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WFWV Administration



Via Hand-Delivery

November 20, 2015

Workforce West Virginia  
Attn: Russell Fry, Acting Executive Director  
112 California Avenue  
Charleston, WV 25305

RE: Appeal of determinations regarding objections to prevailing wage methodology pursuant to WV CSR 96-4-4.

Dear Mr. Fry:

I am writing to you as President & CEO of the Associated Builders and Contractors of West Virginia ("ABCWV"), a statewide trade association representing commercial contractors, industry suppliers and industry related associates to appeal WorkForce West Virginia's ("WFWV") October 30, 2015 determinations regarding objections filed by ABCWV pursuant to WV CSR 94-4-4. The objections, a copy of which is attached as Exhibit 1, were made with regard to WFWV's prevailing wage methodology. A copy of WFWV's determinations with regard to ABCWV's objections is attached as Exhibit 2.

Following is a list of specific reasons that ABCWV appeals WFWV's determinations. For the sake of brevity, ABCWV's objections and WFWV's responses are paraphrased. However, the full version of the objections and responses is available through review of Exhibits 1 and 2:

1. *ABCWV objected because the detailed methodology WFWV utilized has not been made available to the public. [Ex. 1, p.2, para. 1]. WFWV responded that a document describing the rationale, methodology, and formulae was made available on the WFWV website. [Ex. 2, pp. 1-2, para. 1].*

Basis for appeal: The document WFWV refers to is titled, "Calculating the Prevailing Wage in West Virginia." It was incomplete and lacked sufficient information to enable interested parties to determine whether WFWV was complying with the newly-enacted prevailing wage law set forth in W.Va. Code §21-5A et. seq.

2. *ABCWV objected because WFWV included prevailing wage rates in its survey. [Ex. 1, p.2, para. 2]. WFWV responded by asserting that it did not exclude private sector data, and that it included public sector data because it wanted as much information as possible. [Ex. 2, p. 2, para. 2].*

Basis for appeal: Including prevailing wage rates in the survey perpetuates the problems existent in prevailing wage prior to the amendments made by legislature in 2015 and is contrary to the legislative intent. It is clear that the overriding purpose of the amendment to the WV Prevailing Wage Act was to correct the WVDOL wage determination methodology which consistently resulted in artificially inflated prevailing wage rates. Prevailing wage rates cannot be considered “appropriate economic data” under the statute. Even the WVDOL surveys excluded prevailing wage rates from its surveys for obvious reasons. There can be no doubt that the inclusion of prevailing wages heavily impacted the results of WFWV’s survey, particularly in instances where employers reported prevailing wage fringes paid as cash.

3. *ABCWV objected because WFWV failed to compile data in a manner that would accurately reflect the “actual rate of wages paid in the regions of this state”, WV Code §21-5A-5(2). Specifically, ABCWV objected to WFWV’s decision to limit the survey period to four weeks. [Ex. 1, p.2, para. 3]. WFWV responded that residential construction wage data should not be included in the survey (apparently WFWV was responding ABCWV’s assertion in its second objection that residential wage data should be included), and also responded that the four-week survey period was appropriate because Oregon has successfully used a four-week survey period. [Ex. 2, pp. 2-3, para. 3].*

Basis for appeal: First, by limiting available wage information to four selected weeks, WFWV has excluded 77% of the relevant data regarding the “actual rate of wages paid” by employers in the WV construction industry. It is no more burdensome for ABCWV to provide wage rates by classification for the entire year than it is to provide this data for 4 weeks of the year.

Second, WFWV claims that there was a 73.6% response rate to the surveys from 3,722 employers. However, the “Prevailing Wage Methodology Statistics,” prepared on September 30, 2015, shows that only 15% of the surveys returned were actually used in the prevailing wage calculations. This equates to approximately 11% of the total 4,998 surveys that were sent to employers. This methodology does not generate a sufficient data set from which the “actual rate of wages” can be determined.

4. *ABCWV objected because WFWV only provided one week to respond to the surveys; although a one-week extension was eventually granted. [Ex. 1, p. 3, para. 4]. WFWV responded that it allowed three months (June-September 2015) for data collection from employers. [Ex. 2, p. 3, para. 4].*

Basis for appeal: By stating that it allowed three months for data collection, WFWV has side-stepped the issue. The fact is that many employers did not receive the surveys until late in the



period, such that their response time was limited to about one week. Their choice was then to either respond in haste, or to not respond at all. In either case, the accuracy of the process was compromised.

5. *ABCWV objected because WFWV acknowledges that only 21% of the prevailing wages were established using U.S. Bureau of Labor Statistics data, although the statute provides that the methodology for determining prevailing wages shall include “the average rate of wages published by the U. S. Bureau of Labor Statistics”. [Ex. 1, p. 3, para. 5]. WFWV responded W.Va. Code §21-5A-5(2) does not limit WFWV to using BLS data, nor does it dictate what weight BLS data is to be given in comparison to other sources of data. Therefore, according to WFWV, its methodology satisfies the mandate of the new prevailing wage law. [Ex. 2, p. 3, para. 5].*

Basis for appeal: WFWV has not followed the legislative intent. Throughout the date preceding enactment of the 2015 amendments to the prevailing wage law, it was clear that the legislature intended that WFWV rely heavily on BLS data, because that data has for many years been widely regarded as reliable. Since 1884, the Bureau of Labor Statistics of the U.S. Department of Labor, an independent statistical agency, has been the principal Federal agency responsible for measuring labor market activity, working conditions, and price changes in the economy. Its mission is to collect, analyze, and disseminate essential economic information to support public and private decision-making, <http://www.bls.gov/bls/infhome.htm>

It stands to reason that the WV Legislature mandated WFWV to utilize the BLS data because the BLS is the single most qualified and unbiased source of reliable wage data that is readily available. As both WFWV and BLS are both funded by the USDOL, it is logical to expect cooperation between the two agencies and even deference by WFWV to the more than 130 years of experience in the field of economic and employment data compilation and statistical analysis. If WFWV believes that BLS data is not reliable as a data source, it should bear the hefty burden to show why a federal agency whose sole purpose is to gather such data should be disregarded.

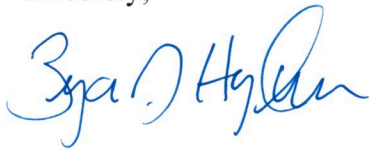
6. *ABCWV objected because WFWV included fringe benefits in its calculation methodology contrary to the mandate of the WV Legislature. [Ex. 1, p. 4, para. 6] WFWV responded that it is appropriate to include fringe benefits because fringe benefits fall within the definition of “wages” that are to be determined pursuant to the statute. [Ex. 2, pp. 3-4, para. 6].*

Basis for appeal: The term of “compensation” was replaced during the drafting of the statute with the term “wages” with the specific intent to exclude fringe benefits from the evaluation of prevailing wage rates. On February 25, 2015, when asked directly by Delegate Caputo from Marion County if the change in definition would exclude the requirement to mandate fringe benefits, the House Government Organization Attorney, Tracy Webb, responded by saying that it would. This reason was cited by members of the legislature both in that committee and during floor debate as a reason not to support the legislation. Officials from WFWV and MU were both in attendance that day and made aware of this interpretation. Contrary to the clear legislative intent, WFWV included fringe benefits in the surveys to employers and in the calculation of the prevailing wage.

The issues that have ensued regarding prevailing wage reform in WV have been disruptive and damaging to construction employers and will ultimately jeopardize job opportunities in our industry. ABCWV, like many in our industry, looks to WFWV to honor the letter and spirit of the amendment to the WV Prevailing Wage Act and to develop a fair, unbiased and accurate prevailing wage. ABCWV supports a fair living wage for employees who work on public improvement projects but also supports the WV taxpayers' right to not be burdened by overpriced public construction for the sake of special interest groups' agendas.

Please do not hesitate to contact me if you have questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bryan J. Hoylman". The signature is fluid and cursive, with the first name "Bryan" being the most prominent part.

Bryan J. Hoylman, President & CEO  
ABCWV