

Rules Clearinghouse No. _____
Proposed Hearing Draft
July 15, 2016

PROPOSED ORDER OF THE WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
ADOPTING RULES

The Wisconsin department of workforce development proposes the following order *to renumber* DWD 293.01; *to renumber and amend* DWD 293.01 (Note); *to amend* DWD 293.02 (1) (a) to (c) and (2) (a) to (c); and *to create* DWD 293.01 (2) relating to payment and performance assurance requirements.

**Analysis Prepared by the Department of
Workforce Development**

Statutes interpreted

Statutes Interpreted: Section 779.14, Stats.

Statutory authority

Statutory Authority: Sections 103.005 (1) and 779.14 (1s), Stats.

Explanation of statutory authority

Section 779.14, Stats., sets the cost thresholds for the payment and performance assurance bond requirements that apply to contracts for performing, furnishing, or procuring labor, services, materials, plans or specifications for a public improvement or public work. Under s. 779.14 (1s), Stats., if a dollar amount is to be indexed, the Department of Workforce Development (DWD) is required to adjust the dollar amount biennially and be in proportion to any change in construction costs. If the adjustment to be made is less than 5%, no adjustment shall be made.

Under s. 103.005 (1) the DWD has authority to adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings.

Related statutes or rules

Chapter 779, Stats. – Liens
DWD Ch. 293 – Payment and Performance Assurance Requirements

Plain language analysis

DWD is required to adjust the contract prices that determine the payment and performance assurance requirements that apply to contracts with state and local governments for the performance of labor or furnishing materials for a public improvement or public work on a biennial basis if the adjustment to be made is 5% or greater. No adjustment is required if the adjustment is lower than 5%. The contract prices are adjusted based on the change in the construction cost index as published by the *Engineering news-record*, a national construction trade publication.

The proposed rule adjusts the contract price thresholds to reflect a 6.15% increase in construction costs from December 2009 to December 2011 and a 5.4% increase in construction costs from December 2011 to December 2013. There is no adjustment in 2016 because increases in construction costs from December 2013 to December 2015 were less than 5%.

In addition, the proposed rule will create s. DWD 293.03 relating to indexing future contract thresholds. On each January 1 in an even calendared year, DWD will calculate the percentage difference between the construction cost index for December of the preceding year, and the construction cost index for December two years before the preceding year, and adjust those amounts by that percentage difference. Any calculated adjustment equal to 5% or greater will be published, and become effective upon publication, in the Wisconsin Administrative Register.

Summary of, and comparison with, existing or proposed federal statutes and regulations

The Miller Act (40 USC 3131 – 3134) applies to contracts awarded for the construction, alteration, or repair of any public building or public work of the Federal Government. While the Act provides that these bonds must be posted on contracts exceeding \$100,000 in cost, the Federal Acquisition Regulation (CFR 48 Part 28) requires the bonds only on contracts that exceed \$150,000.00.

Comparison with rules in adjacent states

Iowa: Contracts for the construction of a public improvement shall, when the contract price equals or exceeds \$25,000, be accompanied by a bond, with a surety, conditioned for the faithful performance of the contract, and for the fulfillment of other requirements as provided by law.

Illinois: Any contractor entering into a contract for public work of any kind costing over \$50,000 with any state officials, boards, commissions or agents, or any political subdivisions, is required to supply and deliver a bond to the state or political subdivision, with good and sufficient sureties.

Michigan: Before any contract exceeding \$50,000 is awarded for the construction, alteration, or repair of any public building or public work or improvement, the proposed contractor is required to furnish a performance bond and a payment bond which will become binding upon the award of the contract to the principal contractor.

Minnesota: Public entities entering into contracts greater than \$100,000 must obtain a performance bond and a payment bond from the contractor. This requirement, with a few exceptions, applies to contracts for "the doing of any public work."

Summary of factual data and analytical methodologies

The proposed rule was drafted after review of state statutes and review of *The Engineering News-Record*, a publication which lists the construction cost index.

Analysis and supporting documents used to determine effect on small business or in preparation of the economic impact analysis

The proposed rule does not have an economic impact on small businesses as defined in s. 227.114 (1), Stats., and no analysis is required.

Effect on small business

The proposed rule will have a positive impact on small businesses. Many construction companies are small businesses and by raising the thresholds in line with increases in construction costs, the proposed rule helps businesses by preventing the bond requirement from applying to small projects.

Agency contact person

Karl Dahlen, Chief Legal Counsel
Department of Workforce Development
201 E. Washington Avenue
Madison, WI 53708
(608) 266-9427
Karl.Dahlen@dwd.wisconsin.gov

Place where comments are to be submitted and deadline for submission

Jim Chiolino, Deputy Division Administrator
DWD Equal Rights Division
P.O. Box 8928
Madison, WI 53708-8928
(608) 266-3345
jim.chiolino@dwd.wisconsin.gov

The department has scheduled a public hearing to be held on August 18, 2016. Comments will be accepted until the date of hearing.

SECTION 1. DWD 293.01 is renumbered 293.01 (1).

SECTION 2. DWD 293.01 (2) is created to read:

DWD 293.01 (2) Beginning on January 1, 2018, and on each subsequent January 1 in an even calendar year, the department shall publish any adjustment of contract thresholds in the Wisconsin Administrative Register. Any adjustment of contract thresholds shall be effective on the date of publication in the Wisconsin Administrative Register. No threshold adjustments shall be made if the adjustment is less than 5%.

SECTION 3. DWD 293.01 (Note) is renumbered 293.01 (b) (Note) and as renumbered is amended to read:

Note: The *Engineering News-Record* is a ~~weekly publication~~ national newsmagazine for the construction industry of McGraw-Hill Companies, 1221 Avenue of the Americas Dodge Data & Analytics, 2 Penn Plaza, 10th Floor, New York, NY 10020 10121. A construction cost index is published in the "Construction Economics" section of each issue.

SECTION 4. DWD 293.02 (1) (a) to (c) and (2) (a) to (c) are amended to read:

DWD 293.02 (1) (a) The payment and performance assurance requirements in s. 779.14 (1m) (c) 1., Stats., shall apply to contracts with the state for the performance of labor or furnishing materials for a public improvement or public work with a contract price exceeding ~~\$16,000~~ \$18,000 but not exceeding ~~\$148,000~~ \$165,000.

(b) The payment and performance assurance requirements in s. 779.14 (1m) (c) 2., Stats., shall apply to contracts with the state for the performance of labor or furnishing materials for a public improvement or public work with a contract price exceeding ~~\$148,000~~ \$165,000 but not exceeding ~~\$369,000~~ \$413,000.

(c) The payment and performance assurance requirements in s. 779.14 (1m) (c) 3., Stats., shall apply to contracts with the state for the performance of labor or furnishing materials for a public improvement or public work with a contract price exceeding ~~\$369,000~~ 413,000.

(2) (a) The payment and performance assurance requirements in s. 779.14 (1m) (d) 1., Stats., shall apply to contracts, other than contracts with the state, for the performance of labor or furnishing materials for a public improvement or public work with a contract price exceeding ~~\$16,000~~ \$18,000 but not exceeding ~~\$74,000~~ \$83,000.

(b) The payment and performance assurance requirements in s. 779.14 (1m) (d) 2., Stats., shall apply to contracts, other than contracts with the state, for the performance of labor or furnishing materials for a public improvement or public work with a contract price exceeding ~~\$74,000~~ \$83,000 but not exceeding ~~\$148,000~~ \$165,000.

(c) The payment and performance assurance requirements in s. 779.14 (1m) (d) 3., Stats., shall apply to contracts, other than contracts with the state, for the performance of labor or furnishing materials for a public improvement or public work with a contract price exceeding ~~\$148,000~~ \$165,000.

SECTION 5. EFFECTIVE DATE AND INITIAL APPLICABILITY. This rule takes effect on the first day of the month following publication in the Wisconsin administrative register, as provided under s. 227.22 (2) (intro.).