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## Viewpoint: Contractors Face Extended Exposure for Prevailing Wage Violations

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This past October, California Governor Jerry Brown signed several bills amending prevailing wage statutes. Chief among these laws was Assembly Bill 1336, which extends the period for the California Labor Commissioner and joint labor management committees to enforce the prevailing wage statutes from 180 days to 18 months from completion or acceptance of a public work by an awarding body. As a result, general contractors must take appropriate measures to reduce or avoid the risk that this new law poses.

Prevailing wage statutes impose joint and several obligations on both the subcontractor and general contractor for the subcontractor's violation of prevailing wage laws. Most importantly, prevailing wage statutes make general contractors strictly liable for the underpayment or non-payment of prevailing wages on public works projects. As such, the profit or fee earned by a general contractor from a public works project could potentially be at risk by virtue of a subcontractor failing to pay prevailing wages. Oftentimes, these violations occur without any knowledge or wrongdoing on behalf of the general contractor. But there are steps that general contractors can utilize to help avoid paying the price for a subcontractor's failure to satisfy the obligations imposed the prevailing wage statutes.

First, general contractors should include an indemnity clause in their subcontracts that requires the subcontractor to indemnify the general contractor for all prevailing wage violations and penalty assessments arising from the subcontractor's scope of work on the project. It should be noted, however, that indemnity provisions may not ultimately be adequate protection in the event of subcontractor insolvency. An indemnity is only as good as the subcontractor standing behind the indemnity.

The next step is to follow the Safe Harbor Provisions of CA Labor Code Section 1775. Although a general contractor can still be found liable for a prevailing wage violation, general contractors will not be separately liable for penalty assessments if it acts in accordance with the following:

- 1) The subcontract includes a copy of the provisions of Labor Code sections 1775, 1771, 1776, 1777.5, 1813, and 1815.
- 2) The general contractor closely oversees payment of the specified prevailing rate of per diem wages by the subcontractor to its employees, by monitoring of the subcontractors actual payroll records.

- 3) Upon becoming aware of any violation, the general contractor should immediately take corrective action to comply with the specific prevailing wage at issue, including retaining from the subcontractor the appropriate amount due for underpaid workers performing work on the project.
- 4) Prior to releasing final payment or retention to the subcontractor, the general contractor must secure an affidavit signed under penalty of perjury from the subcontractor stating that the subcontractor has paid the specified general prevailing rate of per diem wages to its employees on the project and any amounts due for overtime pursuant to Labor Code Section 1813.

General contractors seeking to avoid the risk of prevailing wage violations by subcontractors should include language in subcontracts that allows the general contractor to actively monitor subcontractor labor compliance. By adding language that permits the general contractor to perform random interviews of subcontractor workers and independent verification of amounts actually paid to workers, a general contractor may be able to reduce or avoid exposure by discovering prevailing wage issues at an early stage and while still holding money on the subcontract. Additionally, by taking a proactive approach, general contractors will find themselves more likely in compliance with Labor Code section 1775, which requires that general contractors “diligently take corrective action” when they have become aware of a subcontractor’s failure to pay prevailing wages. By becoming more involved in monitoring subcontractor prevailing wage compliance, general contractors will be better positioned to resolve discrepancies before they become more expensive problems.

Finally, general contractors may request subcontractors to provide performance and payment bonds that guarantee, among other things, subcontractor compliance with prevailing wage obligations. However, this option may not be practical as requiring subcontractors to bond a project and including the subcontractor bond premiums in the general contractor’s bid may make the general contractor’s bid non-competitive.

By recognizing the risk that AB 1336 poses and taking steps to limit exposure, general contractors may reduce much of the extended liability that they now face. As set forth above, drafting subcontracts with provisions that specifically take into account these recent changes in the law will help mitigate the risk of exposure with regard to subcontract prevailing wage violations. In the competitive arena of public works projects, it is very hard for a contractor to make money. In order to hang onto that hard earned money, it is important to vigilantly monitor compliance with prevailing wage obligations and avoid being blindsided by a prevailing wage claim that may prove very expensive.

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