

Memorandum

DATE: June 2, 2009

TO: Speaker Sheridan, Minority Leader Fitzgerald, Members of the Wisconsin State Assembly

FROM: Associated Builders and Contractors of Wisconsin, Inc.
League of Wisconsin Municipalities
Metropolitan Builders Association of Greater Milwaukee
Metropolitan Milwaukee Association of Commerce
National Federation of Independent Business - Wisconsin Chapter
NAIOP, the Commercial Real Estate Development Association
Wisconsin Builders Association
Wisconsin Counties Association
Wisconsin Economic Development Association

RE: **Opposition to Prevailing Wage Provisions in the Budget Bill**

The organizations listed above —representing construction, economic development, small business and local government interests — continue to have serious concerns with the prevailing wage policy issues contained in the budget bill.

AB 75, as introduced, and as modified by the Joint Finance Committee, contains several provisions that significantly expand the application of prevailing wage requirements on state, local and private projects. Our position is that these policy issues should be removed from the budget and openly debated as separate legislation. Absent that resolve, we request that you consider the issues and recommendations outlined below.

1. Publicly Funded Private Construction Projects

One of our main concerns relates to the creation of a new category of prevailing wage projects referred to as “publicly funded private construction projects”. The original bill contained a very broad definition of financial assistance, a \$2,000 dollar threshold, and affected virtually any construction project directly or indirectly associated with the use of local economic development incentives. The Joint Finance Committee, under Motion #473, substantially modified this provision and instead passed a much narrower application of prevailing wage to private projects that receive \$1 million or more in direct financial assistance. We believe the JFC action, on this provision, significantly improved the original proposal and represents a reasonable compromise. That said, it is important to add that there may be pending or future projects in an existing TIF district or business improvement district predicated on the future commitment of funds. The application of prevailing wage to publicly funded private construction projects should be clarified to grandfather existing TIDs and BIDs.

Recommendation: Support the Joint Finance modifications under Motion #473. Clarify the provision to grandfather existing TIF districts and business improvement districts.

2. Public Works Threshold

Under current law, the threshold for applying prevailing wage on a public works project is \$48,000 for a single-trade project and \$234,000 for a multi-trade project, with these amounts adjusted annually for construction cost inflation. Under AB 75, the threshold was proposed to be changed to \$2,000 for all projects. It also eliminated the distinction between single and multiple-trade projects and eliminated indexing the threshold level annually to adjust for construction inflation. The Joint Finance Committee adopted a modest revision and changed the \$2,000 threshold to \$25,000. At this level, the application of prevailing wage is triggered for even very small public works projects. The administration and enforcement costs alone will increase the cost of local projects and many small business and local contractors will be discouraged from bidding on local work

Recommendation: Change the public works threshold to \$100,000 and index it to annually adjust for construction cost inflation.

3. Application of Prevailing Wage to Privately Funded Public Works — Codification of Controversial DWD Decision

Recently, the Department of Workforce Development Labor Standards Bureau determined that “public works” includes those elements of a private development project that relate to improvements, such as roads, bridges, sewers and water mains, which are ultimately turned over to the municipality. Under the decision, prevailing wage would apply to those “public works” portions of the project even if those improvements were entirely funded by the private developer. That DWD decision has been administratively appealed and a Final Decision is pending by DWD. The agency decision may be appealed to county circuit courts.

AB 75, as introduced, did not contain provisions on this matter. The motion adopted by JFC, however, did include codifying the controversial Bureau decision. In adopting Motion #473, the JFC has now inserted even more questionable prevailing wage policy in the budget bill. The DWD decision, and the associated JFC codification of that decision, overturns longstanding municipal practice throughout the state. It is not uncommon for the approval of a private development to be predicated on the developer making certain infrastructure improvements associated with the development. Once made, those improvements are then turned over to the municipality. Applying prevailing wage to privately funded improvements will increase the cost of private development, could shift the balance of privately funded improvements to taxpayer funded improvements, and, in some cases, may discourage private development altogether.

Recommendation: Adopt a provision to clarify that “public works” does not include privately funded infrastructure improvements. At a minimum, delete the provisions relating to the DWD decision and let the pending administrative appeal and associated litigation run its course.

4. Discriminatory Compliance & Reporting Requirements

Under current law, a contractor is required to submit an affidavit of compliance and maintain payroll records to verify compliance with prevailing wage. Those records are subject to inspection by DWD. AB 75, as introduced, created a weekly payroll reporting requirement, which added additional administrative cost and complexity to prevailing wage requirements. These are the types of requirements that discourage small businesses from participating in prevailing wage projects. The provision applied to any contractor, union or non-union, engaged in a project subject to prevailing wage.

Under JFC Motion #473, the weekly reporting requirement was deleted. Instead, the motion requires that non-union contractors electronically submit a monthly certified payroll record to DWD. Union contractors are exempt from this reporting requirement and instead simply have to file an electronic copy of their collective bargaining agreement. The JFC motion establishes a discriminatory double-standard with respect to reporting and enforcement of prevailing wage laws that should be removed. The motion also provides that DWD must post these records on the internet but may not post personally identifiable information. That provision should be modified to provide that the names of individuals not be required to be submitted to DWD at all to ensure privacy protection.

Both union and non-union contractors perform work on prevailing wage projects. The same prevailing wage rate applies to any worker on a covered project, regardless of union affiliation. The collectively bargained rate is not synonymous with the prevailing wage rate established by DWD for each county and for each trade and provides no evidence that workers were properly classified and properly paid the prevailing wage on a particular job site.

Recommendation: Delete the provision. At a minimum, modify the JFC monthly reporting requirement to apply equally to both union and non-union contractors. Clarify the reporting requirement to specify that individual names would not be required to be submitted to DWD.

5. Application of Prevailing Wage to the Prefabrication of Plumbing, Steamfitting and HVAC Systems

Under current law, prevailing wage does not apply to the prefabrication of plumbing, steamfitting or mechanical (HVAC) systems, which are not assembled on the prevailing wage job site. Under JFC Motion # 479, a new provision was inserted that would apply prevailing wage to the prefabrication of these types of systems. Under the motion, prevailing wage is made applicable to a laborer, worker or mechanic who is employed at

a commercial establishment in Wisconsin that is working on the prefabrication of a system to be incorporated into a public works project.

As evidenced by the discussion in committee, the provision raises questions as to whether it has the effect of increasing the cost of Wisconsin made fabricated systems and, therefore, disadvantages those businesses compared to out of state competitors. It was also suggested the provision could be interpreted to impose a requirement that prevailing wage rates would apply regardless of where the prefabrication occurred.

The provision creates a compliance nightmare for any Wisconsin business engaged in manufacturing these types of systems. The same employee could be involved in the fabrication of numerous jobs in a single day. The employer would have to somehow track which of those numerous jobs would be headed for incorporation into a public works project subject to prevailing wage and, for those jobs subject to prevailing wage, the different prevailing wage rate applicable in the county where the public work site is located. That assumes that the employer even knows whether the fabricated system is headed for a public works project or not. It is common practice to build inventory of prefabricated systems and it is simply not possible to know when that inventory stock is being built whether it may ultimately end up being incorporated into a public works project.

Recommendation: Delete the provision.

6. Clarify the Exemption for Affordable Housing

The affordable housing exemption included in Motion #473 does not apply to affordable housing projects constructed as part of mixed-use development. Contemporary urban design is encouraged, and often required by municipalities, for mixed-use development and often includes retail or commercial components being incorporated with the housing project and should be recognized in the affordable housing exemption.

Recommendation: Modify the bill to apply the affordable housing exemption to mixed-use developments. Specify that an affordable housing project that has at least 50% of the finished area dedicated for residential housing would qualify for the exemption.

Conclusion — The prevailing wage provisions contained in the Joint Finance version of the budget bill do not represent a reasonable or acceptable compromise. In summary, the JFC version of the bill:

- Increases the cost of construction for all units of government and leads to higher costs for taxpayers.
- Likely results in less construction work and fewer jobs.
- Discourages private development by applying prevailing wage to privately funded municipal improvements.
- Negatively impacts small business contractors and diminishes their opportunities to work on smaller municipal projects.

- Establishes a discriminatory reporting and compliance standard based on union affiliation.
- Creates a confusing and impractical application of prevailing wage to the prefabrication of piping and mechanical systems.

Note: This memo is based on the provisions contained in original AB 75, as modified by Motions adopted by the Joint Finance Committee. Statutory language relating to the Joint Finance Motions has not yet been published and may clarify some issues, or raise others, once the substitute amendment is available for review.

Thank you for your consideration of these recommendations.

For More Information Contact:

Patrick Stevens, Wisconsin Builders Association (608) 242-5151

John Mielke, Associated Builders and Contractors of Wisconsin, Inc (608) 244-5883