

ADHERENCE TO PREVAILING WAGE RATES

Professional engineers working on state and municipal construction projects should remember that a failure of a contractor to abide by the prevailing wage rate laws can subject a contractor to a decision of the Wisconsin Department of Workforce Development barring the contractor from bidding on state and municipal work projects.

In a recent case decided by the Court of Appeals, *Kruczek v. Wisconsin DWD*, the Court reviewed some issues associated with DWD orders barring contractors from bidding on public work.

In *Kruczek*, DWD barred Kruczek from bidding on municipal and state public works projects for six months. Kruczek is a contractor that works primarily on municipal sewer and water projects which are subject to the prevailing wage rate statutes of Wisconsin. One of Kruczek's former employees filed a prevailing wage rate complaint with DWD who investigated the claim. The investigation established that the employee had been substantially underpaid as a result of Kruczek not paying the required prevailing wage rate. Based upon its findings, DWD issued the debarment order.

Kruczek appealed to the circuit court which upheld DWD's decision. However, the circuit court held that because Kruczek's claim arose from a violation of the prevailing wage rate law for municipal, not state, projects, DWD did not have authority to debar Kruczek from state projects. Both Kruczek and DWD appealed.

The Court of Appeals held that even though the statute requires DWD to issue findings and an order on debarment within 30 days of the last argument filed, the 30 days was not mandatory and DWD did not lose its jurisdiction when taking 15 months to issue its determination. The Court held that while DWD might have protected the public interest by acting more quickly, it was also important that DWD have the time necessary to properly determine that debarment is appropriate.

The maximum period for debarment is three years. Therefore, even the most flagrant violation may result in a debarment of no more than three years. The Court, therefore, saw no pressing need for quick issuance of a debarment order.

DWD has issued administrative rules providing for debarment procedures. In *Kruczek*, the contractor argued that it was contrary to due process of law for DWD to both investigate the complaint and then sit in judgment on its merits. While there may be some merit to that argument, the Court rejected it and approved DWD's debarment order. The Court of Appeals held that debarment may be issued by DWD under its administrative rules, which do not distinguish between state and local government prevailing wage rates. The Court noted that if a contractor wished to challenge the administrative rules, it would be necessary to commence a lawsuit and serve the legislative joint committee for review of administrative rules, which Kruczek failed to do. Hence, the Court of Appeals held that DWD had authority to debar the contractor from both state and municipal projects for failing to pay the prevailing wage rate on a municipal project.

The Wisconsin Administrative Code contains the rules of executive agencies having rule making authority under the Wisconsin Statutes, notably Chapter 227 of the Statutes. The Code is kept current on a monthly basis and can be subscribed to by contacting the Wisconsin Department of Administration, Document Sales, P.O. Box 7840, Madison, Wisconsin 53707.

Within the Wisconsin Administrative Code are several chapters dealing with the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations). Chapters DWD 290-294 relate to Public Works Construction Contracts. Chapter DWD 290 deals with Contracts for Construction of Public Works. Chapter DWD 293 relates to Payment and Performance Assurance Requirements, and Chapter DWD 294 deals with the Debarment of Public Works Contractors. The current Wisconsin Administrative Code does not contain a Chapter DWD 291. Chapter DWD 294 provides that the Wisconsin Department of Workforce Development shall compile and maintain a current consolidated list of all debarred contractors. A contractor is defined as any individual or legal entity in the

construction business involved in public works projects, including its responsible officers, directors, members, shareholders or partners. Debarment is defined as action taken by the Department to exclude a contractor from performing work either as a prime contractor or as a subcontractor for any state agency or local government for a specified period.

Section DWD 294.04 provides that no state agency or local governmental unit may knowingly solicit bids from, negotiate with or award contracts to and approve or allow subcontracts with a debarred contractor. Under § DWD 294.05, debarment shall be for a period commensurate with the seriousness of the cause for debarment, but not to exceed three years. Debarment begins on the date the Department issues its notice of debarment or on the date that the issue is finally disposed of by a court, whichever is later. The Department may terminate a debarment or reduce the period upon the contractor's request for reasons considered appropriate by the Department, including (1) newly discovered relevant evidence, (2) reversal of the conviction or judgment upon which the debarment was based, (3) a bonafide change in ownership or management of the contractor, or (4) elimination of the cause or causes for which the debarment was imposed. The contractor may not request the Department to terminate or reduce the period of debarment until full restitution of any unpaid wages has been made to all employees.

The prevailing wages that must be paid by contractors is determined by the Wisconsin Department of Workforce Development and certified as an allowable rate. The Department reviews collective bargaining agreements and other wage information and subtracts items which do not represent bonafide fringe benefits. The Department makes annual surveys of employers and compiles a prevailing wage rate for each trade or occupation. Adherence to the prevailing wage rates is aggressively pursued by the Department.

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