

Post-Sandy Reconstruction: What Contractors Need to Know When Bidding for and Performing Work

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Which Prevailing Wage Law Governs?

While post-Sandy revitalization work is generally funded by federal disaster relief money, the funding is funneled through the states where the targeted relief areas are located. Federal funding signifies that federal laws such as the Davis-Bacon Act (DBA), the Davis-Bacon and Related Acts (DBRA), the Fair Labor Standards Act (FLSA), and the McNamara-O’Hara Service Contract Act (SCA) control the rates of wages and fringe benefits that are required to be paid to workers performing Sandy reconstruction work. Since the funding is funneled through state agencies, however, state prevailing wage laws such as New York Labor Law sections 220 and 230 and New Jersey Labor Law section 34 may also dictate the mandated wage and hour practices for Sandy reconstruction work.

Prior to bidding for the work, contractors must review the bid documents to ascertain the specific prevailing wage requirements governing the project(s) for which bids are being submitted. When in doubt, contractors should consult their counsel or the contracting officers and local labor departments to ascertain their wage and hour obligations.

Compliance Starts at the Bidding Stage

Contractors should never prepare or submit any bids without a complete awareness of the prevailing wage requirements governing their targeted projects. Competitive bidding is a statutory requirement for most public improvements, and Sandy reconstruction work is no exception. Statutes generally require public contracts to be awarded to the *lowest responsive bid submitted by a responsible bidder*. Compliance with prevailing wage requirements has a profound effect on both the responsiveness of the bid and the responsibility status of the contractor. These terms are defined as follows.

What is a “responsible bidder”? A responsible bidder is one who is fiscally responsible, trustworthy, and of the utmost integrity. A contractor’s responsibility status is established through the contractor’s experience in performing public works contracts and the general business integrity and credit worthiness of the company and its owners and officers, disclosed through periodic vendor disclosures filed with the federal government. Contractors are required to disclose any ongoing or prior investigations over prevailing wage compliance and findings of prevailing wage violations by the contractor and any companies owned or controlled by the contractor’s owners or officers.

What is a “responsive bid”? A responsive bid is one that strictly complies with bid instructions. A bid that fails to factor in the required prevailing wage rates will, in most instances, be deemed unresponsive, since bid instructions generally require the application of prevailing wage rates. A bid that has been determined as non-responsive will have a substantial negative effect on a contractor’s responsibility status and the contractor will have to notify contract agencies of the non-responsive determinations in vendor disclosures. This will have a direct negative effect on the contractor’s bid eligibility for future public contracts.

Compliance During Contract Performance

The compliance obligation requires contractors to take a number of steps. Compliance means submission of accurate and truthful certified payroll records to the contracting officers and payment of the right wages and fringe benefits. Compliance also requires contractors to post the required workplace and job site notices and make prevailing wage schedules readily available for employees to review. Furthermore, contractors should provide employees with statutorily required acknowledgments of rates of pay, frequency of payments, and their overtime exemption status.

In addition, compliance requires contractors to provide employees with paystubs containing their rates of pay, hours of work, and pay withholdings. Contractors should also ensure that employees are aware of their rates of pay prior to having them perform any work. Finally, compliance requires contractors to keep accurate records for all days and hours worked by employees and to classify work performed by employees. Contractors should consult with their counsel to devise comprehensive compliance protocols.

High Profile Nature of Sandy Reconstruction Work Means More Scrutiny

Given the high-profile nature of post-Sandy reconstruction, contractors can expect heightened vigilance from the government in the enforcement of prevailing wage laws. Contractors should expect unannounced site visits from state or federal labor department investigators. Certain seemingly minor violations, such as a contractor's failure or neglect to maintain prevailing wage postings or wage schedules on site will likely result in additional and heightened inquiry by the government. Contractors should also be mindful that local organized labor groups, as part of their organizing campaign, will eagerly seek to serve as local watch dogs to report perceived non-compliance with prevailing wage laws to the enforcement authorities.

Contractors should be ready at all times to demonstrate their compliance with prevailing wage requirements. Contractors will be required to update their vendor disclosures on file with the government and disclose all pending prevailing wage investigations and findings from the investigators. Prevailing wage investigations will affect a contractor's responsibility status.

As the government is likely to take a zero tolerance approach in prosecuting violators of prevailing wage laws, contractors should expect stiff penalties if they are found to have violated prevailing wage laws. Penalties involve not only civil monetary penalties, such as restitution payments and statutory fines, but may also include debarment from performing future public work if a contractor is found to have violated prevailing wage laws. During the pendency of any investigation into the contractor's wage and hour practices, the investigating authority may request the contracting agencies to withhold contract payments due and owing to the contractor. Finally, violations of prevailing wage laws may result in criminal prosecution of the contractors. In states such as New York, workers can also seek to collect wage underpayments through private lawsuits in state courts and assert claims against the contractors' surety bonds.

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