



Wisconsin County Highway Association

2010 Winter Conference

New Prevailing Wage Legislation: When/Where/Who? Open Discussion

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Issue

Under what circumstances (if any) must a County pay prevailing wages when making improvements to a county highway?

Prevailing Wage Statute

- Wis. Stat. § 66.0903(3)(am)(as amended by 2009 WI Act 28; effective 1-1-10) states:

A local governmental unit, before making a contract by direct negotiation or soliciting bids on a contract for the erection, construction, remodeling, repairing or demolition of any project of public works, shall apply to the department to determine the prevailing wage rate for each trade or occupation required in the work contemplated. ... The department shall issue its determination within 30 days after receiving the request and shall file the determination with the requesting local governmental unit.

What types of projects are covered by the local governmental unit prevailing wage law? (§66.0903(2), Stats.)

- Highway, street, bridge, building or other infrastructure project.
- A project erected, constructed, repaired, remodeled, demolished by one local governmental unit for another local governmental unit under a contract under s. 66.0301 (2), 83.03, 83.035, or 86.31 (2) (b) or under any other statute specifically authorizing cooperation between local governmental units.
- A project where the completed facility is leased, purchased, lease purchased or otherwise acquired by, or dedicated to, a local governmental unit instead of the public entity contracting for the construction work.
- A road, street, bridge, sanitary sewer or water main project where the completed work is acquired by, or dedicated to, a local governmental unit, including ownership or maintenance by the local governmental unit under §236.13(2), Stats.

What work is not covered by prevailing wage law?

- A project of public works for which the estimated project cost of completion is **below \$25,000**.
- A project of public works in which the labor for the project is provided by unpaid volunteers.
- **Minor service or maintenance work, warranty work, or work under a supply and installation contract.**

What is "minor service and maintenance work"?

Minor service and maintenance work for local governmental units, for state agencies, and developers/owners of publicly funded private construction projects includes:

- minor crack filling, chip or slurry sealing, or other minor pavement patching (not including overlays) that has a projected life span of no longer than 5 years, cleaning drainage or sewer ditches or structures, or any other limited, minor work on public facilities or equipment that is routinely performed to prevent breakdown or deterioration.
- Minor service and maintenance work for local governmental units and for publicly funded private construction projects also includes the depositing of gravel on an existing gravel road applied solely to maintain the road and road shoulder maintenance.

What is a “supply and installation contract”?

- A supply and installation contract is a contract where 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 is performed on the site of the project. The total labor cost to install the material cannot exceed 20% of the total cost of the contract.

Exemptions from Prevailing Wage Law

- The department, upon petition of any local governmental unit, shall issue an order exempting the local governmental unit from applying to the department for a determination under §66.0903 when it is shown that an ordinance or other enactment of the local governmental unit sets forth standards, policy, procedure and practice resulting in standards as high or higher than those under this section. See §66.0903(6), Stats.

How has the Prevailing Wage Law been affected by 2009 WI Act 28?

- Prior to the changes in the budget bill, a local governmental unit had to pay prevailing wage for any “public works project” as defined by Wis. Admin Code § DWD 290.01(17).
- Certain improvements were specifically excluded from the definition of “public works project” such as service and maintenance work, warranty work, and work under a supply and installation contract. Also, prevailing wage laws did not apply to single-trade public works projects under \$48,000 (as indexed) or multi-trade public work projects under \$234,000 (as indexed).

How has the Prevailing Wage Law been affected by 2009 WI Act 28?

- The most critical change to prevailing wage laws is the deletion of the exclusion for single-trade public works projects under \$48,000 or multi-trade public works projects under \$234,000.
- Now any project of public works costing \$25,000 or more that does not fall within the definition of minor service and maintenance work, warranty work or supply and installation contracts will have to pay prevailing wage.

How has the Prevailing Wage Law been affected by 2009 WI Act 28?

- The budget bill also creates Wis. Stat. § 66.0904 relating to prevailing wage for publicly funded construction projects. According to Wis. Stat. § 66.0904(2), any owner or developer of real property who enters into a contract for the erection, construction, remodeling, repairing, or demolition of any publicly funded private construction project on that real property must include in the contract a stipulation that any covered employee will be paid the prevailing wage as determined under that section.
- However, § 66.0904 does not apply to a publicly funded private construction project that receives less than \$1,000,000 in direct financial assistance from a local governmental unit; a project in which the labor is provided by unpaid volunteers; or minor service or maintenance work, warranty work, or work under a supply or installation contract.

Attorney General Opinion (OAG-5-09)

- The attorney general recently issued a formal opinion on the impact of prevailing wage law changes regarding intergovernmental agreements entered into under Wis. Stat. § 66.0301(2).
- The amendments to the prevailing wage law specifically state that prevailing wage rates must be paid for projects erected, constructed, repaired, remodeled, demolished by one local governmental unit for another local governmental unit under a contract under § § 66.0301(2), 83.03, 83.035, or 86.31(2)(b) or under any other statute specifically authorizing cooperation between local governmental units.
- The attorney general opined that, after the effective date of the amendments (Jan. 1, 2010), prevailing wage rates must be paid to the employees of a local unit of government that enters into a intergovernmental agreement under § 66.0301(2) or § 83.035 to perform services for another local unit of government with respect to any public works or public construction project whose estimated cost exceeds \$25,000.

Prevailing Wages

Four issues must be analyzed:

1. Whether the project is a “public works project;”
2. Whether the project involves the “contracting out” of services;
3. Whether the County has the legislative authority to repair/improve the street/highway; and
4. Whether any exceptions to the prevailing wage requirement apply.

Project of Public Works

To determine if a project is a “public works project,” consider the following factors:

- The nature and the character of the project;
- The ownership, use and maintenance of the project; and
- Whether the work is being done for the appropriate municipality.

Elliott v. Morgan, 214 Wis. 2d 253, 265-66, 571 N.W.2d 866, 871 (Ct. App. 1997).

Project of Public Works

- “Riverwalk project” in Milwaukee was not a public work. *Elliott v. Morgan*, 214 Wis. 2d 253, 571 N.W.2d 866 (Ct. App. 1997).
- City did not “own” project – the project was not being constructed by the City, was not on property owned by the city, and would not be operated or maintained by the City.
- The fact that the City contributed financially to the project did not transform it into a public work.

Making a Contract

- A project is not subject to prevailing wage if the municipality performs the work itself.
- A municipality is only required to pay prevailing wages on a public works project that is contracted out.

Purpose of Prevailing Wage Law

“The purpose of the prevailing wage law is to set the prevailing wage rates and hours of work **for employees of private employers** working on public works projects.”

Bldg. & Constr. Trades Council of South Central Wisconsin v. Waunakee Comty. Sch. Dist., 221 Wis. 2d 575, 582, 585 N.W.2d 726, 729 (Ct. App. 1998) (emphasis added).

County Jurisdiction Over Highways

- Wis. Stat. § 83.03(1)

The county board may construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county.

County Jurisdiction Over County Trunk System

- Wis. Stat. § 83.025(2)

The county trunk system shall be marked and maintained by the county. No county shall be responsible for the construction and maintenance of a city or village street on the county trunk highway system to a greater width than are those portions of such system outside the village or city and connecting with such street.

Maintenance of City Streets on County Trunk System

- Wis. Stat. § 83.025(1)(c)

All streets or highways in any city or village over which is routed a highway system shall be a part of the county trunk system unless the governing body of the city or village, by resolution, removes the street or highway from the system, but the removal shall apply only to that portion of any street or highway which is situated wholly within the city or village.

Maintenance of City Street to Full Width

- A county's legal obligation to maintain a county highway in a municipality is limited to the width of the county highway.
- Nothing prevents a county from maintaining a highway greater in width than the county highway.

Cost Sharing

- Wis. Stat. § 83.03(2) limits the amounts that a county can demand from the town, city or village in which the improvement is located for cost sharing to \$1,000/year.
- However, there is nothing in the statute that prohibits a voluntary cost sharing mechanism. If town/village/city and county mutually agree to share the cost, § 83.03(2) does not apply.
See Fond du Lac County v. Town of Rosendale, 149 Wis. 2d 326 (Ct. App. 1989)

County Work on Municipal Streets

- Wis. Stat. § 83.035

Any county board may provide by ordinance that the county may, through its highway committee or other designated county official or officials, enter into contracts with cities, villages and towns within the county borders to enable the county to construct and maintain streets and highways in such municipalities. (Emphasis added).

County Liability for Repair

- Wis. Stat. § 893.83(1)

If damages happen to any person or his or her property . . . by reason of the insufficiency or want of repairs of a highway that any county by law or by agreement with any town, city, or village is bound to keep in repair, or that occupies any land owned and controlled by the county, the county is liable for the damages and the claim for damages shall be against the county. . . .

Case Study – Q & A

FACTS:

- City tears up County Highway within City limits to replace utilities.
- Because City tears up Highway, City is responsible for replacing Highway.
- City asks the County Highway Department to submit a cost estimate for replacing Highway.
- City decides to use County Highway Department to replace Highway.

Case Study – Q & A Cont'd

QUESTION:

- Does County Highway Department have to pay prevailing wages to its employees working on the City Highway reconstruction project?

Answer = YES

Why?

- City is a separate and distinct municipality from the County.
- City “owned” the project because it paid for a majority of the reconstruction.
- Essentially, the City “contracted” with the County for services, and the County is the same as a private employer in that regard.

Answer = NO

Why?

- The County is authorized to use its own workforce to do work on its own highway.
- A County is ultimately responsible for maintenance of a highway and therefore controls the means and method by which the highway system is maintained.
- Purpose of prevailing wage statute is to set wages and hours for employees of private employers working on public works projects.

Questions?