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RULE PROPOSALS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WAGE AND HOUR COMPLIANCE**

39 N.J.R. 2470(a)

Proposed Amendments: *N.J.A.C. 12:60-2.1 and 2A.1*

[Click here to view Interested Persons Statement](#)

Prevailing Wages for Public Works; Custom Fabrication

Authorized By: David J. Socolow, Commissioner, Department of Labor and Workforce Development.

Authority: *N.J.S.A. 34:11-56.25* et seq., specifically, *N.J.S.A. 34:11-56.43*.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2007-207.

A **public hearing** on the proposed amendments will be held on the following date at the following location:
Tuesday, July 17, 2007
10:00A.M. to 12:00 Noon
N.J. Department of Labor and Workforce Development
John Fitch Plaza
1st Floor Conference Room
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by August 31, 2007 to:
Frederick S. Cohen, Regulatory Officer
Office of Legal and Regulatory Services
N.J. Department of Labor and Workforce Development
P.O. Box 110 - 13th Floor
Trenton, New Jersey 08625-0110
Fax to: (609) 292-8246

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The agency proposal follows:

Summary

The Department is proposing amendments to *N.J.A.C. 12:60-2.1* and *2A.1*, which would incorporate changes to the New Jersey Prevailing Wage Act (PWA), *N.J.S.A. 34:11-56.25* et seq., resulting from P.L.-2004, c. 101 (*N.J.S.A. 34:11-56.26*), and would eliminate any possible confusion regarding the application of the PWA and the rules promulgated in accordance therewith, *N.J.A.C. 12:60*, to "custom fabrication," as that term is defined within P.L. 2004, c. 101 (*N.J.S.A. 34:11-56.26*).

P.L. 2004, c. 101 specifically addresses the payment of prevailing wages for "custom fabrication." It includes "custom fabrication" within the statutory definition of "public work" and it defines the term "custom fabrication" to mean "the fabrication of plumbing, heating, cooling, ventilation or exhaust duct systems, and mechanical insulation." The Senate Labor Committee Statement to Senate Bill, No. 596 (P.L. 2004, c. 101) also states that, "this bill (S. 596) provides that any custom fabrication of mechanical insulation, plumbing, heating, cooling, ventilation or exhaust duct systems used in public work is subject to the 'New Jersey Prevailing Wage Act' P.L. 1963, c.150 (C.34:11-56.25 et seq.), **whether or not the fabrication is done on the site of the public work.**" (emphasis added). Nevertheless, certain public works contractors have recently been asserting that work, which would otherwise be covered under the PWA as "custom fabrication" should not be so covered, because the work in question was not performed at the work-site of a public works project. In support of this assertion, the public works contractors have cited to *N.J.A.C. 12:60-2A.1*, which addresses "the manufacture or furnishing of materials, articles, supplies or equipment . . . conducted in connection with, and at the work-site of, . . . public works project[s]." This rule was promulgated, "in order to clarify the distinction between on-site and off-site workers" for purposes of determining what constitutes the performance of services "directly on a public work" in accordance with *N.J.S.A. 34:11-56.26(7)*. See *34 N.J.R. 2254(a)*. Apparently, the reason that certain public works contractors have been relying on *N.J.A.C. 12:60-2A.1* when addressing the coverage of custom fabrication under the PWA is that the term "custom fabrication" appears within the heading of *N.J.A.C. 12:60-2A.1*, "Off-site manufacturing, custom fabrication, or furnishing of materials, articles, supplies or equipment." The confusion created by the use of the term "custom fabrication" within the heading of *N.J.A.C. 12:60-2A.1* is understandable. However, since P.L. 2004, c. 101, enacted almost two years after the Department promulgated *N.J.A.C. 12:60-2A.1*, requires that the PWA apply to custom fabrication, whether or not the fabrication is done on the site of the public work, a rule (*N.J.A.C. 12:60-2A.1*), which distinguishes between on-site and off-site workers, is simply not relevant to a discussion of custom fabrication and the PWA.

In light of the foregoing, the Department is proposing that *N.J.A.C. 12:60-2.1* be amended (1) to include the definition of the term "custom fabrication" from P.L. 2004, c. 101, within the words and terms defined for use in *N.J.A.C. 12:60*, and (2) to insert "custom fabrication" within the list of types of work covered under the definition of the term "public work" for use in *N.J.A.C. 12:60*. Both of these proposed amendments appear verbatim within *N.J.S.A. 34:11-56.26*, as amended by P.L. 2004, c. 101.

In addition, the Department is proposing that the term "custom fabrication" be removed from the heading and rule text of *N.J.A.C. 12:60-2A.1* and replaced with the term "assembly." The Department is also proposing that the following sentence be added at *N.J.A.C. 12:60-2A.1(b)*: "Custom fabrication is subject to the Prevailing Wage Act, pursuant to P.L. 2004, c. 101, §1 (*N.J.S.A. 34:11-56.26*), but custom fabrication shall not be subject to the requirements of this section." Again, it is the Department's hope that these amendments will eliminate any possible confusion among public works contractors as to the appropriate use of *N.J.A.C. 12:60-2A.1* in determining the scope of PWA coverage.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The proposed amendments would have a positive social impact in that they would eliminate any possible confusion among public works contractors as to the appropriate use of *N.J.A.C. 12:60-2A.1* in determining the scope of PWA coverage. The proposed amendments would also benefit the Department in that they would make clear to public works contractors the scope of the post-P.L. 2004, c. 101, PWA and thereby assist in a more effective enforcement by the Department of the law.

Economic Impact

The proposed amendments would have a positive economic impact upon public works contractors who, but for the proposed amendments, might misunderstand the requirements of PWA and *N.J.A.C. 12:60* and, thereby, run the risk of incurring unnecessary expenses related to fines and penalties levied by the Department for violations of *N.J.A.C. 12:60*. As indicated above, the proposed amendments would eliminate any possible confusion among public works contractors with regard to the appropriate use of *N.J.A.C. 12:60-2A.1* in determining the scope of PWA coverage. This would presumably result in fewer violations and, consequently, the levying of fewer fines and penalties by the Department. To the degree that inclusion of "custom fabrication," as that term is defined in P.L. 2004, c. 101, within the types of work covered under the PWA would result in increased costs to public works contractors, those increased costs would be the result of P.L. 2004, c. 101, and not the proposed amendments. The proposed inclusion of "custom fabrication" within the definition of "public works" is dictated by P.L. 2004, c. 101. The Department has no discretion to deviate from this statutory mandate.

Federal Standards Statement

The proposed amendments are governed by the New Jersey Prevailing Wage Act, *N.J.S.A. 34:11-56.25* et seq., and are not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required.

Jobs Impact

The proposed amendments would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed amendments would have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed amendments would impose no reporting or record keeping requirements on small businesses, as that term is defined in the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. With regard to compliance requirements, the proposed amendments would require that prevailing wages be paid for "custom fabrication" in the same manner and under the same circumstances as is currently required for construction, reconstruction, demolition, alteration or repair work, or maintenance work, including painting and decorating. As explained above, these amendments are dictated by P.L. 2004, c. 101. The Department has no discretion to deviate from this statutory mandate. The PWA does not differentiate between large and small businesses. Therefore, the Department must enforce the requirements of *N.J.A.C. 12:60* uniformly against all covered businesses, regardless of size. The Department does not anticipate that professional services will be required in order to comply with the proposed amendments. Any costs as a result of the proposed amendments are discussed in the Economic Impact above.

Smart Growth Impact

The proposed amendments would not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

12:60-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

...

"Custom fabrication" means the fabrication of plumbing, heating, cooling, ventilation or exhaust duct systems, and mechanical insulation.

...

"Public work" means construction, reconstruction, demolition, alteration, **custom fabrication**, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program. "Public work" shall also mean construction, reconstruction, demolition, alteration, **custom fabrication**, or repair work, done on any property or premises, whether or not the work is paid for from public funds, if, at the time of the entering into of the contract:

1.-2. (No change.)

12:60-2A.1 Off-site manufacturing, [custom fabrication] **assembly**, or furnishing of materials, articles, supplies or equipment

(a) The manufacture, **assembly** or furnishing of materials, articles, supplies or equipment will be subject to the Prevailing Wage Act if conducted in connection with, and at the work-site of, such public works project.

(b) Custom fabrication is subject to the Prevailing Wage Act, pursuant to P.L. 2004, c. 101, § 1 (N.J.S.A. 34:11-56.26), but custom fabrication shall not be subject to the requirements of this section.

[(b)] (c) (No change in text.)

[(c)] **(d)** The following shall be considered to be part of the work-site of a public works project and subject to the terms of the Prevailing Wage Act:

1. Job headquarters, tool yards, batch plants, borrow pits, [custom fabrication] **assembly** centers and any other related manufacturing or construction site of the same contractor or a subcontractor provided that:

i. (No change.)

ii. They are adjacent or virtually adjacent to the site of the work as defined in [(b)1] **(c)1** above.

[(d)] **(e)** Not included in the site of the work are those locations which were established by a supplier of materials for a public works construction project before the opening of bids and not on the site of the work as set forth in [(b)1] **(c)1** and 2 above.