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SENATE BILL 33

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Carlos R. Cisneros

AN ACT

RELATING TO PUBLIC WORKS; PROVIDING FOR THE DETERMINATION OF
PREVAILING WAGE RATES AND PREVAILING FRINGE BENEFIT RATES;
REQUIRING PAYMENT OF THE PREVAILING RATES ON PUBLIC WORKS
PROJECTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 13-4-10 NMSA 1978 (being Laws 1963,
Chapter 304, Section 1) is amended to read:

"13-4-10. SHORT TITLE.--Sections [~~6-6-6 through 6-6-10~~
~~New Mexico Statutes Annotated, 1953 Compilation]~~ 13-4-10
through 13-4-17 NMSA 1978 may be cited as the "Public Works
Minimum Wage Act"."

Section 2. A new section of the Public Works Minimum Wage
Act, Section 13-4-10.1 NMSA 1978, is enacted to read:

"13-4-10.1. [NEW MATERIAL] DEFINITIONS.--As used in the
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1 Public Works Minimum Wage Act:

2 A. "director" means the director of the division;

3 B. "division" means the labor relations division of
4 the workforce solutions department;

5 C. "fringe benefit" means payments made by a
6 contractor, subcontractor, employer or person acting as a
7 contractor, if the payment has been authorized through a
8 negotiated process or by a collective bargaining agreement,
9 for:

10 (1) holidays;

11 (2) time off for sickness or injury;

12 (3) time off for personal reasons or vacation;

13 (4) bonuses;

14 (5) authorized expenses incurred during the
15 course of employment;

16 (6) health, life and accident or disability
17 insurance;

18 (7) profit-sharing plans;

19 (8) contributions made on behalf of an
20 employee to a retirement or other pension plan; and

21 (9) any other compensation paid to an employee
22 other than wages;

23 D. "labor organization" means an organization of
24 any kind, or an agency or employee representation committee or
25 plan, in which employees participate and that exists for the

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1 purpose, in whole or in part, of dealing with employers
2 concerning grievances, labor disputes, wages, rates of pay,
3 hours of employment or conditions of work; and

4 E. "wage" means the basic hourly rate of pay."

5 Section 3. Section 13-4-11 NMSA 1978 (being Laws 1965,
6 Chapter 35, Section 1, as amended) is amended to read:

7 "13-4-11. PREVAILING WAGE AND BENEFIT RATES DETERMINED--
8 MINIMUM WAGES AND FRINGE BENEFITS ON PUBLIC WORKS--WEEKLY
9 PAYMENT--[~~POSTING WAGE SCALE~~] WITHHOLDING FUNDS.--

10 A. Every contract or project in excess of sixty
11 thousand dollars (\$60,000) that the state or any political
12 subdivision thereof is a party to for construction, alteration,
13 demolition or repair or any combination of these, including
14 painting and decorating, of public buildings, public works or
15 public roads of the state and that requires or involves the
16 employment of mechanics, laborers or both shall contain a
17 provision stating the minimum wages and fringe benefits to be
18 paid to various classes of laborers and mechanics, which shall
19 be based upon the wages and benefits that will be determined by
20 the director [~~of the labor and industrial division of the labor~~
21 ~~department~~] to be prevailing for the corresponding classes of
22 laborers and mechanics employed on contract work of a similar
23 nature in the state or locality, and every contract or project
24 shall contain a stipulation that the contractor, subcontractor,
25 employer or a person acting as a contractor shall pay all

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1 mechanics and laborers employed on the site of the project,
2 unconditionally and not less often than once a week and without
3 subsequent unlawful deduction or rebate on any account, the
4 full amounts accrued at time of payment computed at wage rates
5 and fringe benefit rates not less than those [~~stated in the~~
6 ~~minimum wage rates~~] determined pursuant to Subsection B of this
7 section to be the prevailing wage rates and prevailing fringe
8 benefit rates issued for the project.

9 ~~[B. For the purpose of making wage determinations,~~
10 ~~the director of the labor and industrial division of the labor~~
11 ~~department shall conduct a continuing program for the obtaining~~
12 ~~and compiling of wage-rate information and shall encourage the~~
13 ~~voluntary submission of wage-rate data by contractors,~~
14 ~~contractors' associations, labor organizations, interested~~
15 ~~persons and public officers. Before making a determination of~~
16 ~~wage rates for any project, the director shall give due regard~~
17 ~~to the information thus obtained. Whenever the director deems~~
18 ~~that the data at hand are insufficient to make a wage~~
19 ~~determination, the director may have a field survey conducted~~
20 ~~for the purpose of obtaining sufficient information upon which~~
21 ~~to make determination of wage rates. Any interested person~~
22 ~~shall have the right to submit to the director written data,~~
23 ~~views and arguments why the wage determination should be~~
24 ~~changed.]~~

25 B. The director shall determine prevailing wage

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1 rates and prevailing fringe benefit rates for respective
2 classes of laborers and mechanics employed on public works
3 projects at the same wage rates and fringe benefit rates used
4 in collective bargaining agreements between labor organizations
5 and their signatory employers that govern predominantly similar
6 classes or classifications of laborers and mechanics for the
7 locality of the public works project and the crafts involved;
8 provided that:

9 (1) if the prevailing wage rates and
10 prevailing fringe benefit rates cannot reasonably and fairly be
11 determined in a locality because no collective bargaining
12 agreements exist, the director shall determine the prevailing
13 wage rates and prevailing fringe benefit rates for the same or
14 most similar class or classification of laborer or mechanic in
15 the nearest and most similar neighboring locality in which
16 collective bargaining agreements exist; and

17 (2) prevailing wage rates and prevailing
18 fringe benefit rates determined pursuant to the provisions of
19 this section shall be compiled as official records and kept on
20 file in the director's office and the records shall be updated
21 in accordance with the applicable rates used in subsequent
22 collective bargaining agreements.

23 C. The [~~scale of wages~~] prevailing wage rates and
24 prevailing fringe benefit rates to be paid shall be posted by
25 the contractor or person acting as a contractor in a prominent

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1 and easily accessible place at the site of the work; and it is
2 further provided that there may be withheld from the
3 contractor, subcontractor, employer or a person acting as a
4 contractor so much of accrued payments as may be considered
5 necessary by the contracting officer of the state or political
6 subdivision to pay to laborers and mechanics employed on the
7 project the difference between the ~~[rates of wages]~~ prevailing
8 wage rates and prevailing fringe benefit rates required by the
9 director ~~[of the labor and industrial division of the labor~~
10 ~~department]~~ to be paid to laborers and mechanics on the work
11 and the wage rates ~~[of wages]~~ and fringe benefit rates received
12 by ~~[such]~~ the laborers and mechanics and not refunded to the
13 contractor, subcontractor, employer or a person acting as a
14 contractor or ~~[their]~~ the contractor's, subcontractor's,
15 employer's or person's agents.

16 D. Notwithstanding any other provision of law
17 applicable to public works contracts or agreements, the
18 director ~~[of the labor and industrial division of the labor~~
19 ~~department]~~ may, with cause:

20 (1) issue investigative or hearing subpoenas
21 for the production of documents or witnesses pertaining to
22 public works prevailing wage projects; and

23 (2) attach and prohibit the release of any
24 assurance of payment required under Section 13-4-18 NMSA 1978
25 for a reasonable period of time beyond the time limits

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1 specified in that section until the director satisfactorily
2 resolves any probable cause to believe a violation of the
3 Public Works Minimum Wage Act or its implementing rules has
4 taken place.

5 E. The director [~~of the labor and industrial~~
6 ~~division of the labor department~~] shall issue rules necessary
7 to administer and accomplish the purposes of the Public Works
8 Minimum Wage Act."

9 Section 4. Section 13-4-13 NMSA 1978 (being Laws 1965,
10 Chapter 35, Section 3, as amended) is amended to read:

11 "13-4-13. FAILURE TO PAY MINIMUM WAGE--TERMINATION OF
12 CONTRACT.--Every contract within the scope of the Public Works
13 Minimum Wage Act shall contain further provision that in the
14 event it is found by the director [~~of the labor and industrial~~
15 ~~division of the labor department~~] that any laborer or mechanic
16 employed on the site of the project has been or is being paid
17 as a result of a willful violation a [~~rate of wages~~] wage rate
18 or fringe benefit rate less than the [~~rate of wages~~] rates
19 required, the contracting agency may, by written notice to the
20 contractor, subcontractor, employer or person acting as a
21 contractor, terminate [~~their~~] the right to proceed with the
22 work or [~~such~~] the part of the work as to which there has been
23 a willful failure to pay the required wages or fringe benefits,
24 and the contracting agency may prosecute the work to completion
25 by contract or otherwise, and the contractor or person acting

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1 as a contractor and [~~his~~] the contractor's or person's sureties
2 shall be liable to the state for any excess costs occasioned
3 thereby. Any party receiving notice of termination of [~~his~~] a
4 project or subcontract [~~under~~] pursuant to the provisions of
5 this section may appeal the finding of the director as provided
6 in the Public Works Minimum Wage Act."

7 Section 5. Section 13-4-13.1 NMSA 1978 (being Laws 2004,
8 Chapter 89, Section 1, as amended) is amended to read:

9 "13-4-13.1. PUBLIC WORKS CONTRACTS--REGISTRATION OF
10 CONTRACTORS AND SUBCONTRACTORS.--

11 A. Except as otherwise provided in this subsection,
12 in order to submit a bid valued at more than [~~fifty thousand~~
13 ~~dollars (\$50,000)~~] sixty thousand dollars (\$60,000) in order to
14 respond to a request for proposals or to be considered for
15 award of any portion of a public works project greater than
16 [~~fifty thousand dollars (\$50,000)~~] sixty thousand dollars
17 (\$60,000) for a public works project that is subject to the
18 Public Works Minimum Wage Act, the contractor, serving as a
19 prime contractor or not, shall be registered with the [~~labor~~
20 ~~and industrial~~] division [~~of the labor department~~]. Bidding
21 documents issued or released by a state agency or political
22 subdivision of the state shall include a clear notification
23 that each contractor, prime contractor or subcontractor is
24 required to be registered pursuant to this subsection. The
25 provisions of this section do not apply to vocational classes

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1 in public schools or public post-secondary educational
2 institutions.

3 B. The state or any political subdivision of the
4 state shall not accept a bid on a public works project subject
5 to the Public Works Minimum Wage Act from a prime contractor
6 that does not provide proof of required registration for
7 itself.

8 C. Contractors and subcontractors may register with
9 the division on a form provided by the division and in
10 accordance with [~~labor~~] workforce solutions department rules.
11 The division shall charge an annual registration fee of two
12 hundred dollars (\$200). The division shall issue to the
13 applicant a certificate of registration within fifteen days
14 after receiving from the applicant the completed registration
15 form and the registration fee.

16 D. Registration fees collected by the division
17 shall be deposited in the labor enforcement fund."

18 Section 6. Section 13-4-14 NMSA 1978 (being Laws 1965,
19 Chapter 35, Section 4, as amended) is amended to read:

20 "13-4-14. PAYMENT OF WAGES FROM FUNDS WITHHELD--LIST OF
21 CONTRACTORS VIOLATING ACT--ADDITIONAL RIGHT OF WAGE EARNERS.--

22 A. The director [~~of the labor and industrial~~
23 ~~division of the labor department~~] shall certify to the
24 contracting agency the names of persons or firms the director
25 has found to have disregarded their obligations to employees

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1 under the Public Works Minimum Wage Act and the amount of
2 arrears. The contracting agency shall pay or cause to be paid
3 to the affected laborers and mechanics, from any accrued
4 payments withheld under the terms of the contract or designated
5 for the project, any wages or fringe benefits found due [~~such~~
6 to the workers pursuant to the Public Works Minimum Wage Act.
7 The director shall, after notice to the affected persons,
8 distribute a list to all departments of the state giving the
9 names of persons or firms the director has found to have
10 willfully violated the Public Works Minimum Wage Act. No
11 contract or project shall be awarded to the persons or firms
12 appearing on this list or to any firm, corporation, partnership
13 or association in which the persons or firms have an interest
14 until three years have elapsed from the date of publication of
15 the list containing the names of the persons or firms. A
16 person to be included on the list to be distributed may appeal
17 the finding of the director as provided in the Public Works
18 Minimum Wage Act.

19 B. If the accrued payments withheld under the terms
20 of the contract, as mentioned in Subsection A of this section,
21 are insufficient to reimburse all the laborers and mechanics
22 with respect to whom there has been a failure to pay the wages
23 or fringe benefits required pursuant to the Public Works
24 Minimum Wage Act, the laborers and mechanics shall have the
25 right of action or intervention or both against the contractor

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1 or person acting as a contractor and [~~his~~] the contractor's or
2 person's sureties, conferred by law upon [~~such~~] the persons
3 furnishing labor and materials, and, in such proceeding, it
4 shall be no defense that the laborers and mechanics accepted or
5 agreed to less than the required rate of wages or voluntarily
6 made refunds. The director [~~of the labor and industrial~~
7 ~~division of the labor department~~] shall refer such matters to
8 the district attorney in the appropriate county, and it is the
9 duty and responsibility of the district attorney to bring civil
10 suit for wages and fringe benefits due and liquidated damages
11 provided for in Subsection C of this section.

12 C. In the event of any violation of the Public
13 Works Minimum Wage Act or implementing rules, the contractor,
14 subcontractor, employer or a person acting as a contractor
15 responsible for the violation shall be liable to any affected
16 employee for the employee's unpaid wages or fringe benefits.
17 In addition, the contractor, subcontractor, employer or [~~a~~]
18 person acting as a contractor shall be liable to any affected
19 employee for liquidated damages beginning with the first day of
20 covered employment in the sum of one hundred dollars
21 [~~(\$100.00)~~] (\$100) for each calendar day on which a contractor,
22 subcontractor, employer or person acting as a contractor has
23 willfully required or permitted an individual laborer or
24 mechanic to work in violation of the provisions of the Public
25 Works Minimum Wage Act.

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1 D. In an action brought pursuant to Subsection C of
2 this section, the court may award, in addition to all other
3 remedies, attorney fees and costs to an employee adversely
4 affected by a violation of the Public Works Minimum Wage Act by
5 a contractor, subcontractor, [~~employee~~] employer or [a] person
6 acting as a contractor."

7 Section 7. Section 13-4-14.1 NMSA 1978 (being Laws 2004,
8 Chapter 89, Section 2) is amended to read:

9 "13-4-14.1. LABOR ENFORCEMENT FUND--CREATION--USE.--The
10 "labor enforcement fund" is created in the state treasury. The
11 fund shall consist of contractor and subcontractor registration
12 fees collected by the [~~labor and industrial~~] division [~~of the~~
13 ~~labor department~~] and all investment and interest income from
14 the fund. The fund shall be administered by the division, and
15 money in the fund is appropriated to the division for
16 administration and enforcement of the Public Works Minimum Wage
17 Act. Money in the fund shall not revert to the general fund at
18 the end of a fiscal year."

19 Section 8. Section 13-4-14.2 NMSA 1978 (being Laws 2004,
20 Chapter 89, Section 3) is amended to read:

21 "13-4-14.2. REGISTRATION CANCELLATION, REVOCATION,
22 SUSPENSION--INJUNCTIVE RELIEF.--The director [~~of the labor and~~
23 ~~industrial division of the labor department~~] may:

24 A. cancel, revoke or suspend with conditions,
25 including probation, the registration of any party required to

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1 be registered pursuant to the Public Works Minimum Wage Act for
2 failure to comply with the registration provisions or for good
3 cause, subject to appeal pursuant to Section 13-4-15 NMSA 1978;
4 and

5 B. seek injunctive relief in district court for
6 failure to comply with the registration provisions of the
7 Public Works Minimum Wage Act."

8 Section 9. Section 13-4-15 NMSA 1978 (being Laws 1963,
9 Chapter 304, Section 5, as amended) is amended to read:

10 "13-4-15. APPEALS.--

11 A. Any interested person may appeal any
12 determination, finding or action of the director [~~of the labor~~
13 ~~and industrial division of the labor department~~] made pursuant
14 to the Public Works Minimum Wage Act to the labor and
15 industrial commission sitting as the appeals board by filing
16 notice of the appeal with the director within fifteen days
17 after the determination has been issued or notice of the
18 finding or action has been given as provided in the Public
19 Works Minimum Wage Act.

20 B. The labor and industrial commission, sitting as
21 the appeals board, shall adopt rules as it deems necessary for
22 the prompt disposition of appeals. A copy of the rules shall
23 be filed with the librarian of the supreme court law library.

24 C. The appeals board, within ten days after the
25 filing of the appeal, shall set the matter for an oral hearing

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1 within thirty days and, following the hearing, shall enter a
2 decision within ten days after the close of the hearing and
3 promptly mail copies of the decision to the parties.

4 D. Decisions of the appeals board may be appealed
5 pursuant to the provisions of Section 39-3-1.1 NMSA 1978."

6 Section 10. Section 13-4-17 NMSA 1978 (being Laws 1937,
7 Chapter 179, Section 5) is amended to read:

8 "13-4-17. OUTSTANDING CONTRACTS AND INVITATIONS.--~~[This~~
9 ~~Act]~~ The Public Works Minimum Wage Act shall not ~~[effect any]~~
10 affect a contract ~~[then]~~ existing or ~~[any]~~ a contract that may
11 ~~[thereafter]~~ be entered into pursuant to invitations for bids
12 that are outstanding at the time of ~~[the passage of this Act]~~
13 enactment of that act."

14 Section 11. REPEAL.--Section 13-4-12 NMSA 1978 (being
15 Laws 1965, Chapter 35, Section 2, as amended) is repealed.

16 Section 12. EFFECTIVE DATE.--The effective date of the
17 provisions of this act is July 1, 2009.