PREVAILING WAGE POLICY MEMORANDUM

DATE: **August 11, 2013**

TO: **All Interested Parties**

FROM: **L. Ann Selover, Industrial Statistician, Prevailing Wage Program Manager**

SUBJECT: **Filing an Affidavit Form "On Behalf Of" a Subcontractor**

Policy Disclaimer

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Prevailing Wage should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

Prior to receiving payment on a public works contract, a contractor and all of its subcontractors must comply with the requirements of chapter 39.12 RCW. These requirements include the filing of a Statement of Intent to Pay Prevailing Wages ("Intent"), and the filing of an Affidavit of Wages Paid ("Affidavit"). Prior to receiving payment from the contract awarding agency, RCW 39.12.040 requires contractors to affirm to the contract awarding agency that prevailing wages have been paid in accordance with pre-filed statements of intent to pay prevailing wages on file with the public agency. This provision makes contractors accountable for the compliance of subcontractors, and contractors should require each subcontractor to file its Intent before initiating work on a public works project.

In addition to the Intent form, filing of the Affidavit by each and every contractor and subcontractor is essential for ensuring obtaining the release of retainage held on the contract. However, there are occasions when a subcontractor may fail to file an Affidavit for reasons outside the control of the hiring contractor.

Pursuant to RCW 39.12.040(1)(b), a contractor may file an Affidavit on behalf of a nonresponsive subcontractor that has ceased operations or failed to file as required under prevailing wage law. The process requires that the contractor must accept liability for wages owed by the subcontractor, and that there must be a contractual relationship between the subcontractor who has not filed and the contractor or subcontractor who wants to file on behalf of the nonresponsive contractor. Also, please note that an Affidavit cannot be filed unless a corresponding Statement of Intent to Pay Prevailing Wages (Intent) form was filed by the subcontractor.

Documentation that Must Be Filed with a Request to File on Behalf of a Subcontractor

If your company meets the above conditions, and wants to file on behalf of a subcontractor, the following documentation must be provided in order for L&I to permit the filing:

- A copy of the contract between you and the subcontractor, or other documentation of the contractual relationship identified in RCW 39.12.010(1)(b).
- A copy of a letter sent Certified Mail by your company to the subcontractor giving them 10 business days to file the required form(s), **and**
    - A copy of the Certified Mail Receipt and returned letter and envelope that has been refused or unclaimed, **or**
    - A copy of the signed green Certified Mail Return Receipt.

If you are seeking to file on behalf of a subcontractor for the reason that the subcontractor has ceased operations, you must document that fact. The following is a list of examples of items that L&I may accept as proof that a subcontractor has ceased operations:

- Contractor Registration showing expired/suspended status
- A report from the Secretary of State, Department of Revenue, or other agency web site showing the company is no longer in business
- A letter from the closed firm, stating the firm is no longer in business
- A newspaper article stating the closed business entity's status
- The case number and date of the bankruptcy filing
- A letter from bankrupt firm stating bankruptcy has been filed and the date of filing
- A newspaper article regarding the business entity's bankruptcy status

Filing Process

In addition to the referenced documentation, complete and submit to L&I a hard copy (paper) Affidavit form using the subcontractor's information. You cannot use the PWIA (online) system for this process. Please fill out the paper form as if it were being completed by the subcontractor on whose behalf you are acting, with the following exceptions:

a. Insert your own company information in the "Company Name" section located at the top left of the form. **Do not indicate the subcontractor's business entity name in this section.**

b. In the Craft/Trade/Occupation section located in the middle of the form, write the following statement: [FILL IN YOUR COMPANY NAME] is filing on behalf of [FILL IN SUBCONTRACTOR NAME] due to [INSERT "FAILED TO FILE" OR "CEASED OPERATIONS"]. **You must provide the subcontractor's business address, phone number, contractor registration number (if applicable), and UBI number in this section**.

   Be sure to list the "Craft/Trade/Occupation," "Rate of Hourly Pay" and "Rate of Hourly Fringe Benefits" (if provided). Supply as much information as you have available from payroll records, daily log sheets, etc. Use Addendum A if you run out of space. If an Owner/Operator performed work, include their name. Incomplete forms will not be approved.

c. At the Signature Block, add a note**:** "See attached Assumption of Liability Statement in lieu of this certification" and attach the referenced statement. See item "e" below and the attached "Assumption of Liability Statement."

You must submit the Assumption of Liability statement on your company letterhead using the exact language prescribed by the department. The statement provides that the company filing on behalf of a contractor/subcontractor assumes full liability for any worker wage claims, consistent with the provisions of RCW 39.12.040(1)(b).

Mail completed forms and all documentation along with payment of the Affidavit filing fee ($40 per form) to:

Management Services
Department of Labor & Industries
P.O. Box 44835
Olympia, WA 98504-4835

Notice Regarding Penalties

L&I may issue a Notice of Violation (NOV) against the subcontractor on whose behalf you are requesting to file, and assess a penalty against them, under RCW 39.12.050, in the amount of $500.00 for its failure to file. A violator with unpaid penalties due after a final order will not be permitted to bid on public works or have any public works bid considered. A violator who files a false statement or fails to file a statement or record required to be filed for a second time within a five-year period may be barred from bidding on public works projects for one year.

Intentionally filing a false affidavit on behalf of a subcontractor subjects the filer to the same penalties referenced above as provided in RCW 39.12.050.

Please direct any questions regarding this policy to the Prevailing Wage Office at (360) 902-5335 or by e-mail at PW1@Lni.wa.gov.

Company Letter Head

ASSUMPTION OF LIABILITY STATEMENT

I, _____ (company name), declare under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I _____ (Company Name) am filing an Affidavit of Wages Paid on behalf of _____ (contractor/subcontractor). I, _____ (company name), accept full liability for any unpaid wages owed by ____(contractor/subcontractor on whose behalf you are filing)____to workers on this project for three years from the date of performance of the work.

Signed this _____(date) ___ day of __(month), ____(year)_____, at ___(county)_____, Washington.

_____(Company Name)_____

By_____
(SIGNATURE OF AUTHORIZED REPRESENTATIVE)

ADDENDUM TO THE FILING ON BEHALF OF POLICY

DATE: **March 11, 2016**

TO: **All Interested Parties**

FROM: **Jim Christensen**
Industrial Statistician, Prevailing Wage Program Manager

SUBJECT: **Additional Filing On Behalf Of (FOBO) Process Details;**
Surety Filing On Behalf Of (FOBO) the Prime Contractor

The preceding FOBO policy addresses filing an Affidavit of Wages Paid form on behalf of a subcontractor. The policy's disclaimer applies to both that policy and this addendum.

This addendum clarifies and documents additional aspects of the filing on behalf of process. L&I will also process filing an Affidavit on behalf of a prime contractor.

A Statement of Intent to Pay Prevailing Wages is Required on Public Works

RCW 39.12.040 requires an approved Statement of Intent to Pay Prevailing Wages (Intent) from each contractor and subcontractor on a public work before the public contract awarding agency can begin to make payment(s) for their work. RCW 39.12.040 requires filing the Intent(s) on public works contracts.

L&I will handle a filing on behalf of for missing Intents using the same filing on behalf of process used for an Affidavit of Wages Paid.

An Affidavit of Wages Paid is Required on Public Works

RCW 39.12.040 requires an approved Affidavit of Wages Paid (Affidavit) from each contractor and subcontractor on a public work before the public contract awarding agency can release the retainage held under RCW 60.28.011. On a public works project where no retainage is withheld pursuant to RCW 60.28.011(1)(b), all the Affidavit(s) are required prior to final acceptance of the public works project. RCW 39.12.040 requires filing the Affidavits(s) on public works contracts.

The Contract Bond Guarantees Performance of the Contract Duties

RCW 39.08.010 requires a contract bond on public works that guarantees performance of the contracted duties and work as well as payment of workers and material suppliers. If the contractor fails to perform, the public agency can require the surety issuing the bond to fulfill those duties. RCW 39.12.040 requires filing the Intent(s) and Affidavit(s) on public works contracts.

A Prime Contractor Failure to File their Affidavit

L&I will process filing an Affidavit on behalf of the prime contractor in a similar way to the subcontractor process in the preceding policy.

L&I will process filing on behalf of requests made by the public entity. The party doing the filing on behalf of is required by the policy to include the assumption of liability for any unpaid worker wages. The public contract awarding agency will want to ask the surety that issued the contract bond under chapter 39.08 RCW to perform this duty (instead of the public entity doing so). In that way, the surety will be required to sign the assumption of liability required by the policy and the public entity is protected from that potential liability.

A Hiring Contractor Non-Responsive to a Request to File on Behalf of Their Subcontractor

In the event a hiring contractor is not responsive to a request to file a missing Affidavit on behalf of their subcontractor, that request can move up the chain of contracting as required. A higher tier contractor or the prime contractor may do the filing on behalf of consistent with this policy and addendum. In the event the prime contractor is unavailable or unwilling to do the filing on behalf of, the public entity can ask the surety to complete any of the needed filings consistent with this policy and addendum.

Required documentation

A print out from the USPS web site showing delivery of the letter will be accepted in place of the green Certified Mail Return Receipt card.

Example Affidavit

Included is a completed example Affidavit.

The "Your Company Information" block is completed with the requestor's company information. The remainder of the form (highlighted in orange) is completed using the FOBO contractor's information.

In the Craft/Trade/Occupation section located in the middle of the form, write the following statement: [FILL IN YOUR COMPANY NAME] is filing on behalf of [FILL IN CONTRACTOR OR SUBCONTRACTOR NAME] due to [INSERT "FAILED TO FILE" OR "CEASED OPERATIONS"]. You must provide the **subcontractor's business address, phone number, contractor registration number (if applicable), and UBI number** in this section.

Be sure to list the "Craft/Trade/Occupation," "Rate of Hourly Pay" and "Rate of Hourly Fringe Benefits" (if provided). Supply as much information as you have available from payroll records, daily log sheets, etc. Use Addendum A if you run out of space. If an Owner/Operator performed work, include their name.

Questions or Help

Please direct any questions regarding this policy and addendum to the Prevailing Wage Office at (360) 902-5335 or by e-mail at PW1@Lni.wa.gov.

Department of Labor and Industries
Prevailing Wage Program
(360) 902-5335
www.lni.wa.gov/TradesLicenses/PrevWage

AFFIDAVIT OF WAGES PAID

Public Works Contract
$40.00 Filing Fee Required

Affidavit ID # (Assigned by L&I):

Sample FOBO Form

This form must be typed or printed in ink.

- **FILL in ALL blanks or the form will be returned for correction (see instructions).**
- Please allow a minimum of 10 business days for processing.
- Once approved, your form will be posted online at: https://fortress.wa.gov/lni/pwlaborSearch/Per.asp

Your Company Information (FOBO Requester Info in this box)

Your Company Name: Twilight Construction + Requester Info

Your Company Address: PO Box 297

City: Chelan | State: WA | Zip+4: 98815

Your Contractor Registration Number: TWILIGHT9271

Your UBI Number: 602253565

Your Industrial Insurance Account Number: 991,355-00

Your Email Address (needed here for receipt of approval): twlight@yahoo.com

Your Phone Number: 509-482-4552

Awarding Agency Information

Project Name: Grant Medical Center

Contract Number: 111-026

Awarding Agency: Grant County Hospital District

Awarding Agency Address: PO Box 2

City: Ephrata | State: WA | Zip+4: 98823

Awarding Agency Contact Name: Gail Lary

Phone Number: 509-764-2644

County Where Work Was Performed: Grant

City Where Work Was Performed: Moses Lake

Additional Details

Your Job Start Date (mm/dd/yyyy): 1/1/12 (Sub's)

Your Date Work Completed (mm/dd/yyyy): 1/1/12 (Sub's)

Job Site Address/Location: 1421 Maple Drive

Your Approved Intent ID #: 173456 (Sub's)

RCW 39.04.370 – Is this Prime Contract a contract at a cost of over one million dollars ($1,000,000)? ☐ Yes ☒ No

Contract Details

Bid Date Date (Prime Contractor's): 12/7/11

Award Date (Prime Contractor's): 12/7/11

Indicate Total Dollar Amount of Your Contract (including sales tax): $50,000 (Sub's)

If you answered "Yes" to the RCW 39.04.370 question and the Award Date is 9/1/2011 or later you must complete and submit the RCW 39.04.370 Addendum.

ARRA Funds

Was the project or the American Recovery and Reinvestment Act (ARRA) funded? ☐ Yes ☒ No

Weatherization or Energy Efficient Funds

Was the project funded by any weatherization or energy efficiency grants (not ARRA or otherwise)? ☐ Yes ☒ No

Prime Contractor Company Information

Prime Contractor's Company Name: Twilight Construction

Prime Contractor's Registration Number: TWILIGHT9271

Prime Contractor's UBI Number: 602253565

Hiring Contractor Company Information

Hiring Contractor's Company Name: Twilight Construction (who hired the sub)

Hiring Contractor's Registration Number: TWILIGHT9271

Hiring Contractor's UBI Number: 602253565

Employment Information (Answered for Sub)

Did you use ANY subcontractors? ☐ Yes (Addendum B Required) ☒ No

Was ALL work subcontracted? ☐ Yes (Addendum B Required) ☒ No

Did employees perform work on this project? ☒ Yes ☐ No

Did you use apprentice employees? ☐ Yes ☒ No

Number of Owner/Operators who own or lease trucks to the company who performed work on this project: ☒ None (0) ☐ One (1) ☐ Two (2) ☐ Three (3)

Crafts/Trades/Occupations and Apprentices – For Apprentices enter their name, residence or number, trade they worked on project, the number of hours in the pay period when they actually worked on the project, wage and fringe for each apprentice. For additional craft/trades/occupations please see Addendum A	Number of Workers	Total # of Hours Worked	Rate of Hourly Pay	Rate of Hourly Fringe ("Fringe" Benefits)
Twilight is filing on behalf of Sunrise Electric because they have gone out of business				
Sunrise Electric UBI #604969[illegible] Cont. Reg. SUNRISE[illegible]				
123 Sandclove Dr Olympia, WA 98501 (360) 867-[illegible]				
Electrician (Sub's)	1	250	50.00	2.00

Signature Block

I hereby certify that I have reviewed and understand the instructions and the information set forth and to the best of my knowledge is correct and that all workers employed on this Public Works Project were paid wages not less than the Prevailing Wage Rates as determined by the Industrial Statistician of the Department of Labor and Industries.

Print Name: | Print Title: | Signature: See assumption of liability in lower box certification | Date:

For L&I Use Only

APPROVED: Department of Labor and Industries

By: Industrial Statistician

Requester Info
FOBO Contractor Info

F700-127-000 Affidavit of Wages Paid 3-2011

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The organization of choice in providing public works education, advocacy, expertise, and public awareness for its diverse community of members.

February 8, 2016

Jim P. Christensen
Industrial Statistician and Prevailing Wage Program Manager
Washington State Department of Labor and Industries
P.O. Box 44835
Olympia, WA 98504-4835

Re: Request for Changes to the Filing on Behalf Policy Paper to Include FOBO by a Surety for a Prime Contractor

Dear Mr. Christiansen:

Thank you for meeting via conference call with Mike Shaw and Scott Sawyer to discuss our concerns about implementation of HB 1420 (2013), specifically concerns about a local agencies ability to close a project in the event a prime contractor refused to submit affidavits of wages paid. Per this discussion, we understand it is Labor and Industries position a surety is responsible for filing on behalf of (FOBO) the prime contractor is such circumstances. The surety would take liability for payment of wages as part of the FOBO process.

The FOBO is explained in the August 11, 2013 paper, PREVAILING WAGE POLICY MEMORANDUM. However, this paper does not explicitly state a local agency can compel a surety to file on behalf of a non-responsive prime contractor. It is our understanding Labor & Industries is willing to issue an addendum to the policy paper to address a surety filing.

The purpose of this letter is to formally request an addendum to the policy paper.

Respectfully,

Kirk Holmes
2016 APWA Chapter President

c: Jim Rioux – jrioux@ci.olympia.wa.us
Tina Nelson – knelson@co.kitsap.wa.us
Scott Sawyer – scott.sawyer@scjalliance.com