applies to a request for review by a local government unit under s. 66.0903 (3) (br), Stats., or a state agency under s. 103.49 (3) (c), Stats.

(2) A request for review by a local governmental unit or a state agency will be accepted for consideration if the request meets the following requirements:

(a) The request is in writing.

(b) The request is made within 30 days from the date the determination was issued. A request is timely under this section if it is received by mail with a postmark date within the review period.

(c) The request is made at least 10 days before the date that construction contracts are awarded or negotiated.

(d) The request includes wage rate information for the contested trade or occupation on at least 3 projects of the same type located in the city, village or town where the proposed project is located and on which some work was performed within the applicable survey period and which was previously considered by the department in issuing the determination.

(3) In the course of its review, the department shall consider wage rate information from all other similar projects on which work was performed within the city, village or town during the applicable survey period. The department shall follow the same calculation criteria employed in the survey determinations.

Note: The department is required to affirm or modify the determination within 15 days after the date on which the department receives the request for review. ss. 66.0903 (3) (br), 103.49 (3) (c).

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86; am. (1) (c), Register, June, 1987, No. 378, eff. 7-1-87; am. (1) (c), Register, September, 1990, No. 418, eff. 11-1-90; correction in (1) (e) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; r. and recr. Register, September, 1997, No. 501, eff. 10-1-97; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 290.11 Procedure when a state agency or local governmental unit fails to request a required prevailing wage rate determination or incorporate a required prevailing wage rate determination into a contract.

(1) When the department finds that a state agency or local governmental unit has not requested a prevailing wage rate determination as required under s. 66.0903 (3) (am) or 103.49 (3), Stats., the department shall promptly notify the state agency or local governmental unit of the noncompliance.

(2) The state agency or local governmental unit shall file an application for a prevailing wage rate determination, on a form prescribed by the department, within 10 days of the department's notice of noncompliance.

(3) The department shall issue the prevailing wage rate determination within 30 days of the notice of noncompliance.

(4) The local governmental unit or state agency may request a review of the prevailing wage rate determination within 30 days of the issuance of the determination pursuant to s. DWD 290.10.

(5) If the state agency or local governmental unit failed to incorporate a prevailing wage rate determination into a contract or bid, the local governmental unit or state agency shall either terminate the contract and resolicit bids using the prevailing wage rate determination or incorporate the determination retroactive to the beginning of construction through supplemental agreement or change order. The employer shall be compensated for any increases in wages resulting from the change. The method of incorporation of the prevailing wage rate determination and the adjustment in the contract or bid price shall be in accordance with applicable procurement law.

Note: "Application for a Prevailing Wage Determination Issued by the Department of Workforce Development," form ERD-5719, may be obtained at no charge from the Department of Workforce Development Equal Rights Division, P.O. Box 8928, Madison WI 53708 or the DWD web site at <http://www.dwd.state.wi.us/er/pdf-forms.htm>.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. (2), cr. (3), Register, January, 1986, No. 361, eff. 2-1-86; am. (1) (intro.), Register, June, 1987, No. 378, eff. 7-1-87; correction in (1) (c) and (2) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; r. and recr. Register, September, 1997, No. 501, eff. 10-1-97; r. and recr. Register, July, 2000, No. 535, eff. 8-1-00; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 290.12 Posting of prevailing wage rates. (1)

A clearly legible copy of the prevailing wage rate determination issued by the department or exempted local governmental unit, together with the provisions of s. 66.0903 (10) (a) and (11) (a), Stats., or s. 103.49 (2) and (6m), Stats., shall be kept posted in at least one conspicuous and easily accessible place on the site of each project by the contracting state agency or local governmental unit and the notice shall remain posted during the full time any laborer, worker, mechanic or truck driver is employed on the project.

(2) If there is no appropriate site on a project, a local governmental unit may post the prevailing wage rate determination at the place normally used to post public notices.

(3) Within 7 days of the date that work is first performed by a minor subcontractor, a contractor or subcontractor that hires a minor subcontractor shall either provide a copy of the prevailing wage rate determination for the project to the minor subcontractor or provide written notification to the minor subcontractor that the work to be performed is subject to a prevailing wage rate determination issued by the department.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86; am. (1) (intro.), Register, June, 1987, No. 378, eff.

7-1-87; renum. to be (1), cr. (2), Register, September, 1997, No. 501, eff. 10-1-97; am. (1), renum. (2) to be (3), cr. (2), Register, July, 2000, No. 535, eff. 8-1-00; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 290.13 Evidence of compliance by agent and subcontractor. (1) AFFIDAVIT OF COMPLIANCE.

Upon completion of their portion of work on a public works project and prior to receiving final payment for work on the project, each agent or subcontractor shall file an agent or subcontractor affidavit of compliance with the prevailing wage rate determination, on a form prescribed by the department, with its prime contractor.

(2) RECORD RETENTION. (a) Each agent or subcontractor who performed work on a public works project shall retain the following records for at least 3 years after the last day on which the prime contractor and all its agents or subcontractors completed work on the site of the project:

1. An accurate record of the name, trade or occupation, hours worked, and actual wages paid for all of its employees who performed work on the project.

2. A properly completed agent or subcontractor affidavit of compliance with the prevailing wage rate determination, on a form prescribed by the department, from each of its agents or subcontractors that performed work on the project.

(b) The required records shall be made available for inspection upon request of the department, state agency, or local governmental unit.

(c) The location of the required records shall be designated in the affidavit required under sub. (1). The records shall not be moved from the designated location without prior notice of the new location and the expected move date to the state agency or local governmental unit.

Note: "Agent or Subcontractor Affidavit of Compliance with Prevailing Wage Rate Determination," form ERD-10584, may be obtained at no charge from the Department of Workforce Development, Equal Rights Division, P.O. Box 8928, Madison, WI 53708 or the DWD web site at <http://www.dwd.state.wi.us/er/pdf-forms.htm>.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86; r. and recr. Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.14 Evidence of compliance by prime contractor. (1) AFFIDAVIT OF COMPLIANCE.

Upon completion of the public works project and prior to receiving its final payment for work on the project, each prime contractor shall file a prime contractor affidavit of compliance with the prevailing wage rate determination, on a form prescribed by the department, with the state agency or local governmental unit that awarded the contract.

(2) RECORD RETENTION. (a) Each prime contractor shall retain the following records for at least 3 years after the last day on which the prime contractor and all its agents or subcontractors completed work on the site of the project:

1. An accurate record of the name, trade or occupation, hours worked, and actual wages paid for all of its employees who performed work on the project.

2. A properly completed agent or subcontractor affidavit of compliance with the prevailing wage rate determination, on a form prescribed by the department, from each of its agents or subcontractors that performed work on the project.

(b) The required records shall be made available for inspection upon request of the department, state agency, or local governmental unit.

(c) The location of the required records shall be designated in the affidavit required under sub. (1). The records shall not be moved from the designated location without prior notice of the new location and the expected move date to the state agency or local governmental unit.

Note: "Prime Contractor Affidavit of Compliance with Prevailing Wage Rate Determination," form ERD-5724 may be obtained at no charge from the Department of Workforce Development, Equal Rights Division, P.O. Box 8928, Madison, WI 53708 or the DWD web site at <http://www.dwd.state.wi.us/er/pdf-forms.htm>.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. (2), Register, January, 1986, No. 361, eff. 2-1-86; correction in (1) made under s. 13.93 (2m)

(b) 7., Stats., Register, April, 1996, No. 484; r. and recr. Register, July, 2000, No. 535, eff. 8-1-00.

DWD 290.15 Adjusting minimum project cost of completion. Every year, the department shall adjust the minimum estimated project cost of completion figures for both single-trade and multi-trade public works projects on the basis of the change in the construction cost index as published in the engineering news-record. The adjusted minimum estimated project cost of completion figures shall be rounded to the nearest thousand.

Note: The Engineering News-Record is a weekly publication of the McGraw-Hill Companies, 1221 Avenue of the Americas, New York, NY 10020. A construction cost index is published in the "Construction Economics" section of each issue.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; emerg. r. and recr., eff. 2-13-98; r. and recr. Register, August, 1998, No. 512, eff. 9-1-98; CR 02-011: am. Register June 2002 No. 558, eff. 7-1-02.

DWD 290.155 Minimum estimated project costs.

(1) This chapter does not apply to any single-trade public works project for which the estimated cost of completion is below \$44,000 and any multi-trade public works project for which the estimated cost of completion is below \$216,000.

(2) The estimated cost of completion of a public works project shall include all contracts and subcontracts that are closely related in purpose, time, and place. Similar or related work may be considered a separate public works project only if all of the following apply to each portion of work:

- (a) It has a separate budget.
- (b) It is advertised separately.
- (c) It is bid or negotiated separately.
- (d) It is awarded separately.
- (e) It is not dependent on another segment of work for completion.

(3) The estimated cost of completion of a public works project shall include labor costs based on the most current prevailing wage rates available from the department, material, furnishings, and other things of value required to be supplied by a contractor or its subcontractors to construct a specific project.

(4) The estimated cost of completion of a public works project shall not include land cost, architectural fees, engineering fees, planning and research costs, and administrative costs.

Note: Section 103.49 (1), Stats., defines "single-trade public works project" as "a public works project in which a single trade accounts for 85% or more of the total labor cost of the project," and "multi-trade public works project" is defined as "a public works project in which no single trade accounts for 85% or more of the total labor cost of the project."

History: Cr. Register, November, 1976, No. 251, eff. 12-1-76; r. and recr. Register, January, 1980, No. 289, eff. 2-1-80; am. Register, May, 1982, No. 317, eff. 6-1-82; am. Register, December, 1984, No. 348, eff. 1-1-85; am. Register, June, 1987, No. 378, eff. 7-1-87; am. Register, October, 1990, No. 418, eff. 11-1-90; am. Register, November, 1993, No. 455, eff. 12-1-93; am., Register, September, 1997, No. 501, eff. 10-1-97; emerg. am. eff. 2-13-98; am. Register, August, 1998, No. 512, eff. 9-1-98; emerg. am. eff. 1-4-99; am. Register, May, 1999, No. 521, eff. 6-1-99; renum. to be (1) and am., cr. (2) to (4), Register, July, 2000, No. 535, eff. 8-1-00; CR 02-011: am. (1), Register June 2002 No. 558, eff. 7-1-02; emerg. am. (1), eff. 1-1-03; CR 03-008: am. (1) Register May 2003 No. 569, eff. 6-1-03; emerg. am. (1), eff. 1-1-04; CR 04-006: am. (1) Register May 2004 No. 581, eff. 6-1-04; emerg. am. (1) eff. 1-1-05; CR 05-007: am. (1) Register May 2005 No. 593, eff. 6-1-05; emerg. am. (1), eff. 1-1-06; CR 06-004: am. (1) Register May 2006 No. 605, eff. 6-1-06; **emerg. am. eff. 1-1-07; CR 07-003: am. (1) Register June 2007 No. 618, eff. 7-1-07.**

DWD 290.16 Complaints. Any person may request an inspection pursuant to s. 66.0903 (10) (c) or 103.49 (5) (c), Stats. The request shall be in writing and shall identify the involved project; contractor, subcontractor, or agent; and trade or occupation. The requestor shall sign a statement that he or she understands the obligation to pay costs assessed pursuant to s. 66.0903 (10) (c) or 103.49 (5) (c), Stats., if the contractor, subcontractor, or agent is found to be in compliance.

Note: "Wisconsin Prevailing Wage Rate Complaint," form ERD-9850, is available at no charge from the Department of Workforce Development, Equal Rights Division, P.O. Box 8928, Madison, WI 53708 or the DWD web site at <http://www.dwd.state.wi.us/er/pdfforms.htm>.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86; r. and recr. Register, July, 2000, No. 535, eff. 8-1-00; correction made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 290.17 Standard contract language. Every state agency or local governmental unit shall insert or cause to be inserted a clause in every prime contract that clearly states that the applicable public works project is subject to the provisions of either s. 66.0903 or 103.49, Stats., and ch. DWD 290.

History: Cr. Register, July, 2000, No. 535, eff. 8-1-00; correction made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.