

# Prevailing Wage Law: An Effective Sword of Labor Unions to Hurt their Enemies in the Public Bid Process

## Labor & Employment Law Update

By Jeffrey Risch on April 25, 2019

Having handled countless prevailing wage disputes, the local, state or federal administrative agency assigned to administer compliance (i.e. the US Department of Labor) is the only government entity that can lawfully determine whether a contractor is in violation of an applicable prevailing wage law and push for debarment. Ultimately, a contractor who has been determined by a government agency to have violated its prevailing wage obligations (i.e. a clerical mistake, an accounting error, poor or missing paperwork) is a long way from getting on a "debarment list." First, in order to get debarred from public work, the government is looking for willful violators with a track record of fraud and deceit. This is, of course, very rare. Second, the contractor does enjoy fundamental due process and a chance to be fully heard prior to actual debarment. However, it's becoming a growing trend for certain labor unions (along with their aligned third party "watch dog" groups) to file prevailing wage complaints against contractors, with who they have an issue. They may do this in order to then use the ensuing government investigation/audit to help soil the name of the contractor who has a pending low bid for a public works construction project.

Take note, there's no "gatekeeper" when processing such complaints. Generally, anyone can file a complaint against anyone, without limitations, and without actual evidence of any wrongdoing. And, in many jurisdictions, EVERY COMPLAINT must be investigated.

Many public bodies, especially local units of government, are being told that they must reject the bid of a contractor who has any past or pending prevailing wage complaint against it, even when the contractor is the "low bidder." These public bodies are often being fed "bad information" — "misleading information" — "outdated information" against contractors who have every legal right to bid and perform public works projects. By rejecting bids or terminating contracts with non-debarred contractors, public bodies are depriving contractors of fair due process while ignoring their obligations to the taxpayer.

Contractors must know their rights! Although public bodies have an enormous amount of discretion in ascertaining the “lowest responsible bidder” for public construction projects, they cannot make arbitrary decisions in contradiction to applicable law. Contractors should never be discouraged from submitting bids despite what certain public bodies are being told. From experience and observation, contractors should push back. This push back can be in many forms. Although the filing of a lawsuit or motion seeking injunctive or declaratory relief is sometimes necessary (and, quite effective at times), the public body often simply needs clarity concerning the misinformation it has received. This clarity can usually be achieved through simple letter writing, establishing a dialogue, or other non-legal channels.

Contractors need to be extra cautious and careful in any and all communications with any government agency investigating prevailing wage compliance. To be clear, every complaint must be taken seriously by the contractor to ensure that the record ultimately reflects that the contractor is not only complying with its legal obligations, but also free to bid and perform public construction projects without interference.

With the above in mind, there are 5 basic rules for anyone performing public construction work:

1. Know your legal obligations under any and every local, state or federal prevailing wage ordinance/law that applies to your business (note: what's permissible under Federal Davis-Bacon may be unlawful under Illinois prevailing wage law);
2. Ensure your business is complying with all applicable prevailing wage obligations for every worker, every day, every week, every job;
3. Never allow a prevailing wage audit or investigation to be closed or remain in limbo without some document that confirms your full compliance with your legal obligations (you may have to do this yourself);
4. Never sign any settlement agreement concerning prevailing wage issues without first reviewing it with competent legal counsel to help ensure that no admission of liability or guilt is made and to expressly state that you are free and clear to bid and perform future public construction work; and
5. Educate your local units of government on who you are and highlight your good name and business reputation — get to know the public officials, get involved and form relationships.

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