

**UNDERSTANDING THE APPLICABILITY
OF PENNSYLVANIA PREVAILING WAGE ACT**
43 P.S. 165-1 et seq.
34 Pa. Code 9.101 et seq.

A. General Applicability -

- The Pennsylvania Prevailing Wage Act (the “Act”) applies to all public work projects where a public body is either a party or provides funds for a public work where the estimated cost of the total project exceeds \$25,000.
- Public body – Commonwealth, political subdivisions, authorities created by the general assembly and any instrumentality or agency of the Commonwealth.
- Public work – Construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated costs of the entire project exceeds \$25,000. **Even if public funds are less than \$25,000, as long as the estimated total project costs exceed \$25,000, the Act applies.**
- Funds of a public body – This includes **any** funds provided by a public body. Examples include: General operating, funds from DCED or other Commonwealth agencies, Act 137 funds, PHFA funds, etc.
- Public funds used solely for acquisition do not trigger state prevailing wages.

B. Covered Positions -

- Includes laborers, mechanics, skilled and semiskilled laborers and apprentices employed by a contractor or subcontractor who is engaged in the performance of services directly upon the public work project. **This does not include material suppliers or their employees, nor does it include such work performed by design professionals, surveyors, engineers, planning professionals, etc.**

C. Required Provisions in Project Specifications and Contract for a Public Work-

- Prior to awarding a contract for public work, the entity awarding the contract for the work shall request a determination from L&I of the general prevailing minimum wage rates to be paid workmen on the

project. **A new wage determination must be requested if a contract is not awarded within 120 days of the determination date.**

- The project specifications must contain the prevailing minimum wage rates including contributions for employee benefits as determined by L&I.
- The contract must contain a stipulation that workmen will be paid the prevailing minimum wage rates.
- The contract provisions must be made applicable to all subcontractors.
- All workmen must be paid at least once a week.
- All applicable wage rates shall be posted at the work site and the place at which workmen are paid their wages.
- The contract must contain a requirement that all contractors and subcontractors will keep such records as required by the Act and be preserved for a period of 2 years from the date of payment.
- Workmen can not be paid on a lump sum basis, or a piece work system, or a price certain for the completion of a certain amount of work.
- The contract shall provide that each contractor and subcontractor shall file a statement each week and a final statement at the conclusion of the work on the contract certifying that workmen have been paid in conformance with the Act.
- The public body and the entity contracting for the work must enforce the posting of wage rate determinations and that wage rates are paid in accordance with the Act.

D. Penalties/Claims by Workmen -

- Any failure to pay prevailing wage rates that is deemed to be intentional will subject the contractor or subcontractor to debarment for a period of 3 years from the date of notice from L&I.
- Workmen have up to 3 months from the date they were underpaid to file a claim with L&I for being underpaid. A workmen has 6 months within which to pursue an action against a payor for an underpayment.

E. Exemptions -

- The Act does not apply to public works subject to the Walsh-Healey Act (U.S. Government contracts) or the Davis Bacon Act (contracts in excess of \$2,000 assisted with federal funds).

1. Davis Bacon Act –

- a. CDBG Funded Activities – Financing of construction work. For residential rehabilitation, Davis Bacon applies only if 8 or more units are involved.
 - b. HOME Funded Activities – Davis Bacon applies for projects assisted with HOME funds. A broader application of Davis Bacon exists vs. CDBG funded activities, i.e., Davis Bacon is applicable without regard to whether HOME funds are used for construction or non-construction activities. Davis Bacon is applicable for any contract for the construction of affordable housing with 12 or more units assisted with HOME funds.
 - c. Section 8, Section 8 Mod Rehab SRO, Shelter Plus Care Mod Rehab component for SROs - Davis Bacon applies for rehab of 9 or more Section 8 assisted units.
2. Query: In most instances Davis Bacon residential wage rates are lower than the applicable state prevailing wage rates. Can we force Davis Bacon applicability upon a project, if federal regulations do not require it? For example, if we have a CDBG funded activity that provides for the construction of 7 units with a construction contract that exceeds \$25,000, which would otherwise require state prevailing wages, since federal regulations do not require Davis Bacon wage rates, state prevailing wages are applicable. The entity responsible for paying the state prevailing wage rates can not choose to use Davis Bacon wage rates simply because CDBG funds are used and the contract exceeds the federal threshold of \$2,000.
3. Adverse Financial Impact on Small Federally Funded Projects - Clearly, for small residential projects that do not trigger Davis Bacon wage rates, higher construction costs are realized with the use of state prevailing wage rates. This was not the intended result of the federal regulations.

- The Act does not apply to construction projects financed solely through tax abatements and loans that are fully repaid.

1. Non - Acceptable Loan Terms –

- a. L&I has taken the position that simply deferring a loan is not acceptable and will be treated as a grant of funds, thereby triggering state prevailing wages.
 - i. For example – L&I has not accepted a 30 year deferred, 0% loan.
- b. L&I has taken the position that any loan forgiveness will trigger prevailing wage requirements because this is a disguised grant of public funds.
- c. L&I will take a hard look at who is responsible for repaying the loan. If the entity is the “alter ego” of the public body that is loaning the funds, they will not treat the loan as being repaid from private funds.
- d. L&I will look at whether the loan is secured. Also, the lien position of the loan is of importance to L&I. Although, no definitive position has been gleaned as to what is acceptable to L&I, they will look at whether there is enough equity to secure the loan of public funds.

2. Acceptable Loan Terms -

- a. 0 % interest;
- b. Lengthy amortization periods –
 - i. Up to 50 years has been accepted, albeit with a balloon at 10 years; and
 - ii. Up to 30 years has been accepted, without a balloon.
- c. Loan documents must contain language that provides for remedies to the lender upon loan default.
- d. Loans are to be secured.

- e. A deferral of loan payments is acceptable if a project fails to generate revenues to make amortized loan payments (see below for additional requirements for this use of a loan deferral).
- f. Annual loan payments are acceptable.

3. Approved Loan Examples

- a. Loan from a Redevelopment Authority of DCED funds for renovation of a former YMCA by a private developer into commercial/retail space and housing for college students -
 - i. Interest Rate – 0%
 - ii. Amortization Period – 50 years
 - iii. Payments – Monthly payments of principal only
 - iv. Term – Balloon in 10 years
- b. Loans from a Borough of general funds of the Borough and a Redevelopment Authority of DCED and Act 137 funds for a 9 unit low income housing tax credit project
 - i. Interest Rate – 0%
 - ii. Amortization Period – 30 years
 - iii. Payments – Annual payments of principal only. But, payments may be **deferred** if audited financials reveal that the project is not generating surplus revenue over expenses. L&I further requires:
 - 1. Financials to be audited annually
 - 2. Reserves to be fully funded
 - 3. Loans must be repaid before developer obtains money from operations
 - 4. Repayment of the loans receives first priority in fund disbursement
 - 5. Any deferment must be repaid before the end of the mortgage's term

F. Conclusions -

- L&I is looking very closely at this issue. DCED advises L&I as to projects that are being funded. L&I requests from any state funded grant recipients any and all project documentation including grants, contracts, loan documents, etc. for their review.

- Legal counsel should be involved in preparing response to L&I.
- A central clearing house of L&I opinion letters should be maintained so that that grantees have guidance as to acceptable safe harbors in structuring projects.

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