

WSR 25-05-078
EXPEDITED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES

[Filed February 18, 2025, 10:20 a.m.]

Title of Rule and Other Identifying Information: Chapter 296-127 WAC, Prevailing wage, concerning prevailing wage sanctions, penalties, and debarment.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this expedited rule making is to propose amending four sections in rule to implement SHB 2136, chapter 7, Laws of 2024. The attorney general's office proposed this bill to close a loophole within prevailing wage law, expand the definition of contractor to include substantially identical entities to debarred and sanctioned contractors, and extend sanctions and penalties to those substantially identical entities.

Reasons Supporting Proposal: The department of labor and industries (L&I) needs to conduct rule making to adopt this new statutory language from chapter 39.12 RCW into chapter 296-127 WAC to align rule language with statute language. Reinforces new statutory language in WAC for consistency.

Statutory Authority for Adoption: Chapter 39.12 RCW.

Statute Being Implemented: Chapter 39.12 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting: Ethan Whiten-er, Tumwater, Washington, 360-890-6139; Implementation and Enforcement: David Speer, Tumwater, Washington, 360-869-6129.

This notice meets the following criteria to use the expedited adoption process for these rules:

Adopts or incorporates by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule.

Corrects typographical errors, makes address or name changes, or clarifies language of a rule without changing its effect.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: Adopts new statutory language from RCW 39.12.010 and 39.12.130 into rule without material change, and clarifies the language of WAC 296-127-150 without changing its effect.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO David Speer, L&I, Fraud Prevention and Labor Standards, Prevailing Wage Program, P.O. Box 44540, Olympia, WA 98504-4540, phone 360-869-6129, email

PrevailingWageRules@Lni.wa.gov, BEGINNING February 19, 2025, 8:00 a.m., AND RECEIVED BY April 21, 2025, 5:00 p.m.

February 18, 2025
Joel Sacks
Director

RDS-6109.1

AMENDATORY SECTION (Amending WSR 24-21-088, filed 10/17/24, effective 11/17/24)

WAC 296-127-010 Definitions for chapter 296-127 WAC. (1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department or his or her duly authorized deputy or representative.

(3) "Industrial statistician" means the industrial statistician of the department.

(4) "Assistant director" means the assistant director of the fraud prevention and labor standards (FPLS) division or his or her duly authorized deputy or representative.

(5) "Contractor" means:

(a) The prime contractor, and each and every subcontractor, required to be registered under chapter 18.27 RCW and/or licensed under chapter 19.28 RCW, that performs any work on a public works project site, and/or is required to pay industrial insurance premiums as a construction company.

(b) Employers engaged in shipbuilding and ship repair, building service maintenance, and any fabricator or manufacturer that produces nonstandard items specifically for a public works project.

(c) Employers that contract with contractors or subcontractors for the purpose of the production and/or delivery of materials pursuant to the terms of WAC 296-127-018.

(d) An entity, however organized, with substantially identical operations, corporate, or management structure to an entity that has been found in violation under RCW 39.12.050, 39.12.055, or 39.12.065, or any associated rules. The nonexclusive factors used to determine substantial identity include an assessment of whether there is: Substantial continuity of the same business operation; use of the same machinery, equipment, or both tangible and intangible real or personal property; similarity of jobs and types of working conditions; continuity of supervisors; and similarity of product or services. An entity with operational, corporate, and management structures distinct from an entity that has been found in violation under RCW 39.12.050, 39.12.055, or 39.12.065, or any associated rules, shall not be deemed a substantially identical entity.

(6) The term municipality shall include every city, county, town, district, political subdivision, or other public agency thereof which is authorized by law to require the execution of public work, except drainage districts, diking districts, diking and drainage improvement districts, drainage improvement districts, diking improvement districts, consolidated diking and drainage improvement districts, consolidated drainage improvement districts, consolidated diking improve-

ment districts, irrigation districts, or any such other districts as shall from time to time be authorized by law for the reclamation or development of waste or undeveloped lands.

(7) (a) The term "public work" shall include:

(i) All work, construction, alteration, enlargement, improvement, repair, and/or demolition that is executed by contract, purchase order, or any other legal agreement and that is executed at the cost of the state of Washington or of any municipality. The source of the funding shall not determine the applicability of the statute, and may include, but is not limited to, such sources as those payments made through contracts with insurance companies on behalf of the insured state or municipality;

(ii) All work, construction, alteration, enlargement, improvement, repair, and/or demolition which, by law, constitutes a lien or charge on any property of the state or of a municipality;

(iii) All work, construction, alteration, repair, or improvement, other than ordinary maintenance that the state or a municipality causes to be performed by a private party through a contract to rent, lease, or purchase at least 50 percent of the project by one or more state agencies or municipalities, pursuant to RCW 39.04.260;

(iv) Maintenance, except ordinary maintenance as defined by (b) (ii) (A) and (B) of this subsection, when performed by contract. Maintenance is defined as keeping existing facilities in good usable, operational condition;

(v) Janitorial and building service maintenance as defined by WAC 296-127-023, when performed by contract, on public buildings and/or assets; and

(vi) The fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (a) (i) through (v) of this subsection.

(b) The term "public work" shall not include:

(i) Work, construction, alteration, enlargement, improvement, repair, demolition, and/or maintenance for which no wage or salary compensation is paid, consistent with the requirements of RCW 35.21.278; or

(ii) Ordinary maintenance.

(A) Ordinary maintenance is defined as maintenance work performed by the regular employees of the state or any county, municipality, or political subdivision created by its laws.

(B) For housing authorities when contracting with a property management services company for purposes of operating a housing project, as defined in RCW 35.82.030. Rental and other project revenues collected by a property management services company from the housing project's tenants and used to pay administrative operating and ordinary maintenance costs incurred by the company under the terms of the contract with the authority shall be treated as private funds, and any resulting services as executed at the cost of the property management services company and the housing project's tenants, until the net operating revenues are distributed to the authority for its exclusive use and control. For the purposes of this subsection, "ordinary maintenance" only includes: Routine repairs related to unit turnover work; grounds and parking lot upkeep; and repairs and cleaning work needed to keep a property in a clean, safe, sanitary, and rentable condition that are customarily undertaken or administered by residential property management services companies. "Ordinary maintenance" does not include repairs that would be considered replacement capital repairs or

scheduled regular maintenance work on plumbing, electrical, or HVAC/R systems or their components.

(8) "Contract" means a contract, purchase order, or any other legal agreement in writing for public work to be performed for a fixed or determinable amount, which is duly awarded after advertisement and competitive bid. A contract that is awarded from a small works roster, or under the emergency provisions of state law, need not be advertised.

(9) "Residential construction" means construction, alteration, repair, improvement, or maintenance of single family dwellings, duplexes, apartments, condominiums, and other residential structures not to exceed four stories in height, including basement, in the following categories:

(a) Affordable housing, including permanent supportive housing and transitional housing, which may include common spaces, community rooms, recreational spaces, a management office, or offices for the purposes of service delivery;

(b) Weatherization and home rehabilitation programs for low-income households; and

(c) Homeless shelters and domestic violence shelters.

"Residential construction" does not include the utilities construction (such as water and sewer lines), or work on streets, or work on other structures unrelated to the housing.

AMENDATORY SECTION (Amending WSR 92-01-104, filed 12/18/91, effective 1/31/92)

WAC 296-127-020 Interpretation of phrases used in chapter 39.12

RCW. (1) The "acceptance date of the public works project" referred to in RCW 39.12.065 is the date that the contract awarding agency formally accepts the completed public works project pursuant to state law.

(2) RCW 39.12.050 and 39.12.065 refer to "inadvertent filing or reporting error." The department defines an error as "inadvertent" if it is made by a contractor, as defined by WAC 296-127-010(5), or employer that shows that the error was made notwithstanding the use of due care by the contractor or employer. The burden of proving that an error is inadvertent rests with the contractor or employer charged with the error.

(3) The definition of "locality" in RCW 39.12.010(2) contains the phrase "wherein the physical work is being performed." The department interprets this phrase to mean the actual work site. For example, if nonstandard items specifically produced for public works projects are prefabricated in a county other than the county wherein the public works project is to be completed, the wage for the offsite prefabrication shall be the applicable prevailing wage for the county in which the actual prefabrication takes place. Workers who deliver such nonstandard items, as well as materials pursuant to the terms of WAC 296-127-018, shall be paid the applicable prevailing wage for the county in which the public works project is located.

(4) In the implementation and enforcement of RCW 39.12.050, 39.12.055, 39.12.065, and 39.12.130 the terms "contractor" and "subcontractor" include an entity, however organized, with substantially identical corporate and/or operational structure to an entity that has been found to violate RCW 39.12.050, 39.12.055, and 39.12.065. The

factors used to determine substantial identity shall include an assessment of whether there is: Substantial continuity of the same business operation; use of the same machinery and/or equipment; similarity of jobs and types of working conditions; continuity of supervisors; and similarity of product or services. An entity with operational, corporate, and management structures distinct from an entity that has been found in violation under RCW 39.12.050, 39.12.055, or 39.12.065, or any associated rules, shall not be deemed a substantially identical entity.

AMENDATORY SECTION (Amending WSR 86-03-063, filed 1/17/86)

WAC 296-127-150 Notice of violation. (1) If the department determines after its investigation that there is reasonable cause to believe that the prevailing wage law has been violated, the department shall notify the violator of its determination. The notice of violation shall be served on the violator personally or by certified mail.

(2) The notice of violation shall:

(a) Describe concisely the violation;

(b) Specify which statute or statutes were violated;

(c) If known, identify the laborers, workers, and mechanics who are affected by the violation;

(d) If known, state the amount of unpaid prevailing wages the violator owes;

(e) State that an employee cannot by contract or agreement waive the right to receive the prevailing wage;

(f) State the penalty that the department will assess for a violation, if any, of RCW 39.12.065 and 39.12.050; ~~((and))~~

(g) State the date the complaint was filed with the department; and

(h) If applicable, state the substantially identical entity, however organized, with substantially identical operations, corporate, or management structure to an entity that has been found in violation under RCW 39.12.050, 39.12.055, or 39.12.065, or any associated rules.

(3) RCW 39.12.065 and 39.12.050 establish the penalty amounts.

(4) If the notice alleges a violation of RCW 39.12.065, the department shall serve a copy of the notice of violation on the violator's sureties under chapters 39.08, 18.27, 19.28, and 60.28 RCW.

(5) The notice of violation shall inform the violator and, if a violation of RCW 39.12.065 is alleged, its sureties that they may request a hearing on the violations, the amount of unpaid prevailing wages owed, or the penalties assessed. The notice shall specify that if no hearing is requested within ~~((thirty))~~ 30 days of the date ~~((of issuance of the notice the director shall issue a final, unappealable order finding that the violation did occur, ordering the violator to pay any unpaid prevailing wages, and assessing penalties))~~ of the notice of violation, then it becomes final and binding, and not subject to further appeal.

(6) The director may issue a notice of violation under RCW 39.12.130 to extend the sanctions of a debarred or sanctioned entity imposed through a final and binding order or agreement to a substantially identical entity. A hearing must be held following a timely appeal of the notice of violation in accordance with chapter 34.05 RCW. The director shall issue a written determination including his or her findings after the hearing unless a notice of violation is not timely

appealed. A notice of violation not timely appealed is final and binding, and is not subject to further appeal.

(7) For a notice of violation issued to a substantially identical entity pursuant to RCW 39.12.130, subsections (2)(a) through (g), and (4) of this section are not required if a notice of violation or other applicable order under RCW 39.12.050, 39.12.055, or 39.12.065 is attached.

AMENDATORY SECTION (Amending WSR 19-15-119, filed 7/23/19, effective 8/23/19)

WAC 296-127-310 List of violators. The department shall maintain a list of all contractors who are forbidden to bid on a public works project, or to have a bid accepted, pursuant to RCW 39.12.065(3), 39.12.055, ~~((or))~~ 39.12.050, and 39.12.130. To the extent required by RCW 39.12.065(3), 39.12.055, ~~((and))~~ 39.12.050, and 39.12.130, the industrial statistician shall refuse to certify any statement of intent to pay the prevailing wage or affidavit of wages paid that he or she determines was submitted by a contractor on the list. Because the department receives a large number of requests for certification, the department shall not be liable to any person or entity for certifying a statement or an affidavit of a contractor on the list.

The industrial statistician shall make the list available electronically.