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State of Wisconsin
Department of Workforce Development

Rule Analysis for Legislative Review

August 31, 2010

Proposed Rule in Final Draft Form

**Adjustment of Thresholds for Payment and
Performance Assurance Requirements**

DWD 293.02

CR 10-029

Basis and Purpose of the Proposed Rules

Explanation of agency authority. Section 779.14, Stats., sets the cost thresholds for the payment and performance assurance bond requirements that apply to contracts for the performance of labor or furnishing of materials for a public improvement project or public work. Section 779.14 (1s), Stats., requires the Department to biennially adjust the thresholds for various requirements in proportion to any change in construction costs since the last adjustment if the adjustment to be made would not be less than 5%.

Summary of the proposed rule. Chapter DWD 293 provides threshold amounts for various payment and performance assurance bond requirements that apply to contracts issued by state or local governments for the performance of labor or furnishing of materials for a public improvement or public work. This rule adjusts these thresholds to reflect a 6.82% increase in construction costs from December 2007 to December 2009.

Summary of related federal law. The threshold for application of the federal contractor payment and performance bond requirements is \$100,000. This threshold is in the statute and is rarely adjusted.

Summary of factual data and analytical methodology. Section DWD 293.01 provides that the Department will adjust the thresholds on the basis of the change in the construction cost index as published in the *Engineering News-Record*, a national construction trade publication. Thresholds are rounded to the nearest thousand.

Comparison with similar rules in adjacent states. Minnesota has a public contractors' performance and payment bond requirement that applies to a contract that exceeds \$75,000. Illinois requires a bond if a contract for a public work exceeds \$5,000. Neither state appears to have a mechanism for adjustment of the thresholds, other than statutory amendment. Michigan has a performance bond requirement without a clear statutory threshold. The Department is not aware of a performance bond requirement for public works contracts in Iowa.

Effect on small business. The rule affects small businesses as defined in s. 227.114 (1), Stats., but does not have a significant economic impact on a substantial number of small businesses.

Analysis used to determine effect on small business. Many construction companies are small businesses. The adjustment of the thresholds for application of the payment and performance bond requirements prevent these provisions from affecting more and more public works projects over time due solely to the effects of inflation.

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Public Hearing Summary

A public hearing was held in Madison on March 31, 2010. There were no appearances.

Written comments and responses

The following written comments were received.

(1) National Association of Surety Bond Producers

The Association notes that Wisconsin is required to adjust the statutory bonding requirement thresholds by statute. It describes the effect of the statute as "unfortunate" because each threshold increase "will ensure that more state and local public construction projects will be undertaken without the benefit of payment bond protection . . ." The Association urges DWD to reconsider the need for threshold adjustments and report on this topic to the state legislature.

(2) The Surety and Fidelity Association of America

This commenter also notes that the raising of minimum threshold amounts for bonding and surety requirements may increase the number of projects in which payment protection is not available to subcontractors. It states that the department should reconsider any increases to threshold amounts.

In response to these comments, DWD has not changed the proposed rule. As noted by the first commenter, the statute requires that these amounts be adjusted for inflation. DWD's discretion is limited to the determination of the correct percentage amount to apply to the adjustment.

Response to Legislative Council Staff Recommendations

All comments were accepted.

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